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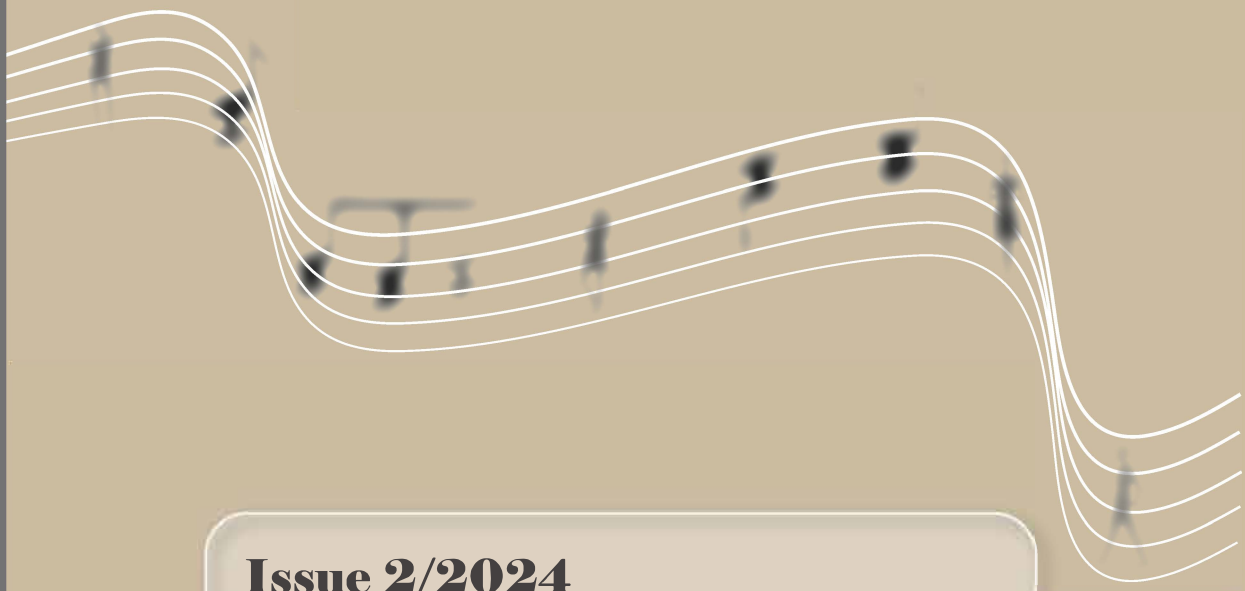

Issue 2/2024

ACCESS TO JUSTICE IN EASTERN EUROPE

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

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Editor-in-Chief's Note

ABOUT ISSUE 2 OF 2024

This spring AJEE issue features a diverse array of compelling articles from authors hailing from Albania, Kosovo, North Macedonia, Romania, Slovakia, and Ukraine, sure to capture the interest of professional readers. We are happy to expand our boundaries to Egypt, Kazakhstan, Morocco, Portugal, and the United Arab Emirates, and present a set of interesting and insightful articles from these jurisdictions. We are glad to present articles from researchers from all over the world, which are interrelated with the aspects of access to justice in the European Union as well as in a global context.

Keeping my role as Editor-in-Chief, I would like to draw particular attention to the following few publications.

In this issue, our readers may find an excellent article by **Bledar Abdurrahmani and Tidita Abdurrahmani** titled "Truth Revelation Instruments in Post-Communist Albania: Transitional Justice Non-Feasance in Investigating Communist Crimes and the Fate of Missing Persons." This article explores the challenges of uncovering the truth about human rights violations during Albania's communist regime. Authors assess the effectiveness of legal measures implemented over the past three decades to address these crimes, particularly regarding the prosecution of perpetrators and the fate of missing persons. Using qualitative analysis of Albanian legislation and policies, the study reveals shortcomings in transitional justice efforts. Despite democratic reforms, the authors find that justice goals remain unmet, with ex-communist officials escaping

accountability and the truth about past atrocities remaining elusive. Furthermore, the ongoing issue of 6,000 missing persons' remains underscores the urgent need to uphold human rights standards.

In this edition, readers will find **Ardrit Gashi's** illuminating piece, "Justice in Property Matters in Kosovo: A Lesson from a Postwar Country." Gashi's work delves into the complexities surrounding property rights in Kosovo, a topic rife with historical intricacies and legal challenges. Through meticulous research and analysis, Gashi explores the various property disputes stemming from ethnic conflicts, discriminatory laws, and wartime conditions. He also examines the aftermath of these disputes, offering insights into strategies for future prevention and material damages recovery.

Gashi's findings reveal three primary categories of property disputes in Kosovo, each with its unique set of challenges and implications. While strides have been made in addressing post-war property claims, significant injustices persist in other areas, prompting Gashi to propose innovative solutions within the realm of modern law. Overall, this article offers valuable insights into the complexities of property justice in post-conflict societies, making it a must-read for scholars, policymakers, and practitioners alike.

In his research article, **Hryhorii Berchenko** explores the nuanced relationship between judicial interpretation and informal constitutional changes, focusing on questions of legitimacy within the framework of the doctrine of constituent power. Author begins by highlighting the delicate balance between stability and dynamism in constitutional law, emphasizing the role of the judiciary in interpreting the constitution to adapt to changing societal norms. He delves into the concept of informal constitutional changes, examining the potential risks and legitimacy concerns associated with judicial intervention.

The study concludes by asserting the crucial role of judicial activity in safeguarding the material constitution, principles, and human rights. Berchenko argues that judicial interpretation serves as a vital mechanism for protecting individual rights and preventing democratic decisions from infringing upon human rights. Moreover, he suggests that the judiciary's approach to informal constitutional changes can serve as an indicator of a country's democratic integrity.

Overall, this article offers valuable insights into the intricate dynamics of judicial interpretation and informal constitutional changes, making it of interest to scholars, policymakers, and legal practitioners alike.

I am pleased to introduce one of the standout publications featured within our pages: "Conference Discussion: Beyond Conflict, Ukraine's Journey to Recovery Reform and Post-War Reconstruction." Authored by **Silviu Nate**, **Andriy Stavytskyy**, **Răzvan Şerbu**, and **Eduard Stoica**, this paper delves into the outcomes and insights garnered from a pivotal conference held on November 29, 2023, as part of an extensive research project.

The conference extensively examined the need for significant reforms across various sectors of the national economy, emphasizing the importance of integrating these reforms into a cohesive strategy to achieve Sustainable Development Goals (SDGs) and meet criteria for EU and NATO membership.

The authors meticulously dissect the main challenges hindering the implementation of these reforms, shedding light on their core components and interrelationships as discussed during the conference. Notably, the paper places particular emphasis on sustaining macroeconomic stability amidst military operations and identifying pivotal programs essential for revitalizing Ukraine's economy. Furthermore, it highlights successful cases of reform implementation at the micro level within state institutions.

Following the conference, the authors provide insights into the formulation of a program document outlining directions for Ukraine's restoration and development. This document emphasizes the critical need for unity among European nations and the United States in supporting Ukraine and offering timely assistance. Domestically, the paper underscores the importance of achieving consensus between the government and business sectors on critical issues such as economic de-shadowing, tax system reform, and enhancing customs services and tax administration.

Overall, this publication offers valuable insights into Ukraine's post-war journey towards recovery and reconstruction, shedding light on key challenges and proposing strategies for addressing them effectively.

As always, 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 and our section editors, as well as editorial board members.

At the same time, I would also like to extend my thanks to our dedicated team, including our newly on board managing editors, language editors, and assistant editor. Let's embrace our collective efforts, recognizing that this significant task is essential and warrants acknowledgment and compensation.

I am proud of your dedicated efforts, and I am glad that this year we again attended the Editorial School of the European Association of Science Editors and gained new skills and abilities. Additionally, I am delighted that this year we are trying out the new tool of the Association of Learned and Professional Society Publishers - The ALPSP Mentoring Scheme.

I am also happy to be involved with you in new initiatives such as Supporting Ukrainian Publishing Resilience And Recovery (SUPRR CEU), The 1st Summer School on Scholarly Communication, and The 11th Conference on Scholarly Communication in the Context of Open Science, organized by the Ministry of Education and Science of Ukraine, among many others. I am proud of you all and glad to work together.

Editor-in-Chief
Prof. Iryna Izarova
Law School, Taras Shevchenko National University of Kyiv, Ukraine
University for Continuing Education Krems, Austria

RESEARCH ARTICLE

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Research Article

TRUTH REVELATION INSTRUMENTS IN POST-COMMUNIST ALBANIA: TRANSITIONAL JUSTICE NON-FEASANCE IN INVESTIGATING COMMUNIST CRIMES AND THE FATE OF MISSING PERSONS

Bledar Abdurrahmani* and Tidita Abdurrahmani

ABSTRACT

Background*: During 45 years of dictatorship in Albania, many people were accused, convicted, imprisoned, exiled, or persecuted for "offences" of a political nature (under the communist law), thereby violating basic human rights. A series of legal measures have been enacted during the 30 years of democratic developments to deal with the bitter past and, especially, the crimes of the communist period.*

Methods: *This study contributes to making a normative evaluation of the status of the right to the truth in international law. The paper focuses on the most important state obligations for giving effect to this right, such as the prosecution of serious violations of fundamental rights and the issue of missing persons. The study uses a qualitative interpretation of the Albanian legislation model built to unveil the truth regarding the violations that occurred during the communist regime, including criminal prosecution and trials and the issue of missing persons. The study is conducted based on a methodology that analyses four variables in each of these policies, specifically: the policies contributing to revelation, the legal and empirical challenges encountered, the constitutional and legal basis of these measures, and the results achieved in practice.*

Results: *The measures set up along the democratic developments in Albania to investigate serious violations of fundamental rights committed by ex-communist officials did not contribute to achieving transitional justice goals.*

Conclusions: *The crimes committed by ex-communist officials during the communist regime in Albania were never punished, and the truth about past atrocities while using the criminal law in Albania was never revealed. In Albania's recent years, regardless of the change of trajectory in dealing with the issue of 6000 missing persons' remains from the communist period, no tangible results are found, leaving the truth about their fate buried, turning it into a serious concern in the framework of guaranteeing human rights. Failure to account for the whereabouts and fate of the missing persons in Albania gives rise to a continuing situation in breach of the right to life.*

1 INTRODUCTION

One of the main challenges a democratic state in a transitional period faces is dealing with the past atrocities of the previous regime as measures that serve justice and truth, therefore giving an immense contribution to building a future of peace and social reconciliation. A question that naturally arises when handling past violations of human rights is: what is meant by truth, and what is the interconnection between truth and justice? Truth is a central concept in the struggle for justice and is oftentimes considered the foundation of justice. Aquinas placed the virtue of truthfulness among the virtues annexed to justice, duly arguing that "truth is a part of justice, being annexed thereto as a secondary virtue to its principal."[1] Almost in the same vein, consider this relation proposed by Teitel and Safjan. While Teitel considers the truth "as a virtue of justice," Safjan states that "justice requires and is based on truth,"[2] so the truth is needed for justice to be executed properly and injustice to be avoided.

Unveiling the truth about serious human rights violations committed by a repressive regime represents the minimum threshold to restore the dignity of the victims as the basis of fundamental rights. Justice must reach the truth, while the latter, as it happened during the communist regime, can be painful and might not produce justice in itself. Justice might instead solely serve to restore the dignity of the victims and alleviate their and their relatives' sufferings. Zalaquett asserts that although the truth cannot really in itself enforce justice, at least it contributes to "putting an end to many a continued injustice. Truth does not bring the dead back to life, but it brings them out from silence."[3] Reaching the truth with all the possible means contributes not only to the victims and their relatives but to society as a whole. Unveiling truth serves to make justice, bring an end to the anguishing, endless search of families in cases of enforced disappearance, and overall dismantle the false narrative of the past with heroes and so-called "enemies" of the people, thus, giving an immense contribution to peace and reconciliation.

1 Thomas Aquinas, 'Summa Theologiae' in Shawn Bawulski and Stephen R Holmes, *Christian Theology: The Classics* (Routledge 2014) ch 8, doi:10.4324/9781315816449-14.

2 Ruti G Teitel, *Transitional Justice* (OUP 2000) 89; Marek Safjan, 'Transitional Justice: The Polish Example, the Case of Lustration' (2007) 1(2) European Journal of Legal Studies 12.

3 Jose Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43(6) UC Law Journal 1433.

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At the end of the Second World War, as in the other South-Eastern European countries, Albania's political power was taken over by the communist party that immediately installed a brutal dictatorship of violence and terror, physically eliminating and persecuting either without trials or with trials that manipulated their political opponents. The communist regime, through its criminal ideology based on demonic principles such as the "dictatorship of the proletariat" and "the class struggle," legitimised the "elimination" and "persecution" of people who were considered harmful to the construction of a new society and, as such, labelled them enemies of the regime and persecuted their close relatives. This criminal approach later became part of the communist law and, consequently, it was exercised as a state policy violating the dignity and basic human rights of thousands of people. Torture, enforced disappearances, and extra-judicial killings as severe forms of human rights violations used during the communist regime against hundreds of thousands of people were not only justifiable instruments adopted to obtain total power over the society, but also a part of a broader strategy of inducing fear on the population to strengthen the dictatorship. The dictatorship in Albania legitimised the perpetration of crimes by placing their commitment in a context that has rendered them understandable, acceptable, and even necessary and of benefit to large groups of the population. In Albania, as in other ex-communist countries, a large apparatus was involved in the conception and implementation of repressive measures and acts of violence.

Official statistics show that, in Albania, 5,577 men and 450 women were shot. 26,768 men and 7,367 women were imprisoned for political reasons, of which 1,292 women and men died or lost their mental capacity and 408 men and women died from torture. Also during this period, 20,000 families were interned for political reasons, of which 7,022 people of various ages died in the internment areas.[4] Due to the persistent freedom infringement during the communist era in Albania, too many people are still categorised as missing. It is assessed that more than 6,000 individuals are missing. As per official information, 5,501 individuals sentenced for political reasons were executed, and their families were never informed about their whereabouts or were not able to retrieve their remains. Official data also show that the graves of 987 other political prisoners who died in prisons during the communist period are unknown to their relatives.[5]

After the fall of the communist regime in 1991, the large scale and the long-term communist repression provided for a high social demand and expectation to execute justice and unveil the truth, to restore the dignity of hundreds of thousands of people desecrated during the communist regime. Justice and truth are also of primary importance when dealing with the issue of thousands of people who disappeared from the communist regime resulting from state repression, whose graves are still unknown though more than three decades have

4 'Databazën e te perndjekurve' (*BUNK'ART 2*, 2016) <https://bunkart.al/2/database> accessed 20 June 2023.

5 International Commission of Missing Persons, *Albania, Missing Persons from the Communist Era: A Needs Assessment* (ICMP 2021) 4 <https://missingpersons.icrc.org/library/albania-missing-persons-communist-era-needs-assessment> accessed 20 June 2023.

passed since the fall of this regime. The wound caused by such an experience is still open. Therefore, establishing the truth about the communist crimes and the missing persons during Albania's communist regime represents one of the pillars of transitional justice, and the goal of the truth-seeking policies is to shed light on repression and uncover the violations before the truth about them is buried.

While international law has made a valuable contribution to the vindication and evolution of the right to the truth, not only through shaping the instruments that contribute to the unveiling of the truth about serious human violations but also through fostering progress in the respective jurisdictions, the fundamental question remains: what is the solution that Albanian domestic legislation has given to this matter and how efficient is it? The purpose of this paper is to analyse the right to the truth about the communist past in Albania and the effectiveness of the instruments adopted in reaching for the truth. The research focuses especially on the obligation of the state to investigate criminal events, such as serious violations of fundamental rights or the issue of missing persons, and other legal and institutional measures carried out to restore justice and truth regarding these issues in Albania.

2 EVALUATING THE STATUS OF THE RIGHT TO THE TRUTH ABOUT SERIOUS HUMAN RIGHT VIOLATIONS IN INTERNATIONAL LAW

Enforced disappearances became an international problem in the second half of the last century because they were used as a strategy to spread terror during conflicts or periods of internal violence, especially as a means of political repression of opponents, causing several gross human rights violations. As a result, hundreds of thousands of people have vanished around the world. In response to this global problem, the Additional Protocol of the Geneva Convention recognised, for the first time in international law, the status of the enforced disappeared person.[6] This Convention laid the foundation for the ways through which parties in an armed conflict could operate to search for, identify, and recover the dead from battlefield areas. Considering the impact that the loss of a person's life might have on his relatives, this act also recognised the right of the "parties to the conflict" and of the "international humanitarian organisations" to inform the relatives of the missing persons about the fate of their loved ones.[7] Accordingly, this moment represents the genesis of the right to the truth about human rights violations which emerged in the context of enforced disappearances.

The right to the truth emerged for the first time, even though not explicitly as a right in the case law of the Inter-American Court of Human Rights (IACtHR), in the area of enforced

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977) [1986] UN Treaty Series 1125/17523, art 33.

7 ibid, art 32.

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disappearances. In the case Velásquez Rodríguez v Honduras, the Court argued that "enforced disappearances cause a multiple and continuing violation of many rights under the ACHR, like the right to personal liberty, the right to life, and the right to integrity of the person, including freedom from torture, and inhuman or degrading treatment."[8] IACtHR considered the right to the truth as stemming from the state's responsibility to respect the dignity of the person rooted in the above-mentioned human rights. This court declared that the failure of a state to investigate acts of disappearance constitutes a violation of the right to life as guaranteed in the ACtHR.[9] In its case law, this court argued that when it was not possible to prosecute or punish the responsible persons, the state still had the obligation to investigate and inform family members about the fate of those missing.[10] The court confirmed that the right to the truth, apart from cases of forced disappearances, also extends to any type of serious violation of human rights.[11] The case law of IACtHR is considered to lay the foundation for recognising and codifying the right to the truth in international law.

The interpretations of the IACtHR regarding the right to the truth have been further reclaimed in the case law of the European Court of Human Rights (ECtHR), which, in turn, has contributed to developing the conceptual framework of the right to the truth, recognizing it beyond cases of disappearance or conflict-related violations. The ECtHR has considered the right to the truth not as an autonomous right under the ECHR, but as a procedural right derived from other rights. This standing is articulated by Naqvi, who outlines that the court has "inferred the right to the truth as part of the right to be free from torture or ill-treatment, the right to effective remedy, the right to effective investigation and the right to be informed of the results."[12] A similar standing to that of IACtHR has also been endorsed by the ECtHR, which declared that "a state's failure…at clarifying the whereabouts and fate of missing persons constitutes a continuing violation to the right to life," according to Article 2 of the ECHR.[13] Natasha Stamenkovikj reasserts that in their case laws, both the IACtHR and the ECtHR recognise that family members must be provided access to the truth about the fate of their missing relatives to avoid ongoing suffering as a result of being deprived of information.[14]

8 *Velasquez Rodriguez v Honduras (Merits)* Ser C no 4 (IACtHR, 29 July 1988) paras 155, 181 <https://www.legal-tools.org/doc/18607f/> accessed 12 September 2023.

9 ibid, para 185.

10 Y Gloria Park, 'Truth as Justice: Legal and Extralegal Development of the Right to Truth' (2010) 31(4) Harvard International Review 24.

11 *Barrios Altos v Peru* Ser C no 75 (IACtHR, 14 March 2001) para 48 <https://www.legal-tools.org/doc/f1439e/> accessed 12 September 2023.

12 Yasmin Naqvi, 'The Right to Truth in International Law: Fact or Fiction?' (2006) 88(862) International Review of the Red Cross 257.

13 ibid.

14 Natasha Stamenkovikj, 'The Truth in Times of Transitional Justice: The Council of Europe and the Former Yugoslavia' (DPhil thesis, University of Tilburg 2019) 34.

In the late 90s, this issue of enforced disappearances received greater attention. In 1992, the Declaration of the UN General Assembly provided the definition of an "enforced disappearance" offence for the first time and also supplied a framework of rules that all member states were required to follow as minimum standards to suppress the practice of enforced disappearances.[15] Although this Declaration did not have any binding force, it represents an important moment in the evolution of the "right not to be subjected to enforced disappearance."

Legal protection against enforced disappearances in international law was seen to acquire the recognition of a specific human right "not to be subjected to enforced disappearance."[16] The Disappearance Convention is the most important instrument acknowledging the above right as an autonomous and non-derogable right.[17] The Convention's main aim is the prevention of the enforced disappearances phenomenon through enacting a new framework in international criminal law related to the above widespread practice, considering it as a crime against humanity. One of the most important provisions of the Convention is the definition given to "enforced disappearance," as deprivation of liberty by agents of the state, followed by the refusal to acknowledge the concealment of the fate and whereabouts of the disappeared person. Meanwhile, a separate article deals with the cases of enforced disappearances that can only be ascribed to non-state actors. The Convention requires that member states implement the necessary steps to ensure that an enforced disappearance is regarded as an offence in terms of their criminal law.

Enforced disappearance of persons is considered a continuing offence so long as the perpetrators persist in concealing the fate and the whereabouts of persons who have disappeared, and these facts remain unclarified.[18] The UN stipulates that the breach of an international obligation "has a continuing character and it extends over the entire period during which the act remains not in conformity with the international obligation."[19] Therefore, states must bear responsibility for all violations arising from enforced disappearances and not only for the violations that occurred after the entry into force of the Convention. According to the Convention, most cases should be brought before national courts. The Disappearance Convention criminalises any failure on the part of the authorities to investigate acts of disappearance.[20] Considering the binding force of this

15 General Assembly Resolution 47/133 of 18 December 1992 'Declaration on the Protection of All Persons from Enforced Disappearance' <https://digitallibrary.un.org/record/158456?ln=en> accessed 12 September 2023.

16 General Assembly Resolution 61/177 of 20 December 2006 'International Convention for the Protection of All Persons from Enforced Disappearance' <https://digitallibrary.un.org/record/589467?ln=en> accessed 12 September 2023.

17 ibid, art 17 para 2/f.

18 ibid, art (8) paras 1/b, g.

19 General Assembly Resolution 56/83 of 28 January 2002 'Responsibility of States for Internationally Wrongful Acts' art 14 (2) <https://digitallibrary.un.org/record/454412?ln=en> accessed 12 September 2023.

20 General Assembly Resolution 61/177 (n 16) art 6.

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human rights instrument, the Convention establishes a mechanism to ensure the Party's compliance with its obligations.

As Scovazzi and Citroni state in their contribution, the crime of the enforced disappearance "affects several people who suffer harm besides the primary victim: the family and friends of the main victim, are all capable of being victims as a result of the anguish, fear and uncertainty that this offence invokes."[21] The Convention considers the relatives of enforced disappeared persons as victims and provides them with two main rights: firstly, the right to "reparation considered as a state obligation to cover material and moral damages," and, secondly, the right of the primary victim's relatives to know the truth regarding the circumstances of the enforced disappearance and the location of the disappeared person's remains.[22] The Convention obligates states' Parties to take all appropriate measures to search for, locate, and release disappeared persons and, in the event of death, to locate, respect, and return their remains as the duty derived from the right to the truth.[23]

In this Convention, for the first time in international law, the right to the truth was expressly articulated. According to the Convention, the scope of the "right to know" is related not only to international armed conflicts and interstate duties, but it extends even to the contexts of internal violence.[24] In the framework of these developments, the placement of the right to the truth about enforced disappearances has led some authors to consider it an autonomous right in international law.[25] Regardless of these attitudes and the fact that this right is becoming more firmly entrenched in international human rights law, it should be emphasised that this right is more a principle of International Law of great importance, especially in cases of human rights violations. The ratification of the Disappearance Convention by member states holds them responsible for investigating and unveiling the truth in cases of enforced disappearances and serious violations of human rights, to compensate the victims and their relatives, as well as to inform them about the progress of the investigations and the fate of the missing persons. As also affirmed in the case of Velasquez Rodriguez v. Honduras, "only by determining the truth regarding a victim's fate is the ongoing violation finally stopped and the state's duty to investigate satisfied."[26] In the case of Jularic vs. Croatia, the court declared that the state's failure to establish the truth simultaneously represents a breach of the right to life, as guaranteed in the ECHR.[27]

21 Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* (Martinus Nijhoff Pub 2007) 98, 258.

22 General Assembly Resolution 61/177 (n 16) art 18 (1) para g, art 24 (2).

23 ibid, art 24 (3).

24 ibid, art 1 para (2).

25 Eduardo Ferrer Mac-Gregor, 'The Right to The Truth as an Autonomous Right Under the Inter-American Human Rights System' (2016) 9(1) Mexican Law Review 136, doi:10.1016/j.mexlaw.2016.09.007.

26 *Velasquez Rodriguez v Honduras* (n 8) para 181.

27 *Jularić v Croatia* App no 20106/06 (ECtHR, 20 January 2011) para 51 <https://hudoc.echr.coe.int/eng?i=001-102904> accessed 10 September 2023.

The hierarchy achieved by the right "not to be subjected to enforced disappearance" in international law was recognised by IACtHR standings, confirming that the above-mentioned right should be viewed as *jus cogens* norm.[28] The acquisition of such a status in International Law has also been endorsed by many researchers who consider it to have attained *jus cogens* status. One of these scholars is Jeremy Sarkin, who thoroughly surveys the meaning, context, development, and status of enforced disappearances as *jus cogens* in International Law, obligating member states to take active measures to avoid and investigate instances of it.[29]

Albania ratified the Convention several weeks after receiving approval from the General Assembly of UN by the Law no. 9802/2007.[30] The international law in Albanian legal order is of a higher position than the domestic law. Article 122 of the Albanian Constitution foresees that international law applies directly, except when it is not self-executable, and its application requires the promulgation of a law.[31] The domestic legal approach related to protection from enforced disappearance requires the promulgation of a law that criminalises the enforced disappearance offence. In addition, dealing with the issue of disappearances that happened during the communist regime in Albania as an open legal and social challenge requires additional legal and institutional measures that will be analysed in the following parts of the study.

3 CONTOURING THE SCOPE OF THE RIGHT TO THE TRUTH ABOUT SERIOUS RIGHTS VIOLATIONS IN INTERNATIONAL SOFT LAW

The right to the truth emerged in international law in the context of enforced disappearances, but this right is of great importance in all serious violations of human rights. As discussed above, the birth of the right to the truth in the framework of all serious human rights violations is dedicated to the contribution of human rights courts, especially IACtHR and, later, ECtHR. An immense contribution is given by several UN policy documents which have extended the scope of the right to truth beyond that recognised by the Protocol of the Geneva Convention. According to the *Impunity Principles of 1997* and the revised ed. of 2005 as non-binding guiding instruments, the right to know the truth about past atrocities is considered "an inalienable and an imprescriptible right of the

28 *Goiburú et al v Paraguay (Merits, Reparations, and Costs)* Series C no 153 (IACtHR, 22 September 2006) <https://www.legal-tools.org/doc/e1a617/> accessed 20 February 2024.

29 Jeremy Sarkin, 'Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law' (2012) 81(4) Nordic Journal of International Law 564, doi:10.1163/15718107-08104006.

30 Law of the Republic of Albania no 9802 of 13 September 2007 'For the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance' [2007] Official Journal of the Republic of Albania 125/3551.

31 Constitution of the Republic of Albania no 8417 of 21 October 1998 <http://qbz.gov.al/eli/ligj/1998/10/21/8417> accessed 20 June 2023.

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victims, their families, and relatives, and it is not conditioned by any legal proceedings."[32] The *Impunity Principles* consider the right to truth as a collective right, retrieving information from history to prevent violations from occurring again in the future. The principles declare that society has the right to know the truth about serious human rights violations, while the state has the responsibility to preserve the memory and further people's knowledge of its historical oppression as part of its heritage.

Another important international law source, *Basic Principles on the Right to a Legal Remedy and Reparation*, adopted in 2005, considers the right to the truth an element of satisfaction in the framework of the general right of remedies and reparations for victims of gross violations of international human rights law. Satisfaction stands among others for "verification of the facts and full and public disclosure of the truth…"[33] The right to the truth, according to *Basic Principles*, focuses on the causes leading to victimisation and on the causes and conditions of the gross violations of international human rights law. This right belongs to the victims, their representatives, and the public, so that factual truth about gross violations of human rights might be publicly disclosed. These standings of the UN soft law became part of the IACtHR standings in the case of Bamaca Velasquez v Guatemala, underlining that: "in addition to being an individual right, the right to the truth also belongs to society as a whole."[34] Later, they were used by ECtHR, stating that "where allegations of serious human rights violations are involved in the investigation, the right to the truth does not belong solely to the victim of the crime and his or her family but also to the other victims of similar violations and the general public."[35]

Contouring State obligations in cases of enforced disappearances and serious violations of fundamental rights in international law have contributed to the design of truth-seeking measures and policies to deal with the bitter past. State-driven truth-seeking measures, although closely related to the pillar of truth, do not emerge exclusively from the right to truth, but rather are considered instruments for guaranteeing human rights in a transitional context. From the point of view of the right to the truth, the Convention recognises the

32 Louis Joinet, 'Question on the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Pursuant to Sub-Commission Decision 1996/119, Annex II' (2 October 1997) <https://digitallibrary.un.org/record/245520?ln=en> accessed 12 September 2023; Diane Orentlicher, 'Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (8 February 2005) Principle 3, 17 <https://digitallibrary.un.org/record/541829?ln=en> accessed 12 September 2023.

33 General Assembly Resolution 60/147 of 21 March 2006 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' para 22 <https://digitallibrary.un.org/record/563157?ln=en> accessed 12 September 2023.

34 *Bámaca-Velásquez v Guatemala (Merits)* Ser C no 70 (IACtHR, 25 November 2000) paras 197, 495 <https://www.legal-tools.org/doc/e1f6bb/> accessed 12 September 2023.

35 *Nashiri v Poland* App no 28761/11 (ECtHR, 24 July 2014) <https://hudoc.echr.coe.int/eng?i=001-146044> accessed 12 September 2023.

state's obligation to investigate cases of enforced disappearances, focusing only on clarifying the fate of the disappeared persons, extending this obligation until the above-mentioned objective is fulfilled. Thus, the right to the truth emerges from the state's obligation to respect the dignity of human beings, which institutes a duty to investigate and undertake all necessary means to effectively inform the families about the fate and whereabouts of their missing relatives. The duty to investigate, among others, aims to recover truth for the relatives of victims and to alleviate their suffering.

This duty to investigate applies not only to cases of enforced disappearances but to all other serious violations of human rights. In Velasquez Rodriguez v. Honduras, IACtHR indirectly implied that the state's obligation to investigate extends beyond cases of enforced disappearances to all serious human rights violations.[36] Of the same opinion, scholars including Naqvi and Stamenkovikj argue that the duty to investigate applies to all violations of human rights.[37] The duty to investigate does not arise solely as an explicit standard for guaranteeing the right to the truth per se, but it also emerges as a standard for safeguarding other fundamental rights, such as the right to life and the right not to be subjected to torture or degrading treatment. The duty to investigate works to give effect to the criminal accountability of perpetrators and the right to aid the victims. The establishment of the truth related to past atrocities and the guilt of the perpetrators should result in criminal investigations and trials. Thus, the right to know who perpetrated the serious violations might be considered in the context of the right to justice, focusing on the tool of criminal prosecution and punishment of past atrocities, besides other tools of a non-judicial character.

Secondly, as the UN emphasises that the right to know the truth about human rights violations serves to end impunity and promote human rights, considering that the judiciary system has a priority mandate to investigate, while the restorative mechanisms of transitional justice are limited to pursuing a complementary mandate alongside the judicial instances.[38] Thus, the right to the truth should be pursued through both judicial and nonjudicial mechanisms. The eradication of impunity about human rights abuse is in the best interest of society as a whole. To satisfy this social need, it is necessary to understand the whole truth about the events and define the corresponding individual responsibilities. To this end, both measures exceed the sphere of the individual interest of the victims.

Thirdly, the state must preserve the memory of the unfortunate past as a form of historical justice and a way to unveil the truth that eases the pain of the victims and contributes to raising awareness among the new generation. As the UN's *Impunity Principles* emphasise people's knowledge of its historical oppression as part of its heritage, so it is also the "state's

36 *Velasquez Rodriguez v Honduras* (n 8) para 181.

37 Naqvi (n 12) 249; Stamenkovikj (n 14) 42.

38 Human Rights Council Resolution 21/7 of 10 October 2012 'Right to the Truth' paras 1, 4 <https://digitallibrary.un.org/record/736871?ln=en> accessed 12 September 2023.

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duty to … preserve the collective memory from extinction."[39] Also, *Basic Principles* considers preserving collective memory as serving for reparation and as an element of satisfaction for the harm suffered.[40] Thus, the state must carry out initiatives and policies protecting collective memory as a way of restoring the truth about the bitter past.

Lastly, as already outlined in the UN *Impunity Principles of 1997*, after the fall of a repressive regime, the new democratic state must give effect to the processes of discovering the truth, thereby establishing mechanisms and models of truth revelation, such as preservation of the archives and providing access to them.[41] *Basic Principles* considers, as a standard of reparation, the state's obligation to develop means of informing the general public on the causes leading to their victimisation and on the causes of the gross violations of international human rights law."[42] Revealing information contained in the files contributes to accountability and the historical clarification of the truth. For the states in transition from dictatorship or repression to democracy, disclosure of the files and archival revelations enables a break from the past and provides truth and respect for human rights.

In conclusion, the right to the truth about serious violations of human rights is not closely bound to the precise wording of particular treaties, but it was vindicated by case law, soft law, and doctrinal contributions. Even though it emerged in the context of enforced disappearances, a series of legal documents of international law made it clear that the right to the truth is of great importance in all serious violations. The truth, together with justice and reparations, are the main pillars that guarantee a complete and sustainable solution to dealing with past human rights violations.

The clear linkage between the right to truth and the preservation of human dignity makes it stand on the threshold of a legal principle and a claim. The right to the truth holds authorities accountable for implementing effective measures and offers the victims and society a tool to instigate truth-seeking processes. Unveiling the truth is an obligation and not an option for states where violations of human rights have occurred. In a transitional context, the right to the truth requires states to prosecute past atrocities and punish the perpetrators. In societies with a history of gross human rights violations, the elucidation of the truth from the perspective of the victim appears to surpass the criminal investigations in importance because it urges a broad official response to rights abuse through establishing mechanisms and models of truth revelation. The right to the truth constitutes a legal basis for the victims and their relatives to submit requests for information and benefit from reparations.

39 Orentlicher (n 32) Addendum, principle 3.
40 General Assembly Resolution 60/147 (n 33) para 22 g.
41 Orentlicher (n 32) Addendum, principle 4.
42 General Assembly Resolution 60/147 (n 33) para 24.

4 THE POLITICS OF TRUTH REVELATION ABOUT SERIOUS HUMAN RIGHTS VIOLATIONS IN ALBANIA

Dealing with the serious violations of human rights and the manipulation of the truth is not only a political, moral, and historical goal, but it is, above all, a legal one. On the domestic level, the protection of human dignity and personhood and fundamental human rights contributes toward achieving justice, unveiling the truth, and dismantling the manipulations built over the decades under the communist regime. The new democratic state must respond to the individual and collective demand for justice and truth by investigating criminal practices, identifying their authors, and evaluating their consequences. While international law has posed normative pressures on domestic jurisdictions to uncover the truth about the past atrocities, the fundamental question remains: what is the solution that Albanian domestic legislation has given to this matter, and how efficient is it?

The following discussion aims to make a detailed analysis regarding how far justice and the truth, especially, has been unveiled through the criminal prosecution and trials of the perpetrators of the communist crimes and to identify what measures have been carried out during the years to track the buried truth, identifying and finding the remains of the missing persons.

4.1. Finding the Truth about Past Human Violations by Using Criminal Law

In a democratic state, judicial truth is the highest and most undisputed form of the truth. In the post-communist society, criminal law is the most useful tool to prosecute serious human rights violations. Criminal proceedings and trials of the perpetrators of previous crimes are usually the first, most prominent instruments of unveiling the truth because they intend to collect evidence, facts, and testimonies about past serious violations. This idea is also endorsed by Stevens, who states that through criminal proceedings and trials, "the truth of what happened is hopefully revealed and the victim's story told."[43] Trials might make an immense contribution to strengthening the rule-of-law by demonstrating that previous serious human rights violations are punished, state actors do not benefit from impunity, and the truth about the most serious atrocities is unveiled.

Scholars support the idea that criminal proceedings of the responsible perpetrators contribute to society through what Antkowiak[44] articulates as guaranteeing non-repetition of gross human rights violations and demonstrating that such acts are not tolerated, or, as Gamarra considers, "deterring ongoing crimes while fostering the rule-of-law and social reconciliation."[45]

43 David Stevens, 'Dealing with the Past' (2004) 55(3) The Furrow 151.

44 Thomas M Antkowiak, 'Truth as RIght and Remedy in International Human Rights Experience' (2002) 23(4) Michigan Journal of International Law 977.

45 Yolanda Gamarra Chopo, 'Peace with Justice: The Role of Prosecution in Peacemaking and Reconciliation' (2007) 13 Revista Eléctronica de Estudios Internacionales 17.

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4.1.1. Overcoming the Obstacles

Dealing with communist crimes in Albania, as in every jurisdiction, raises the dilemma of whether criminal acts committed by individuals during the communist regime should be prosecuted and punished under the standard criminal code. In this way, the truth about past atrocities may be unveiled through the criminal prosecution of the perpetrators. The main concern surrounds how to overcome the basic obstacles related to principles of criminal law, like "*nullum crimen sine lege*" and the "statutory limitations." To respond to these two challenges, it is necessary to analyse the typology of the crimes committed during the communist period, thereby discussing the way they should be qualified under international and domestic law. It is generally accepted that communist regimes have committed massive violations of human rights. Several international documents consider these atrocities as genocide and crimes against humanity.[46] Likewise, in domestic law, it is also accepted that the totalitarian communist regime of Enver Hoxha, who governed Albania after the Second World War until 1990, was characterised by a "massive violation of human rights, individual and collective murders and executions (with and without trial), deaths in concentration camps, deaths from starvation, torture, deportations, slave labour, physical and psychological terror, genocide due to political origins..."[47]

Several international law instruments ratified by Albania during the communist era, such as the International Convention on the Prevention and Punishment of the Crime of Genocide of 1948[48] and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[49] constitute the legal foundation in international law, with the force of *jus cogens*, which renders genocide punishable. These binding instruments explicitly provide for individual criminal responsibility or require

46 Parliamentary Assembly Resolution 1481 of 25 January 2006 'Need for International Condemnation of Crimes of Totalitarian Communist Regimes' para 2 <https://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=17403&lang=en> accessed 12 September 2023; European Parliament Resolution P6_TA(2009)0213 of 2 April 2009 'On European Conscience and Totalitarianism' paras 4, 7 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009IP0213> accessed 12 September 2023.

47 Law of the Republic of Albania no 7514 of 30 September 1991 'On the Innocence, Amnesty and Rehabilitation of Ex-Convicts and Politically Persecuted' [1991] Official Journal of the Republic of Albania 7, Preamble. See also, Resolution of the Parliament of Albania no 11/2006 of 30 October 2006 'On the Punishment of Crimes Committed by the Communist Regime in Albania" [2006] Official Journal of the Republic of Albania 117/4669, para 2; Resolution of the Parliament of Albania of 3 November 2016 'On the Condemnation of the Crimes of Communism Against the Clergy, as well as the special gratitude for the role and activity of the clergy in the defense of democratic values and basic human rights and freedoms' [2016] Official Journal of the Republic of Albania 217/22764.

48 General Assembly Resolution 260(III)A of 9 December 1948 'Convention on the Prevention and Punishment of the Crime of Genocide' art 2 <https://digitallibrary.un.org/record/666848?ln=en> accessed 12 September 2023.

49 General Assembly Resolution 2391(XXIII) of 26 November 1968 'Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity' <https://digitallibrary.un.org/record/202665?ln=en> accessed 12 September 2023.

states to consider an act a crime under domestic law, as does the Albanian Criminal Code and Albanian Genocide Law.

Also, the Nuremberg Charter and the case law of the Nuremberg Trial represent an important basis for prosecuting and punishing communist atrocities.[50] The Nuremberg case law demonstrated that the punishment of any person who committed acts against human rights that constitute criminal offences according to international criminal law might be allowed, independent of domestic law not considering them as criminal offences at the time of their commitment. Everyone involved in acts of violence against human rights that constitute criminal offences under international law should be held responsible and cannot claim to be free from the charges based on the argument that they were acting under orders. In the same vein, the Parliamentary Assembly of the Council of Europe (PACE) urged domestic jurisdictions toward prosecuting communist crimes, arguing that the "statute of limitations for some crimes can be extended since it is only a procedural, not a substantive matter."[51]

ECtHR, in its case law, considers that it "…is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law."[52] Also, in other cases, the Court adopted the same approach, confirming that "even if the acts committed by the applicant could have been regarded as lawful under the law at the material time, they were nevertheless found to constitute crimes against humanity under international law at the time when they were committed."[53]

The instruments of international criminal law and the principles they embody impose the obligation to prosecute and punish serious violations of human rights on the states, regardless of the internal juridical regime. No one can claim that the actions committed, which constitute war crimes, crimes against humanity, and genocide according to international criminal law, were legal in the framework of domestic law. Thus, international criminal law constitutes the foundation upon which criminal acts committed by

50 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal (signed London, 8 August 1945) art 6 <https://www.refworld.org/legal/agreements/un/1945/en/56517> accessed 20 September 2023.

51 Parliamentary Assembly Resolution 1096 of 28 June 1996 'Measures to Dismantle the Heritage of Former Communist Totalitarian Systems' para 7 <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507> accessed 12 September 2023.

52 *Streletz, Kessler and Krenz v Germany* App nos 34044/96, 35532/97, 44801/98 (ECtHR, 2001) para 81 <https://hudoc.echr.coe.int/eng?i=001-59353> accessed 20 September 2023.

53 *Kolk and Kislyiy v Estonia* App nos 23052/04, 24018/04 (ECtHR, 17 January 2006) <https://hudoc.echr.coe.int/eng?i=001-72404> accessed 20 September 2023. See also, James A Sweeney, 'The Elusive Right to Truth in Transitional Human Rights Jurisprudence' (2017) 68(2) International and Comparative Law Quarterly 353, doi:10.1017/S0020589317000586. 55.

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ex-communist officials during the dictatorship period might be prosecuted and punished under domestic criminal law. International criminal law represents the most important tool for establishing justice, eradicating the culture of impunity, and clarifying that every perpetrator will be brought to justice, sooner or later. The criminal prosecution and trials serve to the unveiling of the truth, shedding light on the bitter past and leaving strong traces in the history of a country.

4.1.2. Legal Foundations of Pursuing and Punishing Past Communist Crimes in Albania

The change of Albania's political system in 1992 brought forth a new era. The large scale and the long-term communist repression provided for a high social demand and expectation that the new constitutional and legal architecture would be guided by the highest values of humanity, including protection of human rights, rule of law, human dignity, justice, peace, and truth.[54]

The first traces of legal measures attempting to handle the communist crimes in Albania were embedded in Law No. 7514, dated 30.09.1991, "On the innocence, amnesty and rehabilitation of ex-convicts and politically persecuted." This law indirectly recognised the criminal activities of the communist regime in Albania, apologized to the Albanian people, recognised the human rights violations that occurred during the communist regime, and, thereby, provided amnesty for the persons convicted on political charges and restoration for the victims or their families. This law sanctioned the creation of a commission with the participation of members of the Parliament and Government, judiciary officials, and members of the Association of Former Political Prisoners. This commission was foreseen to examine and register state political crimes that happened during the communist regime. Such an act did not produce any effect, therefore remaining a formal statement on paper. The initial approach adopted by Albania in dealing with communist crimes was an important step compared to other former communist countries, but concrete measures failed to follow.

The criminal prosecution of former high-communist officials, was initially focused only on crimes of an economic nature due to the lack of a legal domestic provision for punishing communist crimes. In 1994, before the adoption of the New Criminal Code, 24 former high-communist officials were punished for crimes of an economic nature. In January 1995, Albania adopted Law No. 7895, dated 27.01.1995, called "Criminal Code of the Republic of Albania," which created the legal basis to prosecute and punish communist crimes, qualifying them as crimes against humanity. According to this law, "Murder, enforced disappearance, extermination, enslaving, internment and expulsion and any other kind of human torture or violence committed according to a concrete premeditated plan or systematically, against a group of the civil population for political,

54 Law of the Republic of Albania no 7692 of 31 March 1993 'On an Amendment to Law no 7491 of 29 April 1991 "On the Main Constitutional Provisions"' [1993] Official Journal of the Republic of Albania 3, Preamble; Constitution of the Republic of Albania (n 31) Preamble, arts 21, 25.

ideological, racial, ethnical and religious motives, shall be punishable to not less than fifteen years of prison or life imprisonment."[55]

The second attempt at the prosecution of the communist crimes in Albania began in 1995 with the approval of Law No. 8001, dated 22.09.1995, "On genocide and crimes against humanity committed in Albania during the communist regime for political, ideological and religious reasons." This law explicitly sanctioned "the obligation of the prosecutor's office to follow the criminal investigations and proceedings against crimes committed during the communist regime for political, ideological, and religious reasons."[56] A few weeks after the law came into force, 24 high-ranking communist officials were arrested and accused of committing crimes against humanity almost without an investigative process. The defendants were largely the same ex-officials who, a few years prior, had been sued for the economic charges. The trial took place without the presence of the media and was not open to the public. The court banned the opportunity for the victims' claims to be heard, violating their right to participate in the process of seeking the truth and making justice. The Court of First Instance found some of these officials guilty, but the sentence was reduced in the Court of Appeal; in the end, in 1997, the Supreme Court acquitted the defendants, declaring that they could not be held liable for actions that were not illegal at the time they were committed. Even though the prosecution raised such a serious charge, in no case was it able to prove the guilt of the officials arrested for these crimes. As scholars Aliaj[57] and Asllani[58] argue, this decision of the Supreme Court was not in conformity with international law instruments and standards that explicitly provide for individual criminal responsibility in cases of crimes against humanity. Failure to properly apply international and domestic law in punishing the communist crimes relates to the fact that four years after the fall of the regime, human resources in the judiciary system remained almost the same, while the judges newly introduced into this system lacked adequate professional skills.

Albanian and international scholars support the idea that the rush to arrest former high communist officials could not be justified except by the political interests of the ruling party, to target and remove the old caste from politics and to gain votes from the people. Asllani endorses this idea by stating that the "Genocide law was a political tool of the ruling

55 Law of the Republic of Albania no 7895 of 27 January 1995 'Criminal Code of the Republic of Albania' art 74 <https://qbz.gov.al/eli/ligj/1995/01/27/7895/49876337-8143-4c8e-bba8-a8620022f231;q=ligj> accessed 12 June 2023.

56 Law of the Republic of Albania no 8001 of 22 September 1995 'On Genocide and Crimes against Humanity Committed in Albania During the Communist Regime for Political, Ideological and Religious Reasons' art 3 <https://qbz.gov.al/eli/ligj/1995/09/22/8001/47d8f329-ba05-4ad4-8fad-7f6d4f62827c;q=ligj> accessed 12 June 2023.

57 Arbora Aliaj, 'Transitional Criminal Justice in Albania: The use of trials and criminal proceedings as a Transitional Justice Instruments' in OSCE and Konrad-Adenauer-Stiftung, *Transitional Justice in Albania: A Compilation of Papers by Young Albanian Researches* (OSCE 2020) 197.

58 Dorina Ndreka Asllani, 'Dilemmas in Using International Law for Pursuing the Communist Crimes: The Albanian Case' in Patrycja Grzebyk (ed), *The Communist Crimes: Individual and State Responsibility* (Instytut Wymiaru Sprawiedliwości 2022) 38.

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party because their implementation resulted in the banning of high members of the opposite party from participating in the forthcoming elections."[59] Austin and Ellison also state in their paper that the "Genocide Law in Albania did not serve its legal purpose. This law was abused and misapplied by the ruling Party and then quickly dismantled and rendered meaningless in 1997 with the coming to power of ex-communist political forces."[60] The above-mentioned law did not constitute a new legal basis for the prosecution of communist crimes because this basis had already been created several months before with the entry into force of the Criminal Code. Rather, it represented a political strategy of the ruling party to hit their opponents. The purpose of this law was not the prosecution of communist crimes, but the exclusion from the electoral process that would take place a few months later of the political opponents involved in criminal proceedings. Criminal law, as a form of enacting justice and revealing the truth about communist crimes in Albania, proved to be a substitute for political justice.

In recent years, several initiatives have been carried out to bring justice and unveil the truth about the challenging past as soon as possible, but these approaches serve more historical justice and truth than individual ones. Through the creation of public mechanisms, such as the Institute for the Study of Crimes and Consequences of Communism and the Authority of Former State Security Files, institutional action was meant to serve the cause of justice and truth by giving the opportunity for access to secret files to the victims and society, analysing crimes committed, identifying perpetrators, and, if possible, referring them for criminal prosecution.[61] These institutions played an important role in enabling the victims and society, especially the young generation, to learn the truth about the criminal communist past, but have made vague attempts in referring perpetrators of communist crimes to the prosecution office. Such an apathetic attempt to identify and sue those responsible for communist crimes was made in 2019 when the Institute referred one criminal report against a former prison high-ranking official, who had emigrated in the '90s, to the prosecution office. Even though 4 years have passed since then, nothing is publicly known about the progress of the criminal investigations of this case.

4.1.3. Evaluating the Politics

The criminal investigations and trials of the perpetrators of the communist crimes would be the most important tools with a significant impact on restoring justice and truth and, especially, raising Albanian society's awareness of the scale of the communist atrocities.

59 ibid 37.

60 Robert C Austin and Jonathan Ellison, 'Post-Communist Transitional Justice in Albania' (2008) 22(2) East European Politics and Societies 386.

61 Law of the Republic of Albania no 10242 of 25 February 2010 'On the Institute of Studies on the Crimes and Consequences of Communism in Albania' [2010] Official Journal of the Republic of Albania 30/1013; Law of the Republic of Albania no 45/2015 of 30 April 2015 'On the Right to Information about the Documents of the Former State Security in the People's Socialist Republic of Albania' [2015] Official Journal of the Republic of Albania 88/4671.

Criminal justice would serve to unveil the truth, making an immense contribution to the victims' reparation, helping social reconciliation, and preventing similar scenarios from happening in the future. The scale of human violations that happened during a long repressive communist regime in Albania laid out high expectations regarding the measures to be included in the transitional legal framework. The real steps undertaken to prosecute and punish communist crimes were far from the expectations.

Albanian society has failed to punish the perpetrators of the past communist atrocities. When crimes of the past are not properly prosecuted, doubtlessly truth becomes a victim on its own. The failure of Albanian's society to prosecute and punish communist crimes was also confirmed in 2006 by the Parliament. The Albanian Parliament made a "*mea culpa*," admitting that the fall of the communist regime in Albania was not followed by an investigation of the crimes committed by that regime, especially since the perpetrators of these crimes were never seriously confronted with justice, and no public apology was sought to the victims of the communist genocide.[62]

Nowadays, many victims and perpetrators are no longer alive, making it difficult or impossible to initiate criminal proceedings. Even though the crimes committed by ex-communist officials were not prosecuted and punished, this process still should not be considered impossible to achieve. The prosecution system in Albania should play a more proactive role in pursuing communist crimes through its discretion. Victims of communist violence and the state-mandated institutions created to provide evidence of the communist crimes have the right, and, at the same time, the duty to refer every identified case to the criminal prosecution office. The justice system at the domestic and international level can make a valuable contribution in this direction.

In Albania, since the criminal trials did not produce the desired effect, the social demand to analyse, study, and provide evidence of communist crimes, as well as their consequences, with any appropriate means, is imperative. The Parliament estimated that the awareness of the Albanian public opinion, especially of the young generation, about the inhumane crimes committed by the communist regime was quite poor.[63] Therefore, the Parliament invited studies of a historical character to enable an objective verification of the history of Albania during the communist dictatorship, as well as called for the drafting of a national strategy for eliminating the consequences of half a century of totalitarianism in Albania. The evaluation of the communist period and the communist crimes should not be left only to the judgment of researchers and historians, but it needs timely intervention from the state through other policies, like public access to the files of the former state secret service, and the study of communist crimes to raise historical awareness of the bitter past. Such initiatives might serve justice and, above all, the truth. Thus, Albanian society faces the challenge swiftly seeking historical justice for the truth about the past to be transmitted across generations through collective memory and memory practices.

62 Law of the Republic of Albania no 7514 (n 47) art 4.

63 Resolution of the Parliament of Albania no 11/2006 (n 47) art 5.

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4.2. The Politics of Truth about the Missing Persons from the Communist Era

During the communist era in Albania, resulting from the persistent freedom infringement, more than 6,000 persons were categorised as missing. The people's disappearance under the communist regime was part of a state demonic strategy of terror, fear, and violence, punishing the political opponents or so-called "enemies of the people" even after their death and not allowing the "victims" to have a grave or informing the family members of their fates. Most of the disappearances in Albania occurred under circumstances such as a) the execution based on a court decision with capital punishment according to the law of the time, b) being killed at the state border, c) dying in prisons as a result of torture, d) dying in internment camps or medical or rehabilitation institutions as a result of slave treatment, etc., e) shootings without trial, or f) arrests and detention of the persons by secret police, then dying as a result of torture, etc. All these forms of state repression that led to the disappearance of the persons happened randomly during the period of dictatorship in Albania.

In a transitional context with a history of gross human rights violations, socio-political needs urge one to consider in which way the issue of missing persons can best be addressed. Tracing the missing people is crucial to maintaining and restoring basic human rights, supporting their families is also an act of respect for the dead. Above all, tracing the missing persons from the Communist Era stems from the Disappearance Convention. This is because the prohibition of enforced disappearance and the corresponding state obligation to investigate establish the fate and whereabouts of the disappeared, punish the responsible perpetrators, and attain the status of *jus cogens* in international law. This state obligation enjoys a higher rank in the international law hierarchy than other obligations arising from serious human rights violations. Inaction or refusal of the state to carry out an investigation and provide information to the relatives of the missing people about the remains of their loved ones causes great suffering and constitutes a breach of the right to life and, simultaneously, an infringement of the right to know the truth. The State is obligated to investigate every situation involving a violation of the rights protected by the international human rights instruments. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.[64]

Discovering the buried truth, identifying and finding the remains of the missing persons, and bringing the perpetrators before justice is a difficult and lengthy process. The success of it depends primarily on the institutional and political will to address this issue. The investigations into human rights abuses related to the issue of persons who went missing from the communist era should not be left up to solely the unofficial searches and exhumations by family members but should also be part of a well-resourced, state-

64 *Velasquez Rodriguez v Honduras* (n 8) para 176.

sponsored broader strategy and policy. The domestic legal system should be capable of dealing with cases of disappearances, thereby producing concrete results. The undertaking of legal and institutional measures in this way should not be considered a result, but as a means to achieve the final goal: discovering the truth that was buried many decades ago, giving the victims due respect, and providing the families with the required support.

4.2.1. Overcoming the Obstacles

Enforced disappearances that happened during the period of dictatorship in Albania constitute a continuing violation of many rights under several documents of international law. The investigation of these cases represents an important obligation stemming from the Disappearance Convention. Undoubtedly, the criminal investigation of missing persons is the primary method to discover the circumstances of the disappearance, identify the responsible perpetrators, and search, find, and identify the victims. The results of the investigations might condition the legal qualification of the offence. Nevertheless, cases of disappearances resulting from a widespread or systematic attack against a civilian population during the communist regime might be qualified as crimes against humanity. This is also asserted by the Rome Statute of the International Criminal Tribunal.[65] Therefore, as previously discussed, international and domestic law makes it possible to prosecute and punish crimes against humanity, regardless of obstacles such as "*nullum crimen sine lege*" and "statutory limitations."

Thus, as determined by the Disappearance Convention and argued by IACtHR, even in the case that the individual responsible for crimes of this type cannot be legally punished under certain circumstances, the state is obliged to use the means at its disposal to inform the victims' relatives about their fate and whether they were killed, as well as the location of their remains.[66] Therefore, the state has the obligation to organise the internal legal and institutional system to respond to this obligation. From this point of view, when dealing with the issue of missing people from the communist era, the main problem to resolve is how to reach the burial places, overcoming two difficult obstacles: time and silence. The combination of these factors makes finding the remains of the missing persons very difficult. In the Albanian context, there has been a lack of information for several decades about the missing people. Such a long period creates a large challenge in collecting information and identifying the victims. Therefore, the use of traditional methods, such as the publication of the identity of the missing persons, undertaking campaigns to collect information from the public, etc., are ineffective.

65 Rome Statute of the International Criminal Court (adopted 17 July 1998) art 7 <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en> accessed 12 June 2023.

66 *Velasquez Rodriguez v Honduras* (n 8) para 181.

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The other obstacle to overcome is breaking the silence. The question arises on how to strike a balance between the right to collect valuable information about the remains of missing persons and the necessity to retrieve such information from persons who know about their fates. The concern is how to make the executioner, collaborator, or their relatives speak up and tell the truth. To achieve this goal, it will be necessary to use incentive-based approaches to have them offer information instead of allowing them to remain silent. This approach, which is currently also used in criminal law, can be a valid tool, although ethically questionable, because it can present itself as rewarding the author for the crime committed. Thus, the administrative proceedings approach may be more appropriate to be adopted. In this view, the administrative proceedings can also serve as a necessary preliminary tool for initiating the criminal investigation.

4.2.2. Constitutional and Legal Basis of the Missing Persons from the Communist Era

The obligation to search for and discover the remains of persons considered missing during the communist dictatorship stems from values and principles that constitute important cornerstones in Albanian constitutional architecture. From a broad legal interpretative point of view, guaranteeing the principle of justice and peace and basic human rights, like the right to life, as well as the prohibition of torture, cruel, inhuman, or degrading punishment or treatment gives rise to the state's obligation to deal with the issue of missing persons from the communist era.[67] Also, the constitution imposes the obligation to apply binding international law on the Albanian state. According to the Constitution, any international agreement that has been ratified constitutes part of the internal juridical system and it is implemented directly, except for cases when it is not self-executing, and its implementation requires the issuance of a law.[68]

After the fall of the communist regime in Albania, the issue of missing persons resulting from state repression was not considered a priority. During the period from 1991 to 2013, there was no political and institutional will to address the issue through legal and administrative measures. The remains of the disappeared during this period were found only through the efforts and interest of the relatives of the missing people who engaged with their private moral or material resources in carrying out the complicated process of gathering information about the remains and their exhumation. Cooperation between the families of the missing persons and the state institutions, like the State Police, the Institute of Forensic Medicine, and the Prosecution Office could be traced only in the final stage of this process, that of exhumation after the discovery of the remains. The involvement of such state structures was mandatory due to the provisions of the Criminal Procedural Code, which sanctioned that where unidentified remains are found, a criminal investigative

67 Constitution of the Republic of Albania (n 31) Preamble.
68 ibid, arts 5, 122.

procedure must be initiated to identify the circumstances of the disappearance, the identity of the victims, the responsible perpetrators, etc.[69]

The first legal step in tracing the remains of the missing persons was the ratification by Albania of the UN International Convention, "On the Protection of All Persons from Enforced Disappearances," in 2007.[70] According to the Albanian Constitution, international law is of a higher ranking position than domestic one, providing the obligation of the Albanian state to implement international law. The Convention imposes important obligations on the Albanian state to clarify the issue of the persons who went missing during the communism period, and this responsibility lasts until the fate and whereabouts of the victims are verified. The second step was taken in 2013, fulfilling the obligation stemming from the Disappearance Convention by criminalising the offence of enforced disappearances under the Albanian Criminal Code by the Law No. 144/2013.[71] It was only in 2015 that a state unit was established to deal with the issue of the remains of the missing persons by the Institute of Politically Persecuted Persons. The main purpose of setting up this mechanism was to create an initial database of missing persons. Another legal progress was achieved in 2018 with the ratification by Albania of the cooperation agreement between the Council of Ministers of the Republic of Albania and the International Commission on Missing Persons (ICMP).[72] According to this act, ICMP undertakes assisting the Albanian government in drawing up the list of missing persons and their family members, thereby providing technical assistance and regularly informing the families of missing persons about the recovery and identification of the remains.[73]

Important progress was made in 2020 in clarifying, by law, the meaning of the term "missing person from the time of communism."[74] The law has given the same definition to the persons that are considered missing under communism as to those considered enforced disappeared, according to the Disappearance Convention. The clarification by the law of the notion of missing persons during communism enables an accurate identification of the victims included in this category by the public institutions in charge

69 Law of the Republic of Albania no 7905 of 21 March 1995 'Criminal Procedure Code of the Republic of Albania' art 200, para 2 <https://qbz.gov.al/eli/ligj/1995/03/21/7905/def27cc2-ec71-458f-aec6-fa2a1f0b56c8;q=ligj> accessed 22 June 2023.

70 General Assembly Resolution 61/177 (n 16); Law of the Republic of Albania no 9802 (n 30).

71 Law of the Republic of Albania no 144/2013 of 2 May 2013 'For some additions and changes in the law no 7895, dated 27.1.1995 "Criminal Code of the Republic of Albania", amended' [2013] Official Journal of the Republic of Albania 83/ 3526, art 2.

72 Law of the Republic of Albania no 83/2018 of 15 November 2018 'For the ratification of the cooperation agreement between the Council of Ministers of the Republic of Albania and the International Commission on Missing Persons (ICMP)' [2018] Official Journal of the Republic of Albania 172/12074.

73 ibid, art 2.

74 Law of the Republic of Albania no 114/2020 of 29 July 2020 'For some changes and additions to the law no 45, dated 30.4.2015 "On the right to information about the former state insurance documents of the People's Socialist Republic of Albania"' [2020] Official Journal of the Republic of Albania 154/9734, art 2, para 4.

and serves as a basis for identifying, searching, and finding the remains of the missing people. This also enables their relatives to make requests for information or reparations to the state competent authorities. Thus, it is useful that the state authorities establish a comprehensive database of missing persons, which might provide reliable information regarding cases of missing persons and allow their families to register missing relatives and exercise their social and economic rights.

The Institute of the Politically Persecuted Persons was not the right mechanism to deal with the issue of missing persons. Considering this, the Albanian government mandated the Files Authority with the administrative investigation of the remains of the missing persons from the communist period in 2022. This state entity, together with the Ministry of the Interior Affairs, cooperated with ICMP.[75] The Files Authority has only recently established a unit to deal with the process of identification and recovery of the remains of missing persons, in addition to launching an online platform for collecting information about them.

Regardless of the legal steps taken during the 30 years of democratic development in Albania, it must be said that on the concrete level, very little has been achieved. The latest exhumation to find and identify the whereabouts of the missing persons from the communist era dates back to 2010 in places called "Mali me Gropa," Dajti Mountain, Tirana. In 2010, the Institute of the Politically Persecuted Persons, after finding 11 plastic bags with human remains thought to have been shot during the communist regime, referred the case to the Tirana Prosecution Office. The latter has registered criminal proceedings no. 2502/2010 and started investigations for the offence provided for by article 79/dh of the Criminal Code, "Murder in other qualifying circumstances," thus sending the identified human remains to the Albanian Institute for Legal Medicine (ILM) for further examination. ILM confirmed the remains of 13 persons, while DNA identification has not yet been carried out due to the lack of technological infrastructure and the difficulties encountered in this type of procedure. Meanwhile, as it randomly happens, the investigation has been suspended until the examinations are completed. In 2018, the Prosecution Office of Fier registered an investigation for the same criminal offence based on the suspects for a mass grave from the communist period in the village of Panahor, Mallakastër, Fier. No results are yet available from the proceedings of such an investigation, furthermore, exhumation has not begun.

Therefore, it must be said that the process of searching for and discovering the missing persons has almost stalled. No criminal proceedings related to missing persons have been carried forward or have reached the expected success. From this situation naturally arises a strong scepticism as to who will be held criminally responsible for crimes against humanity in these cases, to restore justice and truth.

75 Law of the Republic of Albania no 72/2022 of 20 October 2022 'For some changes and additions to the Law no 45/2015 "On the right to information about the documents of the former State Security of the Socialist People's Republic of Albania", amended' [2022] Official Journal of the Republic of Albania 154/18649, art 10.

4.2.3. Evaluation of the Policy

More than three decades after the fall of the communist regime in Albania, criminal investigations as the most effective tool to deal with the issue of missing persons did not produce any effect, thus they did not serve the cause of justice and truth. There was a lack of institutional will on behalf of the Prosecutor's Office to investigate previous communist crimes. This becomes obvious in the standing articulated by the high representatives of the General Prosecution Office who have argued that the actions carried out by former communist officials under the communist law cannot be qualified as crimes in the present time because the former communist officials acted according to the law applicable at the time.[76] The prosecutor's office also states that they have been handling very old, mostly prescribed crimes, which pose many difficulties in collecting and documenting the evidence related to this issue. As Bllaca and Pilika emphasise, they argue that the perpetrators had acted by the law and then, in force, obstructed the enforcement of the right to the truth and justice.[77]

The lack of institutional will is expressed not only from the point of view of these scholars, but it is also from the point of view of the formal legal aspect. For about 30 years, the Prosecutor's Office has not been organised in such a way that a specific structure by this entity might handle the investigations of communist crimes. On the other hand, there is also a lack of will on behalf of the Parliament of Albania, which monitors the activity of the Prosecution Office. During these three decades, this issue has been mentioned in only a few formal positions of mainly right-wing political forces in the Albanian parliament. In no case has the Parliament of Albania exerted enough pressure and demand for accountability towards the Prosecutor's Office. The Albanian Parliament has not considered utmost priority in providing the Prosecutor's Office with adequate human resources and the needed financial support to intensify investigations on crimes of communism. Intensification of investigations might produce concrete results, helping to clarify and restore justice for the crimes of communism and restoring basic human rights and respect for the victims. The EU progress report of 2020, and those from the 4 years following, also reached the same conclusion, stating that "the Prosecutor's offices failed to conduct any 'ex officio' investigation on missing persons, the resolution of cases has remained low partly due to the lack of capacities and resources and political will is needed to establish an efficient cooperation mechanism among relevant institutions and to enhance public awareness."[78]

76 Gjergj Erebara, Albanian Prosecutor Declines to Probe Communist-Era Disappearances (*Balkan Transitional Justice*, 22 October 2021) <https://balkaninsight.com/2021/10/22/albanian-prosecutor-declines-to-probe-communist-era-disappearances/> accessed 25 September 2023.

77 Erinda Bllaca and Anita Pilika, *The Unsolved Issue of the Missing Persons in Albania: A Comparative Study* (Institutit për Aktivizëm dhe Ndryshim Social 2021) 21.

78 Commission Staff Working Document, Albania 2021 Report: Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2021 Communication on EU Enlargement Policy, SWD/2021/289 final, 28 <https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=CELEX:52021SC0289> accessed 26 September 2023.

Throughout such a long period, no legal policy has been adopted to deal with the issue of missing persons from the communist period, leaving the relatives of the victims without protection and, thus, not serving the cause of justice and truth. Regardless of some limited measures taken in 2015, it was only in 2022 that the Albanian legislation mandated the Files Authority to administratively investigate this heavy burden of the past. By the end of 2023, the authority had just started the first administrative investigations in search of the graves of the missing people in Kolonje.[79] According to the head of the Files Authority, about 107 possible burial sites of missing persons had been identified through the end of 2023, but no concrete exhumation process had yet begun.[80] In addition to the above-mentioned measures, political will and endorsement are required to provide the File Authority with the necessary financial and human resources to effectively coordinate activities related to the investigation and identification of missing persons from the communist era. The cooperation between the above-mentioned authorities and the ex-communist officials or other persons who might give valuable information on the remains of the missing persons has not yet been properly addressed by the law.

Despite these measures taken, there are no tangible results for the remains of 6,000 missing persons, leaving the truth about their fate buried and converting the issue into a serious concern in the framework of guaranteeing human rights. The failure to investigate and punish communist crimes as serious violations of human rights can lead to international responsibility of the State because of the lack of due diligence to respond to them as required by the international law-binding instruments. The issue of missing persons from the communist dictatorship in Albania remains an open process that calls for justice, accountability, and truth.

Therefore, it is a priority for Albania to adopt legislation that includes provisions protecting the rights of the families of missing persons from the communist era. The Prosecutor's Office ought to guarantee an adequate number of prosecutors entitled to follow the investigations of secret gravesites and of locations where crimes were committed in collaboration with the other institutions in charge of dealing with this issue. Sufficient resources should be allocated to ILM for the examination and identification of missing persons. Incentive-based approaches should be adopted and further utilised by the institutions in charge to gather relevant information from the people involved. The Files authority should be endorsed with the necessary financial and human resources to handle and coordinate effectively activities related to the investigation and identification of all missing persons from the communist era.

79 'Vrasjet në kufi, AIDSSH nis hetimin e parë administrativ për të zhdukurit në Kolonjë' (*Authority of Information on Secret State Documents of Albania*, 2023) <https://autoritetidosjeve.gov.al/blog/vrasjet-ne-kufi-aidssh-nis-hetimin-e-pare-administrativ-per-te-zhdukurit-ne-kolonje> accessed 24 December 2023.

80 Najada Pendavinji and Erald Kapri, 'Institutional Obfuscation Frustrates Search for Communist-Era Victims in Albania' (*Balkan Transitional Justice*, 19 September 2023) <https://balkaninsight.com/2023/09/19/institutional-obfuscation-frustrates-search-for-communist-era-victims-in-albania> accessed 25 September 2023.

5 CONCLUSIONS

The right to the truth about serious violations of human rights is not closely bound to the precise wording of particular treaties, but it was vindicated by case law, soft law, and doctrinal contributions. The clear linkage between the right to the truth and the preservation of human dignity makes it stand on the threshold of a legal principle and a claim. Knowing the truth "to the fullest extent possible" is extremely important to help communities understand the causes of past atrocities. Unveiling the truth is an obligation, not an option, for states where violations of human rights have been committed. In a transitional context, the right to the truth offers the victims and society a tool to instigate truth-seeking processes and demands from authorities to implement effective measures to guarantee it. If implemented properly, these processes can play a determinant role in establishing the basis upon which justice can be executed.

Albania has experienced a painful past under a criminal communist regime that caused serious violations of basic human rights, a toll of many victims, a significant part of whom are still missing. The transition from a totalitarian (communist) system to a democratic one for Albania was a difficult and complex process due to the lack of resources and, often, the will of the new political elite to carry out institutional reforms in a sustainable manner. During these 33 years of democratic developments in Albania, crimes committed by the communist regime were never investigated, the perpetrators of these crimes never seriously confronted justice, and no public apology was sought for the victims of the communist genocide. The instruments of criminal law in Albania did not produce any "legal truth" about the communist crimes.

The communist system's ideology of violence and terror extended the demonic policy of punishment for the so-called "enemies of the people" even after the death of the person, not allowing the possibility for the "victim" to receive a grave or for the family members to know about the location of their relative's grave. For about three decades in Albania, there was no legal policy dealing with the issue of missing persons during the communist period. The process of finding their remains has been taken over by the family members themselves. It was only in 2022 that the Albanian legislation assigned responsibility to the Files Authority to administratively investigate this heavy burden of the past. Safeguarding the rights of families of the missing persons is fundamental to upholding human rights and the rule of law in post-communist Albania. Until now, there have been no tangible results about the remains of 6,000 missing persons, leaving the truth about their fate buried and turning it into a serious concern in the framework of guaranteeing human rights. The issue of missing persons from the communist dictatorship in Albania still remains an open process that calls for justice, accountability, and truth.

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AUTHORS INFORMATION

Bledar Abdurrahmani*
Dr.Sc. (Law), Faculty of Law and Political Science, Aleksandër Moisiu University, Durres, Albania
bledar_abdurrahmani@yahoo.com
https://orcid.org/0009-0004-6235-5189
Corresponding author, responsible for conceptualization, data curation, formal analysis, investigation, methodology, project administration, resources, supervision, validation and writing.

Tidita Abdurrahmani
PhD (Humanities), Assoc.Prof., Faculty of Technology and Business, Bedër University College, Tirana, Albania
abdurrahmanitidita@yahoo.com
https://orcid.org/0000-0001-9449-6884
Co-author, responsible for formal analysis, methodology, resources, validation and writing – review and editing.

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RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

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Research Article

JUDICIAL INTERPRETATION AS INFORMAL CONSTITUTIONAL CHANGES: QUESTIONS OF LEGITIMACY IN THE ASPECT OF THE DOCTRINE OF CONSTITUENT POWER

Hryhorii Berchenko*

ABSTRACT

Background: *Stability is considered a traditional legal value, particularly in relation to the stability of the constitution. This emphasis on stability stems from the need to protect the text of the constitution from frequent and unreasonable changes. However, stability must be combined with dynamism, a task primarily shouldered by the judicial branch of power through constitutional interpretation. Notably, ideas of judicial rule-making and the notion of a living/invisible constitution are only some manifestations of such a phenomenon as informal changes to the constitution. Yet, the potential risks posed by judicial intervention and the legitimacy concerns surrounding such informal changes warrant scrutiny. What is the correlation of informal constitutional changes through interpretation with the traditional doctrine of sovereign constituent power? What should be the limit of the interpretation of the constitution so that such an interpretation is not recognised as abusive? These and other issues are the focal point of research in the article.*

Methods: *The following methods were used to research the main approaches to informal changes to the constitution. The system-structural method was used to characterise the concept of a living and invisible constitution and varieties of informal constitutional changes and to establish the relationship between these concepts. The logical-legal method made it possible to find out the content of the positions of scientists regarding the potential violation of the boundaries of interpretation of the constitution by the courts, as well as arguments for and against the legitimacy of judicial interpretation, an assessment of informal changes in the constitution from the standpoint of modern views on the doctrine of constituent power. Additionally, the comparative method was employed to study the experience of foreign countries in terms of the characterisation of binding interpretation.*

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Results and Conclusions: *The study analyses the current state of the concept of informal changes to the constitution through judicial interpretation, its connection with the doctrine of constituent power, as well as the question of the legitimacy of such an interpretation and its limits. The primary conclusion is that judicial activity guarantees the protection of the material constitution, principles and human rights. That is, the judiciary does not allow sovereign decisions made democratically (by the people) to infringe on human rights. Thus, the text of the constitution is interpreted in a conformal way to individual rights. Questions about the role of the judiciary, the possibility of informal changes to the constitution, and judicial law-making as such can be an indicator for distinguishing between authoritarian/totalitarian countries and democratic ones.*

1 INTRODUCTION

As András Sajó points out, we cannot have illusions: the constitution is carried out by people, not by computers programmed according to the mysterious will of the founders of the constitution.[1] Richard Allen Posner elaborates on hermeneutic reasons for interpreting the constitution, noting that the true meaning does not "live" in the words of the text as words inherently indicate something external. Rather, meaning is what arises when the reader involves their linguistic and cultural understanding, as well as personal experiences, in interpreting the text.[2]

As James Bryce points out, any question of the content and application of fundamental laws arising from legal proceedings must be decided by a court.[3] Judge of the Supreme Court of the USA Charles Evans Hughes (1862–1948) said: 'We are under a Constitution, but the Constitution is what the judges say it is'.[4]

Lon L. Fuller notes that no drafters of a constitution can foresee all the obstacles and difficulties that may arise when the structure they created undergoes tension associated with new and unusual requirements.[5] Katharina Sobota also speaks in this vein:

> '… given the role of constitutional, judicial and academic interpretations, which are mainly in writing, and not as part of systematic codification, participate in determining the application of constitutional law, it is necessary to warn against excessive requirements of the form'.[6]

1 András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European UP 1999) 289.
2 Richard A Posner, *The Problems of Jurisprudence* (Acta 2004) 290.
3 James Bryce, *American Commonwealth*, vol 1 *National Government* (Pub House VF Richtep 1889) 409.
4 James E Leahy, 'The Constitution Is What the Judges Say It Is' (1989) 65(3) North Dakota Law Review 491, doi:10.1080/00220973.1938.11017667.
5 Lon L Fuller, *Anatomy of Law* (Sphera 1999) 81-2.
6 Katharina Sobota, *Das Prinzip Rechtsstaat: Verfassungs- und Verwaltungsrechtliche Aspekte* (Jus Publicum Series 22, Mohr Siebeck 1997) 471.

Hence, adopting a purely textual approach to the constitution, divorced from its textual expression outside the practice of application and interpretation, would be overly formalistic. Considering this, it is worth analysing the interpretation factor, which usually affects its content and alters the already formed interpretation - even more so.

Another crucial aspect to consider is the protective role of judicial activity in safeguarding the material constitution, fundamental principles and human rights. The judiciary ensures that decisions made democratically by the sovereign (the people) do not infringe on human rights. Thus, the text of the constitution is interpreted in a conformal way to individual rights.

As pointed out by Brian Z. Tamanaha, in most Western liberal democracies, the decisive word on the content of rights lies with judges, whether in ordinary courts, constitutional courts, or human rights courts exercising judicial review over legislation. This underscores the belief that the interpretation of human rights is a special prerogative of the judiciary, reflecting an anti-majoritarian design that distrusts democratically accountable bodies.[7] Moreover, judicial interpretation can also be considered informal changes to the constitution, which will be explored later in the article.

2 INFORMAL CHANGES TO THE CONSTITUTION: PROBLEM STATEMENT

First of all, it is pertinent to raise the question of understanding the constitution beyond its written text, viewing it as a "living" organism, a notion supported by Andrew Arato[8] and other scientists substantiating the post-sovereign concepts of constituent power. This perspective underscores the increasing significance of the material constitution.

Furthermore, the above-mentioned idea coincides with the approach developed in Western literature, which isolates the so-called informal amendments to the constitution. Traditionally, speaking of amending the constitution, we mean transforming its text. However, as stated in paragraph 18 of the Report on Constitutional Amendment CDL-AD(2010)001, adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009), 'the substantial contents of a constitution may, of course be altered in many other ways – by judicial interpretation, by new constitutional conventions, by political adaptation, by disuse (désuétude), or by irregular (non-legal and unconstitutional) means.'[9]

7 Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 105.

8 Andrew Arato, *Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia UP 2009) 360; Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (OUP 2016) 308, doi:10.1093/acprof:oso/9780198755982.001.0001; Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (CUP 2017) 482, doi:10.1017/9781316411315.

9 Report of the Venice Commission CDL-AD(2010)001 of 19 January 2010 'On Constitutional Amendment' <https://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2010)001-e> accessed 05 February 2024.

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At the same time, paragraph 246 of the same report states that 'constitutional change should preferably be adopted by way of formal amendment, respecting the democratic procedures laid down in the constitution, and not through informal change. When substantive informal (unwritten) changes have developed, these should preferably be confirmed by subsequent formal amendment.'[10]

Additionally, the report's subsection titled 'Formal and informal constitutional change' within sub-section VII 'Striking a balance between rigidity and flexibility' delves into the various informal methods of change, including judicial interpretation, constitutional custom and conventionality, and constitutional culture. Notably, the Commission makes interesting differences. Institutional and rights provisions also differ as to the typical mechanism of informal change. The former are complemented by constitutional conventions, while the latter are reinterpreted and specified by courts and other bodies involved in constitutional review (134).

It should be noted that changes to the constitution through informal methods like constitutional customs and judicial practice have historical roots and are not solely a product of exclusive modernity. This collection of practices has evolved, as noted by scientists who have also observed the phenomenon of informal changes.

James Bryce, when describing the changes and development of the American Constitution, particularly in light of its rigid classification, identifies three ways for its adaptation to the ever-changing environment: amendments, interpretation, and changes influenced by customs.[11]

In 1934, Karl Nickerson Llewellyn, a representative of the sociological school of law, in his work 'The Constitution as an Institution,' labelled an element of the orthodox theory of the Constitution as the idea that 'only amendments to the Constitution are the Amendments'.[12]

Friedrich August von Hayek also noticed that judges and legislators develop constitutions. Operating on his own construction of the 'rules of fair conduct', he points out that such rules, like the order of actions they enable, undergo gradual improvement through the deliberate efforts of judges or other legal experts. They improve the existing system by establishing new rules.[13]

Georg Jellinek noted that constitutional provisions often lack clarity and are vague, requiring subsequent laws issued by the legislator to provide specific meaning. Similarly, only the judge can clarify the content of laws that they are tasked with applying. Court

10 ibid.

11 Bryce (n 3) 426.

12 Karl N Llewellyn, 'The Constitution as an Institution' (1934) 34(1) Columbia Law Review 4, doi:10.2307/1115631.

13 FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, vol 1 *Rules and Order* (Routledge 2003) 100.

rulings interpreting laws can vary depending on the changing views and needs of the person. The legislator is just as dependent on these views when interpreting the constitution. In this way, the constitution is transformed as its interpretation changes.[14]

Georg Jellinek distinguished between changes in the text of the constitution, carried out by purposeful volitional acts, and transformations of the constitution, which he understood as occurring without altering its text directly. The latter changes are caused by facts not directly related to the intentions to make such changes or the realisation of inevitable changes.[15]

In the modern science of constitutional law, a consensus has more or less formed on changes to the constitution through its interpretation. Constitutions are changed not only through official amendments but also, in most cases, through informal changes made through judicial interpretation, as noted by Gary Jeffrey Jacobsohn and Yaniv Roznai.[16] As David Feldman points out, there may be special, official practices for proposing and deciding on constitutional changes, but changing the practice without formal changes can directly change the constitution.[17] According to Diego Valades, one of the reasons for constitutional instability is related to interpretive processes. This interpretation is carried out by judges and, in general, by all who apply the constitution.[18] Furthermore, the German doctrine also postulates that, like any other law, constitutional law can be developed and even established through interpretation, as advocated by Josef Isensee.[19]

We will also express the thesis that the availability of appropriate informal avenues of change is closely connected with the concept of a material constitution. This notion, advocated by Joel Colon-Rios, suggests that the material constitution extends beyond the textual confines of the written text of the constitution, encompassing broader principles from both written and unwritten sources (and in some cases, certain provisions of the written text called constitution may not even belong to the material constitution). Joel Colon-Rios highlights the distinction between ordinary changes in constitutional theory and those related to the material constitution.[20]

The idea that constitutional change should not solely result from a formal amendment process is a common theme in the informal conceptions of the constitution discussed by

14 Georg Jellinek, *Constitutions, their Changes and Transformations* (Pravo 1907) 12.

15 ibid 4-5.

16 Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale UP 2020) 244, doi:10.2307/j.ctv10sm8x0.

17 David Feldman, 'Political Practice and Constitutional Change' in Xenophon Contiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2021) 201.

18 Diego Valadés, *El control del poder* (UNAM, Instituto de Investigaciones Jurídicas 1998) 425-9.

19 Josef Isensee, 'Legitimation des Grundgesetzes' in Josef Isensee und Paul Kirchhof (hrg), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, bd 12 *Normativität und Schutz der Verfassung* (CF Müller Verlag 2014) 7-8.

20 Joel Colon-Rios, *Constituent Power and the Law* (Oxford Constitutional Theory, OUP 2020) 184.

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Marco Goldoni and Michael A. Wilkinson. These conceptions include the ideas of a mixed constitution, living constitution and political constitution.[21]

It is worth recalling that the constitutions of a number of countries have never been formally rigid and have instead relied on current legislation. This practice continues in the UK, where the constitution is determined by material criteria. In addition, there are objective reasons for informal changes (development) of the written (formal) constitution through customs, judicial practice, and other factors.

Xenophon Contiades endeavours to establish the ratio of the concept of constitutional change with other related concepts. In his opinion, unlike the terms 'revision' and 'amendment', change corresponds to images of transformation through the constant interaction of formal and informal mechanisms. It implies smoothness, covering the relationship between political antagonism, judicial identity and the constitution.[22]

In science, such a direction as 'comparative constitutional amendment' is also distinguished - this is a study of how supranational, national and subnational constitutions change through formal and informal means, including changes, revision, evolution, interpretation, replacement and revolution.[23]

Konrad Hesse identifies 'constitutional deviations' (Verfassungswandel), by which the scientist understands the unchanged text as such - it remains unchanged, but the concretisation of the content of constitutional norms, which, especially given the breadth and openness of many constitutional provisions, can lead to different results under changing circumstances and thus contribute to "deviations".[24]

Peter Häberle points out that the older the constitutions, the more science and practice complement written texts through unwritten rules. This paradigm does not support the overestimation or underestimation of constitutional texts.[25] This perspective is crucial because while judicial practice should independently form interpretations that harmonise with the text, informal changes should not be excessively employed as substitutes for formal changes where necessary.

As for practice, there are quite a few cases where we can see the role of courts in informal changes to the constitution. One of the most striking cases is the implementation of judicial review regarding the laws amending the constitution, where courts form implicit criteria for

21 Marco Goldoni and Michael A Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (CUP 2023) 4, doi:10.1017/9781009023764.

22 Xenophon Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Taylor & Francis Group 2012) 2.

23 Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Bloomsbury 2017) 3.

24 Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (CF Müller 1999) 16.

25 Peter Häberle, *El Estado Constitucional* (Universidad Nacional Autónoma de México 2003) 7.

'unamendable provisions'/'eternity clauses' (Ewigkeitsgarantie in German, immutable clauses in Spanish) or interpret existing ones.[26] Courts also shape the doctrine of militant democracy[27] and other aspects of constitutional interpretation.

3 JUDICIAL INTERPRETATION OF THE CONSTITUTION AND CONSTITUENT POWER

Regarding the interpretation of the constitution by constitutional (supreme) courts, an additional problem arises - what justifies the legitimacy of the relevant interpretation if it is qualified as developments or actual changes to the constitution? How does such legitimacy, if any, correlate with the legitimacy of the constituent power?

While we have already partially addressed this issue,[28] further arguments and reflection are necessary. Thus, according to Bertrand Mathieu, the judge, the rights watchdog, fits into a logic that competes with the democratic logic.[29] As András Sajó notes, 'with the advent of judicial review and constitutional adjudication, a new function was attributed to courts, and apex courts in particular: They have the power to review legislation that is deemed to be the legitimate expression of democratic popular will. This raises new issues of the legitimacy of courts'.[30]

Instead, the attempt to build a logic of legitimation of interpretation is present in Pierre Rosanvallon by expanding the concept of democratic legitimacy and its inexhaustibility exclusively with an electoral model and a sovereign concept of constituent power. According to Pierre Rosanvallon, the constituent power as the direct existence of the sovereignty of the people cannot be taken as the norm of democratic life.[31] At the same time, the scientist distinguishes the electoral people, the social people and the people-principle.

26 Hryhorii Berchenko, Tetiana Slinko and Oleh Horai, 'Unamendable Provisions of the Constitution and the Territorial Integrity of Ukraine' (2022) 5(Spec) Access to Justice in Eastern Europe 113, doi:10.33327/AJEE-18-5.4-n000447; Hryhorii Berchenko and others, 'Preliminary Judicial Control of Amendments to the Constitution: Comparative Study' (2022) 5(4) Access to Justice in Eastern Europe 159, doi:10.33327/AJEE-18-5.4-n000435.

27 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 3, doi:10.1515/bjes-2019-0019.

28 Hryhorii Berchenko, Andriy Maryniv and Serhii Fedchyshyn, 'Some Issues of Constitutional Justice in Ukraine' (2021) 4(2) Access to Justice in Eastern Europe 135-6, doi:10.33327/AJEE-18-4.2-n000064.

29 Bertrand Mathieu, *Le Droit Contre la Démocratie?* (LGDJ 2017) 184.

30 Andras Sajo, 'Courts as Representatives, or Representation Without Representatives: Report' (The European Standards of Rule of Law and the Scope of Discretion of Powers in the Member State of the Council of Europe: Conference, Yerevan, Armenia, 3–5 July 2013) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2013)008-e> accessed 05 February 2024.

31 Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Kyiv-Mohyla Academy 2009) 161.

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Constitutional courts guarantee the identity of democracy as an institution in temporal fluidity. The function of representing principles thereby acquires enhanced significance.[32]

Pierre Rosanvallon proposes refraining from evaluating the legitimacy of constitutional courts or various reflexive authorities in terms equivalent to sovereignty. Thus, we see a clear correlation with post-sovereign constituent power. In his opinion, beyond mere legitimacy of competence, their legitimacy approaches that of an invisible institution's authority.[33]

Interestingly, at one time, the inventor of the constituent power, l'abbé Sieyès, put forward the idea of a constitutional jury to prevent any possible future political upheavals coming from below.[34] Although the mentioned jury was not a full-fledged court in the full sense of the word, and was not democratically elected, it marked an early attempt to balance sovereign constituent power with a body tasked with interpreting the constitution.

From the outset of the emergence of constituent power, as proposed by l'abbé Sieyès, balancing sovereign constituent power with the role of a court or similar interpretive body appears logical and natural.

According to András Sajó and Renáta Uitz, democracy may be wrong and require judicial correction where self-correction is too slow, costly or nonexistent.[35] At the same time, in their opinion, the constitutional legitimacy of higher courts depends on their ability to demonstrate skill and impartiality in observing the constitution.[36]

The connection between constitutional justice and the constituent power is seen quite clearly in the practice of the Venice Commission.[37] We can also recall Woodrow Wilson's statement that the Supreme Court represented 'a kind of Constitutional Assembly in continuous session'.[38]

Lucia Rubinelli believes that the courts exercise derivative constituent power since all written constitutions are inevitably 'incomplete contracts'. In her view, in liberal societies based on the principle of separation of powers and its polyarchic structure, constitutional courts are subjects exercising limited, gradual derivative power to rewrite the constitution. At the same time, as the scientist emphasises, courts are not omnipotent institutions and rely on the support of public opinion and the decisions of the elected.[39]

32 ibid 170-1.
33 ibid 200-1.
34 Marco Goldoni, 'At the Origins of Constitutional Review: Sieye`s' Constitutional Jury and the Taming of Constituent Power' (2012) 32(2) Oxford Journal of Legal Studies 234, doi:10.1093/ojls/gqr034.
35 András Sajo and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 371, doi:10.1093/oso/9780198732174.001.0001.371.
36 ibid 353-4.
37 Berchenko, Maryniv and Fedchyshyn (n 28) 135-6.
38 Hannah Arendt, *On Revolution* (Penguin Books 1990) 200.
39 Joel I Colón-Ríos and others, 'Constituent Power and its Institutions' (2021) 20(4) Contemporary Political Theory 926, doi:10.1057/s41296-021-00467-z.

Today, it is argued that judicial entities in most countries after 1945 have acquired strong compensatory functions. Moreover, in some cases, constitutions themselves have been gradually developed by judicial institutions, often relying on internationally constructed norms, as noted by Chris Thornhill.[40] Therefore, courts, from the very beginning of the creation of the constitution, have been integral to the mechanism of constituent power from the inception of constitution-making, aligning with Andrew Arato's concept of post-sovereign constituent power. This is exemplified by the adoption of the constitution in the North African Republic in 1996, where the Constitutional Court played a pivotal role.

Thus, we get a clear idea of the constituent power possessed by judges. According to the appropriate approach, the mouth of the constitutional courts reflects the essence of constituent power, thereby enhancing their legitimacy.[41] Moreover, the public legitimacy of interpretation is very important. Society may either support or contest such interpretations and may have its own interpretation of the constitution.

James Bryce, reflecting on the role of the judiciary in interpreting the constitution, discussed the power of public opinion in the USA. If the people approve of the way in which this government explains the constitution, they continue unhindered; however, if the people respond disapprovingly, then they suspend or at least proceed in slower steps.[42]

In a truly democratic society, this is exactly what should work. Consequently, the justification of decisions by constitutional courts for their public persuasiveness and perception should come to the fore.

Today, relevant ideas are central to the German doctrine of constitutional law. Josef Isensee posits that citizens collectively act as a society of interpreters of the Constitution.[43] Fundamental rights guarantee everyone the freedom to respond to the content and limits of his right and freedom, to express his opinion about them or to conduct scientific research. For the same reason, fundamental rights open the space for social interpretation of the Constitution.[44] Similar opinions are expressed by Peter Häberle, describing the theory of open society interpreters of the constitution.[45]

40 Chris Thornhill, 'Constituent Power and European Constitutionalism' in Xenophon Contiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2021) 281.

41 Hryhorii Berchenko, 'The Development of the Constitution Through its Judicial Interpretation and the constituent Power' (2020) 80 Actual Problems of the State and Law 18, doi:10.32837/apdp.v0i88.3051.

42 Bryce (n 3) 422-3.

43 Josef Isensee, 'Grundrechtsvoraussetzungen und Verfassungserwartungen an die Grundrechtsausübung' in Josef Isensee und Paul Kirchhof (hrg), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, bd 5 *Allgemeine Grundrechtslehren* (CF Müller Verlag 1992) 353.

44 ibid.

45 Peter Häberle, 'Die Offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur Pluralistischen und "Prozessualen" Verfassungsinterpretation'(1975) 30(10) JuristenZeitung 297, doi:10.2307/20811044.

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Beyond the scope of German doctrines, similar ideas are espoused by John Rawls, who considered the Supreme Court a model of public discretion and stressed the pressing need for citizens to achieve practical understanding in judging the constitutional foundations.[46] Freedom of speech and interpretation of the constitution emerge as important safeguards against abuse.[47] Lucia Rubinelli also concurs, emphasising that the scope of the derivative constituent power wielded by the courts largely depends on the cultural and political conditions of each particular society. [48]

4 ARGUMENTS FOR AND AGAINST THE LEGITIMACY OF JUDICIAL INTERPRETATION

Renowned authoritative researcher of democracy, Robert Alan Dahl, adopts a rather critical opinion about the role of courts. He believes that judging by the history of judicial review of laws in the United States, judicial guardians (a term he coined) do not really offer noticeable protection of fundamental rights in the face of the threat of their constant violation by the entire demos or its individual representatives.[49] Here, the issue of politicisation of constitutional proceedings cannot be overlooked.[50]

Furthermore, András Sajó and Renáta Uitz point to the strong temptations of judicial rewriting of constitutions under the guise of interpretation. This practice poses high risks, including a lack of legitimacy, honesty, information, elitism and serving special interests to the detriment of democracy.[51]

András Sajó, in analysing the question of legitimacy, presents arguments for and against. Arguments against include the following: Amendments to the constitution under the pretext of interpretation occur without authorisation and call into question the foundations of constitutionalism. By doing so, they deprive the constitution of its legitimacy, which comes from the power of the founder, and its strong integrity and peremptory. This erosion of legitimacy makes the legal system unpredictable and helpless.[52]

46 John Rawls, *Political Liberalism* (Osnovy 2000) 224, 226.

47 The formation of such traditions is extremely important for Ukraine. On the constitutional tradition of freedom of speech in the context of Ukraine, see: Tatiana Slinko and Olena Uvarova, 'Freedom of Expression in Ukraine: (Non)sustainable Constitutional Tradition' (2019) 9(3) Baltic Journal of European Studies 25, doi:10.1515/bjes-2019-0020.

48 Colón-Ríos and others (n 39).

49 Robert A Dahl, *Democracy and Its Critics* (Yale UP 1989) 189.

50 Berchenko and others (n 26) 165; Dmytro Vovk and Yurii Barabash, '"Justices Have a Political Sense". The Constitutional Court of Ukraine's Jurisprudence in Politically Sensitive Cases' (2021) 2(18) Ideology and Politics Journal 312, doi:10.36169/2227-6068.2021.02.00014.

51 Sajo and Uitz (n 35) 342.

52 Sajó (n 1) 240.

As Brian Tamanaha writes, appointing judges who are not elected grants a group of individuals unaccountable to democracy the power to veto democratic legislation.[53] The main risk is that the rule of law can turn into the rule of judges.[54] The expression 'government by judges' was first proposed in 1914 by the President of the Supreme Court of North Carolina, USA.[55] Today, there is a growing discourse advocating to 'remove the constitution from the courts' (Mark Tushnet), [56] pointing to the rule of the courts, which threatens democracy (Jean-Éric Schoettl),[57] and coining the term 'juristocracy' to describe the dominance of judge in governance (Ran Hirschl).[58]

One should not forget the concept of abusing constitutionalism and the Abusive Judicial Review, as outlined by David Landau and Rosalind Dixon, wherein would-be authoritarian leaders may seek to seize courts for abuse as part of a broader project of democratic erosion.[59]

Now, let us delve into the arguments in defence of the legitimacy of the judicial interpretation of the constitution. Richard Allen Posner presents several counterarguments against sceptics, offering eleven such points in defence of judicial interpretation within American law. In his opinion, the possibility of judicial interpretation protects the essence of the Constitution from encroachments, as the Supreme Court considers disputes at the frontiers of law, among them mainly those on which the Constitution lacks clarity.[60]

While acknowledging the risk of judges making wrong decisions, Ronald Dworkin cautions against exaggerating this danger.[61] In interpreting the constitution, Ronald Dworkin prefers the American method: to assign judicial responsibility to judges whose decisions are final, except in cases of constitutional amendment or a subsequent judicial decision.[62] In his view, adding to the political system a process that is institutionally structured as a debate over principles rather than a competition for power is nevertheless desirable, and it is considered a valid basis for allowing judicial interpretation of the foundations of the constitution.[63]

Bertrand Mathieu argues that the legitimacy of judges hinges on their impartiality, with independence from political power being just one condition; true impartiality implies that

53 Tamanaha (n 7) 105.
54 ibid 124.
55 Rosanvallon (n 31) 185-6.
56 Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton UP 1999) 242.
57 Jean-Éric Schoettl, *La Démocratie au péril des prétoires: De l'État de droit au gouvernement des juges* (Gallimard 2022) 256.
58 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard UP 2004) 286.
59 David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53(3) UC Davis Law Review 1313.
60 Richard A Posner, *Frontiers of Legal Theory* (Harvard UP 2004) 1.
61 Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1978) 148.
62 Ronald Dworkin, 'Constitutionalism and Democracy' (1995) 3(1) European Journal of Phdosophy 10, doi: 10.1111/j.1468-0378.1995.tb00035.
63 ibid 11.

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judges refrain from engaging in the political field.[64] Nassim Nicholas Taleb proves that the judicial interpretation fits into his idea of anti-fragility. Choosing a court can be a lottery - nevertheless, this approach avoids large-scale mistakes.[65]

András Sajó presents an argument in favour of the legitimacy of the judicial interpretation, suggesting that it represents a new form of constitutional legislation capable of adapting to more complex conditions without compromising basic constitutional values or even aiding their realisation.[66] According to András Sajó, entrusting the task of constitutional development to the "least dangerous" judicial branch instead of a valid legislative body susceptible to political influences and personal and political interests may result in less biased changes and a less radical deviation from previous constitutional concepts.[67] Notably, the idea of the "least dangerous" branch of government was even reflected in the decision of the Constitutional Court of Ukraine of October 27 2020 № 13-p/2020[68] and was drawn from the ideas of Alexander Hamilton as articulated in the famous 'The Federalist Papers' (No. 78).[69]

The role of judicial practice in shaping constitutional rights is significant. Constance Grewe, on the example of Italy, Germany, France, Norway and Switzerland, showed how the supreme or constitutional courts (in France - the Constitutional Council) supplemented the constitutional catalogue of rights.[70]

A more radical opinion is offered by French scientist Michel Troper, who noted that the supremacy of the constitution over the acts adopted for their execution should be considered a legal fiction: the bodies issuing these acts are subject to the norms they determine. In his opinion, the constitution's content is composed only of norms created by interpretation by law enforcement agencies, which are subject exclusively to their own will.[71] Therefore, based on his arguments, it is quite logical that Michel Troper claims that the court, interpreting the constitution, exercises constituent power.[72] The court, which controls the constitutionality of laws, is both a legislator and a founder of the constitution. Such a court, as a control body with constituent power, establishes its powers.[73] While

64 Mathieu (n 29).
65 Nassim Nicholas Taleb, *Antifragile: Things that Gain from Disorder* (Penguin Books UK 2013) ch 5.
66 Sajó (n 1) 240.
67 ibid 241.
68 Decision no 13-p/2020 Case no 1-24/2020(393/20) 'On the constitutional submission of 47 People's Deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine' (Constitutional Court of Ukraine, 27 October 2020) [2020] Official Gazette of Ukraine 92/2976.
69 Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Bantam Books 1982) no 78.
70 Constance Grewe, 'Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des europäischen Gerichtshofes für Menschenrechte' (2001) 61 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 467-9.
71 Michel Troper, *Pour une Théorie Juridique de l'État* (Presses Universitaires de France 1994) ch 19, 291.
72 ibid.
73 ibid.

Troper's concept may seem overly voluntaristic, to some extent, it is quite logical and organically fits into the French tradition.

As for us, in general, it is impossible to be in captivity of classical democratic sovereign theories today based on modern realities. Traditional approaches to democracy can no longer be considered sufficient to criticise judicial legitimacy. While this usually does not remove all problems in the activities of the judiciary, especially in societies that are not stable constitutional democracies, the corresponding vector of development can hardly be ignored or deliberately stopped.

5 THE LIVING/INVISIBLE CONSTITUTION

Along with the idea of informal changes to the constitution through judicial interpretation, there exists a closely related concept known as the living and invisible constitution.

The idea of a 'living constitution' serves as an alternative to the 'material constitution', as highlighted by Marco Goldoni and Michael A. Wilkinson. Although prominent in English-speaking jurisdictions, this concept is well-known in other Western constitutional traditions.[74] According to Volodymyr Shapoval, the normative content of the constitution created by interpretation by the courts is characterised as a living constitution.[75] According to Oksana Shcherbanyuk, the judicial doctrine of a living constitution is based on a special method of interpreting the constitution - an evolutionary interpretation, according to which constitutional norms are interpreted in the light of the conditions of modern life, taking into account the peculiarities of the development of society, that is, dynamically.[76]

Benjamin N. Cardozo pointed out that 'A constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, and the meaning hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its play.'[77]

In addition to the concept of a living constitution, albeit much less often mentioned, some scholars also refer to the concept of an invisible constitution.[78] While not

74 Goldoni and Wilkinson (n 21) 3.

75 Volodymyr Shapoval, *Fundamentals of Constitutionalism (Essays on History, Theory and Practice)* (Myshalov DV 2021) 55.

76 Oksana Shcherbanyuk, 'Individual Constitutional Complaint as a Means of Ensuring Constitutional Democracy' (2018) 12 Law of Ukraine 81, doi: 10.33498/louu-2018-12-077.

77 Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale UP 1921) 83-4.

78 Yurii Barabash, Darijus Beinoravičius and Juozas Valčiukas, 'Invisible Constitution as an Instrument of Consolidation of Nation and Defence of Democracy' (2022) 4(3) Insights into Regional Development 110, doi: 10.9770/IRD.2022.4.3(7); Rosalind Dixon and Adrienne Stone (eds), *The Invisible Constitution In Comparative Perspective* (CUP 2018); David L Sloss, *The Death of Treaty Supremacy: An Invisible Constitutional Change* (OUP 2016); Laurence H Tribe, *The Invisible Constitution* (OUP 2008).

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necessarily synonymous with the concept of a living constitution, the overarching notion remains the same idea – the real meaning of the constitution is established by judges.

6 LIMITS OF JUDICIAL INTERPRETATION OF THE CONSTITUTION

What can be said about the limits of interpretation? Indeed, despite the relatively serious arguments regarding legitimacy, the question still arises: how can we distinguish where judicial interpretation can be considered beyond permissible limits? After all, in the presence of a formal text of the constitution as an act of constituent power, the courts remain somehow limited to it.

Benjamin Cardozo argued that 'they (judges – Hryhorii Berchenko) have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power, they violate the law'.[79] This approach seems to us quite reasonable, underscoring the importance of respecting established limits.

András Sajó and Renáta Uitz point out that the line of demarcation between the application, interpretation and rewriting of the constitution is not always so vivid.[80] They bring a dilemma: while courts lack democratic constituent power, constitutions are a product of man, and people as such are imperfect, and human foresight is limited.[81]

According to Josef Isensee, the constitutional theory has not yet solved the dilemma of how to avoid the "softening" of the constitutional state without being in a state that is frozen in its development and divorced from reality.[82]

In the context of the formal text and the decision of the constituent power, there is an approach according to which the courts are limited to the text of the constitution (which is a manifestation of the constituent power). Instead, Gary Jeffrey Jacobsohn and Yaniv Roznai emphasise the need for the courts to protect the very core of the constitution, although they recognise the possibility of a constitutional revolution through interpretation.[83] Another question is that even constitutional revolutions in the form of interpretation in certain cases can also be recognised as legitimate. Therefore, as we can see, this is a fairly broad approach to judicial interpretation as an opportunity for informal constitutional changes.

In our opinion, András Sajó speaks quite successfully and metaphorically about the need to protect the core of the constitution:

'Although constitutional values and concepts are subject to changing and flexible interpretations, they do have a core meaning that we need to insist on if we want the words

79 Cardozo (n 77) 129.
80 Sajo and Uitz (n 35) 342.
81 ibid 343.
82 Peter Häberle, 'Die Menschenwürde als Grundlage der staatlichen Gemeinschaft' in Josef Isensee und Paul Kirchhof (hrg), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, bd 2 *Verfassungsstaat* (CF Müller Verlag 2004) 317.
83 Jacobsohn and Roznai (n 16) 245-6.

and the law to convey some sort of meaning. Maybe all orders and all concepts are like Peer Gynt's onion; we can keep peeling off the layers until we reach the center and find nothing there. Constitutionalism, however, requires us to believe that there is a core. This belief does not ban peeling off the layers and does not demand us to proclaim human rights absolute and immutable'.[84]

Lucia Rubinelli underscores the role of the courts in maintaining the basic structure of a constitution, emphasising that while they cannot alter this structure, they can marginally interpret and rewrite its content, provided they maintain relative independence over political (democratically elected) players.[85] Rubinelli cites an additional procedural criterion for the legitimacy of informal changes made by the judiciary in addition to the essential (material) criterion that we saw from previous authors (she calls this the basic structure of the constitution). This opinion is in some way correlated with her idea of social legitimacy and recognition of the relevant role of the judiciary as a derivative of the constituent power.

On the other hand, there is a narrower approach to the limits of judicial interpretation, which focuses on the text of the constitution itself. According to this perspective, 'the wording of the Basic Law is an insurmountable barrier to any interpretation, while the constituent power or amendments to the constitution is intended to update the text itself'.[86] As you can see, in this case, there are virtually no opportunities for informal changes. The disadvantage of this approach is that the textual component comes to the fore, and the essential (material) is ignored.

Ultimately, the idea posed by Gary Jeffrey Jacobsohn and Yaniv Roznai regarding the core of the constitution as the boundary beyond which interpretation becomes illegitimate appears justified. Likewise, Lucia Rubinelli's emphasis on the basic structure of the constitution and the independence of the court itself as the material and procedural limit of judicial interpretation is noteworthy and deserving of support.

Thus, we can say that the courts are the bridge between reality and super-positive norms and the material constitution, with which the latter can manifest itself. In any case, it is necessary to recognise the fact of the transformation of the constitution through its judicial interpretation. It is always necessary to understand the alternative, which is the development of the constitution through acts of an ordinary legislator. Moreover, the legitimacy to speak on behalf of the constituent power of the legislature is much less than that of the constitutional courts if you take the approach of Pierre Rosanvallon and other scholars. That is why the development of the constitution through its interpretation should not be opposed to the concept of constituent power; it is necessary to look at the latter more broadly, considering the idea of judicial interpretation of the constitution.

84 Sajó (n 1) 289.

85 Colón-Ríos and others (n 39) 935.

86 Isensee (n 19).

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7 THE POWER TO INTERPRET OFFICIALLY

Lucia Rubinelli exemplifies the exercise of derivative constituent power by constitutional courts through their authority in handling conflicts of institutional competence, known 'conflitti di attribuzione', as outlined in Article 134 of the Italian Constitution. This authority extends to adjudicating conflicts between the highest state bodies, such as legislative, executive and judicial branches, or between the national government and regions.[87] Similar competencies are enshrined in the constitutions of many other countries, including Serbia, Kosovo, Albania, Montenegro, North Macedonia, Slovenia, Germany, Spain, and others.

Additionally, the Supreme Court of Canada possess similar powers, demonstrated through its practice of implicitly assessing laws that amend the Constitution of Canada.[88]

In resolving disputes over competing competence, known as competence conflict, the role of constitutional courts in interpreting the constitution is evidently significant, highlighting their involvement in informal changes to the constitution.

In addition to resolving conflicts of institutional competence, constitutional courts also wield broader powers, such as implementing binding interpretation of the constitution in abstracto, which are not directly tied to conflict resolution but nevertheless contribute to informal changes. This authority, known as 'official interpretation,' is relatively rare and carries significant weight as it is normative and binding on all others.

However, Victor Skomorokha emphasised that the concept of 'official interpretation of legal norms' is not generally recognised.[89] As Volodymyr Shapoval notes, the concept of official interpretation is absent in the legal theory and practice of countries whose law is assigned to the Anglo-Saxon "family" of legal systems.[90]

Nonetheless, the implementation of binding interpretations of the constitution is enshrined in several countries, including Azerbaijan, Kyrgyzstan, Moldova, Russia and Ukraine.[91] For example, in Ukraine, such powers are called 'the official interpretation of the Constitution of Ukraine'. Similarly, the Constitution of Bulgaria, in accordance with paragraph 1 of part 1 of Article 149 of the Constitution of Bulgaria, grants the Constitutional Court the authority to provide mandatory interpretations of the constitution.[92]

87 Colón-Ríos and others (n 39) 933.
88 Berchenko and others (n 26) 166.
89 Victor Skomorokha, *Constitutional Jurisdiction in Ukraine: Problems of Theory, Methodology and Practice* (Lesya 2007) 415.
90 Volodymyr Shapoval, *Modern Constitutionalism* (Yurinkom Inter 2005) 100.
91 Jacek Zaleśny (ed), *Constitutional Courts in Post-Soviet States: Between the Model of a State of Law and Its Local Application* (Peter Lang 2019) ch 1.
92 'Constitution of Bulgaria' in *Constitutions of the Countries of the World: Republic of Bulgaria, Romania, Hungary, Republic of Croatia* (OBK 2021) 60.

In Ukraine, the idea of abandoning such an official interpretation has repeatedly emerged. Bohdan A. Futey posed a rather simple question, asking whether the 'solution of issues of compliance with the Constitution' differs from the official interpretation,[93] a distinction that may appear strange for an American federal judge.

The Venice Commission has also weighed in on this matter. In its opinion, on the draft constitution of Ukraine dated May 21 1996 CDL-INF (96)6 regarding the text approved by the Constitutional Commission on March 11 1996, the Commission expressed scepticism that 'while it is obvious that the Constitutional Court has to interpret the Constitution to arrive at its decisions, it seems outside the usual functions of a judicial body to adopt an official interpretation of the Constitution. What may be provided for is that the Constitutional Court can give advisory opinions, interpreting constitutional provisions with respect to certain specific problems' (Article 150).[94]

As stated in preliminary opinion CDL-PI (2015) 016 dated July 24 2015 (paragraph 47),[95] 'under the amendments, the Constitutional Court retains the competence "to provide the official interpretation of the Constitution" (Article 147 and Article 150 § 1.1.2.), which is contrary to previous recommendations of the Venice Commission.[96]

Therefore, despite our commitment to the idea of judicial lawmaking and informal changes to the constitution by interpretation, we do not support a normative interpretation as a separate authority of the constitutional court unless it concerns the resolution of competence conflicts).

Today, while the law requires the constitutional submission regarding the official interpretation of the Constitution to include 'substantiation of the grounds that caused the need for interpretation' (part 4 of Article 51 of the Law of Ukraine of July 13 2017 No. 2136-VIII),[97] this requirement is extremely evaluative and its qualification as fulfilled or not depends entirely on the position of the Constitutional Court of Ukraine itself. Notably, the CCU is increasingly beginning to gravitate towards the tendency to avoid providing a normative interpretation (see, for example, the Ruling of the Constitutional Court of Ukraine on the

93 Bohdan A Futey, *Formation of the Legal State in Ukraine 1991–2005* (2nd edn, Yurinkom Inter 2005) 95.

94 Opinion of the Venice Commission CDL-INF(96)6 of 21 May 1996 'On the draft Constitution of Ukraine (Text approved by the Constitutional Commission on 11 March 1996 (CDL(96)15)' <https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1996)006-e> accessed 05 February 2024.

95 Preliminary Opinion of the Venice Commission CDL-PI(2015)016 of 24 July 2015 'On the Proposed Constitutional Amendments Regarding the Judiciary of Ukraine' <https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)016-e> accessed 05 February 2024.

96 It is about the Opinion of the Venice Commission CDL-AD(2008)029 of 24 October 2008 'On the draft laws amending and supplementing (1) the Law on constitutional proceedings and (2) the Law on the Constitutional court of Kyrgyzstan' § 18 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)029-e> accessed 05 February 2024.

97 Law of Ukraine no 2136-VIII of 13 July 2017 'On the Constitutional Court of Ukraine' [2017] Official Gazette of Ukraine 63/1912.

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closure of constitutional proceedings regarding the official interpretation of a separate paragraph of the fourth preamble of the Constitution of Ukraine of November 14 2023 No. 17-up/2023).[98] This is not surprising given the inherent difficulty in implementing normative interpretation objectively.

Furthermore, one might question what the Constitutional Court of Ukraine would do if asked to give an official interpretation of the rule of law (Article 8 of the Constitution) without reference to a specific controversial situation. It seems more expedient to form the content of this principle on a case-by-case basis.

We now turn to the argument put forth by Michel Troper, who contends that interpretation in abstracto is inherently present in any solution in concreto (meaning casual review of constitutionality). According to Troper, an in concreto decision provides for a preliminary interpretation of one or more constitutional provisions, as the court must determine whether the act that is being challenged is contrary to the constitution. This preliminary interpretation always remains abstract in nature; it binds the legislator subject to constitutional control, not only in connection with this dispute but also regarding the further application of the interpreted provisions. Thus, Troper asserts that an interpretation is always abstract, whether it is given in a decision in abstracto or to justify a decision in concreto, and its author is always the constitutional legislator.[99]

In this regard, we believe that securing the authority to check specific acts for compliance with the constitution is quite enough. Therefore, as for us, we advocate reevaluating the concept of the 'official interpretation of the Constitution' as a separate authority of the Constitutional Court of Ukraine. While this authority has certain analogues in foreign countries, we propose restricting it to the consideration of casual cases or tying it to the resolution of competence conflicts - tied to specific practical problems of law enforcement. In its most radical version, even a complete rejection of such an interpretation in general is possible. At the same time, interpretation by the Constitutional Court will necessarily be carried out casually - when considering a particular case through constitutional control (constitutional review of legislation).

98 Resolution no 17-уп/2023 Case no 1-7/2020(172/20) 'On closing the constitutional proceedings in the case based on the constitutional submission of 142 people's deputies of Ukraine regarding the official interpretation of a separate provision of the fourth paragraph of the preamble of the Constitution of Ukraine' (Grand Chamber of the Constitutional Court of Ukraine, 14 November 2023) <https://zakon.rada.gov.ua/laws/show/vb17u710-23#Text> accessed 05 February 2024.

99 Troper (n 71) sez 19.

8 CONCLUSIONS

As for us, it is impossible to be in captivity of classical democratic sovereign theories in light of modern realities. Traditional approaches to democracy can no longer be considered sufficient to criticise judicial legitimacy. While this does not remove all problems in the activities of the judiciary, especially in societies that lack stable constitutional democracies, the corresponding vector of development can hardly be ignored or deliberately stopped.

Judicial activity guarantees the protection of the material constitution, principles and human rights. That is, the judiciary prevents democratically made sovereign decisions from infringing on human rights. Thus, the text of the constitution is interpreted in a conformal way to individual rights.

Questions about the judiciary's role, the possibility for informal constitutional changes, and judicial law-making serve as pivotal indicators distinguishing authoritarian/totalitarian countries from democratic ones. In non-democratic regimes, the existence of an independent judiciary, as well as some real possibilities for interpreting the constitution, which is recognised by the courts of civilised countries, seems unnecessary and harmful. Only the dictator has the sole monopoly right to the constitution there. Such views conflict with modern ideas of law, human rights, and the dynamism of social life. Thus, judicial interpretation is a legitimate form of informal constitutional change.

Diverse approaches exist on the latitude for informal changes to the constitution, ranging from recognition of the corresponding changes in the form of a constitutional revolution, as proposed by Gary Jeffrey Jacobsohn and Yaniv Roznai, to narrower approaches that prioritise adherence to the text of the constitution. We consider the idea of the constitution's core as the limit, beyond which will mean the illegality of interpretation, the most justified.

Pierre Rosanvallon suggests an approach to addressing the legitimacy of the interpretation of the constitution by the constitutional courts by expanding the concept of democratic legitimacy and its inexhaustibility exclusively with the electoral model and the sovereign idea of constituent power. This connection between constitutional justice and constituent power is also seen in the practice of the Venice Commission. Thus, according to the appropriate approach, by the mouth of the constitutional courts, it is precisely the constituent power that shows the high degree of legitimacy of such courts. Moreover, public legitimacy of interpretation is very important, as societal support or dissent may or may not support this interpretation while having its own interpretation (Josef Isensee, Peter Häberle). This underscores the important of freedom of speech and interpretation of the constitution as safeguards against potential abuse.

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AUTHORS INFORMATION

Hryhorii Berchenko
Cand. of Science of Law (Equiv. Ph.D.), Assoc. Prof. of the Department of Constitutional law of Ukraine of Yaroslav Mudryi National Law University, Kharkiv, Ukraine
g.v.berchenko@nlu.edu.ua
https://orcid.org/0000-0002-0365-9009

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RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

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Research Article

JUSTICE IN PROPERTY MATTERS IN KOSOVO: A LESSON FROM A POSTWAR COUNTRY

Ardrit Gashi*

ABSTRACT

Background: *In the realm of property matters, or more precisely, the infringement of property rights and the pursuit of adequate justice, Kosovo stands out as one of the most unique cases. Its uniqueness stems not from a singular circumstance, law, or period but from a complex interplay of events, laws, and historical periods. The primary objectives of this paper revolve around property disputes stemming from ethnic conflicts, discriminatory laws, and wartime circumstances. The paper is grounded in two fundamental hypotheses. Firstly, it seeks to examine the property disputes that have arisen because of these conflicts, discriminatory laws, and war, particularly targeting certain segments of the population. Secondly, it aims to explore strategies for avoiding such consequences in the future and recovering material damages incurred. The context under observation is also important because of the significant involvement and influence of the international administration. In this sense, the case of Kosovo can serve as a typical example, theoretically and practically, for other societies and countries facing similar challenges. Lessons from the positive aspects of Kosovo's case should be considered while avoiding repeating numerous mistakes to prevent these countries from experiencing the consequences of such oversights.*

Methods: *The foundational sources used to develop this paper encompass scholarly works such as textbooks and scientific papers, legislative acts including international conventions, and judicial practice. Given the paper's unique nature and the problem it addresses, it further draws upon a range of research and reports from reputable international organisations that have systematically monitored the situation as impartial observers.*

The paper adheres to a specific methodology, with the historical method being indispensable in matters related to property. Through this method, the evolution of ownership, ideas, community consciousness, political and social movements that influenced the law, and international missions approaches that contributed to shaping distinctive legislation in Kosovo known as 'UNMIK Regulation' are unveiled.

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This study predominantly employed the analysis method, synthesis method, and comparative method. The analysis method scrutinises relevant legal provisions and case law, while the synthesis method has been utilised within the framework of comparative methods. To a certain extent, the descriptive method was also employed to furnish readers with a clear overview of the events and relevant implementation mechanisms related to property rights.

***Results and Conclusions**: The paper delineates three major types of property disputes arising from the unique circumstances characterising Kosovo: property claims deriving from 'repressive measures' (1990-1998), property claims deriving after the war (27 February 1998 - 20 June 1999); and property claims caused by the system of social property (after 1945)– subsequently deriving from its privatisation after 1999. For each of these violations of property rights, their causes, circumstances, and underlying purposes are examined and argued. The paper also discusses approaches for addressing these disputes. While it is concluded that addressing property claims deriving after the war (27 February 1998 - 20 June 1999) has been satisfactory, the same cannot be said for the other two categories of property disputes. In these instances, modern law remains largely silent. Therefore, although this paper is titled 'justice' in property matters it primarily grapples with the prevailing of 'injustices' in property matters. However, the paper offers ideas and suggestions on how modern law can address these categories of violation of property rights.*

1 INTRODUCTION

The evolution of historical and political circumstances has shaped the essence of property relations, rights, violations, and the nature of property disputes. Conversely, given that property relations form the foundation of any legal order, it is impractical to delve into them without considering the political and legal context. In the past, Kosovo has lacked a formal legal system of its own to regulate property relations aside from customary law.[1] Consequently, each system and foreign state apparatus that was established brought its own set of rules.

In its later history, post-1945, Kosovo unwillingly remained under the Socialist Federal Republic of Yugoslavia (hereafter: SFRY), precisely under the Republic of Serbia, with the status of "autonomous province".[2] Throughout this period, the institution of social property, also known as socially owned property, occupied a central position, encompassing legal and

1 This type of law was neither written nor issued by any legislative body; rather, it embodies rules established and applied by society, with a vital role played by the precedents set by councils of elders—the most senior individuals familiar with the customs and rules of customary law. See, Syrja Pupovci, *Marrëdhënjet Juridike Civile në Kanunin e Lekë Dukagjinit* (Universiteti i Prishtinës 1971) 9.

2 Constitution of Socialist Federal Republic of Yugoslavia of 21 February 1974 [1974] Official Gazette of Socialist Federal Republic of Yugoslavia (SFRY) 01, ch 1 basic principles; Constitution of Socialist Autonomous Province of Kosovo of 28 February 1974 [1974] Official Gazette of SFRY 01, ch 1 basic principles. Also, Noel Malcolm, *Kosovo: A Short History* (Macmillan Pub 1998) 341; Fred Singleton, *A Short History of the Yugoslav Peoples* (CUP 1989) 209.

economic dimensions.[3] This concept was ideologically directly connected with Yugoslav socialism. Despite the fact that private law in former Yugoslavia was regulated according to the civil law tradition, heavily influenced by Austrian law and the pandect system division, the legal institute of social property constituted a significant exception.

Social property did not come into existence accidentally; it was established through various laws and several phases of development. In fact, its genesis (starting in 1945) and subsequent evolution mark the origins of property issues. In the beginning, after 1945, socially owned property was state property, confiscated, nationalised, and expropriated by citizens.[4] Land confiscated by the state was dedicated to the creation of a so-called "agricultural fund", which later allocated the land to economic organisations[5] functioning as agricultural cooperatives. Land into possession of the cooperative was registered as a land of Socially Owned Enterprises (hereafter: SOE) in the capacity of social ownership, whereas the cooperative, in the capacity of a legal entity, was registered in public land records as possessor right holder. On this occasion, state property ("nationwide"), along with property in possession of cooperatives, was transferred into the socially owned property.[6] Even though, at this point, one must also mention "agrarian reform", where part of the land from agricultural funds was allocated in use to farmers who did not possess any land or who did not possess enough, under specific conditions by proclaiming the principle that the land belongs to those who cultivate it.[7] Later, socially owned property was embodied and built

3 Socialist property replaced the feudal property relations which were based on the Ottoman Empire *tapi* system. See, Iset Morina, *Die Entwicklung des Immobilienrechts im Kosovo* (Verlag Dr Kovač 2007) 38; Ejup Statovci, *Marrëdhëniet pronësore juridike në sendet e paluajtshme në KSA të Kosovës* (Universiteti i Prishtinës 2009) 172.

4 Law of the Federal People's Republic of Yugoslavia 'On Agrarian Reforms and Colonialization' [1945] Official Gazette of FPRY 64; Law of the Federal People's Republic of Yugoslavia 'On Confiscation of Property of War Criminals and Collaborators' [1946] Official Gazette of FPRY 61; Law of the Federal People's Republic of Yugoslavia 'On Transfer of Enemies' Property into State Ownership' [1946] Official Gazette of FPRY 63; Law of the Federal People's Republic of Yugoslavia 'On Amendment of Law on Expropriation' [1957] Official Gazette of FPRY 12; 53/62, 13/65.

5 Law of the Socialist Federal Republic of Yugoslavia 'On amendments and addendums of Agricultural Fund of Farmers Economy in Social Ownership and Allocation of Land to Farmers-Economic Organizations' [1965] Official Gazette of SFRY 10.

6 Abdullah Aliu, *E Drejta Sendore: Pronësia* (Universiteti i Prishtinës 2006) 295.

7 Law On Agrarian Reforms and Colonialization (n 8) art 1. The so-called agrarian reform was fundamentally unjust and discriminatory against the indigenous Albanian population. This is attributed to the fact that properties that exceeding 15 hectares were taken from Albanian owners and distributed to 'colonialists' from other Yugoslav countries, particularly from Serbia and Montenegro, who resettled in Kosovo. On the other hand, politically this was justified by the socialist principle of equality, asserting that land belongs to those who cultivate it. See Fatmir Sejdiu, *Politika agrare si instrument i shtypjes nacionale në Kosovë* (Universiteti i Prishtinës 2001) 120. In addition to this, during this period, a Turkish-Yugoslav "Gentlemen's" Agreement in 1953 was reached. According to this Agreement, the deportation obligations of the Albanian population to Tukey, where initially Turkey requested the deportation of 250,000 Albanian residents of the anticipated one million to be resettled. The property of these inhabitants was never even discussed; it was all taken without any documentation. See, Kosova Institute of History, *Expulsions of Albanians and Colonisation of Kosova*

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based on constitutional and legal principles (norms).[8] These provisions also determined categories of socially owned property.[9] Therefore, in the former SFRY socialist system, socially owned property generally consisted of land and all production assets (apart from personal property assets of artisans), assets of social labour (assets in service of organisation of associated labour or particular body), as well as all minerals and other natural wealth.[10]

Conceptually, the best way to understand this kind of property is to compare it with the concept of ownership itself. There are at least four main identifying elements or main differentiating aspects between social ownership and private ownership. First, the aspect of who was the "owner" of socially owned property and which were authorisations (entitlements) over the social property. At this point, it is a commonly known legal fact that one can acquire ownership rights on no legal basis over this property and wealth (including municipalities, organisations of associated labour and foundations)[11] since these entities were only *bona fide* administrators of this property. The second aspect regards the function of social ownership, which consists of the fulfilment of collective needs, especially of those who work and administrate production and distribution.[12] The third aspect regards the institute of prescription, which could not be applicable for social ownership[13] until the legislative change in 1996.[14] Whereas the fourth aspect was about some cases of legal transactions of socially owned property. Indeed, this should have been "non-transaction" because such a procedure, in principle, could not be implemented, but only in specific cases and exceptionally when such ownership transactions served to increase the value in qualitative or quantitative aspects of socially owned property.[15]

(Kosovo Information Center 1997) ch 3, para 3 <https://nointervention.com/archive/Yugoslavia/Kosovo/www.kosova.com/contents.htm> accessed 14 December 2023. Also see, Fehmi Pushkolli, *Shpërnguljet e shqiptarëve në Turqi dhe Marrëveshjet Jugosllave-Turke* (Fjala 1994).

8 Wlodzimierz Brus, *Socialist Ownership and Political Systems* (Routledge & Kegan Paul 1975) 93.

9 Especially, Constitution of Socialist Federal Republic of Yugoslavia (n 2); Law of the Socialist Federal Republic of Yugoslavia 'On Associated Labour' [1976] Official Gazette of SFRY 53; Law of the Socialist Federal Republic of Yugoslavia 'On Enterprise' [1988] Official Gazette of SFRY 77.

10 Constitution of Socialist Federal Republic of Yugoslavia (n 2), ch 3 basic principles.

11 This determination was enshrined in constitutional provisions, see ch. 3 Basic principles of Constitution of Socialist Federal Republic of Yugoslavia. Also, Constitution of Socialist Autonomous Province of Kosovo (n 2) ch 3 basic principles.

12 Jovan Đorđevič, *Sistemi Politik* (Universiteti i Prishtinës 1978) 415.

13 Law of the Socialist Federal Republic of Yugoslavia 'On Basic Property Relations' [1980] Official Gazette of SFRY 06. Article 29 of this Law deleted with amendments and addendums of Law No. 29/96.

14 Case AC-II-12-0187 *MM v Privatization Agency of Kosovo* [2013] Special Chamber of the Supreme Court of Kosovo 2013.

15 According to article 4 of the Law on Transfer of Immovable Property (Official Gazette of Socialist Autonomous Province of Kosovo 45/81), property in social ownership cannot be transferred to private persons, unless in special circumstance determined by the law. For example, the transfer of social ownership may take place with compensation for land deemed impractical for rational operation, such as small and isolated forests, enclaves, and semi-enclaves. The condition for this transfer is that the funds received must be utilized for the acquisition of another land of similar nature.

This form of organisation, for a short time, became dominant in the planned economy with the social plan, and as such, it grew and multiplied. Presently, social ownership in Kosovo constitutes the largest type of property.[16] It is essential to emphasise that not all social property is deemed illegitimate; its legitimacy is contingent on its origin, explicitly involving confiscations, colonisations, nationalisations, and expropriations without compensation. In this aspect and in the context of property rights, the rule of law, and the democratic principles in our modern era, these processes that led to establishing social property are considered illegitimate and unjust.[17]

During the 1990s, the succession and disintegration of SFRY was began.[18] These secessions marked the point of no return in the nationalisation of politics and rapidly escalated into war.[19] During that time, the status of Kosovo changed drastically. On 28 March 1989,[20] Serbia employed various laws and measures (known as "repressive measures" or compulsory/emergency measures) to contest and destroy the autonomy of Kosovo.[21] In

16 There were over 590 SOEs identified in Kosovo. SOEs were estimated to constitute 90 percent of Kosovo's industrial and mining foundation, 50 percent of commercial retail space, and less than 20 percent of agricultural land, encompassing prime commercial agricultural land and the majority of Kosovo's forests. The SOE sector employed around 20,000 individuals and operated across diverse sectors, including metallurgy, plastics, paper processing, tourism, mining, agro-industry, agriculture, forestry, construction, textiles, wineries and breweries, tobacco, as well as retail and wholesale trade. See, Privatization Agency of Kosovo, *Work Report August 2008 – August 2009* (2009) 6 <https://www.pak-ks.org/page.aspx?id=2,40> accessed 15 December 2023.

17 See for example, European Parliament, *Private properties issues following the change of political regime in former socialist or communist countries Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia*: *Study* (Policy Department Citizens' Rights and Constitutional Affairs 2010) <https://www.europarl.europa.eu/thinktank/en/document/IPOL-PETI_ET(2010)425609> accessed 15 December 2023.

18 The declarations of independence by Slovenia and Croatia in 1991 signified the initiation of the dissolution of SFRY, subsequently resulting in three bloody wars in Balkan: Croatia 1991-1995); Bosnia and Herzegovina 1992-1995; and Kosovo 1998-1999). See, John R Lampe, *Yugoslavia as History: Twice there was a country* (2nd edn, CUP 2000) 365; Carsten Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (2002) 96(2) The American Journal of International Law 380, doi:10.2307/2693933.

19 Sabine Rutar, 'Nationalism in Southeastern Europe, 1970–2000' in John Breuilly (ed), *The Oxford Handbook of the History of Nationalism* (OUP 2013) 527, doi:10.1093/oxfordhb/9780199209194.013.0026; Ana S Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (OUP 2008) 232, doi:10.1093/acprof:oso/9780195333435.001.0001; Vesna Pesic, *Serbian Nationalism and the Origins of the Yugoslav Crisis* (Peaceworks 8, United States Institute of Peace 1996) 5.

20 On March 28, 1989, the Assembly of the Republic of Serbia ratified Constitutional amendments 9-49, effectively transferring the powers of the self-governing bodies of Kosovo to the authorities of Serbia.

21 Among the key laws that should be highlighted, though not exclusively, is the Law on the Action of Republican Bodies in Special Circumstances in Kosovo, enacted on June 26, 1990. This law resulted in the dismantling of the structure overseeing the institutions of social and economic activities, leading to the dismissal of nearly 300 Albanian directors. Another significant law was the Law on Abrogation of the Activity of the Assembly of Kosovo and its Government, 5 July 1990. By that law Kosova was deprived of legislative and executive power; the Law on Labour Relations in Special Circumstances in Kosovo, implemented on July 26, 1990, is deemed an act of national discrimination against Albanian population.

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summary, under these repressive measures, three policies were implemented: firstly, the dismissal of the majority of Albanian public servants and workers in the public sector; secondly, the conversion of all socially-owned enterprises into public enterprises under the administration of individuals loyal to Belgrade; and thirdly, the transfer of property rights/assets of SOEs in Kosovo to Serbian public enterprises.[22] These measures were also strongly condemned by the United Nations General Assembly.[23] The end of Kosovo's autonomy was met with violent protests by Albanians, which were eventually quelled. Subsequent to the unrest, thousands of police were deployed from outside the province, leading to widespread repression, arrests, and imprisonments.[24] Ultimately, this situation culminated in the war from February 1998 to June 1999.[25]

The enormous violations of property rights and other basic rights of the Albanian population in Kosovo were a catalyst for the war of 1998-1999. In June 1999, following the

It instituted a prohibition on all activities in the Albanian language, encompassing education, culture, science, and mass media. This legislation led to the banishment of 135,000 Albanian workers from their position of employment, significantly impacting their material well-being of their families; On 27 September 1990, Serbia approved its Constitution, further diminishing the autonomy of Kosovo. This constitution refers to Kosovo as 'Kosova and Metohija,' a term viewed by Albanians as emblematic of Serbian occupation. See, Kosova Institute of History (n 7) ch 4, paras 2, 3. Also see, Esat Stavileci, Rrënimi i Autonomisë së Kosovës (Shoqata e pavarur e juristëve të Kosovës 1992) 43; Adil Fetahu, Masat e përkohshme: akt i shkatërrimit të ndërmarrjeve ekonomike dhe institucioneve shoqërore të Kosovës (Bashkimi i Sindikateve të Pavarura të Kosovës 1992) 8.

22 Malcolm (n 2) 345; Ted Baggett, 'Human Rights Abuses in Yugoslavia: To Bring an End to Political Oppression, the International Community Should Assist in Establishing an Independent Kosovo' (1998) 27(1) *Georgia Journal of International and Comparative Law* 461. Albanian ethnics faced ongoing expulsion from positions controlled by state-owned enterprises. Serbian militia, under the leadership of Z. Raznjatovic, intensified harassment against Albanians, characterized by Kosovar leaders as "ethnic cleansing in the quiet". The reported outcome was a significant Albanian emigration from Kosovo, with estimates reaching up to 500,000. See, Minorities at Risk Project, 'Chronology for Kosovo Albanians in Yugoslavia' (*Refworld*, 2004) <https://www.refworld.org/docid/469f38f51e.html> accessed 14 December 2023.

23 Situation of human rights in the territory of the former Yugoslavia: violations of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro) (adopted 20 December 1993 UNGA Res 48/153) <https://digitallibrary.un.org/record/283503?ln=en> accessed 15 December 2023. Inter alia, strongly condemns specific measures and discriminatory practices, as well as human rights violations against ethnic Albanians in Kosovo. It highlights the extensive repression carried out by Serbian authorities, including police brutality against ethnic Albanians, arbitrary searches, seizures, and arrests, along with torture and ill-treatment during detention. Discrimination in the administration of justice contributes to a climate of lawlessness, allowing criminal acts, particularly against ethnic Albanians, to occur with impunity. The discriminatory removal of ethnic Albanian officials, especially from the police and judiciary. This includes the mass dismissal of ethnic Albanians from professional, administrative, and other skilled positions in state-owned enterprises and public institutions. This also encompasses the removal of Albanian teachers from the Serb-run school system and the closure of Albanian high schools and universities, etc.

24 Tim Judah, *Kosovo: What Everyone Needs to Know* (OUP 2008) 67.

25 Florian Bieber and Žīdas Daskalovski (eds), *Understanding the War in Kosovo* (Frank Cass 2003) 3.

capitulation of Serbia and the conclusion of the war in Kosovo, the United Nations Mission was deployed in Kosovo, and hereby, the Interim Administration of the United Nations Mission in Kosovo (hereinafter: UNMIK) was established.[26]

As a post-war aftermath, UNMIK and Kosovo society faced many issues, such as war crimes, internal displacement of ethnic groups, reconstruction of burned settlements, peacebuilding, the rule of law strengthening, retribution, institutional establishment, and functioning, etc.[27] Moreover, land and property became pivotal concerns as they are intricately linked to the conflict and injustices from the past. Therefore, establishing effective mechanisms for resolving property disputes, coupled with appropriate approaches, emerged as a critical priority.

From 1999 to 2008, the international administration had legislative, executive, and judicial power and determined which laws were applicable. Also, in the sense of property rights, UNMIK administered movable and immovable property (excluding private property) across the entire territory of Kosovo, particularly in cases where there were reasonable and objective grounds to believe that such property was registered under the former Yugoslavia or Serbia, or any other relevant body, and was socially owned.[28]

Kosovo experienced a rapid transition from a country with socialist/communist traditions and a history governed by hundreds of discriminatory laws to a country governed by a more developed Western legal framework after 1999.[29] This marked a significant and swift transformation in the legal and governance structure.

26 UN Security Council Resolution 1244 (1999) [On the Deployment of International Civil and Security Presences in Kosovo] (adopted 10 June 1999) <https://undocs.org/S/RES/1244(1999)> accessed 15 December 2023; UNMIK Regulation no 1999/1 of 25 July 1999 'On the Authority of the Interim Administration in Kosovo' <https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_01.htm> accessed 15 December 2023.

27 Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 99-128, doi:10.1093/0199243093.001.0001; Gjylbehare Bella Murati, *UN Territorial Administration and Human Rights: The Mission in Kosovo* (Post-Conflict Law and Justice, Routledge 2020) 28; Flora Ferati-Sachsenmaier, 'Postwar Kosovo: Global and Local Dimensions of Interethnic Reconciliation Processes' (2019) 13(2) *International Journal of Transitional Justice* 310, doi:10.1093/ijtj/ijz004.

28 Art. 6 of UNMIK Regulation no 2000/54 of 27 September 2000 amending UNMIK Regulation 1999/01 of 25 July 1999, as amended, on the Authority of the Interim Administration in Kosovo.

29 During the execution of their responsibilities, individuals performing public duties or holding public office in Kosovo are required to apply internationally recognized human rights standards: (a) The Universal Declaration on Human Rights of 10 December 1948; (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto; (c) The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; (d) The International Covenant on Economic, Social and Cultural Rights of 16 December 1966; (e) The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; (f) The Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979; (g) The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; and (h) The International Convention on the Rights of the Child of 20 December 1989. These legal acts shall be considered to have become

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In February 2008, the Assembly of Kosovo declared its independence, proclaiming it an independent and sovereign state.[30] In April 2008, the Assembly of Kosovo also adopted its Constitution, which entered into force on 15 June 2008.[31] The significance of this Constitution lies in the fact that it represented the international community's engagement in finding an internationally accepted solution to Kosovo's political status.[32]

With this momentum, the transference of authorisations occurred (from UNMIK to Kosovo's institutions).[33] However, Kosovo did not make substantial changes; rather, it followed the existing framework. Furthermore, after gaining independence, Kosovo consistently demonstrated loyalty and coordination with its partner states and international organisations,[34] particularly in actions that impacted its citizens' vital rights.[35]

effective as of June 10, 1999. See, UNMIK Regulation no 1999/24 of 12 December 1999 'On the Law Applicable in Kosovo' <https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_24.htm> accessed 15 December 2023.

30 Kosovo Declaration of Independence of 17 February 2008 <https://www.refworld.org/legal/legislation/natlegbod/2008/en/56552> accessed 15 November 2023. Kosovo declared its independence from the Republic of Serbia. The United Nations Security Council Resolution 1244 (1999) is still into the force. As of now, Kosovo officially is recognized as an independent state by one hundred and seventeen states. See, Robert Muharremi, 'Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited' (2008) 33(4) Review of Central and East European Law 401, doi:10.1163/157303508X339689; Colin Warbrick, 'Kosovo: The Declaration of Independence' (2008) 57(3) The International and Comparative Law Quarterly 675.

31 Constitution of the Republic of Kosovo of 15 June 2008 (with amendments I-XXVI) <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 15 December 2023.

32 Robert Muharremi, 'The Republic of Kosovo: Introductory Note' (Oxford Constitutional Law, 2008) <https://oxcon.ouplaw.com/display/10.1093/law:ocw/law-ocw-cm471.document.1/law-ocw-cm471?rskey=2xyhfg&result=768&prd=OXCON> accessed 15 December 2023.

33 Martti Ahtisaari, Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum: Comprehensive Proposal for the Kosovo Status Settlement, art 14 <https://digitallibrary.un.org/record/595359?ln=en&v=pdf> accessed 15 December 2023.

34 Hajredin Kuçi, 'International Legal Cooperation between Kosovo and other States and Organizations' (2018) 43(3) Review of Central and East European Law 314.

35 Wolfgang Benedek, 'Final Status of Kosovo: The Role of Human Rights and Minority Rights' (2005) 80(1) Chicago-Kent Law Review 215; Beti Hohler and Barbara Sonczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The curious case of the ECHR in Kosovo' in Stephanie Schiedermair, Alexander Schwarz and Dominik Steiger (eds), *Theory and Practice of the European Convention on Human Rights* (Nomos 2022) 261; Remzije Istrefi and Iliriana Islami, 'Incorporation of International Human Rights into National Legislation: The Case of Kosovo' (2017) 20(1) SEER Journal for Labour and Social Affairs in Eastern Europe 119.

2 THE NATURE OF PROPERTY DISPUTES AND JUSTICE

Concerning common property disputes among individuals, Kosovo upholds the traditional property protection system rooted in Roman law and modern civil law principles.[36] Under the influence of Roman law concerning the protection of property and other property rights in general, a series of lawsuits were employed to seek protection for these rights. Examples include *actio reivindicatio*, *actio publiciana*, *actio negatoria*, *interdictum retinendae possessionis*, etc.[37] However, considering the circumstances in Kosovo, it is evident that after 1999, apart from these property disputes filed before regular courts, there are three major kinds of property disputes: property claims deriving from "repressive measures" (1990-1998), property claims deriving after the war (27 February 1998 - 20 June 1999); and property claims caused by the system of social property (after 1945)–subsequently deriving from its privatisation after 1999.[38]

To handle these disputes efficiently, Kosovo has instituted specialised mechanisms and bodies with administrative, judicial, and quasi-judicial functions. The judiciary system in Kosovo comprises the following courts: Basic Courts, Court of Appeals, and Supreme Court.[39] Relevant to our topic and the nature of property matters is the establishment of specific judging panels to address these specific issues. In this regard, within the Supreme Court framework, a Panel of Appeals was created for property issues handled by the Kosovo Property Agency, as well as a Special Chamber for property problems arising from privatisation under the Privatisation Agency of Kosovo.[40]

The establishment of these mechanisms was undertaken to enhance efficacy in resolving property matters even though the repercussions stemming from these types of disputes and the mechanisms established for their resolution have intricately complicated the contemporary process of codifying civil law.[41]

36 Berat Aqifi, Petrit Nimani and Artan Maloku, 'The Right of Ownership and Legal Protection in Kosovo' (2023) 6(3) Access to Justice in Eastern Europe 228, doi:10.33327/AJEE-18-6.3-a000310; Iset Morina, 'Sachenrecht im Kosovo' in Herbert Grziwotz, Johanna Schmidt-Räntsch and Gerhard Ring (eds), *Bürgerliches Gesetzbuch: BGB,* band 3: *Sachenrecht* (5 Aufl, Nomos 2021) 2525; Ejup Statovci, *Mbrojtja e Pronësisë: Studim Komparativ* (ribot, Enti i Teksteve 2009) 46. Also, Law of the Republic of Kosovo no 03/L-154 of 25 June 2009 'On Property And Other Real Rights' [2009] Official Gazette of the Republic of Kosovo 57/20, art 93–103.

37 Herbert Hausmaninger and Richard Gamauf, *A Casebook on Roman Property Law* (OUP 2012) 205; Paul du Plessis, *Borkowski's Textbook on Roman Law* (OUP 2015) 219, 229, 231.

38 Ardrit Gashi, *Mbrojtja e pronësisë: Një studim sipas të drejtës në Kosovë dhe Konventës Evropiane për të Drejtat e Njeriut* (Alb-Juris 2021) 188.

39 Law of the Republic of Kosovo no 06/L-054 of 23 November 2018 'On Courts' [2018] Official Gazette of the Republic of Kosovo 22/3, art 8.

40 ibid, art 25. Details regarding the scope and competences of these mechanisms will be discussed below.

41 Ardrit Gashi, 'Codification of Private Law in the Republic of Kosovo: The Influence of European Codifications, European Law and Challenges' (2022) 10(2-4) International Journal of Private Law 199, doi:10.1504/IJPL.2022.129672.

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3 PROPERTY CLAIMS DERIVING FROM "REPRESSIVE MEASURES" (1990-1998)

As mentioned above, immediately following the destruction of the status of autonomy that Kosovo had until then, during the 1990s, a direct offensive on property relations ensued through a series of measures and laws. There are three primary laws entirely issued on a discriminatory basis against the Albanian population:

- Law on Changes and Supplements on the Limitation of Real Estate Transactions (hereafter: Law No. 22/91);
- Law on the Conditions, Ways, and Procedures of Granting Farming Land to Citizens Who Wish to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohija (hereafter: Law No. 43/91).
- Law on the Conditions and Procedures for the Transformation of Social Property into Other Forms of Ownership (hereafter: Law No. 48/91).[42]

These laws were not merely conventional statutes; they constituted programs with specific missions to provide residences for officials and encourage the influx of individuals from other countries who desired to live in Kosovo. The underlying objective appeared to be a classic form of re-nationalisation of property[43] and a push for recolonisation. On the other hand, there appeared to be attempts to compel Albanians to emigrate from their ethnic land.

Thus, through Law No. 22/91, it was stipulated that individuals of Albanian ethnicity did not possess the right to acquire and purchase real estate. On the other hand, Albanian citizens were only permitted to sell their properties to individuals who were not Albanian (like Serbs, Croats, etc.). The transfer of immovable property necessitated a written contract between the transferer and the receiver on a legal basis, coupled with registration in the property rights register.[44] This condition could never be fulfilled by the Albanians because the agreement for the transferal of rights of an immovable property had to be completed and verified before a competent court–that, in this case, this discriminatory

42 Law of the Republic of Serbia 'On Changes and Supplements on the Limitation of Real Estate Transactions' [1991] Official Gazette of the Republic of Serbia 22; Law of the Republic of Serbia 'On the Conditions, Ways, and Procedures of Granting Farming Land to Citizens Who Wish to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohija' [1991] Official Gazette of the Republic of Serbia 43; Law of the Republic of Serbia 'On the Conditions and Procedures for the Transformation of Social Property into Other Forms of Ownership' [1991] Official Gazette of the Republic of Serbia 48; 75/91, 8/94.

43 They decided to terminate socially owned first through various procedures of "renationalization" and after to gain ground and take measures for privatization process. In this manner, there was a reduction in workers' rights, accompanied by an increase of government control exercised by state representatives on management committees. See, Milica Uvalic, 'Privatization in Serbia: The Difficult Conversion of Self-Management into Property Rights' in Virginie Perotin and Andrew Robinson (eds), *Employee Participation, Firm Performance and Survival* (Advances in the Economic Analysis of Participatory & Labor-Managed Firms 8, 8th edn, Emerald 2004) 224, doi:10.1016/S0885-3339(04)08009-3.

44 Law On Basic Property Relations' (n 13) art 33; Law on Transfer of Immovable Property (n 15) art 10.

law did not permit.[45] In this way, this law flagrantly violated the fundamental principle of freedom of contract as a fundamental component of the liberal theory–*laissez-faire.* This legal framework applies the principle that everyone should be granted the autonomy to make their own choices.[46]

What were the consequences of this injustice? This situation resulted in numerous illegal property relations–known as informal transactions. Such transfers commonly involved a property agreement that was orally and discreetly concluded, possibly with witnesses present, and kept in the possession of the buyer. These agreements were never certified by a court, and consequently, the transaction was not registered in the immovable property rights register/cadastral records.[47] This implies that concerning the same property, there can be a registered formal holder and a *de facto* holder of the property who exercises their power over the property. These issues and property uncertainties concerning transactions came to the forefront after 1999, following the liberation of Kosovo. A new category of property disputes was introduced into the judicial system.[48] These lawsuits have a distinct name, referred to as lawsuits for verifying ownership.[49] The most appropriate legal solution for this issue is the validation of these transactions and contracts based on a standard of the legislation on obligation relations whereby the contract, for the conclusion of which the written form is necessary, is considered binding even if it was not completed in this form,

45 The act of registering rights over immovable property is crucial and bears a 'constitutive effect'. This implies that the acquiring of possession/property, alteration, transformation/termination of ownership to immovables necessitates a contract that holds legal validity and the registration of the relevant transaction in cadastral records–*modus acquirendi*. See, Christoph U Schmid, Christian Hertel and Hartmut Wicke, *Real Property Law and Procedure in the European Union: General Report, Final Version* (European University Institute, Deutsches Notarinstitut 2005) 27. The same principle holds true for former Yugoslavia and Kosovo as well. See, Andrija Gams, *Bazat e së drejtës reale* (Universiteti i Prishtinës 1978) 182.

46 Morris R Cohen, 'The Basis of Contract' in Richard A Epstein (ed), *Liberty, Property, and the Law: Contract - Freedom and Restraint* (Routledge 2011) 3; Jan M Smits, *Contract Law: A Comparative Introduction* (Edward Elgar 2014) 10; Roscoe Pound, 'Liberty of Contract' (1909) 18(7) *The Yale Law Journal* 456, doi:10.2307/785551.

47 This issue was observed by international organizations operating in Kosovo in a supervisory capacity, such as Department of Human Rights of the Organization for Security and Co-operation in Europe - Mission in Kosovo. See, OSCE, *Litigating Ownership of Immovable Property in Kosovo* (OSCE Department of Human Rights and Communities 2009) 5 <https://www.osce.org/kosovo/36815> accessed 15 December 2023.

48 OSCE, *Kosovo: First Review of The Civil Justice System* (OSCE Department of Human Rights and Communities 2006) 7 <https://www.osce.org/kosovo/19401> accessed 15 December 2023; OSCE, *Property Rights Mass-Claim Mechanism: Kosovo experience* (OSCE Pub 2020) 14-20. <https://www.osce.org/mission-in-kosovo/454179> accessed 15 December 2023. Ardrit Gashi, 'Causes of Procedural Delays During the Settlement of Civil Cases at First Instance Courts' (2010) 14(1) E Drejta – Law 110.

49 This is not associated with the three well-known lawsuits for the protection of property like *actio reivindicatio, actio publiciana, actio negatoria or interdictum retinendae possessionis.*

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provided that the parties–creditor and debtor have fulfilled, wholly or predominantly, the commitments arising from it.[50]

Law No. 43/91 constituted the legal basis for the unfair distribution of property and public assets based on ethnic grounds, particularly favouring the Serbian minority. The Serbian regime transported numerous Serbian families from various countries as settlers/colonists.[51] A second wave of recolonisation commenced on 10 August 1995 and continued afterwards. Serbian refugees from Croatia reached around 8,000 by 31 August 1995.[52] However, the statistics acknowledge the possibility of claiming that only half of the plan for settling 20,000 Serbian colonists in Kosovo has been fulfilled.[53] To describe this situation more accurately, the International Helsinki Foundation for Human Rights referred to it as a policy of "Serbianization" in Kosovo while also identifying a series of restrictions imposed on the freedom of movement of ethnic Albanians, denying the right of use the of the Albanian language and the possession of the private property.[54] The property and goods distributed to the colonists did not belong to Serbia; instead, they were the property of Albanians and social enterprises developed and cultivated by the Albanian population constituting around 90 percent at that time.[55]

Law No.48/91 violated the property rights of socially owned entities, which, as mentioned above, were built by the efforts of the workers–constituting almost absolutely Albanians. In the socialist system, as mentioned earlier, socially owned enterprises were organised under

50 This exception applies if there is nothing else, except the stipulated form. See, Law of the Socialist Federal Republic of Yugoslavia 'On Obligation Relations' [1978] Official Gazette of SFRY 30/78, art 73. Also, Case no KI 60/12 Rev no 58/2007 (15 March 2010) [2012] Constitutional Court of the Republic of Kosovo.

51 Rifat Blaku, *Shkaqet e eksodit shqiptar, shpërngulja e shiptarëve gjatë shekujve* (Prishtina 1992) 203.

52 See, Kosova Institute of History (n 11) ch 4, para 7.

53 A statement released by the Committee for Human Rights and Freedoms in Kosovo cautioned that a large-scale conflict might erupt in Kosovo if the resettlement of Krajina Serb refugees persisted. The statement highlighted that between August 9th and 31st, approximately 8,356 refugees from Krajina had been resettled in 23 locations in Kosovo, and prior to that, around 2,947 Serb refugees from Bosnia had also been relocated to the region. See, Minorities at Risk Project (n 22). In the Municipality of Prizren: one thousand two hundred eighty colonist were settled; in the Municipality of Prishtina: two thousand forty; in Municipality of Peja: one thousand; in municipality of Istog: six hundred and sixtyseven; in Municipality of Gjilan: five hundred; in Municipality of Gjakova: four hundred twenty; in Municipality of Mitrovica: three hundred and eighteen; in Mnicipality of Vushtria, Mnicipality of Suhareka and Municipality of Zubin Potok: two hundred fifty colonists were settled. etc. See, Kosova Institute of History (n 11) ch 4, para 7.

54 Minorities at Risk Project (n 26). Also, Human Rights Watch, 'World Report 1996 – Federal Republic of Yugoslavia' (*UNHCR Refworld*, 1 January 1996) <https://www.refworld.org/docid/3ae6a8b08.html> accessed 15 December 2023; Llibert Cuatrecasas and Vasili Likhachev, 'The Crisis in Kosovo: Explanatory Memorandum CG (5) 7 Part II' (*Council of Europe*, 22 May 1998) <https://rm.coe.int/the-crisis-in-kosovo/1680718a71> accessed 15 December 2023.

55 Statistical Office of Kosovo, *Demographic Changes of the Population of Kosovo for the period 1948–2006* (Population Statistics, SOK 2008) 19; Hivzi Islami, *Demographic Studies: 100 Years of Kosova Demographic Development of Kosova* (Kosovo Academy of Sciences and Arts 2008) 205, 212.

the self-government system and were led by workers' councils. The destruction of the autonomy of Kosovo resulted in the displacement of 135,000 Albanian workers from their employment.[56] Consequently, through Law No.48/91, the workers' councils of socially owned enterprises were replaced by bodies composed of loyalists sent from Belgrade in the capacity of management bodies. This law stipulated the conversion of SOEs into joint-stock companies, granting exclusive authority to the management body of the enterprise to decide on the transformation into joint-stock companies, as well as the issuance of shares.[57] It has been proven that in this way, the capital of socially owned enterprises, represented by shares, is transferred predominantly into the hands and ownership of the Serbian and Montenegrin population.[58] Besides that, there are also rights in socially owned housing, which were closely tied to employment.

Consequently, a significant number of Albanians were forcibly evicted from their homes. Many of these properties were then reallocated to Serbs and Montenegrins under preferential terms. In addition to losing their homes, the evicted Albanians also forfeited financial assets deposited in employment-linked housing funds and the right to purchase the socially owned apartment they had lived in and had accumulated during years of employment.[59]

The damage and legal chaos brought about by the laws of this decade will likely be irreparable, and as it seems never avoidable.

After 1999, one of the most sensitive issues was the establishment of the legal infrastructure while simultaneously addressing a series of discriminatory laws. This responsibility fell to UNMIK, acting as the administrator in Kosovo in harmony with the authorisations granted by the United Nations.[60] In this context, the applicable law consisted of UNMIK regulations and secondary legal acts/instruments (administrative directions) issued thereunder (approved and signed by the Special Representative of the Secretary-General), as well as the law in force in Kosovo before 1989 (prior to the destruction of autonomy and repressive measures in Kosovo). In the event of a conflict between these laws, the UNMIK regulations and secondary legal instruments issued by UNMIK were given primacy.[61]

Law No. 22/91 and Law No. 43/91 discussed above were repealed specifically as discriminatory legislation.[62] These laws have been repealed, and it is evident that they will remain part of history. However, the consequences are significant.

56 Stavileci (n 21).

57 Law On the Conditions and Procedures for the Transformation of Social Property into Other Forms of Ownership (n 42) art 7.

58 Nekibe Kelmendi, 'Problemet pronësoro-juridike në Kosovë: si të zgjidhen ligjërisht' (1999) 4 Kosova Law Review 75.

59 Scott Leckie, 'Resolving Kosovo's Housing Crisis: Challenges for the UN Housing and Property Directorate' (2000) 7 *Forced Migration Review* 12-3.

60 UN Security Council Resolution 1244 (1999) (n 26); UNMIK Regulation no 1999/1 (n 26).

61 UNMIK Regulation no 1999/24 (n 29).

62 UNMIK Regulation no 1999/10 of 13 October 1999 'On the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property' <http://www.unmikonline.org/regulations/1999/reg10-99.htm> accessed 15 December 2023.

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The question can now be raised: What happened to those transactions that took place during those years based on these laws? What happened to the judgments that were issued based on these laws? And what occurred to the cadastral records of immovable properties that were made based on these laws and judgments? Unfortunately, nothing has been done. The reason is that UNMIK did not have the mandate to rectify or repair the injustices of the past, and secondly, UNMIK did not possess the capacity or mandate to provide long-term solutions as a state would.

On the other hand, even after Kosovo gained independence in 2008, the state has not taken measures in this direction. This is particularly due to political realities on the ground,[63] with a focus on avoiding further tensions with the Serbian minority and facilitating negotiations between Kosovo and Serbia.[64] What reality is created by this situation? With the liberation of Kosovo from Serbian occupation[65] in June 1999, more than 90 percent of the Serbian minority was displaced to Serbia and its surrounding areas. Consequently, their properties were predominantly occupied by Albanians.[66] These property disputes are called property claims derived from the war (27 February 1998 - 20 June 1999) and will be addressed in the subsequent section, focusing on property claims arising from this period.

As for Law No.48/9, UNMIK decided that the transformation of SOEs into other forms of organisations would be recognised only if it happened prior to 1989 or thereafter but was implemented/based on a non-discriminatory law and procedures.[67] This meant that based

63 See extensively, James Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans* (IB Tauris 2009) 25; Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP 2009) 165.

64 Bardhok Bashota and Afrim Hoti, 'The Role of the EU in Facilitating a Hard Implementation Dialogue: Normalization of Kosovo-Serbia Relations' (2021) 45(3) *Southeastern Europe* 4, doi:10.30965/18763332-45010001; Leon Hartwell, *The Serbia-Kosovo Dialogue: Ripe for Resolution?* (Center for European Policy Analysis 2021) 2.

65 As the Ottoman Empire crumbled, leaving Kosovo in a state of anarchy, the Serb army under King Peter invaded from the north and occupied all of Kosovo. The Conference of Ambassadors, meeting in London from December 1912 to August 1913 to discuss events in the Balkans, confirmed the independence of Albania itself, but agreed to recognize Serb rule over Kosovo, thus excluding 40 percent of the Albanian population in the Balkans from Albania itself. It was a tragic mistake that haunted the Balkans right to the end of the 20th century. See, Robert Elsie, *Historical Dictionary of Kosovo* (Historical Dictionaries of Europe 79, 2nd edn, Scarecrow Press 2011) 57; Malcolm (n 2) 251.

66 Department of Human Rights and Rule of Law of the Organization for Security and Co-operation in Europe focus attention on the absence of directions on the actions to be taken to ensure a harmonized approach in addressing property rights violations. Issues such as illegal occupation, unequal access to mechanisms for the protection of property rights, and the existing uncertainty in the law, especially considering the domestic applicable law enacted prior to 1989, highlight the necessity for comprehensive legal reform. See, OSCE, *Property Rights in Kosovo* (OSCE Department of Human Rights and Communities 2002) 5 <https://www.osce.org/kosovo/13062> accessed 15 December 2023.

67 UNMIK Regulation no 2002/12 of 13 June 2002 'On the Establishment of the Kosovo Trust Agency' <https://unmik.unmissions.org/sites/default/files/regulations/02english/E2002regs/RE2002_12.pdf> accessed 15 December 2023.

on the criterion of discrimination of these laws, no transformation of SOEs was recognised. As a result, their legal status until 1989 will remain in force, making them eligible for inclusion in the privatisation process.[68]

4 PROPERTY CLAIMS DERIVING AFTER THE WAR (27 FEBRUARY 1998 – 20 JUNE 1999)

In post-war countries, beyond property issues, there exists a right under international law that safeguards the turnback of displaced humans to their homes.[69] This right, often referred to as the right to return, asserts that individuals forced to flee their homes due to conflict, persecution, or other emergencies have the right to return to their original homes or places of residence once conditions permit, and as such has undergone significant evolution as a human rights norm. Protecting these rights is instrumental in advancing long-term peace, stability, economic vitality, and justice.[70] Hence, since the inception of the UNMIK engagement in Kosovo, property matters and housing rights have consistently held a prominent position on the agenda. Recognising this, UNMIK[71] established quasi-judicial and administrative bodies to expedite the resolution of property claims related to the conflict. This was done to prevent the overwhelming number of claims from burdening the regular court system.

To achieve an efficient and effective resolution of claims concerning residential property, several key measures and processes need to be in place. Some of these include a clear, comprehensive legal framework outlining the procedures for resolving property claims, defining the rights of claimants and the obligations of relevant authorities. At the same time, specialised bodies or tribunals are dedicated to handling property claims with their expertise and resources. In this sense, with the aim of offering comprehensive guidance on property rights in Kosovo, the Housing and Property Directorate has been established.[72] This includes the establishment of the Housing and Property Claims Commission as an independent body of the Housing and Property Directorate, which will resolve private

68 ibid, ss 1, 2. Also, Ardrit Gashi, 'Die Umwandlung des gesellschaftlichen Eigentums im Kosovo' (2018) 59(6) Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung 282.

69 Marcus Cox and Christopher Harland, 'Internationalized Legal Structures and the Protection of Internationally Displaced Persons' in Joan Fitzpatrick (ed), *Human Rights Protection for Refugees, Asylum Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (Transnational Pub 2002) 521.

70 Scott Leckie, *Housing, Land, and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases, and Materials* (CUP 2007) 1-3.

71 UN Security Council Resolution 1244 (1999) (n 26) art 11.

72 UNMIK Regulation no 1999/23 of 15 November 1999 'On the establishment of the Housing and Property Directorate and the Housing and Property Claims Commission' art 1 <https://reliefweb.int/report/serbia/unmik-regulation-no-199923-establishment-housing-and-property-directorate-and-housing> accessed 15 December 2023.

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disputes (non-commercial) concerning residential property referred to by the Housing and Property Directorate.[73] The creation of the Housing and Property Directorate resulted in the removal of jurisdiction for all housing cases from domestic courts, aligning with standard legal interpretation in Kosovo.[74] However, implementing this change was contingent upon the creation of rules of procedure for the Housing and Property Directorate.[75] This situation created a void in property rights cases.[76]

These quasi-judicial bodies dealt with three categories of applications/disputes:

a) Applications by individuals/natural persons whose property, possession or occupancy rights to residential real property have been revoked subsequent to 1989 on the basis of discriminatory legislation;
b) Applications concerning possible validation of unofficial/informal contracts or transactions[77] of residential real property based on the free will of the parties after 1989; and
c) Applications by individuals/natural persons who were the owners, possessors, or occupancy right holders of residential real property prior to 1999 and who do not have possession of their property and where the property has not willingly been transferred.[78]

In post-conflict societies, also mistrust often persists among parties that were once in conflict. For this purpose, the formation of these bodies could only be facilitated by the UNMIK.

It is observed that the primary challenge impacting property rights in Kosovo stems from the unlawful occupation of both residential and non-residential properties. The proceedings before the Housing and Property Directorate can extend up to four years,[79] and there is a

73 ibid, art 2.
74 Morina (n 36).
75 UNMIK Regulation no 2000/60 of 31 October 2000 'On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission' <https://docs.pca-cpa.org/2016/01/UNMIK-Regulation-2000-60.pdf> accessed 15 December 2023.
76 Anneke Rachel Smit, 'Housing and Property Restitution and IDP Return in Kosovo' (2006) 44(3) International Migration 67.
77 Contracts or unofficial/informal transactions, in this context, pertain to those transactions occurring after 1989, which, under discriminatory laws were deemed illegal and not permitted. Otherwise under normal circumstances, absent discriminatory laws, these contracts would be considered legal transactions. See, Law of the Republic of Serbia 'On Special Conditions Applicable to Real Estate Transactions' [1989] Official Gazette of the Republic of Serbia 30; Law On Changes and Supplements on the Limitation of Real Estate Transactions (n 42).
78 UNMIK Regulation no 1999/23 (n 72) art 1.2.
79 In this regard, there was also criticism voiced by Venice Commission. See, *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms* no 280/2004 (11 October 2004). <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)033-e> accessed 15 December 2023.

lack of an effective remedy to address the prolonged duration of these proceedings and/or decisions on the merits. This situation has created an environment of impunity concerning violations of property rights. In addition, a significant challenge that adversely affected the Albanians was the inability to furnish ownership proofs and evidence. This challenge came from the informal transactions (non-registration) between 1989–1998, compounded by the impact of the war in 1998–1999, which included the burning of houses and the loss of everything during the displacement in Albania.

Furthermore, it is crucial to highlight an exceptionally significant and unprecedented fact: the Serbian military forces, upon concluding the war and withdrawing from Kosovo, took the cadastral registers with them. The lack of cadastral records further complicated the situation, contributing to an even deeper chaos regarding ownership evidence.[80] In practical terms, the situation unfolded with Albanians holding *de facto* possession of the property—considered unlawful possessors, while the Serbs had the last ownership evidence—"papers". Given these circumstances and considering that a significant number of Serbs did not consider themselves indigenous (with many arriving in the 1990s), they opted to sell these properties to the Albanians.[81]

To address disputes over private property, encompassing agricultural and commercial property, significant legislative changes were introduced in 2006. These changes aimed to implement a mass claims resolution methodology.[82] These changes transformed the Housing and Property Directorate into a new agency called Kosovo Property Agency.[83] The central mandate of the newly established Agency was to ensure the effective and efficient resolution of property disputes related to private immovable property, encompassing agricultural land and commercial property.[84] In substance, the Kosovo Property Agency was

80 Regarding to this issue in 2011 within the European Union facilitated negotiations (between Kosovo-Serbia) was reached the Brussels Agreement on Cadastre (2 September 2011), which has never been fully implemented. See also, Shpetim Gashi and Igor Novaković, *Brussels Agreements Between Kosovo and Serbia: A Quantitative Implementation Assessment* (Friedrich-Ebert-Stiftung 2020) 2.

81 In the opinion of the author of this article, the choice made may not be deemed a good or just option. However, it appears that such decisions were driven by circumstances to mitigate potential conflicts. In transitional justice, such methods may be considered at times, but it is essential that any actions occur with the full and voluntary consent of the parties involved. See for example, Rhodri C Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice* (Occasional Paper Series, ICTJ 2007) 51; Edward Tawil, *Property Rights in Kosovo: A Haunting Legacy of a Society in Transition* (Occasional Paper Series, ICTJ 2009) 49-50.

82 Regarding the term 'mass claims' see, Howard M Holtzmann, 'Mass Claims' *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law 2008) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1891> accessed 15 December 2023.

83 UNMIK Regulation no 2006/10 of 4 March 2006 'On the Resolution of Claims relating to Private Immovable Property, Including Agricultural and Commercial Property' <https://docs.pca-cpa.org/2016/01/UNMIK-Regulation-2006-10.pdf> accessed 15 December 2023.

84 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc S/205/335 (23 May 2005) § 67 <https://undocs.org/S/2005/335> accessed 15 December 2023. Also, Margaret Cordial and Knut Rosandhaug, *Post-Conflict Property Restitution: The Approach in*

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an administrative body. However, it was also quasi-judicial and had some reduced competencies. However, it was authorised to assist the courts in resolving war-related claims from the war–between 27 February 1998 and 20 June 1999. Its primary focus was on ownership claims concerning private immovable property, including agricultural and commercial property. Additionally, this Agency handled claims related to property use rights for private immovable property, covering agricultural and commercial holdings, especially when the claimant could not exercise such property rights.[85] Kosovo Property Agency decisions could be challenged through the judicial process only in the Appeals Panel of the Supreme Court of Kosovo.[86]

The sociohistorical context in which the legal framework is created, with the aim of restoring rights that existed during the war, indicates that the legislator intended to establish a law specifically for the restitution of property rights held by individuals at the outbreak of the 1998–1999 war. Consequently, any property rights acquired after the eruption of the war–*post factum* should be addressed through regular civil procedure mechanisms within the framework of the standard civil court system.[87]

According to the relevant legal framework, for an applicant to obtain a positive decision or order, they must present evidence substantiating ownership of private immovable property, encompassing agricultural and commercial holdings. Alternatively, the applicant needed to provide documentation supporting a use right for private immovable property, including agricultural and commercial property, especially in cases where the applicant could not exercise such property rights.[88] But, for applicants, particularly those of Albanian descent, demonstrating proof of ownership posed a significant challenge. Many of their evidential documents were either burned/destroyed or lost during the war. In such cases, their recourse was limited to presenting witnesses or any available evidence associated with the possession of the property. This could include details about the cultivation of the land, crops grown over a specific period, or similar factors.

In instances where restitution was ruled in favour of applicants/claimants, they were granted the prerogative to select from three potential options for implementation: first, the applicant/claimant could opt for immediate repossession of the claimed property; second, the applicant/claimant had the choice to place their property under Kosovo Property

Kosovo and Lessons Learned for Future International Practise (Martinus Nijhoff Pub 2009) 216, doi:10.1163/ej.9789004155602.i-1849.

85 UNMIK Regulation no 2006/10 (n 82) art 2.

86 See, Law of the Republic of Kosovo no 06/L-054 (n 39).

87 Case no GSK-KPA-A-217/11 *BS v SK* [2012] Appeals Panel of the Supreme Court of Kosovo.

88 UNMIK Regulation no 2006/50 of 16 October 2006 'On the Resolution of Claims relating to Private Immovable Property, Including Agricultural and Commercial Property' art 3.1 <https://www.yumpu.com/xx/document/view/23938304/rregullorja-e-unmik-ut-2006-50> accessed 15 December 2023. Also, Order no PCC/D/2/2007 Kosovo Property Claims Commission (KPA 2007) 2.

Agency temporary administration through a rental scheme, or the third option involved the closure of the claim file when claimants had sold or voluntarily disposed of the property.[89]

In 2007, the Kosovo Property Agency claim intake concluded with a total of 42,749 registered claims by the end of the process, and by 2015, the adjudication process was within the mandate. About 10,646 claimed properties had been confirmed as inadmissible because of the damage to the houses and properties during the war, and as such was not conferred within the jurisdiction of these mechanisms to address claims for monetary compensation for damage or destruction of property, as it was explicitly excluded from consideration.[90] This category remains in the so-called "war reparations".

Compared to the duration of court proceedings in regular courts, it can be asserted that the Kosovo Property Agency successfully fulfilled its mandate because its decisions became executable fifteen days after the date of announcement of the decision to the parties,[91] providing that no appeal has been filed before Appeals Panel of the Supreme Court of Kosovo. Hence, these decisions were directly executed by the Agency without the supervision of the court for administrative conflicts nor the application of enforcement procedure by the court provided by enforcement law.

In 2016, the Kosovo Property Agency was transformed into the Kosovo Property Comparison and Verification Agency.[92] The establishment of the Kosovo Property Comparison and Verification Agency came as the result of the Brussels Agreement on Cadastre of 2 September 2011.[93] The scope of operation of this mechanism is to solve claims and legacy applications from the Kosovo Property Agency related to private property and continue affecting the authority for enforcement of the remaining decisions of the respective authorities, which are the Kosovo Property Agency or Housing and Property Directorate. In addition, and most importantly, comparing and resolving differences (identify any discrepancies, alterations, or missing information in the documents) between original cadastral documents dated pre-June 1999, which were taken by the Serbian forces during the war, and current cadastral documents in the Republic of Kosovo.[94] The absence of cadastral documents resulted in an unforeseen and challenging situation, creating chaos in

89 UNMIK Regulation no 2006/10 (n 82) art 2.6. After 2008, Law of the Republic of Kosovo no 03/L-079 of 13 June 2008 'Amending UNMIK Regulation 2006/50 on the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property' [2008] Official Gazette of the Republic of Kosovo 32/1.

90 Around 37.641 claims (88.1% of the total received) relate to agricultural land, while 943 claims (2.2%) relate to commercial properties and 4.162 (9.7%) to residential property. For 98.8% of claims the claimants claim ownership rights over the claimed properties. See, Kosovo Property Agency, *Annual Report 2015* (KPA 2016).

91 UNMIK Regulation no 2006/50 (n 92) art 15. As amended by Law of the Republic of Kosovo no 03/L-079 (n 89).

92 Law of the Republic of Kosovo no 05/L-010 of 9 June 2016 'On Kosovo Property Comparison and Verification Agency' [2016] Official Gazette of the Republic of Kosova 37/21.

93 See, Gashi and Novaković (n 80).

94 Law of the Republic of Kosovo no 05/L-010 (n 92) art 2.

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property relations that no one had expected or imagined. The resolution of such a complex issue required the intervention of the European Union and the implementation of various mechanisms. It involved the engagement of relevant stakeholders, including cadastral offices, archive institutions, property owners, communities, and religious institutions, to provide input and verify information.

5 PROPERTY CLAIMS DERIVING BY THE SYSTEM OF SOCIAL PROPERTY (AFTER 1945)

The third category of property disputes pertains to social property, which, in alignment with the demands of an open market economy, is scheduled to undergo the privatisation process. But, in the context of Kosovo, this process carries deeper significance and extends beyond purely economic considerations. Privatisation evokes emotional issues stemming from historical events such as confiscations and nationalisations of property after 1945–after the creation of socialist property and several subsequent property transformations. Therefore, this process is considered legally complex and politically difficult, with extensive consequences in an economy involving numerous former owners and employees.[95] Here, we are addressing the claims of former legitimate owners whose property was confiscated in the past, seeking its eventual return to them.

For illustrative purposes, let us refer to a case—a brief factual background from judicial practice:

> "*On 23 April 1946, after K.B. had been executed as an enemy of the people, the People's Council of in the Municipality I./I. decided, pursuant to Art 29 of the Law on Agrarian Reform, to confiscate … ha of land belonging to K. B. located in a place known as "Q.", assigning that land to the district council of the trade union as a sports playground. On 21 December 1955, the confiscated land was given to the Agriculture Cooperative "D." in "I./I." for temporary usage. The People's Council of the Municipality I./I. did not, at that time, render any permanent decision in regard to the concerned land…*"[96]

To fulfil the mission of transferring socialist property and socially owned enterprises into private capital through privatisation, the Kosovo Trust Agency was established as a competent body for administration, protection and selling part or all the shares of socially

95 OSCE, *Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo* (OSCE Pub 2008) 5-6 <https://www.osce.org/kosovo/32012> accessed 15 December 2023.

96 Ondrej Pridal, Agnesa Vezgishi and Timo Knäbe (eds), *Jurisprudence Digest of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters,* vol 1 (EULEX Kosovo 2016) 155.

owned enterprises and publicly owned enterprises,[97] and especially with the capacity to conclude contracts, to take, maintain and to sue third parties, as well as to be sued on behalf of SOEs as legal representative.[98] After 2008, with the declaration of independence of Kosovo and after came into the force of the Constitution of 2008, the transfer of competencies occurred.[99] Within the scope of this transformation, the Privatization Agency of Kosovo was established as an independent public institution with complete legal liability as legal replacement/successor of the Kosovo Trust Agency with all rights and obligations. The Privatisation Agency, as the Kosovo Trust Agency, has executive competencies to administrate all enterprises in social ownership and assets placed in the territory of Kosovo, regardless of whether these enterprises undergo a transformation because of "repressive measures".[100]

For efficiency purposes, the Special Chamber within the Supreme Court of Kosovo was established,[101] with exclusive competencies and authority over all cases and proceedings involving any claim alleging ownership or any other right or title/interest concerning assets of an SOE. In this way, property claims and creditors' claims in the liquidation or privatisation proceedings are subject to judicial protection. In the adjudication of these cases, provisions and rules of civil procedure law are applicable.[102] Also, it is important to emphasise that when treating cases, the Special Chamber within the Supreme Court applies international standards regarding human rights, especially Prot. 1–1 of the European Court of Human Rights prevails in any Kosovo regulation or law. The Special Chamber within the Supreme Court operates in two instances, and judgements rendered by the second instance are considered final. They can only be argued before the Constitutional Court of the Republic of Kosovo.[103]

97 At this point, the difference between Socially Owned Enterprises and Publicly Owned Enterprises comes to the surface. Socially Owned Enterprises means an enterprise that was created as socially capital managed and administered by workers' councils under the Law On Associated Labour (n 13); Law On Enterprise (n 13). Publicly Owned Enterprises means an enterprise that was created as publicly owned by a public authority (municipality or government) or other public organizations within the territory of Kosovo. Kosovo's legal doctrine also acknowledges and accepts this conceptual difference. See, Iset Morina (ed), *Fjalor juridik: e drejta private, e drejta publike, e drejta penale: pravni rečnik u privatnom, javnom i krivičnom pravu* (Akademia e Drejtësisë e Kosovës 2019) 669.

98 UNMIK Regulation no 2002/12 (n 67).

99 Kosovo Declaration of Independence (n 30); Constitution of the Republic of Kosovo (n 31).

100 Law of the Republic of Kosovo no 04/L-034 'On the Privatization Agency of Kosovo' [2011] Official Gazette of the Republic of Kosovo 19/1.

101 UNMIK Regulation no 2002/13 of 13 June 2002 'On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters' <https://www.yumpu.com/en/document/view/37815826/unmik-regulation-no-2002-13-kosovo-trust-agency> accessed 15 December 2023. After 2008, Law of the Republic of Kosovo no 06/L-086 of 30 May 2019 'On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters' [2019] Official Gazette of the Republic of Kosovo 12/1.

102 Iset Morina dhe Selim Nikçi, *Komentar i Ligjit për Procedurën Kontestimore* (Deutsche Gesellschaft für Internationale Zusammenarbeit 2012) 679.

103 Ardrit Gashi, 'The Constitutional Protection of Property: The Case of Kosovo' (2019) 22(1) SEER Journal for Labour and Social Affairs in Eastern Europe 56, doi:10.5771/1435-2869-2019-1-53.

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More precisely, the exclusive authority of the Special Chamber of the Supreme Court includes all the matters over the cases related to:

- Decisions/actions of the former Kosovo Trust Agency or the Privatization Agency of Kosovo;
- Allegations relating to ownership of property over which these Agencies have declared managerial authority by proclaiming the ownership of SOE on such property;
- Allegation relating to any investment, asset, capital, or money under the control of SOE;
- An application made by these Agencies of an SOE that has gone through or is under the liquidation procedures by these Agencies.[104]

The problem is that privatisation in Kosovo was not followed by another important legal process for property rights: the denationalisation process. More precisely, this process involves restating lands to owners whose property was nationalised and confiscated after 1999. Denationalisation remains mainly characteristic and implemented in socialist and communist systems.[105]

Today, there is a commonly known consensus among the societies of the countries in transition that the expropriation of assets under socialist regimes was not legitimate.[106] The failure to implement this process, as a consequence, created a huge number of property disputes. Certainly, from the perspective of property rights protection and to avoid injustice from the past, it would be more proper to conduct the denationalisation process prior to the privatisation process or at least in parallel.

Kosovo, as a part of the former socialist system of Yugoslavia after liberation, did not promulgate any law regarding property restitution or denationalisation. As a result, this kind of property dispute was presented in front of the Special Chamber within the Supreme Court because there were no other legal solutions.[107] Formally, the Special Chamber of the Supreme Court has exclusive competence for adjudicating these claims. However, there is a substantial legal gap in Kosovo's legal system.

104 UNMIK Regulation no 2002/13 (n 101) s 4. After 2008, Law of the Republic of Kosovo no 06/L-086 (n 101) art 5.

105 Jozef M van Brabant, *Privatizing Eastern Europe-The Role of Markets and Ownership in the Transition* (Kluwer Academic Pub 1992) 116.

106 Herbert Brücker, *Privatization in Eastern Germany: A Neo-Institutional Analysis* (Frank Cass 1997) 84.

107 Since its commencement in June 2003, the Special Chamber of the Supreme Court of Kosovo has encountered a total of 42,593 cases, successfully resolving 20,644 among them. Presently, there are approximately 21,949 pending cases before the Special Chamber of the Supreme Court, originating from disputes arising between parties engaged in the privatization of socially owned enterprises and their assets. See, Pridal, Vezgishi and Knäbe (n 96) [4].

Unusually, when adjudicating this nature of claims, the Special Chamber of the Supreme Court referred to the institute of *prescription*.[108] The legal period for the acquisition of ownership through prescription for social entities (municipalities, organisations, entities, SOEs) was very short. If a property became an asset in social/public ownership without any legal foundations or basis, its recovery could be sought within five years from the date a previous owner learned about the change but no later than ten years after the factual change of the property.[109] On this basis, the Special Chamber of the Supreme Court initiated the process of granting rights to social entities.

However, questions arose as to whether this interpretation was fair and just, particularly when the justifications of damaged parties that they were politically persecuted by the system and could not refer to courts run by the same politics were not taken into consideration.[110] Logically, this inability of damaged parties automatically led to the commencement of acquisition prescription in favour of legal persons (municipalities, organisations, entities, SOEs) created by the socialist system. Recognising that this approach constituted a second injustice for the injured parties, the Special Chamber of the Supreme Court shifted its method of argumentation, and finally, the Special Chamber of the Supreme Court accepted that without a specific law which gives authorisation to Kosovo authorities to undertake actions regarding confiscation and nationalisation, the court could not decide over restitution of claimed property.[111] As well, without a definitive law or decision issued by a competent public organ–legislature in this case, which asserts acts of confiscations in the past as null and void, applicants cannot successfully restore confiscated property.

Similarly, the Constitutional Court of the Republic of Kosovo, in adjudicating a case on property restitution, recommended to the applicants initially to file a claim before the Special Chamber of the Supreme Court or to any other competent special court with the mandate to decide over this kind of property claims, without any constitutional recourse or recommendation.[112] The court later acknowledged the absence of a specific law in the Republic of Kosovo addressing property restitution. Consequently, claims for property restitution cannot rely on the protections outlined in Protocol 1–1 of the European Court of Human Rights, with necessary modifications–*mutatis mutandis*, the safeguards articulated in Article 46 (Protection of Property) of the Constitution. This limitation arises

108 A legal institute of property law which comes from Roman law (*usucapion* for movables, *praescriptio longi temporis* for immovables) as a mode of acquisition of property – the acquisition of title to property as a result of lapse of time. See, Adolf Berger, *Encyclopedic Dictionary of Roman Law* (American Philosophical Society 1953) 645; Reinhard Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (CUP 2002) 69.

109 Law On Associated Labour (n 9) art 268.

110 Supreme Court decided against claimant on reasoning that in the course of the socialist regime did not exhaust legal remedies. See*: Case MT v Department of Kosovo Roads* Rev no 43/2011 [2019] Supreme Court of the Republic of Kosovo.

111 Case no AC-I-15-0249 *HB v Kosovo Trust Agency* [2016] Special Chamber of the Supreme Court of the Republic of Kosovo.

112 Case no KI02/09 *KK v Ministry of Agriculture* [2010] Constitutional Court of the Republic of Kosovo.

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from the fact that property restitution claims cannot be deemed a "legitimate expectation" without a legal framework governing property restitution, as elucidated earlier.[113] This inherently implies that these parties still face obstacles in obtaining justice, and legally, they do not have any legal instrument available to realise their rights.

6 CONCLUSIONS

A comprehensive understanding of property disputes and property law in general requires an examination of their origin and progression. Insight into the historical factors is essential for intelligently comprehending the evolution of this legal institution, the nature of property disputes, and their proper resolution.

Concerning property disputes stemming from "repressive measures" (1990-1998), a fundamental lesson drawn from the case of Kosovo emphasises how discrimination based on ethnicity can irreparably undermine property relations. Indeed, in the truest sense of the word, this situation amounted to apartheid. Though these violations of property rights may belong to the past, their repercussions persist in the present day. Still, justice eludes the victims of that time. The institutions have consistently emphasised that, as new entities, they lack the budgetary and financial capacity to compensate for the illegal actions of the regime after 1990. Corrective justice must be instituted for these citizens as well. Achieving substantive corrective justice is inseparable from its consequential impact on those who reaped the advantages of apartheid politics. The last hope and potential opportunity for compensations at this stage lie in their incorporation into the category of war reparations– whenever there is a demand for them.

A comparable scenario, marked by an absence of response or justice, is also evident in the realm of property claims that derived after the events of 1945. This category of claims is largely being overlooked. Even so, there are no surviving former owners, and the number of direct heirs is diminishing rapidly, while third-generation heirs may face various problems in securing the right information and evidence. Currently, the constitutional framework of the Republic of Kosovo is founded on key principles, including but not limited to freedom, democracy, equality, respect for human rights and freedoms, the rule of law, the right to property, social justice, pluralism, etc. A glimmer of hope emerged with the establishment of the Constitutional Court of the Republic of Kosovo. However, the Constitutional Court assumed a passive role in this matter. It aligned with the European Court of Human Rights stance, affirming that it does not compel Contracting States to pass a final law on the restitution of property. It granted considerable latitude to the Contracting States in defining the parameters of property restitution and determining the associated conditions. Hence, in this sense and in alignment with these principles,

113 *Case* no KI78/18 *PM v the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters* [2019] Constitutional Court of the Republic of Kosovo.

particularly those of social justice and the right to property, it is imperative for Kosovo to promptly enact legislation that addresses the restitution process.

From 1999 to 2008, the international administration (UNMIK) had legislative, executive, and judicial power and determined which laws were applicable. The issue arose from the fact that the UNMIK displayed a lack of readiness to address historical injustices or, at the very least, mitigate the repercussions of the past. For UNMIK, the standard that all property, including residential property, commercial and agricultural lands, enterprises, and other socially owned assets, should have a clear and rightful possessor to take effective possession of their property was valid by not going back to the past and origin of property disputes and problems. This is evidenced by how the property claims derived after the war (27 February 1998 – 20 June 1999) and their successful handling. This occurred because the process was more streamlined for UNMIK; they possessed international experience, or at least the potential to acquire it. Additionally, they had more advanced logistics and, crucially, access to information through liaison offices and diplomatic channels. In the current context, Kosovo still encounters substantial challenges in meeting these prerequisites.

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AUTHORS INFORMATION

Ardrit Gashi
Dr.Sc.(Law), Professor of Private Law, Faculty of Law, Department of Civil Law, University of Prishtina, Prishtina, Republic of Kosovo
ardrit.gashi@uni-pr.edu
https://orcid.org/0000-0001-8123-7031
Corresponding author, responsible for writing, reviewing and editing of this article.

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RESEARCH ARTICLE

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Research Article

DUAL SANCTIONING OF HATE CRIMES AND HATE SPEECH AS PART OF EXTREMISM IN THE SLOVAK REPUBLIC: CONCEPTUAL, LEGISLATIVE AND PRACTICAL ISSUES

Sergej Romža, Simona Ferenčíková and Libor Klimek*

ABSTRACT

Background: *Extremism poses a cross-border social problem, lacking a universally accepted definition. In principle, so-called hate crimes are specific types of criminal offences that cut across all types of extremism. We can even talk about their conceptual overlap. A special category of hate crimes is represented by so-called verbal attacks, known as hate speech, which are considered an abuse of freedom of expression from an international perspective as well as in jurisprudence of the European Court on Human Rights. As a result of such a perception, their criminal sanction comes into consideration. In accordance with the principle of subsidiarity of criminal law repression, another method of sanctioning hate crimes and hate speech is also possible, namely by administrative law. The existence of "multiple legal regulations" on extremism as delict caused a dual sanctioning system of extremism. It leads to application problems in legal practice, for example, an unclear understanding of offences from criminal and administrative perspectives or even the weak possibility of investigating such acts by State power. The main objective of the contribution is to point out the dual legal regulation (criminal and administrative) of the sanctioning of extremism, in particular its special category – hate crimes and hate speech.*

Moreover, the objective of the contribution is to assess its unclear issues in legal understanding and to identify specific application problems caused by its dual system (criminal and administrative). Special attention is focused on applicable sanctions in both the criminal law area and administrative law areas. At the end, suggestions on how to solve indicated problems are introduced.

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Methods: *The primary sources used for the elaboration of the contribution are scholarly sources (books, studies, scientific papers, etc.), legislative instruments (national and international legislation) and case law (of Slovak national courts and the European Court of Human Rights and the Court of Justice of the European Union). The authors use traditional methods of legal scientific (jurisprudential) research – general scientific methods and special methods of legal science (jurisprudence).*

The general scientific methods used in the paper are predominantly logical methods, namely, the method of analysis, the method of synthesis, the method of analogy, and the descriptive method. The descriptive method has been used to familiarise the reader with the current legal regulation of extremism. The method of analysis has been used regarding relevant legal provisions and case-laws of courts. The method of synthesis has also been used. The special methods of legal science used here predominantly include methods belonging to a group of interpretative methods, namely, the teleological method, the systematic method and the comparative method. The teleological method has been used to explain the purpose of legislative instruments. The systematic method has been used to classify the relevant applicable law. The comparative method has been used to examine the relationship between legislative perspectives – criminal and administrative.

Results and Conclusions: *Regarding extremism offences committed in the Slovak Republic, in specific cases, the decision making whether the committed offence is criminal or of an administrative nature depends on the attitude of the person who committed it. In the Slovak Republic, legislative amendments are intended to address the area of extremism offences, but they have not been introduced as final. A new legal regulation of the administrative offences of extremism is envisaged in terms of their definition. A new sanctioning policy of extremism administrative offences by juvenile offenders is also expected. Moreover, the application of probation in case of offences committed by juvenile delinquents in the area of extremism is recommended and preferred. It would highlight the importance of restorative justice, including its strengthening. Probation would allow the court, when sanctioning extremism in the criminal law area, to create a so-called tailor-made sanction, which would strengthen the individualisation of the sanction, the educational purpose of the sanction and the achievement of both the purpose of the sanction and the purpose of the Criminal Code, which is to protect society from criminal offences and their perpetrators. Even the Constitutional Court of the Slovak Republic partially examined the modification of the elements of criminal offences of extremism.*

1 INTRODUCTION

Illegal behaviour in the sense of a *criminal offence* is generally considered socially dangerous, harmful and unacceptable behaviour. This also applies to extremist crimes. Extremism is considered as a societal problem – in the Slovak Republic and in other democratic and legal states.

For example, the term *extremism* is used within the European Union (hereinafter the "EU").[1] As regards the territory outside the EU, the term *hate crimes* is used. Hate crimes are specific types of crimes occurring across all types of extremism.[2]

In several documents and recommendations of international organisations of which the Slovak Republic is a member, the term *hate crimes* is commonly used.[3] Currently, there are several definitions of hate crimes, but they share certain common features. A hate crime shall meet the characteristics of a criminal offence according to the legal system of the given State. It shall be a crime in which the perpetrator has chosen the object of the attack (which can be an individual, a group of people or property) based on real or perceived affiliation or relationship to one of the so-called protected characteristics. On the other hand, the term hate crime is not defined in the Slovak Penal Code No. 300/2005 Coll.[4] However, *hate crimes* conceptually overlap with *extremism crimes*.

Hate motives are at the core of the hate crime concept, which was created a few decades ago in the USA. The core of this approach is the emphasis on harming an individual or a group showing a certain difference as a victim of prejudice. Initially, this approach was focused on violent attacks against ethnic and religious minorities (including anti-Semitic attacks), but it was gradually extended to other victimisation factors, such as sexual orientation, disability, age, political orientation, social status, etc. The attacked person is defined by his group characteristic – either (s)he cannot change it (race, age), or it is not fair to demand this change (religious belief). The concept of hate crime is used in different connotations – as a scientific, legal or statistical term. A special category is represented by verbal attacks (so-called hate speech), often carried out through social networks in recent years. Hate crimes can be understood as a certain subset of extremist-motivated criminal activity.[5]

The concept of hate speech is not defined in the national legislation of the Slovak Republic and is not perceived uniformly within the EU. The European Parliament broadly perceives hate speech as a term that is used inclusively according to its everyday meaning, as well as to distinguish the legal category of criminal hate speech or, more specifically, incitement to

1 Peter Polák, 'Extrémizmus a možnosti jeho kontroly podľa legislatívy Európskej Únie' v Miroslava Vráblová (ed), *Trestnoprávne a kriminologické možnosti eliminácie extrémizmu* (Leges 2019) 273.

2 Lenka Letková, *Trestné činy extrémizmu: z pohľadu štatistiky a rozhodovacej praxe od roku 2017* (CH Beck 2023) 16.

3 For example, Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part [2023] OJ L 2862/1; Communication from the European Commission to the European Parliament and the Council: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime COM(2021) 777 final (9 Desember 2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0777> accessed 15 September 2023.

4 Zákon Slovenskej Republiky č 300/2005 Zz z 20 mája 2005 'Trestný Zákon' <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/300/> accessed 15 September 2023.

5 Jakub Holas, 'Extremismus, hate crime, nebo obojí?' v Miroslava Vráblová (ed), *Trestnoprávne a kriminologické možnosti eliminácie extrémizmu* (Leges 2019) 56.

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hatred.[6] Within the Slovak Republic, it is possible to understand hate speech as a certain expression based on prejudices, such as belonging to a race, nation, nationality, skin colour, ethnic group, family origin or religious belief, with the purpose of harming protected interests under the Criminal Code.[7]

In early 2022, the European Commission proposed the inclusion of hate speech and hate crimes in the list of so European crimes by amending Article 83(1) of the Treaty on the Functioning of the European Union. This move aims to address these offences as they pose threats to fundamental democratic pillars.[8] Consequently, hateful speech and crimes committed out of hatred will thus be an area of criminal activity according to 83(1) of the Treaty on the Functioning of the EU.[9] These are part of the so-called European criminal offences, wherein the European Parliament and the Council of the EU, through directives, establish minimum rules regarding the definition of the facts of criminal offences and sanctions.[10]

2 CONCEPTUAL AND LEGAL ISSUES OF EXTREMISM IN THE SLOVAK REPUBLIC: FINDING THE BORDERS OF ALLOWED SPEECH

The basic document defining the priorities of the Slovak Republic in the area of preventing and combating radicalisation and extremism is the document entitled *Concept of Combating Radicalisation and Extremism until 2024*[11] (hereinafter the "Concept"). In the Slovak legal order, the concept of extremism is not legally defined. The definition of extremism is provided by the Concept. According to the Concept, extremism refers to expressions and actions based on the positions of an ideology extremely extreme towards the principles of the democratic rule of law, which directly or in a certain time horizon, through deliberate verbal or physical actions, have a destructive effect on the existing democratic system and its basic attributes in order to promote their own ideological goals. In addition, the concept also lists the characteristic features of extremism, which include an attack on the system of fundamental rights and freedoms, an attempt to limit and suppress the exercise of fundamental rights and freedoms for certain groups of the population defined by their real or perceived belonging to a certain race, nation, nationality, ethnic group or for their real or perceived origin, skin colour, gender, sexual orientation or religion.

6 Letková (n 2) 16.
7 Ivan Smieško, *Internet a trestné činy extrémizmu* (Aleš Čeněk 2017) 48.
8 Letková (n 2) 17.
9 Treaty on the Functioning of the European Union (consolidated version) [2016] OJ C 202/47.
10 See, Communication from the European Commission to the European Parliament and the Council (n 3) ann.
11 Uznesenie vlády Slovenskej Republiky č 22/2021 z 13 januára 2021 'Koncepcia boja proti radikalizácii a extrémizmu do roku 2024' <https://rokovania.gov.sk/RVL/Material/25631/1> accessed 20 November 2023.

The Concept addresses the conceptual and systemic aspects of extremism. Legal issues of extremism are regulated by specific legal norms. With the accession of the Slovak Republic to the EU, the *Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*[12] (hereinafter referred to as the "Framework Decision") required the Slovak Republic to prosecute criminal acts of extremism. The framework decision defines which intentional acts should be considered criminal. As regards the Slovak national legal system, in the case of extremism, it presents two levels of sanctioning for perpetrators of extremism – first, administrative liability under the *Administrative Offenses Act No. 372/1990 Coll.*[13] and, second, criminal liability under the *Criminal Code No. 300/2005 Coll.*[14] This duality results primarily from the subsidiary status of criminal law in relation to other legal branches in the legal order of the Slovak Republic.

Criminal offences of extremism are closely connected to freedom of speech. The European Court of Human Rights (hereinafter the "ECHR"), seated in Strasbourg (France), stated in its case law that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle, it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance, provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued (case of *Erbakan v. Turkey*, judgment of 6 July 2006, § 56).[15] Indeed, it is necessary in democratic societies to punish expressions based on intolerance, inciting and supporting or justifying hatred. Expressive hate speech is not protected through freedom of expression through the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter the "Convention").[16] Hate speech can be understood as public written, verbal (oral), graphic (drawing), audio (recording) and audiovisual (film, video) expression that incites, spreads, promotes, and justifies hatred towards individuals or to groups of persons for their gender, nationality, language, religion, race, ethnicity, skin colour, origin, sexual orientation.[17]

The Internet provides space for exercising freedom of expression. In addition to spreading hate speech, the extremist scene uses the Internet to create and spread misleading information (disinformation), fake news or conspiracy theories. Extremist groups try to

12 Council Framework Decision 2008/913/JHA of 28 November 2008 'On combating Certain forms and Expressions of Racism and Xenophobia by Means of Criminal Law' [2008] OJ L 328/55.

13 Zákon Slovenskej Republiky č 372/1990 Zb z 28 augusta 1990 'O priestupkoch' <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1990/372/> accessed 15 September 2023.

14 Zákon Slovenskej Republiky č 300/2005 Zz (n 4).

15 *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006) <https://hudoc.echr.coe.int/?i=001-76232> accessed 15 September 2023.

16 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention on Human Rights) <https://www.echr.coe.int/european-convention-on-human-rights> accessed 15 September 2023.

17 Tomáš Strémy a Lucia Kurilovská, *Trestný zákon: Komentár,* II: *Zväzok* (Wolters Kluwer 2022)1355.

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influence the public through social networks, leisure sports and interest clubs (for example, martial arts groups and music groups). Hate speech in the Slovak Republic spreads mainly through the Internet, as follows from valid criminal decisions, especially through the Facebook social network.[18]

According to Article 26(2) of the Constitution of the Slovak Republic,[19] everyone has the right to express their opinions in words, in writing, in print, in pictures or in any other way, and the right to freely seek, receive and spread ideas and information regardless of state borders. It should be noted that the forms of freedom of speech are demonstratively listed. Freedom of expression can also be expressed implicitly, for example, by silence, photography, animation, signs, cyphers, symbols, melodies, sounds, the use of sound and visual recordings, the transmission of sound and images by broadcasting, computer network transmission, data carriers, storages. It can also be symbolic expressions such as clothing, hairstyle, tattoos, presentation of signs, numbers, gestures, and facial expressions. Any form of expression of freedom enjoys constitutional protection, but it is not absolute protection.

On the other hand, freedom of speech can be limited if the conditions set by the Constitution are met. According to Article 26(4) of the Constitution, freedom of expression can be limited by law if it concerns measures in a democratic society necessary to protect the rights and freedoms of others, the security of the state, public order, and the protection of public health and morals. The possibility of limiting freedom of expression is inevitable.

Moreover, the Constitution also enshrines other human rights and freedoms that may conflict with the right to freedom of expression, such as the right to privacy and the right to protect a good reputation. Every person's freedom of speech ends where the right of another begins and cannot be abused to interfere with the rights of other persons. The Constitutional Court of the Slovak Republic pointed out that all fundamental rights and freedoms are protected only to the extent and extent that the exercise of one right or freedom does not lead to an unreasonable restriction or even denial of another right or freedom (Finding of the Constitutional Court of the Slovak Republic of 27 February 1997, Ref. No. PL. ÚS 7/96).[20]

Article 10(2) of the Convention sets out the reasons for restricting freedom of expression because its exercise also includes duties and responsibilities. The Convention regulates more grounds for restricting freedom of expression than the Constitution. Neither the Constitution nor the Convention provides the state with unlimited scope for discretion in favour of which State-proclaimed public interest the State restricts freedom of expression. Such discretion of the State is carried out under the supervision of judicial authorities. As

18 See case-law of Slovak national courts. *Slov-Lex: Legislative and Information Portal* <https://www.slov-lex.sk/vseobecne-sudy-sr> accessed 15 September 2023.

19 Ústava Slovenskej Republiky č 460/1992 Zb z 1 septembra 1992 <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/> accessed 15 September 2023.

20 Nález č PL ÚS 7/96 (Ústavného súdu Slovenskej Republiky, 27 februára 1997) <https://www.slov-lex.sk/judikaty/-/spisova-znacka/PL%252E%2B%25C3%259AS%2B7%252F96> accessed 15 September 2023.

noted by the Constitutional Court of the Slovak Republic, this supervision includes whether the specified restriction of freedom of expression was legal, legitimate and necessary. The supervision covers both the area of legislation and its application in practice, primarily through the courts (Finding of the Constitutional Court of the Slovak Republic of 11 November 2015, Ref. No. II. ÚS 184/2015).[21]

3 CRIMINAL LAW ASPECTS OF EXTREMISM

As regards the national law of the Slovak Republic, all *criminal offences of extremism* are defined in the Criminal Code No. 300/2005 Coll.[22] Moreover, key terms *extremist group* and *extremist material* are defined. According to Article 140a of the Criminal Code, the *criminal offences of extremism* are enumerated: founding, supporting and promoting a movement aimed at suppressing fundamental rights and freedoms; expressing sympathy for a movement aimed at suppressing fundamental rights and freedoms; producing extremist material; disseminating of extremist material; possession of extremist material; denying and approving the Holocaust, criminal offences of political regimes and against humanity; defamation of race, nation and belief; inciting of national, racial and ethnic hatred; apartheid and discrimination against a group of persons; and any crime committed for a special motive according to Article(e) of the Criminal Code.

Criminal offences of extremism are generally aimed at protecting society, society's values or fundamental rights and freedoms from extremism. The perpetrator of an extremist criminal offence can be a criminally responsible natural person (a sane person from the age of 14) but also a legal person (for example, an association or business company). All criminal offences of extremism are considered as so-called intentional offences. They differ from each other in the so-called objective aspect of the offence. They represent different types of acts and behaviours aimed at attacking or restricting fundamental rights and freedoms.

Hate crimes are criminal offences committed with a motive of bias. It is this motive that distinguishes hate crimes from other criminal offences. A hate crime is not one specific crime; it can be intimidation, threats, damage to property, bodily harm, murder or another criminal offence.[23] The Slovak Criminal Code does not define a hate crime, but Article(e) regulates so-called special motive. This includes all criminal acts motivated by hatred against a group of persons or an individual because of their real or perceived belonging to a race, nation, nationality, ethnic group, their real or perceived origin, skin colour, gender, sexual orientation, political belief or religion.

21 Nález č II ÚS 184/2015 (Ústavného súdu Slovenskej Republiky, 11 novembra 2015) <https://www.ustavnysud.sk/docDownload/b0440df6-9c09-435d-b3d0-f6c0ca99de69/%C4%8D.%2036%20-%20II.%20%C3%9AS%20184_2015.pdf> accessed 15 September 2023.

22 Zákon Slovenskej Republiky č 300/2005 Zz (n 4).

23 OSCE, *Hate Crime Laws: A Practical Guide* (2nd edn, ODIHR 2022) <https://www.osce.org/odihr/523940> accessed 13 July 2023.

The Framework Decision 2008/913/JHA established the obligation for the Member States of the European Union, including the Slovak Republic, to introduce the liability of legal persons for the acts mentioned therein and to propose sanctions for legal persons. The Slovak Republic fulfilled this obligation by the Act No. 91/2001 Coll. on Criminal Liability of Legal Persons,[24] which came into force on 1 July 2016. A legal person can be prosecuted as a perpetrator of a criminal offence for exhaustively defined criminal offences. To determine the extent of criminalisation of a legal entity, the so-called minimal model was introduced, i. e., limited criminal liability.[25] All crimes of extremism are also included in the catalogue of criminal offences of legal entities.

A legal person can be criminally responsible as well for verbal hate crimes – so-called hate speech. Criminal punishment for extremist crimes comes into consideration, namely expressing sympathy for a movement aimed at suppressing fundamental rights and freedoms; denying and approving the Holocaust, criminal offences of political regimes and against humanity; defamation of race, nation and belief; inciting of national, racial and ethnic hatred.

4 ADMINISTRATIVE LAW ASPECTS OF EXTREMISM

The Administrative Offenses Act included administrative offences of extremism, which came into effect on 1 February 2014. These offences are regulated in Article 47a of the Act as four separate extremism offences.[26]

While the Criminal Code is based on a formal understanding of the criminal offence (an exception to the formal understanding is a so-called material correction), the Administrative Offenses Act is based on the principle of a material understanding of delicts (Finding of the Constitutional Court of the Slovak Republic of 9 January 2019, Ref. No. PL. ÚS 5 /2017-117)[27].

The objective of the legal regulation of administrative offences of extremism was to catch those expressions which, within the framework of the criminal proceedings, would have ended with the rejection or the stopping of the criminal prosecution with reference to a material correction. They mean such illegal acts, the seriousness of which would not be sufficient to fulfil the factual essence of one of the criminal offences of extremism. From a

24 Zákon Slovenskej Republiky č 91/2016 Zz z 13 novembra 2015 'O trestnej zodpovednosti právnických osôb a o zmene a doplnení niektorých zákonov' <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2016/91/> accessed 15 September 2023.

25 Jaroslav Ivor, Peter Polák a Jozef Záhora, *Trestné právo hmotné,* I: *Všeobecná časť* (2 vyd, Wolters Kluwer 2021) 504.

26 Zákon Slovenskej Republiky č 372/1990 Zb (n 13).

27 Nález č PL ÚS 5/2017-117 (Ústavného súdu Slovenskej Republiky, 9 januára 2019) <https://www.ustavnysud.sk/docDownload/f935300e-7cf7-4e51-8750-93a445ce4520/%C4%8D.%201%20-%20PL.%20%C3%9AS%205_2017.pdf > accessed 15 September 2023.

public interest perspective, in suppressing manifestations of extremism, it is important that even these less severe forms of illegal behaviour are sanctioned (in criminal proceedings). In this way, expressions falling under hate crimes or hate speech (but not all) can be affected in administrative law through the administrative body.[28]

On the other hand, it should be noted that the administrative offences of extremism exclude historical and period clothing used at cultural events, modelling competitions, and educational exhibitions, the purpose of which is not to support opinions or ideologies, the content of which is the suppression of basic human rights and freedoms.

5 PRACTICAL PROBLEMS OF PUNISHMENT OF HATE CRIMES AND HATE SPEECH RELATED TO SUBSIDIARITY OF CRIMINAL LAW

Criminal law in the Slovak Republic is built on the *principle of subsidiarity*, which positions criminal law as considered a "last resort" and, at the same time, represents the State's most stringent legal measure. The subsidiarity of criminal repression is also manifested in relation to the application of the so-called material correction, where the assessment and punishment of the act are shifted from criminal law to administrative law, particularly for minor or minor gravity offences for juvenile offenders.

Ideally, if a misdemeanour falls within the category of a criminal offence (i.e. an offence of the first level of gravity), it should have a corresponding equivalent in administrative law as a misdemeanour or other administrative delict. However, the practical problem arises when a misdemeanour as a category of criminal offence under criminal law does not have its equivalent in administrative law as an administrative delict, narrower than a misdemeanour. This problem also concerns criminal offences of extremism. Not every extremist criminal offence has its equivalent at the level of administrative law as an administrative offence of extremism.

On the analysis of the current legal regulation of offences of extremism according to the Criminal Code and administrative offences of extremism according to the Administrative Offenses Act can be observed that offence according to § 47a(1)(a) of the Administrative Offenses Act is of a subsidiary nature to the criminal offence of *expressing of sympathy for a movement aimed at suppressing fundamental rights and freedoms* according to Article 422 of the Criminal Code (classified under hate speech) or to the criminal offence of *disseminating of extremist material* according to Article 422b of the Criminal Code.

Further, as noted by the Regional Court in Trenčín (court in the Slovak Republic), the administrative offence of extremism, according to Article 47a(1)(b) of the Administrative Offenses Act, is subsidiary to the criminal offence of *defamation of race, nation and belief*

28 Peter Potásch a ine, *Zákon o priestupkoch: Veľký komentár* (Eurokódex 2016) 164.

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according to Article 423 of the Criminal Code (Resolution of the Regional Court in Trenčín of 11 October 2018, Ref. No. 2To/21/2018)[29].

Furthermore, the criminal offence of supporting and promoting a movement aimed at suppressing fundamental rights and freedoms stipulated by Article 421 of the Criminal Code does not correspond to any administrative offence of extremism. This criminal offence is a misdemeanour. In the case of misdemeanours, law enforcement authorities and courts shall apply a material correction.

All other cases of extremist expressions, including those that can be classified under hate crimes and hate speech and which are misdemeanours, remain without any sanction from the State in case of material correction. This means that hate crimes and hate speech that do not reach the necessary seriousness for criminal sanctioning, even if they fulfil the formal elements of the criminal offence, cannot be sanctioned under current legislation.

The legislator's intention in introducing the administrative offences of extremism was to intercept those proceedings which, within the framework of the criminal proceedings, would have been terminated by the rejection of the criminal complaint or its termination with reference to a material correction. This intention of the legislator was clearly not fulfilled. Except for two criminal offences of extremism (production of extremist material and apartheid and discrimination against a group of persons), all other criminal offences of extremism are essentially misdemeanours. However, the legal regulation of administrative offences of extremism does not correspond to all criminal offences of extremism, which means excluding their subsidiarity. If subsidiarity is excluded, subsidiary disability at the level of administrative law is also excluded. Any changes to the legal regulation of extremism in the Criminal Code must necessarily be followed by changes to the legal regulation of extremism in the Administrative Offenses Act due to the preservation of subsidiarity and continuous sanctioning.

Currently, a legislative loophole causes impunity for perpetrators whose actions, initially suspected as criminal offences, are later deemed administrative offences by law enforcement authorities or the court. This kind of case involved the unlawful behaviour of a 14-year-old offender initially suspected of committing a criminal offence. However, after further clarification, the law enforcement authorities concluded that in the given case, it was not a criminal offence but an act that could be assessed as an administrative offence. In such cases, the person is not responsible under administrative law.[30]

In the context of prosecuting extremist expressions, including hateful expressions of juvenile offenders, a practical issue arises concerning the application of material corrective measures. We view these measures as crucial due to their potential to leave extremist

29 Prípad č 2To/21/2018 (Krajský súd Trenčín, 11 októbra 2018) <https://obcan.justice.sk/content/public/item/4609f1be-c532-4574-bbc9-17f44facde51> accessed 15 September 2023.

30 Explanatory report on the draft law amending the Criminal Code No. 300/2005 Coll.

expression unaffected. This problem is related to the *age* of the person, which is a condition for the emergence of legal liability.

Under current laws, criminal liability for extremist expression arises upon reaching the age of 14,[31] while administrative legal responsibility for extremist expression arises upon reaching the age of 15.[32] Consequently, a juvenile person over the age of 14 but under the age of 15 can commit an extremist (hate) crime. The law enforcement authorities or the court, after assessing the seriousness, shall apply the so-called material correction. Assessment and punishment of the act shall be moved from the area of criminal law to the area of administrative law.

However, from an administrative law perspective, a person committing the offence is an *ineligible subject of law*. Age is a special ground that leads to the postponement of a case due to lack of age. Consequently, the offender's actions remain entirely unaffected. Such a situation does not produce any relevant effects in prevention but also in repression. Harmonisation of the age of criminal perspective and administrative perspective regarding responsibility could "remove" the current special kind of "criminal immunity for offenders aged 14-15".

In the conditions of the Slovak Republic, the proposed legislative amendments concerning the area of administrative offences and conditions of its liability have yet to be successful so far. As regards administrative offences, a new legal regulation of extremism offences is expected and a proposal to lower the age threshold for administrative law liability. We consider it necessary to lower the age of administrative law liability for offences of extremism to the level of age as a condition of criminal law liability. This alignment would ensure the continuity of prosecution of extremist expressions, including acts falling under hate crimes and hate speech.

If the so-called material correction were applied, the criminal law sanctioning would be transferred to administrative law. This adjustment would resolve age-related issues in proceedings and prevent postponements. Extremist expressions that, from a criminal law perspective, would not be serious enough to sanction would be sanctioned, aligning with the original intent of introducing administrative regulation against extremism offences. This approach would make subsidiary sanctioning possible and maintain the efficiency of proceedings without disruption.

According to the registered statistics of extremist criminal offences committed in the Slovak Republic, it follows that young people have a high share of committing such offences, with more than half of the perpetrators falling into the category of juveniles. Likewise, research shows that the majority of extremists, members and supporters of extremist movements are

31 Zákon Slovenskej Republiky č 300/2005 Zz (n 4) art 22(1).

32 Zákon Slovenskej Republiky č 372/1990 Zb (n 13) art 5(1).

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young people often located on the margins of society. Factors such as loss of employment and family background may contribute to their alienation.

The most at-risk group is the youth, who, due to their age, tend to seek a radical solution to society's mistakes and shortcomings; young people are comfortable with a black-and-white vision of the world, especially the concentration of the problem in simple slogans or the search for an enemy who is responsible for everything.[33]

In general, the material correction can also be applied to criminal offences of extremism of legal entities. In practice, a problem arises with the legal sanction of a legal entity. Administrative offences are a category of administrative delicts that can only be committed by a natural person. Indeed, from a legal perspective, extremism administrative offences can only be committed by a natural person.

Legal entities can be sanctioned under administrative law but for other categories of administrative offences, such as so-called administrative offences of legal entities or administrative offences, regardless of culpability. Another problem arises when a legal entity commits an extremist criminal offence (hateful and verbal). In such cases, law enforcement authorities or the court, after assessing the seriousness, may opt to apply a so-called material correction, shifting the assessment and sanctioning of the act from criminal law to the area of administrative law. However, from an administrative law perspective, the legal entity would be considered an ineligible subject of law, potentially leading to the postponement of the case. Such a situation does not produce any relevant effects in prevention as well as in repression.

In legal practice occur odd situations. For example, according to the Decision of the Regional Court in Trenčín of 11 October 2018, Ref. No. 2To/21/2018,[34] the legal practice attempts to refer the case under discussion to administrative proceedings if it is not possible to prove the intentional form of culpability of the act within the framework of criminal proceedings. In terms of culpability, the offence is based on negligence. Illegal conduct would be finally discussed and sanctioned, but only at the level of subsidiary – less serious – as regards the severity of the sanction and its consequences.

6 SANCTIONING OF HATE CRIMES AND HATE SPEECH

From the Slovak criminal law perspective, the sanction shall be proportional to the seriousness of the criminal offence. It shall be individualised and differentiated with regard to the nature of the committed offence.[35] The law obliges the court to take into account the

33 Miroslava Vráblová, 'Sankcionovanie páchateľov extrémistických trestných činov' v Miroslava Vráblová (ed), *Trestnoprávne a kriminologické možnosti eliminácie extrémizmu* (Leges 2019) 370.

34 Prípad č 2To/21/2018 (n 29).

35 Ingrid Mencerová a ine, *Trestné právo hmotné: Všeobecná časť* (2 vyd, Heuréka 2015) 292.

individual characteristics of each individual criminal offence. This is an expression of the principle of judicial individualisation of sanctioning.[36]

The possibility of sanctioning verbal expressions by criminal law is in line with the case law of the European Court of Human Rights. In certain circumstances, this Court admits criminal responsibility for abuse of freedom of expression. A criminal sanction is considered only if the State does not have the possibility to apply a milder sanction. According to the European Court of Human Rights, States must be restrained when using criminal sanctions in these cases; they only have a wider scope to interfere with freedom of expression in cases of incitement to violence.[37]

An important requirement is the adequacy of the sanction. The most severe sanction is considered to be a criminal sanction, the consequence of which is the greatest interference with human rights. A criminal sanction should be considered as a subsidiary means in the sense of the *ultima ratio* principle. As pointed out by the European Court of Human Rights, the assessment of the proportionality of the interference with the protected interests depends on whether the State authorities could have resorted to means other than criminal sanctions, such as civil and disciplinary remedies (Judgment of the European Court of Human Rights of 23 September 1998 – *Lehideux and Isormi v. France*, Application No. 24662/94)[38].

If the State authorities have concluded that no other means suffice, instead of criminal sanctions, non-criminal sanctions should be applied, particularly when resorting to a prison sentence.[39] Imprisonment is a universal sanction in the Slovak Republic; it can be imposed for all crimes. Therefore, a prison sentence can be imposed for an extremist criminal offence (verbal and hateful). However, imprisonment is a so-called last resort in sanctioning juvenile offenders. For juvenile offenders, the so-called unconditional prison sentence is the last option to sanction a juvenile offender. Other sanctions are preferred, drawing from administrative legislation, where financial penalties can be logically considered. According to the Criminal Code, a financial penalty can be imposed on a juvenile as an alternative punishment instead of imprisonment, contingent upon their employment or financial circumstances supporting such penalties.

36 Stanislav Mihálik a Filip Vincent, 'Zásady ukladania trestov a ich vplyv na aplikačnú' v Lukáš Michaľov, Sergej Romža a Simona Ferenčíková (eds) *Privatizácia výkonu trestu odňatia slobody, sci-fi alebo jediná možnosť?: IV Košické dni trestného práva* (Univerzita Pavla Jozefa Šafárika 2020) 307.

37 Peter Hanák, 'Kriminalizácia žurnalistiky: Trestne stíhaní novinári na Slovensku v európskej perspective' (2016) 5(2) Mediální studia 250.

38 *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998) <https://hudoc.echr.coe.int/fre?i=002-6795> accessed 14 July 2023.

39 Juraj Sopoliga, 'Trestnoprávna zodpovednosť za šírenie nepravdivých informácií' *Právne listy* (Bratislava, 15 December 2021) <http://www.pravnelisty.sk/clanky/a1036-trestnopravna-zodpovednost-za-sirenie-nepravdivych-informacii> accessed 14 July 2023.

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In the context of registered sanctions imposed for extremist crimes in Slovakia, prison sentences with conditional suspension dominate, along with other punishments such as confiscation of property. Non-conditional imprisonment, the most severe type of punishment, is rarely imposed by the court in exceptional cases for committed criminal offences of extremism. *Letková* analysed 152 decisions of the Specialised Criminal Court, which became final in the period 2017-2022. Her analysis shows that plea agreements are common (79%, i.e. 115 cases), with non-conditional imprisonment imposed in only 9 cases. The most frequently imposed sentences were a suspended prison sentence of 2 years, a suspended sentence of 6 months and a suspended prison sentence of 3 years. As far as the alternative sanctions are concerned, a financial penalty was most often imposed. The penalty of banning participation in public events was imposed less often. In a negligible number of cases, protective treatment (anti-alcohol and anti-drug addiction) was also imposed in addition to the punishment.[40]

Manifestations of extremism, according to the Administrative Offenses Act, are sanctioned by a fine – up to EUR 1000. When such a fine is imposed, the decision of the administrative body also includes a request to eliminate the illegal situation – within 60 days. The fine can be imposed repeatedly until the illegal situation is eliminated. To compare, since 2017, more than 70% of financial penalties imposed for criminal offences of extremism were lower than EUR 1000. The criminal sanction, by its intensity of intervention in the offender's property sphere, actually corresponds to the intensity of the administrative sanction's intervention in the offender's property sphere. There is no difference in the intensity of the penalty. Paradoxically, the opposite situation also occurs when the administrative sanction is more severe than the criminal sanction.

For example, an act displaying characteristics of extremism, especially if aggressive in nature and linked to event participation, may also be considered an offence of *spectator violence*. The penalty for an offence is a fine from EUR 300 to 6000. If it is a risky event, the sanction for the offence is a fine from EUR 500 to 10000 and a restrictive measure – a ban on participation in the public event for up to 5 years.[41]

The sanctioning of legal persons for hate speech is questionable. The court can only impose such a penalty and in such an amount as determined by law. The Act No. 91/2016 Coll. on Criminal Liability of Legal Persons, logically, does not include imprisonment as a possible sanction for legal persons. Therefore, it is necessary to look for another alternative to punishment.

Drawing inspiration from administrative law legislation, financial penalties can be applied to legal persons for hate speech as an alternative to imprisonment. The conditions for imposing a monetary penalty are the same for natural persons and legal persons; the only

40 Letková (n 2) 119-25.

41 Zákon Slovenskej Republiky č 372/1990 Zb (n 13) art 47a.

exception is the amount of the penalt, which is significantly higher for legal persons – from EUR 1500 to EUR 1 600 000.

A financial penalty shall not be an intensive intervention in fundamental rights and freedoms but an intensive intervention in the property sphere of a legal entity. Thus, the principle of restorative justice can be fully manifested when punishing legal entities for hate speech. However, it is also possible to consider the sanction of prohibition of activity if the legal conditions for imposing this type of sanction are met. It should be noted, as pointed out by *Mulák,* that during the last two decades, it has been possible to register continuous debates about relations of retributive and restorative justice, whose central issue can be understood as the nature of a conflict arising as a consequence of commitment of a criminal offence.[42] In each case, public criminal proceedings should be guaranteed.[43]

7 CONCLUSIONS AND RECOMMENDATIONS

According to the current Slovak national legislation and the application practice of law enforcement authorities, courts and administrative authorities, it is unclear which types of speech – content or form – shall be sanctioned. In specific cases, the decision-making on whether the committed offence (act) is of a criminal nature or of an administrative nature, in the case of extremism offences, depends on the attitude of the person who committed it. Such a situation cannot be considered consistent with the principle of legal certainty.[44] Since the majority of legally binding decisions, including sanctions imposed, in matters of extremism end with an agreement on guilt and punishment (criminal law measure), the reasoning of the court cannot be found as the justification of the decision.

In the Slovak Republic, legislative amendments are intended to address the area of extremism offences. Still, they have yet to be introduced as final at this time of writing. A new legal regulation of the administrative offences of extremism is envisaged in terms of their definition. A new sanctioning policy of extremism administrative offences by juvenile offenders is also expected. In line with the case law of the European Court of Human Rights, the use of the institution of probation seems to be a very effective approach.

The application of probation (probation programs) for offences committed by juvenile delinquents in the area of extremism is recommended and preferred. Probation would highlight the importance of restorative justice, including its strengthening. It would allow

42 Jiří Mulák, 'Possibilities of Introduction of Subsidiary Prosecution in Czech Criminal Proceedings' (2018) 8(3) The Lawyer Quarterly 307.

43 Jiří Mulák, 'The Principle of the Public of Criminal Proceedings as an Attribute of the Right to a Fair Trial' (2018) 11(3) The Lawyer Quarterly 518.

44 Matúš Kováč, Stanislav Mihálik a Filip Vincent, 'Niektoré aspekty protiextrémistickej novely a jej dosahy na aplikačnú prax' v Miroslava Vráblová (ed), *Trestnoprávne a kriminologické možnosti eliminácie extrémizmu* (Leges 2019) 170-1.

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the court, when sanctioning extremism in the criminal law area, to create a so-called tailor-made sanction, which would strengthen the individualisation of the sanction, the educational purpose of the sanction and the achievement of both the purpose of the sanction and the purpose of the Criminal Code, which is to protect society from criminal offences and their perpetrators. In a broader context, probation can prevent criminal activity and thus reduce recidivism, albeit not entirely but at some level.

Even the Constitutional Court of the Slovak Republic partially examined the modification of the elements of criminal offences of extremism. It stated that it perceives a positive effort by the legislator to regulate hate speech, but the legislator should, in the future, put more emphasis on conceptual work in amending the Criminal Code and should reflect more restraint in criminal law repression.

According to the Constitutional Court, hate speech in the future could be regulated through private lawsuits for the protection of personality or linking the relevant facts of criminal offences to the criterion of violence or violation of public order (Finding of the Constitutional Court of the Slovak Republic of 9 January 2019, Ref. No. PL. ÚS 5/2017-117).[45] We consider this approach as well presented.

At the same time, it is necessary to add that the conceptual work on legislative amendments of the Criminal Code should also be focused on guaranteeing continuity with the administrative law approach, which also represents regulation outside of the criminal law area. All cases of extremist expressions, including those that can be classified under hate crimes and hate speech, would be legally affected by the State in the case of a material correction application. Even hate crimes and hate speech that do not reach the necessary seriousness for criminal sanctioning, even if they fulfil the formal elements of a criminal offence, would be sanctioned outside the area of criminal law.

In our opinion, the existing applicable sanctions, both for individuals and for legal persons, are sufficient and do not necessitate the introduction of new types of sanctions.

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45 Nález č PL ÚS 5/2017-117 (n 27).

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AUTHORS INFORMATION

Sergej Romža
PhD (Law), Professor and Head at the Department of Criminal Law, Faculty of Law, Pavol Jozef Šafárik University in Košice, Slovakia
sergej.romza@upjs.sk
https://orcid.org/0000-0002-2432-5681
Co-author, responsible for writing, conceptualization, resources, and review.

Simona Ferenčíková
PhD (Law), Vice-Dean, Associate Professor at the Department of Criminal Law, Faculty of Law, Pavol Jozef Šafárik University in Košice, Slovakia
simona.ferencikova@upjs.sk
https://orcid.org/0000-0002-7897-0168
Co-author, responsible for writing, conceptualization, resources, review, and project administration.

Libor Klimek*
PhD (Law), Associate Professor at the Department of Criminal Law, Faculty of Law, Matej Bel University in Banská Bystrica, Slovakia
libor.klimek@umb.sk
https://orcid.org/0000-0003-3826-475X
Corresponding author, responsible conceptualization, methodology, formal analysis and editing.

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RIGHTS AND PERMISSIONS

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Research Article

NAVIGATING LEGAL FRONTIERS: ADDRESSING CHALLENGES IN REGULATING THE DIGITAL ECONOMY

Liridon Dalipi and Agim Zuzaku*

ABSTRACT

Background: *The integration of digital technologies into various facets of society has given rise to the digital economy, transforming the economic landscape. Western Balkan nations face challenges from this digital transformation, necessitating effective regulatory frameworks. Recognising and addressing regulatory gaps is crucial for fostering a secure and innovative digital environment. This study examines regulatory challenges in the Western Balkans' digital economy, focusing on public-private partnerships (PPPs) in cybersecurity. The research question revolves around identifying gaps in legal frameworks, understanding PPP dynamics in countering cyber threats, and assessing the potential impact of the EU's Digital Market Act and Digital Services Act on the Western Balkan regulatory sphere.*

Methods: *The research employs a qualitative approach, analysing the legal and policy frameworks of six Western Balkan countries. Data is gathered through an in-depth examination of cybersecurity laws, strategies, and action plans, with a specific emphasis on provisions related to PPPs. Comparative analysis is utilised to discern patterns and variations across the countries while also considering the potential impact of the Digital Market Act and Digital Services Act.*

Results and conclusions: *The analysis reveals a common challenge – the lack of specific regulations for the digital economy, creating a legal vacuum. Varying PPP integration levels exist across the Western Balkans. Significant findings include ethical considerations, challenges related to data privacy, and the need for robust competition regulations. Examination of the Digital Market Act and Digital Services Act highlights potential harmonisation opportunities and challenges. In conclusion, the research underscores the urgency for comprehensive regulatory reforms in the Western Balkans to address the challenges of the digital economy. The study advocates for developing specific laws governing digital platforms, strengthening PPPs to enhance cybersecurity, and incorporating ethical considerations in legal frameworks. The findings offer valuable insights for policymakers and stakeholders, emphasising the necessity of adaptive and forward-looking regulatory approaches in the ever-evolving digital landscape, considering the potential impact of EU initiatives such as the Digital Market Act and Digital Services Act.*

1 INTRODUCTION

In this era of rapid technological change, digital platforms have gained a key role in the economic and social structure, bringing about major developments in citizens' awareness of electronic services, which their governments now provide. The Western Balkans and the countries of the European Union are subject to this great transition towards the use of digital technology to improve the provision of services and to facilitate citizens' access to them.

In recent years, the governments of countries of the Western Balkans and the European Union have shown an increased commitment to the development of digital infrastructure and the broader use of online services. However, their use has not yet reached the desired levels, although there is an increase compared to other years.

To address this issue and understand the potential and challenges of using online services in these countries, this research will focus on the analysis of the legal basis, technological challenges, and impact of online services on the economy of these regions. By analysing legal instruments such as the Digital Markets Act (DMA), we will examine efforts to regulate digital platforms and improve citizens' use of online services.

The use of online services in the countries of the Western Balkans by a large part of citizens started with the spread of the Covid-19 virus. Prior to this, online services were primarily used by businesses for banking, tax services, e-commerce and other online services.[1] However, the state shutdown in mid-2020 accelerated the shift towards online platforms, leading to a significant increase in the adoption of digital services across various sectors.

The heightened adoption of ICT technology within the judicial community was encouraging. The first online trial was successfully conducted,[2] accompanied by webinars, consultations, and meetings held in a virtual environment. With continued support, these advancements hold the potential for positive, long-term impacts.[3]

With the focus on the use of online services, the countries of the Western Balkans have experienced a rapid transition towards a more digitised economy and society.[4] This has

1 Xiao Xiao and other, 'ICT Innovation in Emerging Economies: A Review of the Existing Literature and a Framework for Future Research' (2013) 28(4) Journal of Information Technology 264, doi:10.1057/jit.2013.20.

2 The first online trial in North Macedonia was held in the Basic Court Kavadarci, which found a way to hold trials with all involved participants without their joint physical presence in the court premises. See: Center for Legal Research and Analysis. *Challenges of the Judiciary During a State of Emergency* (CLRA 2020) 26.

3 Arbëresha Loxha Stublla and Njomza Arifi, 'The Western Balkans and the Covid-19: Effects on good Governance Rule of Law and Civil Society' (*Group for Legal and Political Studies*, 21 June 2020) <https://www.legalpoliticalstudies.org/the-western-balkans-and-covid-19-effects-on-good-governance-rule-of-law-and-civil-society/> accessed 24 January 2024.

4 Berat Rukiqi, *Covid-19 dhe Ndikimi në Ekonomi: Mundësitë për rimëkëmbje dhe transformim ekonomik* (Oda Ekonomike e Kosovës, Fondacioni Konrad Adenauer 2020).

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brought fundamental changes in how citizens follow services and businesses operate. This transition has brought new challenges, including the need for an appropriate legal and regulatory framework to support the development and use of online services in these countries.

The emergence of the COVID-19 pandemic in early 2020 triggered a significant shift in various aspects of daily life. With the need to prioritise public health and safety, traditional activities came to a halt, prompting a surge in the adoption of digital alternatives. In response to the challenges posed by the pandemic, numerous webinars were conducted, suggesting innovative approaches to advisory services.

The education sector swiftly adapted to the new normal, with schools and universities transitioning to online teaching methodologies facilitated by information technology. Similarly, remote work became a prevalent practice in professions where it was feasible. This paradigm shift was not only limited to the educational and professional realms but also extended to consulting services. Many organisations, recognising the potential of information technology applications, advocated for the delivery of their services through digital platforms.[5]

Amid the disruptions caused by the pandemic, the Information and Communication Technology (ICT) infrastructure played a pivotal role in sustaining economic activities. E-commerce experienced notable growth, reflecting the increased reliance of citizens and businesses on the Internet. The adaptability of individuals and enterprises to leverage ICT further underscored its significance during these challenging times.

1.1. The methodology

This study's methodology was developed through a qualitative approach. It used an interpretive framework to deeply understand the legal and political context of cyber security and the digital economy in Western Balkan countries, and compare them with EU countries. This methodology has followed several main steps in defining and analysing the key aspects of the study.

Various legal documents, policies, and strategies are reviewed to understand the interaction between the public and private sectors in cyber security and the digital economy. Starting with a detailed description of the legal, political and economic context in which the countries of the Western Balkans operate, we followed the identification of the main themes and categories of responsibilities.

5 Agim Zuzaku, Ilir Murtezaj and Valon Grabovci, 'The Role of ict During the Covid 19 Pandemic in the Advisory Service in Kosovo' in L Parijkova and Z Gancheva (eds), *Knowledge Society and 21st Century Humanism: 18th International Scientific Conference, Sofia, 1-2 November 2020* (Za Bukvite – O Pismeneh 2020) 816.

Extensive research has been used to deepen understanding and gather the views of key actors in the field. The use of this method has improved the consistency and depth of the analysis, enabling a deeper understanding of how the public-private partnership works in the development of policies and legal measures related to the challenges of cyber security and the development of the digital economy in the region.

1.2. Defining the problem

In a period of accelerated technological development, the digital economy has transformed economic paradigms, bringing new challenges to regulators and legislators. In this context, one of the main problems is the lack of an adequate and appropriate legal framework to efficiently address the various aspects of the digital economy.

Despite the rapid growth of digital markets and their substantial impact on the global economy, most current laws are still designed for a traditional economy and cannot cope with the specific challenges of this digital revolution. The appearance of the platforms and model of the collaborative economy has highlighted the lack of a dedicated legal basis to address the complex and specific challenges of this sector.

The problem is further highlighted by the insufficient response at the international level, despite some legal efforts like the Digital Markets Act. Thus, this lack of a global legal framework causes legal uncertainty and deficiencies in the protection of consumer rights, privacy and data security in the context of this new form of commerce.

In this context, addressing the problem focuses on the need to develop an appropriate legal framework capable of effectively addressing the challenges posed by the expansion of the digital economy while ensuring adequate protection for participants in this transformed and technologically advanced market.

2 LEGAL REGULATION AND THE DIGITAL ECONOMY

The literature review identified a link between legal regulation and the development of the digital economy.

Nowadays, the rapid development of information technology has announced the arrival of a new concept that is creating a new development paradigm for countries – the concept of "Digital Economy". This trend is an inevitable force shaping the trajectory of economic activities with the evolving technological landscape.

However, due to the rapid advancement of technological platforms, the massive widespread use of the Internet, and constant innovations, there is still no precise and universal

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definition of the digital economy. Various technological applications have caused major changes in the way companies, institutions and markets operate and function.[6]

In this context, efforts to deeply understand what is involved in measuring the digital economy are still in their infancy. Some efforts have included using online platforms, e-commerce, digital services, and automation of business processes. However, the scale and variability of these activities are such that they do not allow a clear and appropriate definition of the concept.

One of the main challenges is that the digital economy includes many different and diversified areas, causing difficulties in drawing up a general definition. In addition, the rapid changes and innovations in this field make it difficult to define boundaries and common terminology.

Therefore, continuing discussions and research to determine what the digital economy means in practice is necessary to understand the potential and challenges of this paradigm shift in the economic world.

The dangers of the digital economy have brought about political and policy controversy over the digital economy and e-commerce, examining its limits and how best to regulate it. Policy discussions on this topic, however, do not take into account the true distribution of digital commerce, which includes hardware, software, networks, platforms, applications and data as key elements, pushing the boundaries of e-commerce policies towards trade-in utility, services and intellectual property protection.[7]

The concept of a fully digital enterprise, blending people, technology, and organisational agility, stands as a formidable force in the contemporary economic and social landscape. However, embarking on the journey toward a digital future is a complex undertaking, fraught with challenges and considerations.

Organisations grapple with the fundamental question of whether they possess the capacity to confront the multifaceted challenges posed by digitalisation. This encompasses the ability to validate, assimilate, and effectively commercialise the wealth of knowledge generated by the digital landscape.[8]

6 Nguyen Thi Thanh Van and Nguyen Thien Duy, 'Digital Economy: Overview of Definition and Measurement' (2020 5th International Conference on Green Technology and Sustainable Development (GTSD), Ho Chi Minh City, Vietnam, 27-28 November 2020) 593, doi:10.1109/GTSD50082.2020.9303166.

7 Padmashree Gehl Sampath, 'Regulating the Digital Economy: Are We Heading for a Win-Win or a Lose Lose?' (*SSRN*, 18 December 2018) <https://ssrn.com/abstract=3107688> accessed 24 January 2024.

8 Agim Zuzaku and Blerton Abazi, 'Digital Transformation in the Western Balkans as an Opportunity for Managing Innovation in Small and Medium Businesses - Challenges and Opportunities' (2022) 55(39) IFAC-PapersOnLine 60, doi:10.1016/j.ifacol.2022.12.011.

The intricacies of IT work are formidable, especially for organisations lacking independent IT systems that can compete effectively in a dynamic digital environment. The sophistication, dynamism, and complexity of IT work pose hurdles for unprepared entities.

Many organisations encounter a trifecta of challenges – a dearth of resources, a shortage of talent, and competing priorities. The scarcity of resources, coupled with the distraction from other pressing matters, hinders their ability to concentrate on digital transformation. This often leads to a hopeful yet passive expectation that digital evolution will occur spontaneously with a stroke of luck.

The reality unfolds starkly – either companies and their inter-organisational networks proactively engage with digital transformation or risk being weakened by their own delays. The idea that digital evolution will materialise without conscious efforts proves to be a fallacy.

The digital future demands a strategic and concerted effort from organisations. While challenges loom large, the imperative for digital transformation necessitates a departure from passive anticipation to proactive engagement. Embracing the complexities of digitalisation, overcoming resource constraints, and fostering a commitment to innovation are essential steps for organisations aspiring to thrive in the digital era.

3 THE DIGITAL MARKETS ACT

The primary legal texts for the Digital Markets Act (DMA) are Regulation (EU) 2022/1925 of the European Parliament and the Council, dated 14 September 2022, regarding contestable and fair markets in the digital sector and the Procedural Implementing Regulation.[9]

The Digital Markets Act (DMA) serves as a crucial supplement to existing competition laws, aiming to curtail the power wielded by major digital entities. This chapter delves into the DMA's key provisions, shedding light on its obligations for designated gatekeepers and the consequences of non-compliance.

One of the central tenets of the DMA is the imposition of specific obligations on gatekeeper platforms. These mandates are designed to foster fair competition and create a level playing field within the digital ecosystem. For instance, gatekeepers are required to allow business users on their platforms to promote their offerings and engage in transactions with customers outside the confines of the gatekeeper's platform. Moreover, the DMA prohibits gatekeepers from displaying preferential treatment to their own services and products over those of third parties on their platforms, ensuring a more impartial ranking.

9 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 'On Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828' (Digital Markets Act) (Text with EEA relevance) [2022] OB L 265/1.

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To ensure adherence to the DMA, robust enforcement mechanisms are in place. Non-compliance with the established obligations can result in severe consequences for the implicated digital companies. Fines, constituting up to 10% of the company's total worldwide annual turnover (or up to 20% for repeated infringements), serve as a potent deterrent. Additionally, periodic penalty payments of up to 5% of the average daily turnover may be imposed. In cases of systematic infringements identified after market investigations, the DMA empowers authorities to institute additional remedial measures.[10]

The DMA officially came into force on 1 November 2022, following its publication in the Official Journal on 12 October 2022. Its practical application commenced on 2 May 2023. From this date, potential gatekeepers must notify the Commission within a two-month window if their platform surpasses specified thresholds. Gatekeepers are broadly defined as entities providing core platform services, meeting criteria such as having at least 45 million monthly active end users, 10,000 yearly active business users in the Union, or a minimum annual turnover of €7.5 billion over the last three financial years.[11] Following notification, the Commission assesses and designates the platform as a gatekeeper. Once designated, gatekeepers have a six-month grace period to align with the obligations outlined in the DMA.[12]

The DMA is an important regulatory tool for enforcing control over the power of large digital companies. By defining and imposing criteria and restrictions on gatekeepers, this act aims to ensure a fairer, more transparent and more competitive environment in digital markets. It is important to note that the DMA does not change the competition rules in the European Union; rather, it serves as an addition and improvement to address the specific challenges of digital markets.[13]

4 THE DIGITAL SERVICES ACT

The Digital Services Act (DSA), spearheading a comprehensive regulatory overhaul, ushers in a new era of digital governance within the European Union. This chapter delves into the DSA's intricacies, focusing on the regulatory cornerstone – Regulation (EU) 2022/2065 of the European Parliament and the Council, dated 19 October 2022.[14]

10 Anna Pingen and Thomas Wahl, 'New EU Rules for Online Platforms' (2022) 4 EUCRIM 228.
11 ibid.
12 Regulation (EU) 2022/1925 (n 9).
13 'About the Digital Markets Act' (*European Commission: Digital Markets Act (DMA)*, 2022) <https://digital-markets-act.ec.europa.eu/about-dma_en> accessed 24 January 2024.
14 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 'On a Single Market for Digital Services and Amending Directive 2000/31/EC' (Digital Services Act) (Text with EEA relevance) [2022] OJ L 277/1.

Born out of the necessity to adapt to the dynamic digital landscape, the DSA seeks to complement and modernise the existing E-Commerce Directive, a document now two decades old. The DSA introduces a set of uniform and horizontal regulations, primarily centred around due diligence obligations and conditional exemptions from liability for online intermediary services.

The DSA casts a wide net, encompassing all online intermediaries offering services in the single market, irrespective of their location within or outside the EU. Tailoring obligations to the size and type of intermediary services, the DSA classifies large online platforms as those with a significant societal and economic impact, meeting specific user numbers and annual turnover criteria.

At the heart of the DSA lies a robust framework for countering illegal content online. The Digital Services Act (DSA) complements existing consumer protection laws by mandating that service providers inform affected users or recipients about the reasons behind removing user-generated content. This requirement also extends to cases involving suspending or terminating services provided to the respective user's account. The aim is to enhance transparency and accountability in digital service provision, ensuring that users are informed about actions taken concerning their content and accounts. Specific due diligence obligations are placed on hosting services, including online platforms such as social networks, content-sharing platforms, app stores, and online marketplaces.

The DSA empowers users by facilitating the reporting of illegal content and challenging platforms' content moderation decisions. Transparency measures are introduced, mandating online platforms to disclose information on algorithms, terms and conditions, and advertising systems. Specific obligations target very large platforms, necessitating risk-based actions and independent audits of their risk management systems.

Effective enforcement mechanisms form a cornerstone of the DSA. It introduces fines, periodic penalty payments, and remedial measures for non-compliance. The oversight structure involves EU countries appointing a Digital Services Coordinator, supported by the European Board for Digital Services. Very large platforms fall under the direct supervision of the Commission, equipped with enforcement powers akin to anti-trust proceedings.[15]

Enacted on 19 October 2022, the DSA outlines a phased implementation approach. Very large online platforms, directly supervised by the Commission, are given a three-month window to publish user numbers. Following designation, these platforms have four months to comply with the DSA. From 17 February 2024, smaller platforms fall under DSA rules, with Member States empowered to enforce regulations.

15 'The Digital Services Act package' (*European Commission: Shaping Europe's digital future*, 2022) <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 24 January 2024.

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The DSA emerges not just as a regulatory document but as a catalyst for transforming the digital landscape. Striking a balance between user empowerment, platform accountability, and regulatory oversight, the DSA sets a precedent for safer, more predictable, and trustworthy online interactions within the EU.[16]

5 NAVIGATING DIGITAL PLATFORMS IN THE WESTERN BALKANS

The European Union's neighbouring countries, particularly those in the Western Balkan region, undergo profound social, economic, and technological changes. These shifts have not only intensified international competition but have also fostered increased flexibility in the labour market.

Central to these transformations is the pivotal role played by technological advancements and digitalisation, which have led to the rise of novel employment structures such as remote and freelance work facilitated by international labour platforms. The prevalence of digital labour platforms in the region has become particularly noteworthy, serving as a dynamic mechanism for aligning labour and skill demand with their respective supplies.[17]

Platform work, defined as labour provided through or mediated by online platforms across diverse sectors, has gained prominence in all six Western Balkan countries. This work involves breaking down jobs into tasks, often contracted out for on-demand services, with at least three primary stakeholders: online platforms, workers, and clients. The matching process is digitally mediated, and the administration may involve varying degrees of algorithmic management.[18]

Two main categories of platform work are observed in the Western Balkans:

- **Digital Labour Platforms for Remote Services** - Involving the remote delivery of electronically transmittable services, dominated by international platforms such as Upwork, Freelancer, Guru, Fiverr, and People per Hour.[19]
- **Digital Labour Platforms for On-location Services** - Encompassing the physical delivery of services with digital matching and administration, particularly represented by local platforms offering ride-hailing and delivery services.[20]

Local labour markets in the region, often marked by underperformance and high entry barriers, especially for the youth demographic, have influenced individuals to explore new

16 Pingen and Wahl (n 10) 228-9.
17 European Training Foundation, *Embracing the Digital Age : The future of work in the Western Balkans: New forms of employment and platform work* (ETF 2022).
18 ibid 7.
19 ibid 8-9.
20 ibid 10-1.

forms of employment perceived as alternative job opportunities. The limited options in traditional labour markets have increased participation in the digital economy.[21]

Moreover, the economic repercussions of the full-scale Russian invasion of Ukraine have further shaped the landscape, prompting heightened engagement in new employment forms and platform work. In this context, the European Commission's proposed Directive on improving working conditions in platform work, currently under negotiation, is poised to significantly influence regulatory frameworks in the Western Balkans. This is particularly relevant in the context of EU accession and alignment with the International Labour Organization's principles of decent work.[22]

6 DIGITAL ECONOMY GROWTH IN THE WESTERN BALKANS

In contemplating the surge of new forms of work in the digital realm, understanding the factors propelling the expansion of the digital economy becomes paramount. Several crucial elements contribute to this phenomenon, with a country's broadband infrastructure, internet penetration, and digital competencies emerging as pivotal facilitators.

A nation's broadband infrastructure forms the backbone of digital progress. Robust and widespread broadband networks lay the foundation for leveraging innovative business models, contributing to enhanced competitiveness and employment growth. Access to high-speed internet is integral to seizing opportunities presented by the evolving digital landscape.

The extent of internet penetration within a country is a critical determinant of its readiness for digital transformation. Countries with higher levels of internet access are better positioned to harness the benefits of emerging digital trends.

Between 2012 and 2022, the Western Balkan countries, notably Serbia, closely followed with a remarkable 56.5% rise. Montenegro and North Macedonia have also displayed notable growth, with a 39.1% and 36.6% increase in daily internet usage, respectively.[23]

In 2022, Kosovo stood out with the highest proportion of individuals aged 16-74 years using the Internet daily, reaching an impressive 92.9%. Bosnia and Herzegovina and Albania maintained acceptable figures with 71.4% and 72.8% daily usage in 2021, respectively.

21 ibid 4-5.

22 Transforming our World: the 2030 Agenda for Sustainable Development (adopted 25 September 2015 UNGA Res 70/1) Goal 8 <https://sdgs.un.org/2030agenda> accessed 24 January 2024.

23 Eurostat, 'Enlargement countries – information and communication technology statistics' (*Eurostat*, May 2023) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Enlargement_countries_-_information_and_communication_technology_statistics> accessed 24 January 2024.

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Despite these positive trends, there is a concern regarding the decline in weekly internet usage (but not daily) to below 10% in all countries in 2022. Serbia recorded the lowest share with 1.8%, followed by Kosovo (2.2% – 2020 data).[24]

These statistics underscore the increasing depth and reach of internet usage in the Western Balkans. However, there is a need for special attention to address potential disparities among countries and ensure fair and equal access for all citizens in this region.

Moving forward, there is a compelling argument for states to orient themselves towards online services. The burgeoning trend of internet usage highlights its growing importance in daily life. Strengthening the legal framework to support and regulate online services is imperative to ensure secure and equitable access for all citizens. By doing so, governments can harness the benefits of the digital age and propel their nations toward a more inclusive and technologically advanced future.

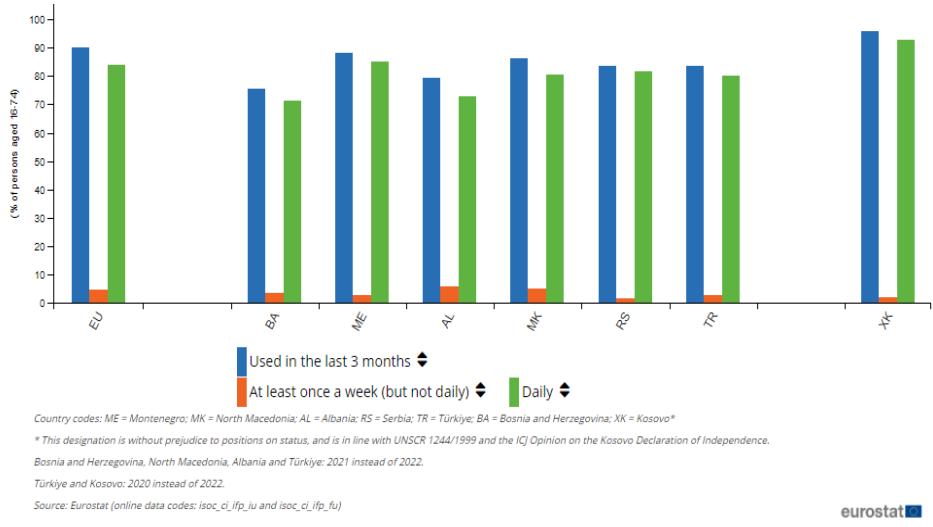

Figure 1. Frequency of internet use, 2022 (EUROSTAT, May 2023)

The proficiency of a population in digital skills is a key factor influencing its engagement in the digital economy. Digital competencies empower individuals to participate in new entrepreneurial activities and navigate the evolving employment landscape. Disparities in digital skills across the region highlight the need for targeted initiatives to bridge these gaps. Serbia and Montenegro exhibit comparatively better performance in this regard.

24 ibid.

The European Union, recognising the transformative potential of the digital economy, has been actively supporting the Western Balkans through initiatives like the Digital Agenda for the Western Balkans. These endeavours aim to accelerate the region's transition into a digital economy, ensuring that the benefits of digital transformation are widespread.

In alignment with broader EU initiatives, individual Western Balkan countries have crafted their national digital strategic frameworks. These frameworks serve as roadmaps for advancing digitalisation, fostering innovation, and enhancing the digital capabilities of their populations.

Flagship 8 within the Economic and Investment Plan for the Western Balkans 2021-2027 is a pivotal driver for digitalisation and the enhancement of human capital. This strategic initiative, encapsulated by the plan, includes key programs such as the Digital Agenda for the Western Balkans and the Youth Guarantee. These initiatives are poised to significantly accelerate the region's progress in the digital realm. The Economic and Investment Plan, a comprehensive strategy, outlines ten investment flagships backed by a substantial financial commitment of up to €9 billion in EU funds. Additionally, there is a potential to leverage an impressive €20 billion in investments through the Western Balkan Guarantee Facility.[25]

This ambitious plan is designed to bolster various sectors, including sustainable transport, clean energy, environment and climate, digital innovation, and the competitiveness of the business sector. Furthermore, it strongly emphasises human capital development, ensuring that the region is equipped with the necessary skills and capabilities to thrive in the digital future.

By targeting these strategic areas, the Economic and Investment Plan for the Western Balkans not only catalyses economic growth but also fosters sustainability, innovation, and human development. It represents a substantial commitment from the EU to support the Western Balkans in navigating the challenges and opportunities of the evolving digital landscape.

As the Western Balkans navigate the complexities of the digital economy, the synergy between infrastructure development, digital literacy initiatives, and strategic EU-backed interventions becomes instrumental in shaping a sustainable and inclusive digital future for the region.[26]

25 Western Balkans Investment Framework, 'Economic and Investment Plan for the Western Balkans 2021-2027' (*WBIF*, 2021) <https://www.wbif.eu/eip> accessed 24 January 2024.

26 Eurostat (n 23).

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7 LEGAL AND POLICY FRAMEWORKS ON PUBLIC-PRIVATE PARTNERSHIPS IN CYBERSECURITY: A COMPARATIVE OVERVIEW OF WESTERN BALKAN ECONOMIES

These efforts to regulate and coordinate cyber security measures cannot be seen separately from the general context of digital developments in these countries. In this era of the digital economy, the increased use of information and communication technology has brought about a number of challenges in various fields, including the digital economy. As these countries tackle cybersecurity challenges head-on, it is also important to consider how these measures impact the growth and development of the digital economy in their national and regional context. In this light, the analysis of public-private partnerships in cybersecurity serves as a key element in understanding the connections between economic development and digital security, paving the way for deeper research and actionable strategies for the sustainable future of technology and the economy in this region.

7.1. Albania

The Law on Cybersecurity, adopted in 2017, aims to establish a robust framework for achieving a high level of cybersecurity.[27] This legislation delineates specific security measures, rights, and obligations and outlines mutual cooperation between entities involved in the realm of cybersecurity. The overarching objective is to enhance the overall resilience and security of digital systems and networks by providing a clear legal foundation for addressing cyber threats and vulnerabilities. The law sets the stage for effective collaboration and coordination among various stakeholders, fostering a comprehensive approach to cybersecurity that safeguards critical infrastructure, data, and digital communication. The National Strategy for Cyber Security 2020-2025 of Albania is a key instrument defined by the Albanian Government, which aims to increase the security of networks and information systems at the national level. This strategy is approved by Decision no. 1084, dated 24 December 2020, of the Council of Ministers and is an essential priority of the Albanian Government.[28]

In accordance with the basic values in the physical and digital world, the strategy aims to guarantee cyber security in the Republic of Albania through the establishment of cooperative institutional mechanisms and legal and technical instruments. These are critical elements of defence in cyberspace and include digital infrastructures, transactions and electronic communications.

27 Law of the Republic of Albania no 2/2017 of 26 January 2017 'On Cyber Security' [2017] Buletini i Njoftimeve ZyrtareI Republikës së Shqipërisë 22/1751.

28 Decision of the Council of Ministers of the Republic of Albania no 1084 of 24 Desember 2020 'On the Approval of the National Strategy for Cyber Security and the 2020-2025 action plan' [2020] Buletini i Njoftimeve ZyrtareI Republikës së Shqipërisë 233/19696.

The strategy also focuses on building professional capacities, increasing nationwide awareness and strengthening national and international collaborations to ensure a secure digital environment. The core values of the strategy include the protection of fundamental rights, freedom of expression, personal data and privacy, access for all, democratic and efficient governance, as well as shared responsibility in ensuring cyber security.

The Strategy is regularly monitored by Albania through monitoring reports, with the aim of evaluating its implementation according to the policy goals and objectives for the period January - December 2021. The Action Plan of the Strategy contains 125 basic activities for its implementation in the coming years.[29]

The National Authority on Electronic Certification and Cyber Security (AKCESK) in Albania holds the crucial responsibility of overseeing the enforcement of three key laws: Law Nr.9880/2008 "On Electronic Signature," Law Nr.107/2015 "On Electronic Identification and Trusted Services," and Law Nr. 2/2017 "On Cyber Security." These legislative frameworks provide the basis for securing electronic transactions, establishing electronic identification standards, and addressing cybersecurity concerns in the digital landscape of Albania. AKCESK's mission, aligned with these laws, is to ensure the security of trusted services, bolstering reliability in electronic transactions among citizens, businesses, and public authorities while enhancing the efficiency of public and private services, including electronic commerce. Additionally, AKCESK defines minimum technical requirements for Critical Information Infrastructure (CII) operators in adherence to international standards, contributing to creating a secure electronic environment as part of its broader goal.[30]

In the Albanian cybersecurity landscape, notable aspects include the absence of specific frameworks delineating public-private cooperation. This absence suggests a potential gap in the collaborative mechanisms between governmental entities and private enterprises in addressing cyber threats. However, the law places emphasis on coordination with security institutions and sector-specific Computer Emergency Response Teams (CERTs), aiming to establish a network of collaboration and information exchange within the national cybersecurity framework. Moreover, the legislation underscores the importance of international cooperation, indicating a commitment to aligning Albania's cybersecurity efforts with global standards and best practices. The narrative here unfolds as a tale of a nation navigating the complexities of cyber threats, seeking coordination within its borders and beyond to bolster its resilience against evolving digital challenges.[31]

29 National Authority on Electronic Certificaton and Cyber Security, *Monitoring the "National Strategy for Cyber Security 2020-2025"* (AKCESK 2023).

30 *National Authority on Electronic Certificaton and Cyber Security (AKCESK)* (2024) <https://cesk.gov.al> accessed 24 January 2024.

31 Irina Rizmal, *Legal and Policy Frameworks in Western Balkan Economies on PPPs in Cybersecurity* (DCAF 2021).

In conclusion, Albania's cybersecurity landscape reflects the country's efforts to tackle challenges in the digital realm. However, the absence of specific frameworks for public-private cooperation signals the need to enhance collaborative mechanisms. The Cybersecurity Law emphasises coordination with security institutions, sector-specific Computer Emergency Response Teams (CERTs), and international authorities. Albania is grappling with the challenges of an insecure digital environment, aiming to fortify partnerships and improve international collaboration to prepare for future digital challenges.

7.2. Bosnia and Herzegovina

The Policy of Electronic Communications of Bosnia and Herzegovina, adopted in May 2017, serves as a crucial document aligning the country with the Digital Agenda of Europe. It sets forth a comprehensive vision for Bosnia and Herzegovina's ICT ecosystem, emphasising support for the ICT sector as a central driver for economic growth. The policy envisions enhancing competitiveness, increasing business productivity, and improving public and e-government services. However, challenges persist in the segmented regulatory environment, with structural divisions across state, entity, cantonal, and local levels, leading to a lack of effective coordination. The public sector acknowledges its role and the need for collaboration but faces delays in law adoption and implementation at the state level. Despite these challenges, as a potential EU candidate, Bosnia has shown a growing commitment to advancing its digital and cyber capabilities, aligning with EU priorities. The Policy of Electronic Communications lays the foundation for Bosnia's digital society, representing a milestone in the country's cyber diplomatic efforts to align with European standards. However, progress is hindered by the complex distribution of powers between the central government and entities, requiring further development of the institutional and regulatory framework.[32]

In conclusion, Bosnia and Herzegovina stands at a pivotal juncture in shaping its digital and cybersecurity landscape. Adopting the Policy of Electronic Communications in 2017 reflects a commitment to advancing the ICT sector and aligning with European digital priorities. However, the absence of explicit references to public-private cooperation poses a notable gap, hindering the establishment of effective partnerships crucial for addressing cybersecurity challenges. The complex distribution of powers among the central government and entities further complicates policy implementation. While the country shows ambition in enhancing its digital capabilities, the nascent institutional and regulatory framework requires further development to realise these aspirations. Bridging these gaps and fostering collaboration between public and private entities will be imperative for Bosnia and Herzegovina to navigate the evolving digital landscape successfully.

32 'Bosnia and Herzegovina' (*EU Cyber Direct*, 2022) <https://eucyberdirect.eu/atlas/country/bosnia-and-herzegovina> accessed 24 January 2024.

7.3. Kosovo

The increasing frequency of cyberattacks in Kosovo has prompted the development of a new policy framework addressing cybersecurity concerns. Consequently, the Kosovo government adopted the National Cyber Security Strategy and Action Plan 2016–2019.[33] The Strategy positions public-private partnerships (PPPs) as both a "strategic principle" and a "strategic objective," emphasising their importance in enhancing the nation's cybersecurity posture. Establishing the National Cybersecurity Council dedicated to collaborating with the private sector underscores Kosovo's recognition of the vital role played by non-governmental entities in bolstering cyber defences. Additionally, the engagement of non-governmental organisations (NGOs) in educational initiatives and awareness campaigns reflects a holistic approach to cybersecurity.

Acknowledging the growing challenge of cybersecurity, the Program of the Kosovo Government 2021–2025[34] emphasises professional capacity building for cyberattack prevention, enhancing the legal framework, and modernising cyber protection equipment. Moreover, the Kosovo Security Strategy 2022–2027[35] prioritises bolstering Kosovo's cybersecurity capacities and pledges investments in cybersecurity, critical infrastructure, innovation, and technology alongside capacity-building efforts.

The legal framework for electronic services was laid in 2012 with the enactment of the Law on Information Society Services No.04/L-094[36] and the Law on Electronic Communications No. 04/L-109.[37] The former grants legal equivalence to electronic documentation, facilitating various electronic services, including e-commerce, e-banking, e-payment, e-government, and e-procurement, while also recognising the validity of electronic signatures. Kosovo's strategic approach and legal foundation position it to navigate the evolving digital landscape effectively and foster a secure and innovative digital environment. The Law on Electronic Communications in Kosovo regulates electronic communications activities with a commitment to technological neutrality and adherence to the EU regulatory framework for electronic communications. The overarching goal is to

33 Government of the Republic of Kosovo, *National Cyber Security Strategy and Action Plan 2016-2019* (Ministry of Internal Affairs 2015) <https://afyonluoglu.org/PublicWebFiles/strategies/Europe/Kosovo%202016-2019%20Cyber%20Security%20Strategy-EN.pdf> accessed 24 January 2024.

34 Government of the Republic of Kosovo, *Program of the Government of Kosovo 2021-2025* (Office of the Prime Minister of Kosovo 2021) <https://kryeministri.rks-gov.net/wp-content/uploads/2022/04/Programi-i-Qeverise-se-Kosoves-2021-2025.pdf> accessed 24 January 2024.

35 Government of the Republic of Kosovo, *Kosovo Security Strategy 2022-2027* (Office of the Prime Minister of Kosovo 2022) <https://kryeministri.rks-gov.net/en/blog/kosovo-security-strategy-2022-2027/> accessed 24 January 2024.

36 Law of the Republic of Kosovo no 04/L-094 of 15 March2012 'On Information Society Services' [2012] Official Gazette of the Republic of Kosovo 6/1.

37 Law of the Republic of Kosovo no 04/L-109 of 4 October 2012 'On Electronic Communications' [2012] Official Gazette of the Republic of Kosovo 30/1.

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foster competition, ensure the efficiency of electronic communications infrastructure, and guarantee the provision of appropriate services within the territory of the Republic of Kosovo. This legislative initiative aligns Kosovo's electronic communications regulations with international standards, emphasising fairness, competitiveness, and the delivery of quality services to the citizens of Kosovo. By embracing the principle of technological neutrality, the law seeks to create a regulatory environment that accommodates advancements in communication technologies, thus promoting innovation and ensuring the continued development of the electronic communications sector in Kosovo.

Law No. 04/L-109 on Electronic Communications in Kosovo is a comprehensive legal framework designed to govern social relations within the realm of electronic communications networks and services. This legislation encompasses various aspects, including the regulation of associated services and facilities, the utilisation of electronic communications resources, and the management of social relations tied to radio equipment, terminal equipment, and electromagnetic compatibility. A crucial emphasis of this law is the provision of equal protection for personal data rights, particularly safeguarding the right to privacy in processing personal data within the electronic communications sector. By addressing these multifaceted dimensions, the law aims to ensure a fair and secure electronic communications environment, fostering the responsible and lawful use of technology while prioritising the protection of individuals' privacy and personal data.

In 2023, the Kosovo Assembly passed Law No. 08/L-173 on Cyber Security,[38] which mandates the establishment of the Cyber Security Agency and partially aligns with Directive (EU) 2013/40, focusing on attacks against information systems.

In conclusion, Kosovo has responded to cyber security challenges by adopting policies and laws to strengthen information protection and its cyber infrastructure. Adopting the National Strategy for Cyber Security, the Action Plan and creating the Agency for Cyber Security shows a commitment to capacity building and network security. However, efforts must continue to include Kosovo in international cyber security initiatives and strengthen cooperation with regional and international partners to address cyber security threats effectively.

7.4. Montenegro

Montenegro has actively strengthened its information security framework, notably with the adoption of the first Law on Information Security in 2010 and subsequent amendments in 2016 and 2020.[39] The more recent Law on Information Security in 2021 reaffirms and augments measures for achieving a high level of information security in networks and

38 Law of the Republic of Kosovo no 08/L-173 of 2 February 2023 'On Cyber Security' [2023] Official Gazette of the Republic of Kosovo 4/1.

39 Decree of Montenegro no 01-755/2 of 15 March 2010 'On the Promulgation of the Law on Information Security' [2010] Službenom listu Crne Gore 14/114.

information systems.[40] This legal framework establishes protocols for recognising and designating key entities, creating a national cybersecurity framework, managing cybersecurity procedures, and overseeing critical entities. It addresses vital aspects of information security, encapsulating confidentiality, integrity, and data accessibility.

Furthermore, Montenegro recognises the strategic importance of public-private partnerships (PPPs) by establishing the National Cybersecurity Council. This collaborative approach aims to secure critical information infrastructure, with a strong emphasis on cooperation with the private sector. The second National Cybersecurity Strategy (2018–2021) enshrines PPPs as a strategic goal, highlighting their pivotal role in enhancing the overall cybersecurity posture of Montenegro.

As the country navigates the burgeoning landscape of online services, the partnership between the public and private sectors emerges as a national priority, ensuring a resilient and secure cyberspace.[41] The recent findings from the analysis of laws and strategies in Montenegro indicate that the country is developing a positive trajectory in its cyber and information security environment. Legal improvements, such as the 2021 law on information security and the emphasis on collaboration with the private sector, reflect a commitment to strengthening cyber capabilities. Recognising the significance of the public-private partnership, this stance is acknowledged as a priority in Montenegro's Cyber Security Strategy for 2018–2021.

7.5. North Macedonia

North Macedonia adopted its National Cybersecurity Strategy 2018–2022 along with an Action Plan in 2018, marking a significant milestone in the nation's cyber defence and resilience efforts. The strategy and its accompanying action plan serve as foundational frameworks aimed at enhancing the country's cyber defence capabilities, fostering a safer digital environment, and fortifying national resilience against cyber threats. With a strategic focus on strengthening cyber defence mechanisms, enhancing incident response capabilities, and promoting cyber awareness and education initiatives, North Macedonia is poised to address evolving cyber challenges and safeguard its digital infrastructure effectively. Through strategic planning and collaborative efforts, the country seeks to uphold cyber resilience and ensure the security and integrity of its digital ecosystem.[42]

40 Laws on amendments to the Law on Information Security, see the link <http://sluzbenilist.me/pregled-dokumenta-2/?id=%7bC707AE79-3025-4387-B59B-34E5979FBC3E%7d> accessed 24 January 2024.

41 Government of Montenegro, *Cyber Security Strategy of Montenegro 2018-2021* (Ministry of Public Administration 2017) <https://www.gov.me/en/documents/fa4f3ed4-d059-4958-8847-d6111360a477> accessed 24 January 2024.

42 Government of the Republic of Macedonia, *National Cyber Security Strategy 2018-2022* (July 2018) <https://eucyberdirect.eu/atlas/sources/republic-of-macedonia-national-cyber-strategy-2018-2022> accessed 24 January 2024.

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In the Republic of North Macedonia, the Ministry of Information Society and Administration (MISA) plays a central role in formulating and implementing digital public administration policies, particularly concerning IT, eGovernment, and public administration modernisation. Government ministries and state bodies oversee sectorial ICT and eGovernment projects, with the National ICT Council established to monitor the implementation of the National ICT Strategy and guide public procurement plans. Supported by an Operational Body, the Council assists in strategic document preparation, reviews good practices, and collaborates with relevant stakeholders. Additionally, the National Cybersecurity Council, formed under the National Cybersecurity Strategy and pending Law on the Security of Network and Information Systems, coordinates cybersecurity efforts.

Furthermore, the establishment of the Broadband Competence Office aims to enhance broadband infrastructure efficiency, while the Digital Forum facilitates cooperation among diverse sectors for information society development. The Personal Data Protection Agency, established under the new Law on Personal Data Protection, ensures the lawful processing of personal data and safeguards individuals' rights and freedoms. Through these administrative bodies and agencies, North Macedonia is actively pursuing digital transformation and cybersecurity initiatives to foster a safe, resilient, and inclusive digital environment.[43]

In summary, North Macedonia acknowledges the importance of a multi-stakeholder approach in addressing cybersecurity challenges, highlighting the involvement of various actors, such as universities, the private sector, and civil society, in developing and implementing the national cybersecurity framework. The establishment of the National Cybersecurity Council further emphasises the commitment to fostering permanent cooperation between the public and private sectors, enhancing coordination, and ensuring comprehensive cybersecurity measures. This inclusive approach not only strengthens cybersecurity resilience but also promotes collaboration, innovation, and collective efforts to safeguard digital infrastructure and protect citizens' rights in North Macedonia's evolving digital landscape.

7.6. Serbia

The Law on Information Security, adopted by the Republic of Serbia on 26 January 26 2016,[44] represents a pivotal step in regulating measures to mitigate security risks in information and communication systems. This comprehensive legislation delineates the responsibilities of legal entities in managing and operating such systems while designating

43 'Governance - Republic of North Macedonia' (*European Commision: Joinup*, 2024) <https://joinup.ec.europa.eu/collection/nifo-national-interoperability-framework-observatory/governance-republic-north-macedonia> accessed 20 January 2024.

44 Law of the Republic of Serbia of 26 January 2016 'On Information Security' [2016] Official Gazette of the Republic of Serbia 6.

competent authorities for the implementation of protection measures. Serving as the first umbrella law of its kind, it establishes a framework to safeguard critical information infrastructure and enhance cybersecurity resilience across various sectors in Serbia.

The establishment of the Body for Coordination of Information Security Affairs marks a significant step towards enhancing the national information security framework in the Republic of Serbia. Envisioned as a cooperative platform for engaging in coordinated efforts and implementing preventive measures, this body plays a pivotal role in fostering collaboration across various sectors. While primarily serving as an advisory body, the Law recognises the potential for broader engagement by allowing the participation of representatives from public institutions, the private sector, the academic community, and civil society in expert working groups. This inclusion reflects a noteworthy display of political will to cultivate public-private partnerships in addressing information security challenges, a concept not widely prevalent in Serbia. Providing such space within the legal framework underscores a progressive approach towards information security governance in the country.

The National Strategy for the Development of Information Security (2017–2020)[45] in the Republic of Serbia underscores the importance of multi-stakeholder cooperation in enhancing cybersecurity measures. Adopted on 29 May 2017, this strategy delineates a roadmap for bolstering information security across various sectors. It articulates fundamental principles and delineates priority areas, such as securing information and communication systems, safeguarding citizens' digital interactions, combating high-tech crime, and fortifying the nation's information security framework. Through its comprehensive approach, the strategy aims to foster collaboration among stakeholders and advance Serbia's resilience against evolving cyber threats.

The Strategy sets the stage for the potential institutionalisation of public-private cooperation through specialised working groups within the Body for Coordination of Information Security Affairs, as mandated by the Law. Furthermore, it underscores the importance of establishing public-private partnerships (PPPs) within this framework to facilitate effective communication and optimise future activities. Emphasising the timely exchange of information and resource sharing, the Strategy prioritises the development of information security in the Republic of Serbia by leveraging collaborative efforts between the public and private sectors.[46]

In conclusion, Serbia has taken significant steps towards bolstering its information security framework through the enactment of the Law on Information Security and the establishment of the National Strategy for the Development of Information Security. These

45 Govenment of the Republic of Serbia, Strategy for the Development of Information Security in the Republic of Serbia for the period from 2017 to 2020 [2017] Official Gazette of the Republic of Serbia 53.

46 Irina Rizmal, *Guide Through Information Security in the Republic of Serbia 2.0* (OSCE Mission to Serbia, Unicom Telecom, IBM, Juniper 2018) 36.

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legislative measures highlight the country's commitment to addressing security risks in information and communication systems while emphasising the importance of multi-stakeholder cooperation. The creation of the Body for Coordination of Information Security Affairs further underscores Serbia's efforts to foster collaboration between public and private entities, marking a crucial milestone in its journey towards enhancing information security at both national and institutional levels. Through the recognition of public-private partnerships as a priority, Serbia demonstrates a proactive approach to addressing contemporary challenges in the digital landscape and strives to ensure the efficient exchange of information and resources for the collective benefit of its citizens and stakeholders. These summaries highlight key points from the legal and policy frameworks in Western Balkan economies regarding public-private partnerships in cybersecurity. The emphasis on multi-stakeholder cooperation, the role of national councils, and strategic goals for PPPs are common themes across these countries.

8 ONLINE SERVICES AS PART OF E-GOVERNMENT

In recent years, the use of Information and Communication Technology (ICT) has rapidly changed e-government services and business models and has largely met citizens' needs of citizens in terms of efficiency and quality of delivery of services by the government.

E-government refers to the use of government Information and Communication Technology to work more efficiently, disseminate information, and provide better services to the public. E-Government is more about government service delivery - the process of public administration reform - than technology.

Benefits resulting from the application of e-government include increasing the efficiency of better-functioning governments, greater trust between government and citizens by increasing transparency, empowering citizens through access to information and contributing to overall economic growth.

"E-Government relates to the use of ICT by government agencies for any or all of the following reasons:

- Exchange of information with citizens, businesses, or other government departments;
- Providing faster and more efficient public services;
- Improving internal efficiency;
- Reducing costs and increasing revenues;
- Restructuring of administrative processes."[47]

47 Agim Zuzaku, 'Communication and Transparency of Public Administration Through Electronic Governance' (master's thesis, University of Southeast Europe 2010).

9 CHALLENGES OF REGULATING THE DIGITAL ECONOMY: TOWARDS A COMPREHENSIVE LEGAL FRAMEWORK

The challenges of regulating the digital economy have emerged as a complex enigma, posing a formidable test to existing legal frameworks. The absence of specific laws governing digital platforms has created a legal vacuum, allowing for unclear practices and ineffective enforcement. In the quest for a solution, a model embraced by European Union member states is seen as a crucial first step towards an appropriate regulation.

The primary challenge stems from the lack of specific regulations, leading to an inability to address new issues and added complexities arising from the digital economy. Existing legal acts focus on specific aspects, often necessitating a comprehensive and adaptable intervention.

One major challenge is the risk to privacy and data security in a robust digital environment. The development of new technologies brings along new risks, emphasising the need for laws and regulations that address these issues with care and precision.

At a time when traditional industries undergo significant transformations and sectors reshape, the regulatory challenge is to adapt to their evolution and ensure a level playing field for all market players.

Monopolisation and barriers created for competition are other challenges stemming from the rapid development of digital markets. A robust regulation is required to prevent the development of monopolies and encourage healthy competition.

Ethical concerns, especially regarding autonomous decisions of systems and emerging technologies, constitute another layer of regulatory challenges. In this context, laws must be updated to address these concerns and ensure an appropriate use of new technologies.

While the benefits of new technologies are immense, they also come with challenges. Legal regulations must be prepared to protect consumer rights and privacy, ensuring a sustainable and fair digital environment. In this process, the search for an appropriate and flexible legal framework becomes essential to effectively and fairly tackle the challenges of the digital economy.

10 CONCLUSION

In conclusion, this research underscores the immediate need for comprehensive regulatory reforms in the Western Balkans to effectively address the challenges the digital economy poses. Specifically, there is a critical call for the development of tailored laws governing digital platforms, a reinforcement of public-private partnerships (PPPs) to bolster cybersecurity efforts, and the integration of ethical considerations within the legal frameworks.

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The study's insights extend beyond the mere identification of issues; they advocate for proactive measures and adaptive regulatory strategies. Policymakers and stakeholders are urged to prioritise the establishment of specific regulations for the digital economy to eliminate existing legal vacuums. Furthermore, strengthening PPPs is imperative for enhancing cybersecurity measures collaboratively. The findings also stress the importance of incorporating ethical considerations into legal frameworks to navigate the ethical dilemmas posed by advancing technologies.

In light of the European Union's proposed Digital Market Act and Digital Services Act, the research highlights both potential harmonisation opportunities and challenges for Western Balkan nations. Policymakers are encouraged to leverage these EU initiatives to align regional regulations, fostering a harmonious digital landscape. These conclusions present actionable recommendations, providing a roadmap for adaptive and forward-looking regulatory approaches in the ever-evolving digital realm. The study serves as a timely resource for guiding stakeholders toward effective regulatory responses in a rapidly transforming digital environment.

An examination of the digital economy and its legal frameworks across various countries reveals that while digitalisation brings numerous benefits, it also presents significant challenges. The digital economy, characterised by increased efficiency, global connectivity, and innovation, offers vast opportunities for businesses, governments, and individuals. However, alongside its advantages come inherent risks, including cybersecurity threats, privacy concerns, and the widening digital divide.

Across different nations, the legal frameworks governing the digital economy play a crucial role in shaping its trajectory. These frameworks vary in their effectiveness, with some countries prioritizing cybersecurity regulations, data protection laws, and measures to promote digital inclusion, while others struggle to keep pace with rapid technological advancements. Regulatory challenges often arise due to the complex nature of digital ecosystems, requiring agile approaches to address emerging issues while balancing innovation and consumer protection.

Several recommendations emerge to enhance the legal framework for the digital economy. Strengthening cybersecurity regulations is paramount to mitigate risks and safeguard digital infrastructure. Privacy legislation is essential to protect individuals' rights and ensure responsible data practices by businesses and governments. Moreover, promoting digital inclusion through affordable access to technology and digital literacy programs can bridge the digital divide and empower marginalised communities.

Support for innovation is vital to foster a dynamic digital economy, requiring regulatory frameworks that encourage entrepreneurship, investment in emerging technologies, and collaboration between industry stakeholders and policymakers. Additionally, an agile regulatory approach is necessary to adapt to the ever-evolving digital landscape, enabling

timely responses to new challenges while fostering an environment of trust, accountability, and ethical use of technology.

In conclusion, while the digital economy presents both opportunities and challenges, proactive measures within the legal framework can ensure its sustainable growth and equitable benefits for all stakeholders. By addressing cybersecurity risks, promoting digital inclusion, enacting robust privacy laws, and fostering innovation through agile regulation, countries can harness the transformative power of the digital economy while mitigating its inherent risks.

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AUTHORS INFORMATION

Liridon Dalipi
Dr.Sc. (Law), Associate Professor, Faculty of Law, University "Kadri Zeka", Gjilan, Republic of Kosovo
liridon.dalipi@uni-gjilan.net
https://orcid.org/0009-0000-9372-104X
Co-author, responsible for research methodology, data collection, writing, and supervising.

Agim Zuzaku*
Dr.Sc. (Information Systems), Assistant Professor, University for Business and Technology, Prishtina, Republic of Kosovo
agim.zuzaku@ubt-uni.net
https://orcid.org/0000-0003-3811-9093
Corresponding author, responsible for conceptualization, writing, and data collection.

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Research Article

THE CRIMINAL CONFRONTATION FOR CRIMES OF DISCRIMINATION AND HATE SPEECH: A COMPARATIVE STUDY

Mohammad Amin Alkrisheh, Saif Obaid Al-Katbi and Khawlah M. Al-Tkhayneh*

ABSTRACT

Background: *The crime of disseminating hate speech is considered amongst the most prominent crimes in this era, particularly with the rapid technological advancements witnessed globally, which have contributed to its emergence across all communities. Given its seriousness, this crime threatens societal stability and security. In a bid to foster a culture of global tolerance and encounter the various manifestations of discrimination and racism, the Emirati legislator enshrined criminal protection for individuals against discrimination and hate speech based on ethnicity, race and religion. This legal safeguard is articulated in Federal Law No. 34 of 2023 concerning Combating Discrimination, Hatred and Extremism. Moreover, the Federal Decree-Law No. 34 of 2021, which addresses Combating Rumors and Cybercrimes, further reinforces this legal framework, specifically targeting the spread of such offences through digital channels. This addition underscores the UAE's comprehensive approach to addressing hate speech and discrimination, acknowledging the evolving nature of these crimes in an increasingly connected world.*

Methods: *The research aims to explore the effectiveness of Emirati law in combating discrimination and hate speech crimes through a multi-method approach, which includes a comparative dimension. Firstly, we conducted a comprehensive literature review of existing legal texts and scholarly articles to understand the broader legal context and historical perspectives on these crimes. This review extended beyond Emirati legal sources to encompass international legal standards and comparative legal analyses, allowing us to contextualise the Emirati legal framework within a global perspective.*

Results and Conclusions: *Our study has provided a detailed examination of the complexities and challenges in addressing the crimes of disseminating and promoting discrimination and hate speech within the UAE legal framework. We have identified that these crimes are*

inherently complex, requiring a specific intent to provoke violence and discrimination. Our analysis reveals a gap in the current legal approach, particularly in addressing the full scope of hate crimes and the nuances of criminal intent.

In light of these findings, we have proposed several critical amendments to the UAE law combating discrimination and hate speech. These include refining the definitions and scope of discrimination in Article 1, incorporating "motive for hate" as a key element in Article 4, revising Article 10 to focus on general criminal intention, and enhancing penalties in Article 16 when foreign financial support is involved. These recommendations aim to strengthen the legal framework, making it more comprehensive and effective in combating discrimination and hate speech, thereby safeguarding social security and human rights.

This research contributes significantly to understanding hate speech and discrimination crimes in the UAE and offers practical solutions for legal reform. It underscores the need for continuous evaluation and adaptation of laws to address evolving social challenges effectively.

1 INTRODUCTION

The crimes of infringement of doctrines and religions, as well as evoking sectarian strife, are amongst the most important crimes that are currently directed to violate the stability and security of communities.[1]

Given the seriousness of disseminating and promoting discrimination and hate speech crimes, as well as their prevalence worldwide, particularly after the current technological advancement, several terrorist organisations exploited these crimes to incite strife and discrimination among the followers of some religions, which resulted in murder crimes and coercive migration in some regions.

Since people are the basic element in internal and external law, international law has been interested in ensuring dignity and a good life for human beings, regardless of their race, religion, or colour. Indeed, International law sought to prevent all forms of discrimination and hate speech in many conventions and treaties, including the Universal Declaration of Human Rights, the Charter of the United Nations, the Convention Relating to the Status of Refugees of 1954, the Convention Relating to the Status of Stateless Persons of 1951, the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the International Covenant on Civil and Political Rights of 1966, and the two International Covenants for human rights. The international law included articles which criminalise any action that targets national unity and international tolerance.[2]

1 Hanan Rayhan Mubarak Al-Mudhakhi, *Information Crimes: A Comparative Study* (Halabi Human Rights Publications 2014) 226.

2 Deri Al-Arabi, 'The Privacy of Judicial Control Procedures for Discrimination Crimes and Hate Speech According to Law 2005' (2021) 6(2) Journal of Human Rights and Public Liberties 216.

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The Emirati legislator took the same steps by passing Federal Law No. 2 of 2015 for Combating Discrimination and Hate and setting control procedures relating to those crimes in accordance with the nature of the criminal conduct, which is usually committed by means of modern communication and information technology methods. It is important to note that this law was subsequently repealed by the Federal Law by Decree No. 34 of 2023 Concerning Combating Discrimination, Hatred, and Extremism.[3]

1.1. Importance of the Study

This study is important because it addresses Federal Law No. (34) of 2023 concerning Combating Discrimination, Hatred, and Extremism. This law is considered one of the most important laws enshrined at a time when the whole world suffered from the crimes of terrorism, discrimination, hatred, blasphemy, and insult to sacred sites, as well as the role of social media sites in spreading those crimes.

1.2. Challenges

The challenge of such a study is centred around the extent to which the Emirati legislator succeeded in citing legal provisions that are sufficient for combating the activities of disseminating and promoting discrimination and hate speech crimes while, at the same time, maintaining people's personal freedom as well as the freedom of speech and expression guaranteed by the constitution.

1.3. Objectives

The study aimed to demonstrate the extent to which the Emirati legal provisions are effective in combating the activities of disseminating and promoting discrimination and hate speech crimes in the light of the escalating debate resulting from the various forms of such conduct and their interference with the freedom of speech and expression that is guaranteed by the constitution.

1.4. Approach

The study employed a multifaceted approach to comprehensively examine the crimes of disseminating and promoting discrimination and hate speech within Emirati law. A descriptive approach was utilised to clearly depict these crimes as defined by Emirati legal statutes. An analytical approach was employed to delve into the diverse jurisprudential and legal texts related to these crimes, shedding light on their historical development and theoretical underpinnings.

3 Federal Decree Law of the United Arab Emirates no 34 of 2023 'Concerning Combating Discrimination, Hatred and Extremism' <https://uaelegislation.gov.ae/en/legislations/2131> accessed 22 December 2023.

Furthermore, the study adopted a comparative perspective to enrich the analysis. By comparing Emirati law with international legal standards and practices in combatting discrimination and hate speech, we aimed to contextualise the Emirati legal framework from a global perspective. This approach allowed us to assess the effectiveness of Emirati law in addressing these crimes while considering international best practices and legal approaches adopted by other nations. To achieve the study objectives it was divided into two parts: firstly, elucidating the definitions of disseminating and promoting discrimination and hate speech and secondly, demonstrating the elements of these offences along with the corresponding sanctions.

2 THE MEANING OF THE CRIMES OF DISSEMINATING AND PROMOTING DISCRIMINATION AND HATE SPEECH

The international community has taken an active interest in establishing the conventions that combat discrimination and racism to achieve equity and justice among people. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination defined discrimination as "any distinction, exclusion, restriction, or preference that is based on race, colour, descent, religion, nationality or ethnic origin, or any other reasons with the purpose or effect of impairing the enjoyment on equal human rights and freedom, either in the political, economic, social or cultural domains, or any other public life domains."[4]

Article 7 of the Universal Declaration of Human Rights states, "All people are equal before the law and are entitled, without any discrimination, to equal law protection. They also have equal protection against any discrimination in violation of this Declaration and against incitement to such discrimination."[5]

Article 26 of the International Convention on Civil and Political Rights states, "All people are equal before law and are entitled without any discrimination to the equal protection of the law. In this vein, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or non-political opinion, national or social origin, property, birth or any other causes."[6]

4 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 UNGA Res 2106 (XX)) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial> accessed 22 December 2023.

5 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 22 December 2023.

6 International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> accessed 22 December 2023.

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To comprehend the intricate dimensions of discrimination and hate within a legal context, we embark on a journey through jurisprudential insights. This section aims to untangle the intricate web of laws and interpretations that define our perception of discrimination and hate, particularly in their propagation. We begin by delving into the theoretical foundations of these concepts, exploring their evolution under the influence of various legal philosophies and doctrines. From theory, we transition to practice, scrutinising how discrimination and hate are codified in statutory law. This involves an examination of specific legal provisions that classify certain behaviours as discriminatory or hateful, resulting in legal consequences. Our exploration culminates in the complex realm of disseminating and promoting discrimination and hate speech. Here, we dissect the defining characteristics of these actions and examine how they are treated within the legal framework, addressing the inherent challenges in enforcing legislation in this domain.

2.1. The definition of discrimination and hate in jurisprudential terms

Discrimination is defined as "a system that gives more superiority to a certain gender or human race over other genders or human races."[7] Others defined it as "every insulting behaviour performed by certain people due to believing that they are better than others, based on any causes related to distinction and preference with the aim of achieving certain objectives to satisfy their needs over others. Such a conduct violates the principle of equal opportunities that governs people and protects their rights and freedom."[8]

We criminalise discrimination, which refers to each verbal or non-verbal speech that evokes spreading discrimination values, as stated in the International Declaration of Human Rights, as well as the different international covenants and local legislations of countries that criminalise all the forms of discrimination based on gender, race, ethnicity, religion, belief, or affiliation.

Hate speech is defined as any form of verbal, written or behavioural communication that offends or uses discriminative language directed towards a person or a group of people based on their religion, ethnic origin, nationality, race, colour, gender, or any of the other factors related to identity. This speech originates from intolerance and hate, where such hate may entail humiliation and lead to divisions.[9]

According to the Federal Investigations Office in the US, hate crimes are "the crimes committed against people, where these crimes are partially or totally driven by biases

7 Mohammad Dhiyab Sattam Al-Jubouri, 'Racial Discrimination from the Perspective of Criminal Law: Comparative Analytical Study' (2018) 2(3/1) Tikrit University Journal of Law 358.

8 Khan Mohammad Adil, 'The Crime of Racial Discrimination in Algerian Law' (master thesis, Mohammad Kheidar University 2015) 11.

9 United Nations Strategy and Action Plan on Hate Speech (18 June 2019) 2 <https://www.un.org/en/genocideprevention/hate-speech-strategy.shtml> accessed 22 December 2023.

against race, religion, disability, sexual orientation, ethnic origin or gender."[10] Furthermore, this definition is supplemented by a psychological perspective, describing it as "a natural status resulting from not accepting- by the brain's part relating to feelings and sensations- some of the elements inserted to it through neurons due to the effects of the external world on the individual."[11]

The International Criminal Tribunal for Rwanda stated that "hate speech is a form of discriminative hostility that aims to devastate the human dignity and offend groups."[12]

Furthermore, the European Union's conduct blog defined online hate speech as "each conduct that publicly incites violence or hatred against a group of people or a certain individual based on race, colour, religion, lineage, nationality, or ethnic origin."[13]

Based on the above mentioned, we define hate speech as any form of communication that degrades, denigrates, or incites violence or prejudicial action against individuals or groups based on specific characteristics such as race, religion, ethnicity, gender, sexual orientation, or disability. This definition is rooted in the legal framework, where hate speech is often identified by its intent to promote animosity, hostility, or violence against a protected group. It encompasses both verbal and non-verbal forms of expression that can have far-reaching impacts on individuals and society.

2.2. The definition of discrimination and hate crimes in law

Article 1 in the decree of Federal Law No. 34 of 2023 concerning Combating Discrimination, Hatred, and Extremism in the United Arab Emirates defines hate speech as "each statement or action that incites discord, strife or discrimination between individuals and groups."

The same article defines discrimination as "each distinction, exclusion, restriction, or preference between individuals that is based on religion, doctrine, nationality, ethnic origin, race, colour, or gender, in compliance with the applicable laws in the country."[14]

Also, the amended Jordanian Cybercrimes Law No. 17 of 2023 defines hate speech in Article 1 as "each statement or action that incites religious, racist or ethnic strife or discrimination between individuals and groups."[15]

10 Walid Hosni Zahra, "*I Hate You…*": *Hate Speech and Sectarianism in the Arab Spring Media* (Center for the Protection and Freedom of Journalists 2014).

11 ibid.

12 Wafi Al-Haja, 'Hate Speech between Freedom of Expression and Criminalization: A Study in Light of the Provisions of International Law' (2020) 4(1) International Journal of Legal and Policy Research 70.

13 Alia'a Ali Zakaria, 'The New Legal Mechanisms to Refute Hatred and Discrimination and Its Contemporize Applications' (2017) Spec (2/1) Kuwait International Law School Journal 543.

14 Federal Decree Law no 34 of 2023 (n 3) art 1.

15 Law of the Hashemite Kingdom of Jordan no 17 of 2023 'Law on Cybercrimes' <https://perma.cc/7RSM-6S4K> accessed 22 December 2023.

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Algerian criminal law, in paragraph 1 of Article 295, defines discrimination as "each distinction, exclusion, or preference that is based on gender, race, colour, lineage, nationality, ethnic origin, or disability to hinder the recognition of human rights and basic freedom or practice and enjoying those rights and freedoms equally in political, social, economic and cultural domains, or any other public life domains."[16]

Also, the Algerian legislator enshrined the Law of Preventing and Combating Discrimination and Hatred in 2020, where Article 2 defines hate speech as "all the forms of expression that disseminate, encourage or justify discrimination, and the speech forms that include using insult, contempt or violence directed towards an individual or a group of people based on their gender, race, colour, lineage, nationality, ethnic origin, language, geographical location, disability or health status."[17]

The European legal framework regarding hate speech and discrimination, particularly in the context of religious defamation, involves various national laws and broader EU policies. These legal frameworks seek to strike a balance between protecting freedom of expression and curbing hate speech and discrimination.

For example, the French Press Freedom Law of 1881, recently amended on 27 January 2017 under law No. 86, included several texts prohibiting incitement to hatred and discrimination. Article 29/9 of the same law states, "each statement that implies insult and contempt without the existence of a real event is considered humiliation."

Similarly, the Netherlands has laws that prohibit public insults and incitement to hatred based on race, religion, sexual orientation, or personal convictions.

The United Kingdom's Public Order Act of 1986 criminalises the use of threatening, abusive, or insulting words or behaviour to stir up racial hatred. This Act encompasses a broad range of potential offences related to hate speech.

At the EU level, efforts to combat hate speech are advanced through policies and communications, exemplified by initiatives such as the "No place for hate: a Europe united against hatred" initiative.[18] This initiative aims to bolster action across various policies, including online hate speech. Additionally, the High-Level Group on combating hate speech and hate crime, established in 2016, works to develop practical guidance, standards, and tools to improve responses to hate speech and hate crime at national and local levels.

16 Penal Code of 1966 as amended by Law no 14-01 of 4 February 2014 <https://www.joradp.dz/HEN/Index.htm> accessed 22 December 2023.

17 ibid, art 2.

18 'No Place for Hate: A Europe United Against Hatred' (*European Commission*, 6 December 2023) <https://commission.europa.eu/news/no-place-hate-europe-united-against-hatred-2023-12-06_en> accessed 22 December 2023.

These laws and policies reflect the EU's commitment to combating hate speech while respecting fundamental rights like freedom of expression. However, It is important to recognise that the implementation and interpretation of these laws can vary significantly between countries.[19]

2.3. Characteristics of disseminating and promoting discrimination and hate speech

In this critical section, we delve into the multifaceted legal elements that constitute the crimes of disseminating and promoting discrimination and hate speech, as well as the sanctions imposed for these offences. Our exploration is twofold: first, we dissect the legal architecture that shapes these crimes, breaking down their components to understand what precisely classifies certain actions or expressions as criminal under this category. This includes examining the intent, the nature of the act, and its impact on targeted individuals or groups**.**

Secondly, we consider the punitive measures and sanctions imposed in response to these crimes. The sanctions reflect the severity with which society and legal systems view such offences, and their analysis offers insight into the broader societal and legal stance on discrimination and hate speech.

A) The Physical Element

The physical element of disseminating and promoting discrimination and hate speech involves racially offensive actions or insults towards religious beliefs and symbols through public expression.[20] In legal terms, this "physical element", known as "Actus Reus," a Latin term meaning "guilty act," constitutes physical or outward actions of a crime. It encompasses specific actions, conduct, or behaviour that constitutes a violation of the law. In the case of disseminating and promoting discrimination and hate speech, the Actus Reus would include the actual acts of speech or expression – whether verbal, written, or via digital media – that

19 For more detailed information on European hate speech laws, you can refer to the following sources: 'Combating Hate Speech and Hate Crime' (*European Commission*, 2023) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/combating-hate-speech-and-hate-crime_en> accessed 22 December 2023; 'European Commission against Racism and Intolerance (ECRI)' (*Council of Europe*, 2023) <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/home> accessed 22 December 2023; 'The European Legal Framework on Hate Speech, Blasphemy and its Interaction with Freedom of Expression' (*European Parliament*, 15 September 2015) <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU%282015%29536460> accessed 22 December 2023; 'Hate Speech' (*European Court of Human Rights*, November 2023) <https://www.echr.coe.int/documents/d/echr/fs_hate_speech_eng> accessed 22 December 2023; 'The Legal Project' (*Middle East Forum*, 2023) <https://www.legal-project.org> accessed 22 December 2023.

20 Ali Mohammad Ali Hammouda, *Explaining the General Provisions of the UAE Federal Penal Code: General Section* / Explanation of the general provisions of the Federal Penal Code of the United Arab Emirates: General Section (Dubai Police Academy 2014) 279.

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disseminate or promote discriminatory or hateful content. This aspect is essential in defining the tangible actions the law deems criminal.

Moreover, the physical element refers to the tangible objects integral to the crime, which can be sensed by the senses. These objects play a crucial role in obtaining evidence that confirms its occurrence and attributes it to the offender who committed it.[21]

Recently, there has been an increased spread in the methods of expressing opinions, driven by the modern technological revolution in communication. These advancements have greatly facilitated the dissemination of ideas and opinions to others, posing challenges to the stability of governments and groups. Indeed, these methods have contributed to generating an intellectual mutation and forming intellectual perspectives conflicting with the public thoughts prevalent among people, particularly those ideas related to the Islamic religion. The methods of expression include:

1- Printed materials, such as books and brochures, which serve as platforms for authors to convey their ideas; however, this method has been restricted by the law of publications and printed materials.
2- Satellite and radio channels by broadcasting television and radio programs. In this vein, more global restrictions reject ethnicity, discrimination and extremist ideas that encourage starting wars.
3- Seminars and conferences, where a group of people gather to exchange certain opinions and ideas or introduce a particular opinion to a group of people and encourage them to adopt this opinion.[22]
4- The World Wide Web, arguably the most dangerous method, is capable of undermining political systems and distorting religious principles. Its pervasive influence has turned it into a nightmare capable of spreading, reshaping minds, and altering opinions worldwide.

Therefore, we will address the interest relating to criminal protection in the crime of disseminating and promoting discrimination and hate speech, as follows:

1) The interest relating to criminal protection in the crime of disseminating and promoting discrimination and hate speech:

Undoubtedly, respecting heavenly religions, prophets, or religious symbols is among the basic interests of the community structure. Violating the sacredness of these religions and their symbols will inevitably cause harm to their followers and thus threaten and undermine the social structure. In this vein, the legislator imposed sanctions on committing the crimes violating that sacredness to protect the interests and freedoms worthy of criminal protection

21 Mahmoud Naguib Housni, *An Explanation of the Penal Code: General Section* (Dar Al-Nahda Al-Arabiya 2019).

22 H Richard Uviller, 'Making it Worse: "Hate" as an Aggravating Factor in Criminal Conduct' (2000) 23 (4) Ethnic and Racial Studies 761, doi:10.1080/01419870050033711.

since public interest is the cause of criminalisation and penalty. Indeed, the criminal law takes drastic measures against those who attempt to use the freedom of expression to incite hate speech or insult one of the heavenly religions to protect these religions and people's dignity against humiliation and abuse.[23]

Therefore, the main objective of criminalising some behaviours is to protect the basic interests of the community and prevent offence.

The harm caused in the domain of the crimes of disseminating and promoting discrimination and hate speech has several forms, including[24]

1) **Individual harm**: the most common type of harm resulting from such crimes. For example, hate speech may be directed towards a certain religion, ethnic group or leading figures belonging to it. This targeting can lead to physical harm, ranging from injuries to murder or damaging property. Also, disseminating discrimination and hate speech can inflict moral harm that violates the dignity of the offended person. For example, insulting clergy members or ascribing negative images and events to them can adversely damage their social prestige and encourage other people to exclude them.
2) **Collective harm**: this type of harm extends beyond individual targets and affects entire communities, transcending clergy members. Indeed, the crimes of disseminating discrimination and hate speech have led to tremendous human and financial loss, stemming from ethnic strife that adversely undermines national unity and social security. In this vein, contempt and discrimination against a certain religion, doctrine, or religious symbol result in moral harm among the followers, amplifying their grief and pain due to ridiculing the sacredness of their religion or doctrine.

As for risk crimes, there should be a risk related to the potential of causing harm - this type of crime occurs when individuals commit behaviour that threatens people's interests or causes real harm or risk to them. The risk caused in the domain of disseminating and promoting discrimination and hate speech has several forms, including[25]

1) **Individual risk**: a risk that threatens the individual interests of a particular person who believes in a certain religion or doctrine, such as a clergy member who belongs to a certain religious organisation, where the source of risk could be a person who holds hostile feelings towards a certain targeted group or individuals. The offender may claim that they defend certain religious facts, practices, or identities; therefore, they make various types of threats, including the perceived threats of using violence against a person or robbing his money without a legal provision.

23 Housni (n 21).

24 Yasser Ahmed Badr, *Contempt of Religions between Freedom, Protection and Responsibility* (House of Thought and Law 2017).

25 ibid.

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2) **Public risk**: a risk that threatens the security and interests of people in the same community and destabilises families and children. The spread of public risk threatens peaceful living among the community individuals, creating a state of horror among citizens. This type of risk includes the risks resulting from the manifestations of collective hate that incite strife and ethnicity, and that represents a source for many cases of human rights violations by governmental or non-governmental agencies; this results in imposing more restrictions on the freedom of practising religious rituals among those believing in them.

2) The criminal behaviour for the crimes of disseminating and promoting discrimination and hate speech:

Disseminating and promoting discrimination and hate speech occurs the moment illegitimate behaviour is committed, where such behaviour is represented by violating the sacredness of a certain religion by spreading images and drawings that demean and undermine the religious feelings of its followers. This includes making fun of religious rituals and symbols, as well as shaming or ostracising religious symbols by ascribing them with insulting and harmful events and images that adversely affect their appreciated character in front of their followers.

Indeed, all types of discrimination and hate speech are criminalised regardless of religion or the religious symbols that are targeted, as violation acts are not limited to a certain prophet or religion but extend to include all religious symbols across different religions.

In their legal articles, most Arabic legislations included various images of criminal behaviour that represent a crime of discrimination and hate against a certain religion. The most common causes of such crimes are:[26]

- Insulting the divinity or challenging God by verbal abuse, writing, drawings, gestures, or any other methods.
- Insulting the prophet Mohammad (peace be upon him) or the other prophets, or ridiculing the religious rituals of Islam, either by writing, drawing, verbal statement, or any other methods.
- Insulting the Holy Quran, distorting It, or ridiculing It.
- Disseminating opinions that include ridicule or contempt of a certain religious doctrine by challenging its rules, rituals, or instructions.
- Printing or publishing a heavenly-sacred book in a distorted manner that affects its content and meaning.
- Producing, selling, trading, or possessing products that include drawings, slogans, words or symbols, or any other things that abuse the Islamic religion or other heavenly religions according to the provisions of the Islamic Sharia, or advertising such products.

26 ibid 71.

- Using compact discs, computer programs or magnetic cards in abusing the Islamic religion, or any other heavenly religions, in accordance with the provisions of Islamic Sharia.

Within the context of European law, common forms of criminal behaviour related to religious discrimination and hate crimes often include[27]

1) Incitement to Hatred and Violence.
2) Defamation of Religious Symbols and Figures.
3) Disturbance of Religious Worship: In certain European jurisdictions, disrupting religious services or practices is considered a criminal offence.
4) Discrimination in Various Sectors: EU laws, guided by directives like the Racial Equality Directive, prohibit discrimination based on religion in employment, education, and service provision.

Based on the above-mentioned concerning the forms of illegitimate conduct relating to the crime of disseminating and promoting discrimination and hate speech, we can see that most crimes require the offender to perform a certain (positive) intended behaviour for it to be considered a legally banned contempt. However, the crime of disseminating and promoting discrimination and hate speech may take place through negative behaviour, represented by refraining from doing a certain behaviour that the legislator requires that person to do in certain circumstances.

The negative behaviour (refraining), in this case, is represented by the individual's tendency to refrain from performing the positive action that they are entitled to do by means of law, such as intervening to prevent contemptuous or ridiculing activities directed at heavenly religions and religious symbols or neglecting to prevent the risks resulting from discrimination and hate speech. In this vein, negative behaviour is equivalent to positive behaviour since the criminalisation of any behaviour is related to the interest that the legislator considers worthy of protection, i.e., protecting the sacredness of the heavenly religions and respecting human dignity.[28]

The forms of criminal behaviour related to religious discrimination and hate crimes in European law, as described, can be compared and contrasted with the approach in UAE law:

1. **Incitement to Hatred and Violence**:

    - **European Law**: This typically includes speech or actions that promote hatred or violence against individuals based on their religious beliefs. European countries have laws that criminalise such incitement, often balancing these with freedom of expression rights.

27 Floris De Witte, 'EU Law and the Question of Justice' (doctoral thesis, London School of Economics and Political Science 2012).

28 Ahmed Abdullah Al-Maraghi, 'The Role of Criminal Law in Protecting Freedom of Religion' (Respect for Religions and Freedom of Expression of Opinion: annual scientific conference, May 3-4, 2015, Faculty of Law, Helwan University) 315.

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- **UAE Law**: The focus is more specific to protecting the sanctity of Islam, as well as other recognised religions, against defamation and actions that could incite religious discord.

2. **Defamation of Religious Symbols and Figures**:
   - **European Law**: Some European countries have laws against the defamation of religious symbols and figures, but these are often balanced with the right to freedom of expression. The enforcement of such laws varies significantly across Europe.
   - **UAE Law**: There is a strong emphasis on protecting Islamic symbols and figures from defamation, with strict penalties for violations.
3. **Disturbance of Religious Worship**:
   - **European Law**: Disturbing religious services or practices can be considered a criminal offence, respecting the right to practice religion freely.
   - **UAE Law**: Similarly, any disturbance to religious worship is taken seriously and subject to legal penalties.
4. **Discrimination in Various Sectors**:
   - **European Law**: Guided by directives like the Racial Equality Directive, European laws prohibit discrimination based on religion in employment, education, and service provision. This reflects a comprehensive approach to preventing discrimination in various public sectors.
   - **UAE Law**: While there is an emphasis on preventing religious discrimination, the scope and application might differ, with a strong focus on protecting the Islamic faith and ensuring societal harmony.

In summary, both European and UAE laws aim to combat religious discrimination and hate crimes, but they do so within their respective cultural and legal frameworks. European laws generally cover a broader range of discrimination grounds and seek a balance between protecting against hate speech and upholding freedom of expression. In contrast, UAE laws strongly protect Islamic religious sanctity and societal harmony, reflecting the country's cultural and religious context.[29]

B) The Moral Element:

The moral element refers to the willingness with which the action is paired, whether the willingness is criminal intention (an intentional crime) or a mistake (non-criminal

29 ECRI Report on the Netherlands (fifth monitoring cycle) (adopted on 2 April 2019) Appendix: Government's Viewpoint <https://rm.coe.int/government-comments-on-the-fifth-report-onthe-netherlands/168094c565> accessed 22 December 2023.

intention).[30] In this context, "the moral element" can be interpreted as "mens rea" or the "guilty mind". In legal terminology, *mens rea* refers to the mental state or intent behind an action, particularly in committing a crime. This concept is crucial for establishing criminal liability, as it involves determining whether the perpetrator had the necessary intent or knowledge that their actions were wrong or would result in a prohibited outcome.

In the context of the crimes of disseminating and promoting discrimination and hate speech, the *mens rea* pertains to the perpetrator's intention to spread discriminatory ideas or to incite hate. It is about understanding the mindset and purpose behind their actions, whether they acted knowingly, recklessly, or with the specific intent to cause harm or incite unlawful behaviour. Recognising and proving this mental element is essential for categorising an action as a criminal offence in this realm.

To establish criminal liability for individuals who disseminate or promote discrimination and hate speech, punishable by law, a moral element (criminal intention) should be present. This means that the intended behaviour is committed based on the offender's knowledge and willingness to disseminate and promote discrimination and hate speech while being knowledgeable about the risks of committing such a crime. The offender's statement should be explicit, demonstrating an intent to disseminate and promote discrimination and hate speech among members of the community.

To establish criminal intention in disseminating and promoting discrimination and hate speech, the offender must be informed that their actions offend others through discrimination based on religion, gender, colour, ethnicity, or religious symbols, whether through writing, drawing, gestures, statements, or any other forms. Failure to grasp the reality of these facts indicates a lack of intention.

Furthermore, the legislator requires the existence of certain traits in the offended party, and the offender should be knowledgeable of those traits to establish the intention in the crime of disseminating and promoting discrimination and hate speech. These traits relate to insulting the Divinity (God), the prophet Mohammad (peace be upon him), other prophets, or clergy members.

The person who performs activities related to discrimination and hate speech aims to achieve a certain intended purpose. For instance, someone who has the willingness to publish drawings and printed materials containing abusive or insulting content directed towards a prophet in newspapers, satellite channels or social media sites despite being informed that such conduct would offend the religious sentiments of followers of the targeted religion, would be committing an intentional crime. This conduct cannot be justified by freedom of expression since performing such behaviour violates the dignity and freedom of others. In fact, the penal code protects people from mistaken practices performed against them due to the freedom of speech and expression.

30 Housni (n 21).

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Beyond merely being informed about the act's violative nature, there must be a willingness to commit such conduct. The offender must be willing to insult and abuse others, either by drawing, writing, verbal statements, or other methods. In this case, the offender would be committing a crime against a legally protected interest by disseminating and promoting discrimination and hate speech against certain doctrines or religions. Therefore, if the committed insulting activities against the religious symbols were free from the element of willingness, they would be negligible, even if they caused severe harm to the community.[31]

By engaging in the act of disseminating and promoting discrimination and hate speech while fully understanding its elements, the offender seeks to achieve a certain objective; in achieving the targeted objective, the crime occurs, and the public criminal intention is established. For example, in the crime of broadcasting slogans, hymns or propaganda that includes ridicule against a certain religion, the offender would intend to disdain that religion and its followers.

The overarching intention is limited to achieving the objective of the crime of disseminating and promoting discrimination and hate speech. In the eyes of the law, the criminal intention is tied to the offender's objective of committing discrimination and hate speech crimes regardless of the motives. Therefore, achieving the targeted purpose or attempting to achieve it is viewed as the most important element in the establishment of the general criminal intention for the crime of disseminating and promoting discrimination and hate speech. This objective is regarded as the immediate and direct objective of the criminal behaviour.[32]

The crime of disseminating and promoting discrimination and hate speech requires the offender to have a specific intention. The offender's willingness should be directed toward disseminating and promoting discrimination and hate speech, and the offender should be well-informed that his speech will result in undesired outcomes that disseminate hatred and discrimination.

In the context of hate speech and discrimination, multiple causes go beyond religion, recognised in UAE law and broader international frameworks. These can include, but are not limited to, the following:

1. **Ethnicity and Race**: Discrimination and hate speech often target individuals based on their ethnic background or race. This can manifest in various forms, from derogatory comments to systemic biases in policies or practices.
2. **Nationality**: Prejudice or hostility against people because of their nationality.
3. **Gender and Sexual Orientation**: Discriminatory practices or speech against individuals based on their gender or sexual orientation are prevalent issues.

31 Nizam Tawfiq Al-Majali, *An Explanation of the Penal Code: General Section* (Dar Al-Thaqafa Publishing and Distribution Library 1998) 260.

32 Badr (n 24).

Each of these areas represents a potential ground for discrimination and hate speech, and laws in many jurisdictions, including the UAE, seek to address these issues to varying extents. In the context of the UAE, while there is a strong emphasis on religious tolerance and harmony, other forms of discrimination and hate speech are also pertinent. They are addressed within the broader legal framework. The approach to these issues is guided by cultural values, social policies, and international human rights standards.

3 THE PENALTY FOR THE CRIME OF DISSEMINATING AND PROMOTING DISCRIMINATION AND HATE SPEECH IN THE EMIRATI LAW

3.1. Lenient sentencing

Undoubtedly, the federal legislator – since the establishment of the United Arab Emirates – has paid more attention to enhancing national unity and peaceful living. This includes actively refuting the manifestations of ethnicity, discrimination and racism and combating all the negative behaviours and activities that may affect the structure of the Emirati community, which thrives on peaceful living and harmonious interaction among its various elements. This protective stance is exemplified by the legislator's interest in instilling the principles of social justice. Indeed, the Emirati legislator viewed social justice and the provision of tranquillity and equal opportunities as basic elements in the community.[33]

The legislator also confirmed that all individuals are equal before the law, where there is no distinction between individuals based on origin, nationality, ethnic origin, or social prestige (Article 25 of the Constitution of the United Arab Emirates).[34]

"The UAE legislator has affirmed the freedom of opinion and expression under Article 30 of the Constitution, which guarantees the freedom of expressing one's opinions in speech and writing and through all other means of expression. However, it is important to note that this freedom is not absolute and is subject to the limits of the law[35].

In accordance with the UAE's legal framework, it is not permissible to invoke the freedom of opinion and expression to engage in any speech or action that incites disrespect for religions or undermines them, contravening the provisions of Decree-Law No. 34 of 2023 Concerning Combating Discrimination, Hatred, and Extremism. This demonstrates that this freedom always ceases when it conflicts with the freedom and dignity of others."

33 Constitution of the United Arab Emirates (permanently adopted in July 1996) art 12 <https://u.ae/en/about-the-uae/the-constitution-of-the-uae> accessed 22 December 2023.

34 ibid, art 25.

35 ibid, art 30.

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Also, this protection is manifested in the penal code and other codes, which we will address as follows:

1) The Federal Decree-Law No. 31 of 2021 Promulgating the Crimes and Penalties Law [36]

Article 362 states that "the punishments of incarceration and a fine, or any one of them, shall be imposed on a person who commits one of the following crimes:

1- Insulting one of the Islamic rituals or sacred sites.
2- Insulting one of the recognised heavenly religions.
3- Condoning, provoking, or promoting sin, or performing any action that seduces others to commit that sin."

If any of these crimes occur publicly, the person shall be punished by incarceration for a minimum of one year and a fine of no less than 100,000 AED, or both.

Article 364 states that the individual "shall be sentenced to detention and a fine, or one of them whoever offends the sacred beliefs or rituals prescribed by the other religions whenever these beliefs and rates are protected according to the rules of the Islamic Sharia."

Article 370 states that "whoever opposes or vilifies the foundations or teachings on which the Muslim religion is based or whatever he essentially knows of it, or preaches another religion, or advocates for a doctrine or ideology that embraces any of the matters mentioned above, or propagates any of these, shall be sentenced to imprisonment for a term not exceeding (5) years."

Article 372 states that "it is prohibited to hold any conference or meeting, in any place in the State, by a group, organisation or society in case any of them aims, directly or indirectly from such a meeting to oppose or vilify the foundations or teachings on which the Muslim religion is based or whatever he essentially knows of it or to preach another religion. The public authority has the right to disband such a conference or meeting, and whoever takes part in such a conference shall be sentenced to imprisonment for a minimum term of (5) years but does not exceed (10) years."

Article 373 states that "whoever possesses written instruments, printings or recordings that include a commend or propagation of any of the things stipulated in Article 371 and where these writings, printings or recordings are meant for distribution or perusal by others, shall be sentenced to detention for a minimum period of one year and a fine of no more than (5000) dirham or both penalties. Shall be sentenced to the same penalty provided for in the preceding paragraph, whoever possesses any means of printing or recording or publicity that has been used to print, record or diffuse slogans, hymns or propaganda for a doctrine, association, organisation or society that aims at achieving one of the objectives provided for in Article 371."

36 Federal Decree Law of the United Arab Emirates no 31 of 2021 'Promulgating the Crimes and Penalties Law' <https://uaelegislation.gov.ae/en/legislations/1529> accessed 22 December 2023.

These articles collectively form a legal framework that prioritises the protection of Islamic values and teachings while also respecting other recognised religions within certain boundaries. The emphasis is on maintaining public religious respect and preventing discord, aligning with the UAE's cultural and religious context. The laws balance religious freedom, protect religious sentiments, and maintain societal harmony.

2) The Federal Decree-Law No. 34 of 2021, related to Combating Rumours and Cybercrimes [37]

Article 24 in the law of information technology in the United Arab Emirates under the Federal Decree-Law No. 34 of 2021 about Combating Rumors and Cybercrimes states, "shall be punished by temporary imprisonment and a fine not less than (200.000) dirham and not more than (1.000.000) dirham whoever establishes or administer a website or publishes on a computer network or any information technology means any information or ideas that imply incitement to riot, hatred, racism, sectarianism, in case such ideas damage the national unity or social peace or prejudice the public order and public morals, or exposed the State's interests to risk."

Article 37 of the Federal Decree-Law No. 34 of 2021 states, "shall be punished by imprisonment and by a fine not less than (250.000) dirham and not more than (1.000.000) dirham, or by any of them, whoever deliberately commits through the computer network, or any information technology means or a website any of the following crimes:

1. Insulting one of the Islamic rituals or sacred sites.
2. Insulting one of the Islamic rituals or sacred sites mentioned in the other religions as long as these rituals and sacred sites are protected according to the provisions of the Islamic Sharia.
3. Insulting one of the recognised heavenly religions.
4. Condoning, provoking, or promoting sin.

If the crime includes any insult to the Divinity (Allah, God) or to the messengers and prophets, or it is against the religion of Islam or insults the bases and principles which constitute its foundation, or if a person opposes the well-known teachings and rituals of Islamic religion or prejudices the religion of Islam or preaches another religion, or promotes a doctrine or a notion which involves any of the aforementioned, then the offender shall be punished by imprisonment for a maximum term of (7) years."

These articles demonstrate the UAE's approach to regulating the digital space, particularly in relation to religious respect and national unity. The laws balance preserving freedom of expression and preventing the misuse of digital platforms to propagate content that could harm religious sentiments or social peace. The stringent penalties associated with these laws

37 Federal Decree Law of the United Arab Emirates no 34 of 2021 'On Countering Rumors and Cybercrimes' <https://uaelegislation.gov.ae/en/legislations/1526> accessed 22 December 2023.

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underscore the seriousness with which the UAE views these offences in the context of its cultural and religious values.

3) The Federal Decree-Law No. 7 of 2014, related to Combating Terrorist Crimes[38]

Article 14 of the law states, "Shall be punished by imprisonment whoever commits an action intended to threaten the State's stability, safety, unity, sovereignty or security, or an action that contradicts the basic principles underlying the ruling system of the State, with the purpose of prejudicing the national unity or the social security." Paragraph 1 of Article 14 refers to the interest intended by the Emirati legislator, which is maintaining the State's security and national unity.

3.2. Penalty with its severe image (severe conditions)[39]

Article 9 of the Federal Law by Decree No. 34 of 2023 Concerning Combating Discrimination, Hatred and Extremism states, "1. If the crimes stipulated in Articles 5, 6, and 7 of this Decree by Law are committed by a public employee during, because of, or on the occasion of performing his work, or by a person with a religious capacity or in charge of it, or if the act occurs in House of Worship, this shall be deemed an aggravating circumstance. 2. The penalty shall be temporary imprisonment for a period not exceeding (5) five years and a fine not less than (AED 500,000) five hundred thousand UAE Dirhams if the acts stipulated in Clause (1) of this Article lead to a breach of public peace."

Also, Article 10 stipulates, "shall be sentenced to temporary imprisonment, any person who misuses religion to call individuals or groups as infidels either by statement, writings, or any other means. The sentence shall be the death penalty if the call of infidelity was associated with death and where the murder crime was committed as a result of that."

Article 9 and Article 10 clearly delineate the following points:

1. Enhanced penalties for public officers and religious figures: The law specifies harsher penalties for hate crimes committed by public officers or religious figures. This underscores the heightened responsibility of these individuals in society, recognising that their actions can have a more significant impact due to their positions of trust and authority.
2. Misuse of religion for discrimination: The article criminalises the misuse of religion for labelling individuals or groups as infidels. This provision aims to prevent religious figures from abusing their influence to incite hatred or discrimination.
3. Severe penalties for grave consequences: The law imposes the most severe penalty – the death penalty – in cases where such labelling leads to murder. This reflects the

38 Federal Law of the United Arab Emirates no 7 of 2014 'Combating Terrorism Crimes' <https://uaelegislation.gov.ae/en/legislations/1018> accessed 22 December 2023.

39 Federal Decree Law no 34 of 2023 (n 3).

seriousness with which the UAE regards the incitement of violence, especially when it is cloaked in religious rhetoric.

Article 13 of the Law of Combating Discrimination, Hatred, and Extremism states, "shall be sentenced to imprisonment for a period not less than (10) years any person, who establishes, sets up, organises or manages an association, centre, entity, organisation, league or group or any branch thereof, or uses any other means with the purpose of offending religions, or encouraging the incitement of hate speech and discrimination."

Article 13 is considered a decisive measure to prevent the establishment and operation of organisations that aim to incite hatred and religious discrimination.

Article 14 states, "Any person who joins, participates in or assists any of the parties referred to in the previous article, while knowing its objectives, shall be sentenced to imprisonment for a period not exceeding (7) years."

Article 15 states, "Any person who holds or organises a conference or a meeting in the State with the intention of offending religions, or provoking discrimination or hate speech shall be sentenced to imprisonment for a period not less than (5) years, and any person, who participates in the conference or the meeting, while knowing its objectives, shall be sentenced to the same punishment. The public authority has the right to stop the conference or the meeting with the use of force if necessary."

Article 15 specifically targets the organisation of events such as conferences or meetings that aim to incite religious insult, discrimination or hate speech. It imposes a minimum prison sentence of five years, not only for organisers but also for participants who realise the objectives of the event, with an emphasis on individual responsibility. The law enables public authorities to stop such conferences or meetings, using force if necessary, demonstrating the government's commitment to effectively preventing hate speech and maintaining public order. Essentially, the offender of the crime bears criminal responsibility and receives the due penalty for that crime, and his act entails a criminal responsibility attached to the legal person. Therefore, if one of the employees of a company engages in behaviour constituting the crime of discrimination stipulated in Article 6 of the Law of Combating Discrimination and Hatred – such as firing an employee who belongs to a particular religious group – criminal responsibility for the crime is not limited to the offender but rather extends to include the representative, manager or agent of the legal person if it is proven that they are aware of that act. This, indeed, represents an extension in the framework of penal responsibility and punishment and a departure from the principle of personal penal liability.

Article 17 states that "the representative, director or agent of a legal entity- in case any of the crimes set forth in the present decree-law is committed, with his knowledge, by any employee acting in his name or to his interest- shall be sentenced to the same penalties prescribed for the committed crime. The legal person shall be held jointly liable to settle any pecuniary penalties or compensation as ruled."

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Article 22 states that "any offender of any of the crimes set forth in the present decree law, who reports the judicial or administrative authorities before the discovery of such crime shall be exempted from penalty. In case such reporting is carried out after the discovery of such crime, the court may decide to exempt such offender from the punishment when the report has resulted in the detention of other offenders. Also, discrimination may not apply regarding any advantage or benefit conferred upon women, children, disabled individuals, elderly or others."

Upon analysing the first part of Article 22, it becomes clear that several conditions must be met to avail oneself of the exempting excuse provided in the Law of Combating Discrimination and Hate Speech.[40] Once such a condition involves reporting a crime as delineated in the law, wherein the reporter must be one of the offenders. Notably, the legislator did not specify the nature of the reporting party – whether they are an original partner or a subordinate – nor did they specify whether the reporting should be to judicial or administrative authorities. However, the disclosed information should be effective and enable the administrative or judicial authorities to uncover the crime. Additionally, the legislator specified a certain time when the person is exempted from penalty if they report the criminal activity before uncovering it by the authorised agencies. For example, if a group of people organises a meeting with the purpose of provoking hate speech, but one member withdraws and informs the authorised agencies, that reporting member is exempted from penalty since they facilitated the uncovering of the crime.

In the second part, Article 19 grants the court the right to exempt the offender from penalty if they reported the crime after its occurrence, where such a reporting contributed to arresting the other offenders. In this case, we propose that the legislator should consider imposing a penalty on the reporting offender instead of a complete exemption, with the final decision resting on the court's discretion.

4 RESULTS AND CONCLUSIONS

The crimes of disseminating and promoting discrimination and hate speech are composite crimes which aim to provoke more violence and discrimination. They necessitate the offender to have a specific intention and willingness to provoke and incite discrimination and hate speech while being well-informed about the outcomes of their speech in terms of fostering hatred and discrimination.

In the Law of Combating Discrimination, Hatred, and Extremism in the UAE, the legislator has imposed sanctions for committing the crime of provoking hate speech but has not addressed hate crimes in a broader sense. Therefore, we suggest the necessity

40 Manal Marwan Monjid, 'Legislative Policy in Confronting Discrimination and Hate Crimes in Federal Law: Analytical Study' (2019) 43(3) Law Journal 297, doi:10.34120/0318-043-003-007.

of imposing sanctions against crimes independently, particularly in cases where the motive is rooted in envy and hate.

5 RECOMMENDATIONS

The study recommends an addition to Article 1 of the Law of Combating Discrimination, Hatred, and Extremism in the UAE, suggesting the inclusion of the following text: "a discrimination that could underestimate or restrict the basic freedom and rights of people." The finalised context could read as follows: "Discrimination: any distinction, exclusion, restriction, or preference that is based on race, colour, descent, religion, nationality or ethnic origin, or any other reasons with the purpose or effect of impairing the enjoyment of equal human rights and freedom, either in the political, economic, social or cultural domains, or any other public life domains."

The legislator should reconsider Article 10 of the Law of Combating Discrimination, Hatred, and Extremism in the UAE. The phrase "(to achieve special interests or illegitimate affairs)" should potentially be omitted and instead rely on the presence of general criminal intention. This is because blasphemy is considered a dangerous threat to the community and should be combated to maintain social security.

As for Article 16 of the Law of Combating Discrimination, Hatred, and Extremism in the UAE, the legislator should consider imposing harsher penalties on offenders who receive financial support from a foreign party due to the potential risk this poses to the State's security.

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AUTHORS INFORMATION

Mohammad Amin Alkrisheh
Dr.Sc. (Law), Full Professor, Public Law Department, College of Law, Al Ain University, Al Ain, United Arab Emirates
mohammad.alkrisheh@aau.ac.ae
https://orcid.org/0000-0002-3649-9494
Co-author, responsible for research methodology, data collection, writing – original draft, writing – review & editing and supervising.

Said Obaid Al-Katbi
Master of Law, Faculty of Law, Al Ain University, Abu Dhabi Police GHQ, Abu Dhabi, United Arab Emirates
Salketbi91@hotmail.com
Co-author, responsible for data collection and writing – original draft.

Khawlah M. Al-Tkhayneh*
PhD (Criminology), Associate Professor, College of Education, Humanities and Social Sciences, Al Ain University, Al Ain, United Arab Emirates
khawlah.altkhayneh@aau.ac.ae
https://orcid.org/0000-0002-1034-5382
Corresponding author, responsible for conceptualization, writing, and data collection.

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RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

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Research Article

THE CHALLENGES OF INVESTMENT ARBITRATION: SUCCESS OR FAILURE? A COMPARATIVE ANALYSIS OF INVESTMENT ARBITRATION IN NORTH MACEDONIA AND KOSOVO

Njomëza Zejnullahu and Bashkim Nuredini*

ABSTRACT

Background: *In today's modern business and technological landscape, businesses are increasingly inclined to seek alternative methods for resolving disputes rather than rely solely on traditional court procedures. Businesses are also increasingly aware of the significance of resolving conflicts through alternative means and taking proactive measures to avoid litigation. In recent decades, investment arbitration has gained widespread acceptance and has emerged as a preferred mechanism for resolving disputes involving international investors in Western Balkan countries. Some countries demonstrate a favourable inclination towards employing arbitration as a dispute resolution mechanism by enacting legislation that grants investors the right to initiate arbitration proceedings against the state in case of failure.*

This scientific research objective will be achieved through the reflection of the legislative framework in the matter of investment arbitration as well as the reflection of the flow of foreign investments, analysing and not limited to the treatment of concrete cases of arbitration disputes. Through this approach, we will answer the central question of how much arbitration as an alternative dispute resolution mechanism is a stimulating factor for attracting foreign direct investment or whether multinational companies only use the legislative and incentive favours offered by the Republic of Kosovo and North Macedonia.

Methods: *The article was conceived based on a modern methodological framework. Within the general methodological framework of scientific research, logical methods play a crucial role in the scientific processing of the research data, drawing conclusions and determining facts through which the truth of the thesis of the work is reached scientifically. In the context of this paper, the method of analysis through which the impact of arbitration as an alternative dispute resolution mechanism in relation to the flow of investments will be analysed is noteworthy.*

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Additionally, methods of abstraction and concretisation will also be used. Abstraction is the basis of analysis, which sometimes represents the separation of parts from the whole subject. Moreover, the comparative method will highlight the diverse normative solutions in national legislation and international legal sources.

Results and conclusions: *In the article, the authors propose considering the effectiveness of existing provisions and determining whether adjustments or alternative approaches are needed to maximise the benefits of foreign investment while minimising potential risks and uncertainties associated with dispute resolution processes.*

1 INTRODUCTION

Arbitration's evolution has followed different trends in various periods of economic and social development. The speed and efficiency of dispute resolution are pivotal in attracting foreign investments, which is essential for any country's economic development. From an investigator's perspective, arbitration emerges as a fundamentally more accessible method of dispute resolution.[1]

This paper aims to identify whether authorising foreign investors the right to sue a country in international arbitration forums serves as a catalyst for attracting foreign investors. It addresses this question in a comparative aspect by comparing the legislation of Kosovo and Macedonia, two neighbouring countries with similar legal, social and economic systems.

Structured logically and chronologically, the paper initially deals with the legislative aspects of foreign investments and then the flow of investments. The theoretical analysis relies on professional literature in the field of arbitration law, specifically examining the works of experts who have significantly contributed to research in alternative dispute resolution. The literature review method aims to summarise reliable prior knowledge and gain insights from the published scientific literature.

In addition to the doctrinal perspective of investment arbitration, as a result of the expectations of the paper's thesis, aspects of the foreign investment pool are treated through empirical data as a reference point in relation to the paper's research objectives.

In countries where the judiciary is slow and inefficient, alternative methods such as arbitration and mediation are sought. This need is expressed primarily in developing countries, which undergo thorough scrutiny by foreign investors evaluating the investment environment they offer. Respecting an investor's property rights is one of the most important elements when deciding whether to start an investment project in a third country.[2]

1 Mariel Dimsey, *The Resolution of International Investment Disputes: Challenges and Solutions* (Eleven International Pub 2008) vol 1.

2 Michał Bors, 'Indirect and creeping expropriation and investor's protection under international investment law' (2014) 21 Studia Iuridica Lublinensia 181, doi:10.17951/sil.2014.21.0.181.

In Western Balkan countries, the rule of law and the efficiency of dispute resolution by the judiciary remain challenging. Consequently, the European Commission (EC) Report on Kosovo for 2022 states, "The efficiency of the judicial system remains of concern, and the time taken for judgements (i.e. the average time from filing a court case to receiving a judgment) remains a cause for concern as they are overall far too long."[3] While EC 2022 Report on North Macedonia highlights "*the positive trend of the efficiency in the judiciary*."[4]

The attraction of foreign investment is crucial for economic development, particularly for countries under development.

In general terms, foreign investment involves a person or legal entity from one economy investing in another economy that involves a transfer of funds or capital into the economy in which the investment is made. Foreign investment involves capital flows from one country to another, granting foreign investors extensive ownership stakes in domestic companies and assets. Foreign investment denotes that foreigners have an active role in management as a part of their investment or an equity stake large enough to enable the foreign investor to influence business strategy.

A modern trend is toward globalisation, where multinational firms have investments in various countries.[5] It is worth emphasising that investment arbitrations and commercial arbitrations differ in several aspects, particularly in terms of how jurisdiction is established. In investment arbitrations, there is no arbitration agreement; rather, jurisdiction is based on an investment protection agreement that includes a general "offer" by the state or permission for a foreign investor to initiate arbitration proceedings if they believe their investment has been harmed.

Mamingi and Martin highlight the role of FDI in facilitating growth and economic transformation among developing countries and the fact that FDI has become the largest source of external finance for developing economies.[6]

Kosovo legislation defines foreign direct investment as "*any asset owned or otherwise lawfully held by a Foreign Person in the Republic of Kosovo to conduct lawful commercial activities.*"[7]

3 European Commission, 'Kosovo* 2022 Report: Communication on EU Enlargement policy' (*European Commission*, 12 October 2022) 22 <https://neighbourhood-enlargement.ec.europa.eu/kosovo-report-2022_en> accessed 05 December 2023.

4 European Commission, 'North Macedonia Report 2022: Communication on EU Enlargement policy' (*European Commission*, 12 October 2022) 19 <https://neighbourhood-enlargement.ec.europa.eu/north-macedonia-report-2022_en> accessed 05 December 2023.

5 James Chen, 'Foreign Investment: Definition, How It Works, and Types' (*Investopedia*, 26 October 2020) <https://www.investopedia.com/terms/f/foreign-investment.asp > accessed 07 October 2023.

6 Nlandu Mamingi and Kareem Martin, 'Foreign Direct Investment and Growth in Developing Countries: Evidence from the Countries of the Organisation of Eastern Caribbean States' (2018) 124 CEPAL Review 79, doi:10.18356/e270b670-en.

7 Law of the Republic of Kosovo no 04/L-220 of 12 December 2013 'On Foreign Investment' [2014] Official Gazette of the Republic of Kosovo 1/1, art 2, para 1.4.

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In contrast to the Law on Foreign Investments in Kosovo, which provides a clear definition of a foreign investor as a foreign individual or entity investing in the Republic of Kosovo, the legislation in North Macedonia lacks a specific normative definition that directly outlines the status of foreign investors.

Consequently, some countries tend to use arbitration to strengthen dispute resolution and, hence, attract foreign investments. Other countries offer attractive conditions for investors while leaving arbitration as an option for dispute resolution but not an obligation.[8]

Both countries have adopted laws on the arbitration procedure, which are fully unified with the international arbitration law. However, the names of these two laws differ. The law in Kosovo bears the title "Law on Arbitration", while in Macedonia, this act is called the "International Commercial Arbitration Act".[9]

This paper is structured as follows: an introduction, the second section providing an overview of foreign investments, the third section delves into the legal and policy framework for FDI in Kosovo and Macedonia followed by statistical data on FDI in the fourth section, and finally, the results and conclusion.

The paper's conclusion will reflect the general analysis of the facts and the interpretation of the legislative framework in the states under analysis. Based on the proven facts, it will be ascertained whether arbitration as an alternative dispute resolution mechanism is a factor simulative in increasing the level of foreign investments or if, in some cases, arbitration may pose challenges to governments and strain state budgets, without significantly affecting the increase in the flow of investments. In some cases, it may present a privileged status of foreign companies over domestic companies, which, in case of eventual disputes, resort to judicial forms of dispute resolution.

2 STATUSES OF THE FDI IN KOSOVO AND NORTH MACEDONIA

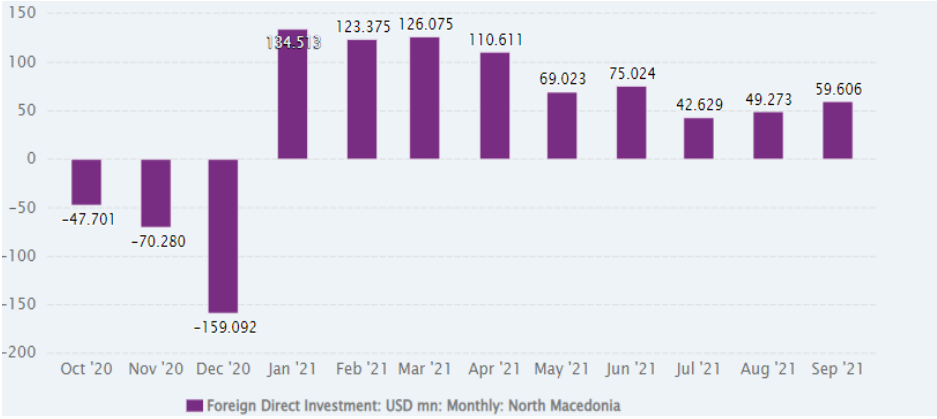
As illustrated in the graph below (Graph 1),[10] Foreign Direct Investment (FDI) in North Macedonia experienced a notable rise of USD 59.6 million in September 2021, marking an increase from the previous month's growth of USD 49.3 million. The data peaked at USD 347.3 million in January 2001 while hitting a record low of – USD 159.1 million in

8 Federica I Paddeu, 'The Impact of Investment Arbitration in the Development of State Responsibility Defences' in Christian J Tams and Stephan W Schill (eds), *International Investment Law and General International Law: Radiating Effects?* (Edward Elgar Pub 2023) 209.

9 Mentor Lecaj, Granit Curri and Donat Rexha, 'The Application of the International and Domestic Arbitration Law in Settlement of Legal Disputes: A Comparative Study' (2022) 6(3) Corporate Governance and Organizational Behavior Review 150, doi:10.22495/cgobrv6i3p14.

10 CEIC, 'North Macedonia Foreign Direct Investment' (*CEIC Data*, 2023) <https://www.ceicdata.com/en/indicator/macedonia/foreign-direct-investment> accessed 05 April 2023.

December 2020. According to the most recent reports from North Macedonia, the Current Account displayed a surplus of USD 20.8 million in September 2021. Furthermore, North Macedonia's Direct Investment Abroad expanded by USD 35.0 million in the same month, whereas its Foreign Portfolio Investment witnessed a decline of USD 551.4 million. Notably, the country's Nominal GDP was reportedly USD 3.6 billion in December 2020.



Graph 1. Foreign direct investment in North Macedonia from October 2000 to September 2021

In January-September 2021, total direct investments in the country amounted to EUR 285.6 million, mainly as a result of the reinvestment of earnings and equity (EUR 196.7 million and EUR 113.2 million, respectively) amid decreased net liabilities based on intercompany lending (by EUR 24.3 million).

The data reached an all-time high of USD 347.3 million in January 2001 and a record low of -USD 223.7 million in November 2022.

Hence, the data in the above table indicate a positive trend of FDI in North Macedonia, which, in particular, is focused on the reinvestment of earnings and equity. The trend has remained constant and has not changed significantly over the years.

The National Bank of the Republic of North Macedonia provides monthly Foreign direct investment in USD (Graph 2).[11]

11 National Bank of the Republic of North Macedonia, 'Direct Investment-Flows' (*National Bank of the Republic of North Macedonia*, 2023) <https://www.nbrm.mk/direktni_investicii_dvizenja-en.nspx> accessed 07 April 2023.

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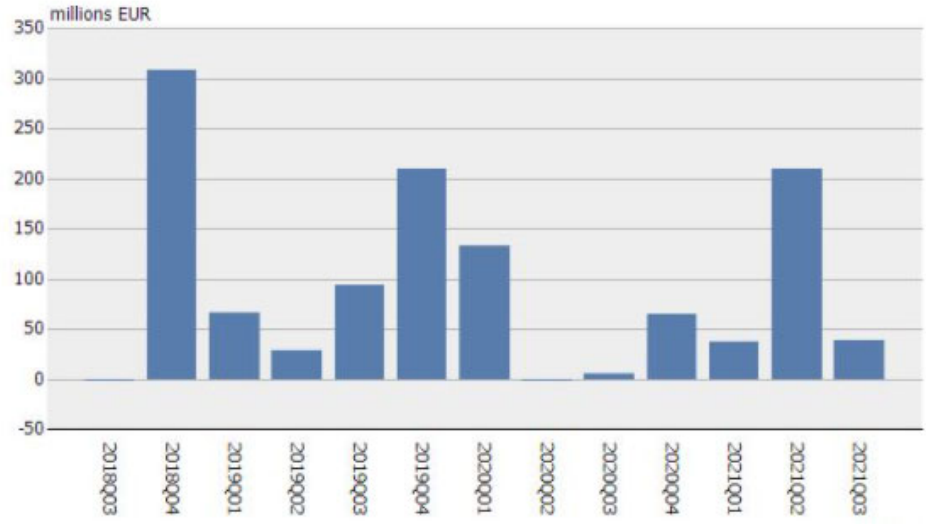

Graph 2. Direct investment in the North Macedonia - transactions

North Macedonia's Foreign Direct Investment (FDI) increased by USD 66.3 million in June 2023, compared with an increase of USD 99.0 million in the previous month (more data in Table 1).[12]

***Table* 1. Foreign direct investment in North Macedonia from January 2001 to June 2023**

LAST	PREVIOUS	MIN	MAX	UNIT	FREQUENCY	RANGE
▼ 66.3 Jun 2023	▼ 99.0 May 2023	-223.7 Nov 2022	347.3 Jan 2001	USD mn	monthly	Jan 2001 - Jun 2023

In 2022, the net flow of FDI in Kosovo was estimated at EUR 778 million, a significant increase from EUR 420 million in 2021 (Table 2).[13]

12 CEIC (n 10).

13 Central Bank of the Republic of Kosovo, 'Foreign Direct Investment - by Country' (*Banka Qendrore e Republikës së Kosovës*, 2023) <https://bqk-kos.org/statistics/time-series/?lang=en> accessed 04 April 2023.

***Table* 2. Foreign direct investments in Kosovo by country (net)**

	Total	Agriculture, forestry and fishing	Mining and quarrying	Manufacturing	Electricity, gas, steam and air conditioning supply	Construction	Wholesale and retail trade; repair of motor vehicles and motorcycles	Information and communication	Financial and insurance activities	Real estate activities	Professional, scientific and technical activities	Administrative and support service activities	Education	Not specified
		A	B	C	D	F	G	J	K	L	M	N	P	
2018	272.1	0.1	-2.7	-17.7	12.1	24.8	19.6	-9.6	15.5	205.2	5.2	4.7	0.7	2.0
2019	254.6	1.5	-6.9	14.2	13.5	-17.1	-6.7	2.3	13.9	223.8	3.4	3.7	1.3	7.6
2020	345.7	2.8	29.1	-4.6	30.0	11.4	-8.1	1.6	85.1	201.1	3.6	0.8	1.3	3.0
2021	420.7	1.1	1.4	-0.4	-38.8	16.7	-4.0	17.3	24.6	384.0	5.7	1.4	1.8	2.6
2022	778.2	0.7	52.4	14.3	44.9	26.7	15.1	14.0	53.9	523.7	10.7	10.7	2.2	12.6

Largest FDI by country is Germany and Switzerland, followed by the US and Albania (Table 3).[14]

***Table* 3. Largest Foreign direct investments in Kosovo by country**

	Total	AT	DE	CH	TR	NL	AL	US	FR	IT	HU	Other
2018	272.1	11.2	60.3	71	12.2	-39.7	22.3	35.5	5.6	2.7	0.1	29.1
2019	254.6	11.9	70.2	61.9	-31.9	1.9	15.2	22.8	3.4	7.9	19.1	39.6
2020	345.7	27.6	67.5	64.1	14.6	0.1	39.8	29.6	3.7	3.5	26.1	22.3
2021	420.7	22.9	121.9	99.2	-38	7.6	50.4	63.7	10.2	8.5	3.6	40.7
2022	778.2	44.7	194.2	155.2	39	43.7	79.8	93	9.9	10.4	14.3	37

14 idid.

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According to the tables above, data show no significant increase in FDI. It is important to analyse this in view of the fact that the above-given investment data are investments provided by the diaspora and not FDI in terms of attracting foreign companies to invest in Kosovo. Investments from the diaspora have been an important driver for FDI in Kosovo. Germany, which hosts the largest diaspora in the world, is the leading country of FDI in Kosovo, followed by Switzerland and Turkey. However, the question remains whether such investment should be considered as FDI.

A range of measures were implemented in the last decade to stimulate FDI, such as the introduction of a flat corporate tax rate at 10%, the establishment of economic zones with a range of benefits for investors, and the adoption of the "Law on Strategic Investments" facilitating the transfer of public assets and infrastructure support for investors in key sectors.[15] However, FDI remained at a relatively low level.

Kosovo faces constraints in its capacity to draw foreign investment, primarily stemming from deficiencies in disseminating information, inadequate communication about its economic prospects and foreign investment opportunities, and the absence of a credit rating from a reputable foreign rating agency.[16] Moreover, the inflow of foreign investment has been impeded by sluggish and inefficient reforms in the business environment, a lack of transparency, limited economic activity across various sectors, the weak rule of law, and unfavourable perceptions held by foreign investors and diaspora communities.

3 LEGAL FRAMEWORK AND POLICIES FOR FDI

3.1. North Macedonia

In the comparative analysis of foreign direct investments and their impact in both countries, the initial focus should be on presenting the legal framework related to the overall business environment unique to each nation.[17] From the perspective of Euro integration, it is evident that Northern Macedonia is making more progress than Kosovo.

North Macedonia generally offers a favourable environment for conducting business, and its legal framework aligns well with international standards. However, corruption remains a persistent issue.[18]

15 Law of the Republic of Kosovo no 05/L-079 of 11 October 2016 'On Strategic Investments in the Republic of Kosovo' [2017] Official Gazette of Republic of Kosovo 6/15.

16 See more: '2023 Investment Climate Statements: Kosovo' (*US Department of State*, 2023) <https://www.state.gov/reports/2023-investment-climate-statements/kosovo/> accessed 05 December 2023.

17 Ivan Bimbilovski and Elizabeta Spiroska, 'Macedonia' in Csongor Nagy (ed), *Investment Arbitration in Central and Eastern Europe: Law and Practice* (Edward Elgar Pub 2019) 261.

18 See more: '2023 Investment Climate Statements: North Macedonia' (*US Department of State*, 2023) <https://www.state.gov/reports/2023-investment-climate-statements/north-macedonia/> accessed 05 December 2023.

According to the 2020 World Bank Doing Business Report, North Macedonia was ranked 17th in the world for doing business, dropping seven positions from the previous year. The institutional framework with legislative powers in foreign direct investment (FDI) in the Republic of Macedonia covers many entities.[19] Nevertheless, large foreign companies operating in the Technological Industrial Development Zones (TIDZ) generally express positive experiences with their investments and maintain good relationships with government officials.[20]

To attract foreign direct investment, the Republic of Northern Macedonia has established several institutions whose exclusive competence facilitates the procedures for attracting foreign investment. Foremost among these is the role of Invest North Macedonia – the Agency for Foreign Investments and Export Promotion, which serves as the primary government institution facilitating foreign investments. This agency works directly with potential foreign investors, provides detailed explanations and guidance for registering a business in North Macedonia, analyses potential industries and sectors for investing, shares information on business regulations, and publishes reports about the domestic market.[21]

The companies in TIDZ realised exports of 275.4 million EUR in January 2023, the highest level in the last five years. Compared to January 2022, exports increased by 11%, i.e. 9% higher than in 2021, and by 45% and 15% higher compared to 2020, i.e., 2019.

The positive growth trend continues concerning imports. In January, the companies in TIDZ imported 221 million EUR. This is 8% more than the same period 2022, which is 44% more than January 2020 and 15% more compared to 2019. The analysis shows that Imports in January 2021 were higher by 10%.

There is a particularly positive growth trend in net exports, which in January were 24.5%. This is due, among other things, to the increased investment activities in the Zones and the increased number of jobs.

The zones' employees reached almost 16,400 in January, 16% higher than in January 2022. Only in the first month of the year were almost 80 new jobs created in the companies in the zones. Otherwise, TIDZ rounded off last year with 2,300 newly created jobs and the highest export of EUR 3.7 billion, making 2022 the most successful year of the zones existence.[22]

19 Biljana Petrevska, 'Foreign Direct Investment in Macedonia – Is there Dicrimination in Practice?' (Knowledge Based Sustainable Economic Development: 4th International Scientific Conference ERAZ 2018, Sofia, Bulgaria, 7 June 2018) 40.

20 See more: '2021 Investment Climate Statements: North Macedonia' (*US Department of State*, 2021) <https://www.state.gov/reports/2021-investment-climate-statements/north-macedonia/> accessed 04 April 2023.

21 See more: *Invest North Macedonia* (2023) <https://investnorthmacedonia.gov.mk/mk/pocetna-stranica/> accessed 05 December 2023.

22 'Positive Growth Trend in TIDZ Continues in 2023 – Increased Exports and New Jobs in January 2023' (*TIDZ*, 5 February 2023) <https://fez.gov.mk/en/positive-growth-trend-in-tidz-continues-in-2023-increased-exports-and-new-jobs-in-january/> accessed 05 December 2023.

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Table 4. Investment Climate and Incentives in North Macedonia[23]

Incentives	Awarded aid	Eligibility criteria	Condition for use of aid	Length of incentives	Zone specific
Tax exemptions from profit tax	Total exemption from profit tax rate, currently at 10%.	Being a domestic or foreign company registered and operating in Technological Industrial Development Zones (established to host high-tech clean industry production that is export-oriented).	Be located in the zone.	10 years[11]	Yes
Tax exemptions from personal income tax	Total exemption from personal income tax rate, currently at 10%.			10 years	
Lower rents	The beneficiaries of TIDZs pay significantly low rent given the area of the parcels.			n/a	
Grant for construction	The amount of aid for construction in TIDZ is limited to EUR 0.5 million. The beneficiaries of the zones use this aid in the form of a grant under the conditions specified in the Law on TIDZ.				
Exemptions from a compensation for organising the construction land (communal taxes)	Exemption from local compensation, determined by the municipality in which the TIDZs are located.		Be located in the zone	n/a	
Aid for training employees	Zone beneficiaries can receive aid in the form of a grant for training of the employees in the amount of 50% of the eligible training costs for general trainings or 25% of the eligible training costs for general trainings/developments.		Be located in the zone.	n/a	
Exemption from paying VAT	Zone beneficiaries are exempt from paying VAT on supply of goods and services in TIDZs (except the supply intended for the final consumption) and import of goods into TIDZs (provided that the goods are not intended for final consumption)., under the conditions specified in the Law on TIDZ.			n/a	
Customs duties for specific equipment, machines and spare parts, exemption.	Exemption from paying customs duties for equipment for performing the activity in the Zone, machines and spare parts, under the conditions specified in the Law on TIDZ.			n/a	

3.2. Legal Framework in North Macedonia

In North Macedonia, no singular law governs foreign investments, nor is there a comprehensive "one-stop-shop" website providing all the relevant laws, rules, procedures, and reporting requirements for investors. Instead, the legal framework comprises numerous laws, including the Trade Companies Law, the Securities Law, the Profit Tax Law, the Customs Law, the Value Added Tax (VAT) Law, the Law on Trade, the Law on Acquiring Shareholding Companies, the Foreign Exchange Operations Law, the Payment Operations Law, the Law on Foreign Loan Relations, the Law on Privatization of State-owned Capital, the Law on Investment Funds, the Banking Law, the Labor Law, the Law on Financial

23 OECD, *Competitiveness in South East Europe 2021: A Policy Outlook* (Competitiveness and Private Sector Development, OECD Pub 2021) North Macedonia profile, 1447-1651, doi:10.1787/cf2e0fc7-en.

Discipline, the Law on Financial Support of Investments, and the Law on Technological Industrial Development Zones (free economic zones).[24]

North Macedonia has simplified regulations and procedures for large foreign investors operating within the Technological Industrial Development Zones (TIDZ). However, the overall regulatory environment in the country remains complex and lacks full transparency, although the government is striving to enhance it.

The Law on International Commercial Arbitration of the Republic of Macedonia establishes the criteria for determining whether arbitration is international.[25] According to this law, arbitration is deemed international if either: 1) one of the parties involved, at the time of entering into the arbitral agreement, is a natural person with domicile or habitual residence abroad or a legal entity with its place of business located abroad; or 2) a substantial part of the obligations arising from the commercial relationship is to be performed in a specific location, or the dispute is most closely connected with a particular place.

24 Decree no 08-1873/1 of 12 May 1993 'Law on Foreign Loan Relations' [1993] Official Gazette of the Republic of Macedonia 31/700; Decree no 08-2820/1 of 24 July 1996 'Law on Privatization of State-owned Capital' [1996] Official Gazette of the Republic of Macedonia 37/791; Decree no 07-2969/1 of 14 July 1999 'Law on Value Added Tax' [1999] Official Gazette of the Republic of Macedonia 44/1298; Decree no 07-3371/1 of 26 July 2000 'Securities Law' [2000] Official Gazette of the Republic of Macedonia 63/2540; Decree no 07-1600/1 of 25 April 2001 'Law on Foreign Exchange Operations' [2001] Official Gazette of the Republic of Macedonia 34/735; Decree no 07-1148/1 of 12 March 2004 'Law on Trade' [2004] Official Gazette of the Republic of Macedonia 16/279; Decree no 07-1761/1 of 30 April 2004 'Law on Trade Companies' [2004] Official Gazette of the Republic of Macedonia 28/459; Decree no 07-437/1 of 29 January 2007 'Law on Technological Industrial Development Zones' [2007] Official Gazette of the Republic of Macedonia 14/190; Decree no 07-3839/1 of 6 September 2007 'Payment Operations Law' [2007] Official Gazette of the Republic of Macedonia 113/1494; Decree no 07-1913/1 of 19 May 2005 'Customs Law' [2005] Official Gazette of the Republic of Macedonia 39/595; Decree no 07-2918/1 of 22 July 2005 'Law on Labor Relations' [2005] Official Gazette of the Republic of Macedonia 62/910; Decree no 07-2327/1 of 21 May 2007 'Law on Banks' [2007] Official Gazette of the Republic of Macedonia 67/884; Decree no 04-486/1 of 27 January 2009 'Law on Investment Funds' [2009] Official Gazette of the Republic of Macedonia 12/257; Decree no 07-1954/1 of 13 May 2013 'Law on Acquiring Shareholding Companies' [2013] Official Gazette of the Republic of Macedonia 69/1461; Decree no 07-5101/1 of 27 December 2013 'Law on Financial Discipline' [2013] Official Gazette of the Republic of Macedonia 187/4616; Decree no 07-2934/1 of 23 July 2014 'Law on Profit Tax' [2014] Official Gazette of the Republic of Macedonia 112/3354;Decree no 07-3053/1 of 3 May 2018 'Law on the Financial Support of Investments' [2018] Official Gazette of the Republic of Macedonia 83/1507. Changes and additions to the Laws were made by decrees in subsequent years.
North Macedonia has concluded an Agreement for Promotion and Protection of Foreign Direct Investments with the following countries: Albania, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, China, Croatia, the Czech Republic, Egypt, Finland, France, Germany, Hungary, India, Iran, Italy, Luxembourg, Malaysia, Montenegro, the Netherlands, North Korea, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan, Turkey, and Ukraine.

25 Decree no 07-1252/1 of 21 March 2006 'Law on International Commercial Arbitration of the Republic of Macedonia' [2006] Official Gazette of the Republic of Macedonia 39/492.

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3.2.1. Law on Strategic Investments[26]

North Macedonia adopted the Law on Strategic Investment to create more favourable conditions for selected investments in the following sectors: energy, transport, telecommunication, tourism, manufacturing, agriculture and food, forestry and water economy, health, industrial and technological parks, wastewater and waste management, sport, science and education.

This Law should encourage economic growth, employment, and the use of new technologies and innovations, increasing North Macedonia's competitive economic opportunities for export, decreasing the trade deficit, and improving the well-being of the citizens of North Macedonia overall.

The Law defines a strategic investment project as a project which fulfils one or more purposes as described above and which realises investments in the amount of:

- At least EUR 100 million on the territory of at least two or more municipalities,
- At least EUR 50 million in the municipalities with a seat in a city, municipalities in the City of Skopje, and the City of Skopje, and
- At least EUR 30 million in municipalities with a seat in a village.[27] As an exception, projects realised in the scope of agreements between countries, projects which are conducted and financed in collaboration with the European Union, the Ministerial Council of the Energy Community (PECI – Project of Energy Community Interest; PMI – Project of Mutual Interest), and projects with international financial institutions are considered as strategic investment projects under this Law.

The strategic investment projects must be in one of the following areas: Energy and infrastructure, transport and telecommunications, tourism, manufacturing, agriculture, forestry and water economy, food industry, healthcare, industrial and technological parks, wastewater and waste management, IT zones, sport, science and education, and construction of large multifunctional construction complexes of construction buildings that cover more than one of the areas mentioned above.[28]

If the investment is over EUR 150 million, it can be granted the status of a strategic investment project even if it is not in the areas mentioned above.

26 Decree no 08-437/1 of 16 January 2020 'Law on Strategic Investment in the Republic of North Macedonia' [2020] Official Gazette of the Republic of North Macedonia 14/256.

27 ibid, art 4.

28 ibid, art 5.

3.2.2. Law on the Financial Support of Investments[29]

The 2021 Legislation concerning the provision of financial backing for Investments establishes guidelines for the categories, quantities, prerequisites, modalities, and processes involved in providing financial aid to enterprises making investments within the confines of the Republic of North Macedonia. This framework of support conforms to the protocols governing the oversight of government assistance.

In the previous period, many Macedonian companies received financial support, increasing the country's economic capacity.

As per the stipulations of the legislation, the following categories of entities are eligible recipients of financial assistance:

- Those entities that have initiated Initial Investments
- Entities demonstrating an increase in total operational revenues
- Entities where the reduction in the workforce does not exceed 5%
- Newly registered companies
- Manufacturers within the Textile & Leather-processing sector
- Companies engaged in military equipment production

For Initial Productive Investments made by business entities founded by residents or temporarily residing individuals of the Republic of North Macedonia located outside the country, the financial support amount will be augmented by 15% of the justified investment expenses, up to an annual limit of EUR 1 million.

Recent modifications to the legislation in 2021 broadened the financial support available for technological advancement and research, bolstered investment endeavours of notable economic significance, assisted the takeover of distressed companies, and fortified market competition.[30]

The underlying intent behind these legislative changes is to expedite economic growth and advancement in the Republic of North Macedonia by promoting investments that enhance the country's economic competitiveness and boost employment opportunities.

29 Decree no 08-3053/1 of 3 May 2018 'Law on the Financial Support of Investments' [2018] Official Gazette of the Republic of Macedonia 83/1507. Amendments and additions to the Law on the Financial Support of Investments were made by decrees: Decree no 08-2600/2 of 17 May 2019 [2019] Official Gazette of the Republic of North Macedonia 98/1243; Decree no 08-3487/1 of 12 June 2019 [2019] Official Gazette of the Republic of North Macedonia 124/1759; Decree no 08-3677/1 of 30 July 2021 [2021] Official Gazette of the Republic of North Macedonia 178/2979.

30 'Changes in the Financial support of investments in North Macedonia' (*Lalicic & Boskoski Law Office*, 2021) <https://lblaw.com.mk/en/financial-support-of-investments-in-north-macedonia/> accessed 05 May 2023.

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3.3. Investment Climate in Kosovo

Kosovo has three economic zones. Zones are established upon the municipality's request to the Ministry of Trade and Industry and are administered by the municipality. Business organisations or associations can also submit requests for establishment to the ministry or the municipality.

Incentives are broadly categorised into fiscal and non-fiscal incentives. Fiscal incentives provide tax and customs duty concessions, while non-fiscal incentives are any other form of state support to investors. Kosovo has established a flat corporate income tax of 10 percent. To encourage investment, the government can grant certain VAT-related privileges, such as a six-month VAT deferment upon presentation of a bank guarantee for companies importing capital goods. Suppliers may export goods and services without being required to collect VAT from foreign buyers. Suppliers may claim credit for taxes on inputs by offsetting those taxes against gross VAT liabilities or claiming a refund. The government can issue guarantees or jointly finance foreign direct investment projects but has not yet done so. Kosovo does not have legislation that incentivises businesses owned by underrepresented investors.[31]

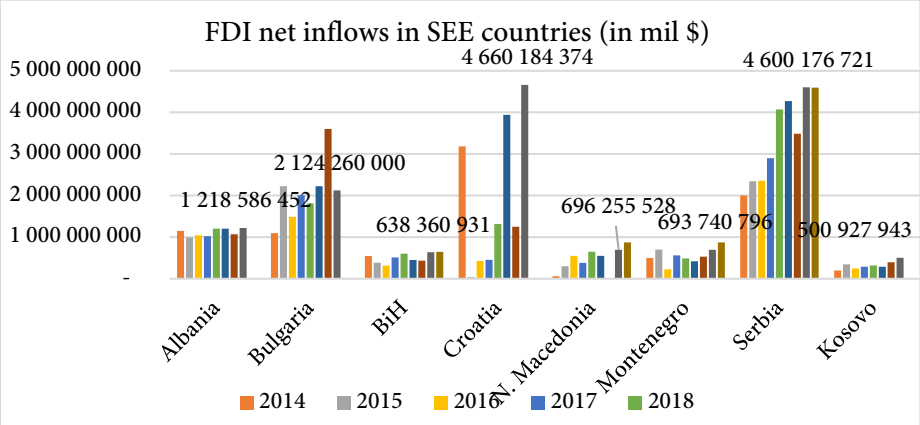
***Table* 5. Investment Climate and Incentives in Kosovo**[32]

Incentives	Awarded aid	Eligibility criteria	Condition for use of aid	Length of incentives	Zone specific
Deferred VAT payment on selected plant machinery.	Deferred payment of VAT on imports of selected plant machinery.	Yes	Import plant equipment and machinery.	Up to 6 months	No
Additional 10% deduction on heavy equipment.	Additional deduction allowance of 10% on top of normal depreciation of the cost of acquisition of heavy equipment (production lines for plant and machinery) and heavy transport vehicles.	Only permitted for "heavy" equipment and vehicles. Applicable for new assets or assets first placed in service in Kosovo. Only allowable on assets first used up to 31 December 2012 (note, both income tax usage period is extended to 31 December 2014).	Acquisition of equipment and vehicles under the category.	n/a	No
No customs duty on machinery and raw material.	Exemption from custom duties on machinery and raw material.	The Law on 0% duties was in the Parliament in 2013 – before these incentives were provided based on UNMIK Regulation NO. 2007/31 PART C.	The exempt material must be aimed at manufacturing.	n/a	No
No fees on business registration (Municipality of Suhareka).	Exemption from fees of businesses registration that are involved in production.	Manufacturing businesses.	Business must be located in Suhareka.	n/a	No
Free use of municipal land in Peja.	Free use of municipal land for business activities.	No specific criteria.	Conduct a new business.	Up to 30 years	No

Kosovo was only able to partially tap its potential in terms of the quantity and quality of attracted investments in the last decade. Despite efforts, inflows remained at relatively low levels without fully recovering after the global financial crisis. In contrast, most neighbouring economies were more successful in attracting investment projects during the same period.

31 See more: '2023 Investment Climate Statements: Kosovo' (n 16).

32 OECD (n 23) Kosovo profile, 1042-1236, doi:10.1787/573f3543-en.



Graph 3. Foreign direct investment net inflows in Southeast European countries

As shown in the above graph (Graph 3),[33] Serbia received the largest portion of the overall Foreign Direct Investment (FDI) inflows in neighbouring nations, accounting for 51%, trailed by Albania with 20%. In comparison to countries within the Southeast European (SEE) region, the statistics indicate that the percentage of FDI in relation to GDP in Kosovo has paralleled that of North Macedonia, stood above that of Bosnia and Herzegovina (B&H), and remained notably lower than Montenegro.

In terms of legislation, there are three laws in Kosovo specifically addressing investors: namely, the Law on Foreign Investors and the Lad on Strategic Investment.

The legal framework for foreign investors in Kosovo encompasses various laws, including those mentioned below.[34] However, continuous updates and harmonisation of legislation are necessary to address the evolving needs and demands of the investment landscape. Stakeholders consistently emphasise the importance of enhancing capacities related to understanding and implementing these laws.[35]

The government recognises the significance of filling gaps in existing legislation to complete the legal framework for Foreign Direct Investments (FDIs). However, it must be noted that the Law on Foreign Investments alone is insufficient to address all gaps in the legal framework; this requires alignment with other laws, too.

33 World Bank, 'Foreign direct investment, net inflows (BoP, current US$)' (*The World Bank*, 2023) <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD> accessed 04 April 2023.

34 Antonis Bredimas, 'Kosovo and Foreign Investment Protection' in Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (EUROYEAR, Springer 2019) 113.

35 Steven C Young, 'Foreign Direct Investment Disputes with Unrecognized States: FDI Arbitration in Kosovo' (2016) 33(5) Journal of International Arbitration 501, doi:10.54648/joia2016037.

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Low numbers in foreign investment in Kosovo show that to attract foreign investment, Kosovo must focus on improving and aligning the legal framework and effective implementation by increasing the efficiency of institutions, particularly those that serve businesses. In regard to alignment, it is important that aside from the Law on Foreign Investments, Kosovo also pays attention to harmonising this law with other laws by providing more flexibility and incentives for foreign investors, in particular, removing the administrative burden and unnecessary bureaucracies.

The Law on Foreign Investment has been adopted with the primary objective of attracting foreign investments in Kosovo.[36] This law provides a fairly comprehensive legal basis setting forth the rights of investors, protective measures, and fundamental guarantees to ensure a favourable investment climate. Incorporating these guarantees in the law adheres to the best practices observed at an international level and is fully in line with EU legislation.[37]

The provision allowing dispute settlement through arbitration is regarded as a protective measure for foreign investors, considering certain challenges within Kosovo's legal system, such as weak rule of law, limited court efficiency, difficulties in contract implementation, and prolonged property disputes.[38]

In cases where no agreed procedure exists, the foreign investor retains the right to settle the investment dispute through litigation before a competent court in the Republic of Kosovo or through local and international arbitration.[39]

The Republic of Kosovo consented to submit an Investment Dispute for arbitration under this article, as authorised by the current law. The foreign investor can provide consent by filing a request for arbitration or submitting a written statement expressing their consent to the Agency.

36 Law of the Republic of Kosovo no 04/L-220 (n 7).

37 The current Foreign Investment Law consists of 26 articles, and the Ministry Industry, Entrepreneurship and Trade (MINT) assumes the responsibility of formulating, developing, and monitoring the policies related to foreign investments through its established mechanisms. It is important to note that foreign investors possess the right to settle investment disputes based on mutually agreed requirements between the investors and the Republic of Kosovo. In the absence of such an agreement, foreign investors retain the right to seek resolution of investment disputes either through judicial proceedings in a competent court in Kosovo or via local and/or international arbitration.

38 Arianit Kaçandolli and Bashkim Nuredini, 'Legal Treatment of Foreign Investment and Role International Investment Arbitration through the prism of Kosovo' (UBT International Conference 2021) 96 <https://knowledgecenter.ubt-uni.net/conference/2021UBTIC/all-events/96> accessed 10 May 2023.

39 According to Art. 16 of the Law on Foreign Investment, there are provisions regarding the resolution of investment disputes in the Republic of Kosovo. The article states that a foreign investor has the right to request the resolution of an investment dispute based on applicable requirements or procedures agreed upon in writing between the foreign investor and the Republic of Kosovo.

Unless otherwise agreed upon in writing between the concerned foreign investor and the Republic of Kosovo, any arbitration conducted under this law is expected to occur in an EU member country that is also a party to the New York Convention.

Law no. 05/L-079 on Strategic Investments[40] is specifically designed to promote and facilitate strategic investments within the Republic of Kosovo. Its primary objectives include encouraging investment, attracting investors, and establishing favourable conditions for the realisation of strategic projects. The law also outlines administrative procedures and criteria for evaluating, selecting, implementing, and supervising such projects. Additionally, it provides guidelines for granting the use of the Republic of Kosovo's property for strategic investment projects.[41]

One of the key features of the law is the establishment of the Inter-Ministerial Commission for Strategic Investments. This commission plays a pivotal role in the decision-making process. The Agency for Investments and Enterprise Support serves as the Secretariat, while the Commission, on a case-by-case basis, issues recommendations regarding granting strategic investor status. These recommendations are provided after consideration of professional advice from the Operational Group responsible for preparing and implementing strategic investments. However, the final decision for each individual case lies with the Government of Kosovo.[42]

The law guarantees various rights to strategic investors. These rights include protection and continuous guarantees, non-discriminatory treatment, compensation in instances of nationalisation, expropriation, or violations of legislation, and protection against the retroactive application of laws. Furthermore, the Government of Kosovo has already decided to grant tax exemptions for 3 to 7 years for new investments, depending on the value of the investments and the number of employees. However, the practices have shown some weaknesses of the law in force, starting from the high threshold necessary for a project to be classified as a "strategic investment" and limited due diligence on the proposed strategic investments.

The above-mentioned concerns pose challenges for foreign investors, as the financial commitment needed to meet the criteria may discourage potential investors from pursuing strategic investment opportunities in Kosovo. Consequently, this may limit the number of projects that benefit from the preferential treatment and incentives associated with strategic investments, potentially impeding overall economic growth.

40 Law of the Republic of Kosovo no 05/L-079 (n 15).

41 The sectors covered by this law include energy, infrastructure and mining, transport and telecommunications, and tourism, among others. The definitions outlined in this law largely correspond to those outlined in the Foreign Investment Law.

42 Instituti për Ekonomi të Tregut të Lirë, *Investimet e Huaja Direkte në Kosovë: Klima e investimeve, potenciali dhe barrierat* (IETL, KAS 2019).

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4 DISPUTE RESOLUTION FOR FOREIGN INVESTORS

Regarding investor protection, it should be noted that a state may undertake different measures and incentives to enact investment legislation ensuring certain treatment for investors. Such legislation might guarantee exemption from taxation regimes or provide a specific fiscal regime for investors in a particular industry sector. However, investors may be concerned that any protections contained in legislation may be subject to revocation by a subsequent government.[43]

One category of agreements pertains to situations where an investor can engage in an investment contract with a host nation. Concession agreements and production-sharing contracts are such arrangements primarily found in extractive industries. These contracts offer investors specific safeguards that facilitate their participation in developing a country's natural resources. The investment contract shields investors against unfavourable alterations in laws or regulations that may impact their interests. However, the effectiveness of these clauses when confronted with government actions can vary.

One of the remarkable developments accompanying the surge in foreign direct investment involves the proliferation of investment treaties initiated by host states. These treaties can be bilateral investment agreements (BITs) between two countries or multilateral investment agreements (MITs) involving multiple nations. Designed to foster foreign investment, these treaties frequently include provisions that establish distinct protections for investors from the respective states. The concept of MITs permits a group of states, often regionally aligned, to extend these protective measures. It's important to highlight that recent times have witnessed significant trade agreement negotiations involving countries holding substantial sway over global trade. For instance, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a significant trade accord following the North American Free Trade Agreement, as well as the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States (although these negotiations have encountered challenges).[44]

4.1. North Macedonia

Creating a stable regulatory framework is undeniably crucial for facilitating foreign investment. In pursuit of both attracting foreign investment and progressing towards EU membership, North Macedonia has consistently pursued a reform-oriented strategy within

43 'International Investment Protection' (*Ashurst*, 11 February 2020) <https://www.ashurst.com/en/insights/quickguide-international-investment-protection/> accessed 10 May 2023.

44 ibid.

its legislative domain. This strategy places notable emphasis on legislation directly relevant to foreign investment.[45]

The foundation of the Law on International Commercial Arbitration draws from a mix of international sources, including bilateral and multilateral agreements that North Macedonia has either independently entered into or inherited from its past association with Yugoslavia.

Notably, the Republic of North Macedonia is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the Geneva Convention on Execution of Foreign Arbitral Awards.[46]

North Macedonia is also a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of the Other States and the European Convention on International Commercial Arbitration.[47] Macedonian Law gives preference to ratified international agreements over domestic legislation.

In April 2006, North Macedonia adopted the Law on International Commercial Arbitration,[48] which is exclusively applicable to international commercial arbitration processes within the country's jurisdiction. Under this law, an arbitration award holds the same weight as a final judgment and can be executed promptly. Arbitration awards originating from external jurisdictions are classified as foreign arbitral awards. They are duly acknowledged and enforced in accordance with the principles outlined in the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

North Macedonia adheres to the concept of obligatory international arbitration when addressing conflicts involving foreign investors. The nation acknowledges the validity of

45 This legal sphere encompasses an array of statutes, including: Decree no 07-2969/1 of 14 July 1999 'Law on Value Added Tax', Decree no 07-1148/1 of 12 March 2004 'Law on Trade', Decree no 07-1761/1 of 30 April 2004 'Law on Trade Companies', Decree no 07-1913/1 of 19 May 2005 'Customs Law', Decree no 07-437/1 of 29 January 2007 'Law on Technological Industrial Development Zones', Decree no 07-2934/1 of 23 July 2014 'Law on Profit Tax', Decree no 07-3053/1 of 3 May 2018 'Law on the Financial Support of Investments' (n 24); Decree no 07-173/1 of 16 January 2002 'Law on the Takeover of Joint Stock Companies' [2002] Official Gazette of the Republic of Macedonia 4/59. Changes and additions to the Laws were made by decrees in subsequent years.

46 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards> accessed 03 March 2023; Convention on the Execution of Foreign Arbitral Awards (26 September 1927) <https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=556&chapter=30&clang=_en> accessed 03 March 2023.

47 Convention on the Settlement of Investment Disputes between States and Nationals of other States (18 March 1965) <https://treaties.un.org/pages/showDetails.aspx?objid=080000028012a925> accessed 03 March 2023; European Convention on International Commercial Arbitration (21 April 1961) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en> accessed 03 March 2023.

48 Decree no 07-1252/1 (n 25).

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foreign arbitration awards and their enforceability within its borders, contingent upon satisfying the stipulated enforcement conditions as set forth in both the Convention and the Law on International Private Law.[49]

Thus, so far, the country has encountered six documented investor-state disputes resolved through international arbitration panels, none of which have involved U.S. individuals or enterprises. The local courts within North Macedonia uphold and implement foreign arbitration awards issued against the Government, and the nation has not historically demonstrated a propensity for extrajudicial actions against foreign investors.

North Macedonia embraces the decisions of international arbitration in matters concerning investment disputes.[50] Domestic courts duly acknowledge and enforce foreign arbitral awards along with judgments rendered by foreign courts. While mechanisms for alternative dispute resolution exist for settling disputes between private entities, they are infrequently utilised.

Established in 1993 within the Economic Chamber of Macedonia (a non-governmental business association), the Permanent Court of Arbitration possesses the authority to administer both domestic and international disputes.[51] North Macedonia mandates mediation in cases involving companies with a value of up to EUR 15,000 (USD 17,715 at the exchange rate as of 25 March 2021) before resorting to litigation.

In contrast to Kosovo's legislation, North Macedonia's laws do not contain a specific provision authorising foreign investors to initiate international arbitration against the state based solely on their status as investors. While the state has established a general legal framework for foreign investment, it lacks a specific provision similar to Kosovo's laws.

The legal framework pertaining to foreign investment in North Macedonia does not grant foreign investors an explicit right to pursue arbitration against the state. Consequently, in the absence of an agreed procedure, foreign investors in North Macedonia may be limited to seeking resolution of investment disputes through litigation before a domestic court or exploring alternative mechanisms for dispute resolution.

In 2017, by Decision 4 No. 44-8454/1 of 19 December 2017, the Government established a Coordinating Body for monitoring arbitration proceedings arising from the concluded or ratified international agreements of the Republic of North Macedonia. Members of the body are the Minister of Economy, the Minister of Finance and the State Attorney of the Republic of North Macedonia, and from June 2021, the Minister of Justice. The Deputy Prime

49 Decree no 07-3099/1 of 4 July 2007 'Law on International Private Law' [2007] Official Gazette of the Republic of Macedonia 87/1096.

50 The nation's Law on International Commercial Arbitration mirrors the structure of the United Nations Commission on International Trade Law (UNCITRAL) Model Law. See: UNCITRAL Model Law on International Commercial Arbitration (21 June 1985, with amendments as adopted in 2006) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 07 April 2023.

51 See more: 'Permanent Court of Arbitration' (*Economic Chamber of North Macedonia,* 2023) <https://arbitraza.mchamber.mk/index.aspx?lng=2> accessed 03 March 2023.

Minister chairs the body in charge of economic issues, coordination with economic departments and investments. The Coordinating Body is tasked with providing a coordinated approach regarding issues of monitoring activities related to resolving disputes that are or will be conducted before agreed international arbitrations. The coordinating body implements the procedure for selecting law firms as an established practice with established selection criteria.[52]

According to an analysis prepared by the coordinating body, the total amount of funds that would potentially have to be paid is in the amount of MKD 82,267,500 (EUR 945 million and USD 420 million), of which the basic value of the disputes is in the total amount of MKD 51,543,443 (EUR 575 million and USD 282 million), while the total costs, namely interest costs, attorney's fees and other costs, amount to about MKD 30,724,056 (EUR 370 million and USD 138 million), which will have implications on the budget of the Republic of North Macedonia in the coming years.[53]

The State Audit Office of the Republic of North Macedonia, through the Final Report on the audit of the financial statements and compliance audit for 2021 of the Government of the Republic of North Macedonia on the basis of the basic budget (637), points out that: "During the audit in December 2022, a verdict was passed for an arbitration procedure (a dispute arising from the Agreement for the purchase and sale of shares and concession concluded on 8 May 1999 between the Republic of North Macedonia and the investor Hellenic Petroleum) in favour of the plaintiff, based on to which the Government should pay budget funds in the total amount of USD 21.5 million, although the amount claimed by the plaintiff was in the amount of USD 42.6 million (of which USD 31.6 million in the name of principal debt and USD 11 million in the name of default interest). Furthermore, the auditor's report states that: 'during the audit procedure, a settlement agreement was signed to settle the debt arising from the arbitration dispute in connection with the Agreement between the Government of the Republic of India (the debtor) and the Government of the Republic of Macedonia, in accordance with which the debtor has to pay an amount in favour of the Government of EUR 858,000 in 4 instalments, whereby the signing of the agreement is conditioned by the payment of the first instalment of EUR 250,000, which was carried out on 2 January 2023 based on a notification received from the Ministry of Finance.'"[54]

At present, North Macedonia is embroiled in four distinct international arbitration disputes encompassing various subjects, including:

The case of GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. against the Republic of North Macedonia, documented as ICC Case No. 26696/HBH, centres on international

52 State Audit Office, *Final Report on the Audit of Financial Statements and Compliance Audit for 2021 of the Government of the Republic of North Macedonia: Basic Budget Account (637)* (SAO 2003) <https://dzr.mk/sites/default/files/2023-06/4_Vlada_RSM_KOMPLET_2022.pdf> accessed 10 July 2023.

53 ibid 3, 40.

54 ibid 40-1.

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commercial arbitration. The case, categorised under the Investor-State type, pertains to industries encompassing Electric Power Energy, Construction, and Specialized Construction Activities. Despite an unspecified introduction date, the proceedings remain ongoing, with Turkey representing the investor and North Macedonia as the respondent nation. The arbitration is overseen by the ICC (International Chamber of Commerce) under the framework of ICC Arbitration Rules, though the specific version remains undisclosed. Furthermore, the case is governed by treaties related to Macedonia and the former Yugoslavia.[55]

In the matter involving Gokul Das Binani and Madhu Binani against the Republic of North Macedonia (II), identified as PCA Case No. 2018-38, the nature of the proceedings is characterised as international. Falling under the Investor-State category, the case revolves around the domains of Mining and Metal Ores. The case was introduced on 7 August 2017, but its status indicates a discontinuation. The claimant's origin is India, with North Macedonia as the respondent and the PCA (Permanent Court of Arbitration) serving as the overseeing institution. The arbitration adheres to the UNCITRAL Arbitration Rules from 1976, with the seat of arbitration located in Geneva. The applicable treaties pertain to India, Macedonia, and the former Yugoslavia.[56]

The Skubenko and others v. North Macedonia case, identified as ICSID Case No. ARB/19/9, involves investors Valentyn Drozdenko, Artem Kadomskyi, Igor Kompanets, and others in a dispute with the Republic of North Macedonia. The heart of the matter lies in their shareholding in Copper Investments JSC and subsidiary company Sardich MC, which holds mining concessions. The case concerns North Macedonia's decision to terminate the claimants' concession for exploiting copper, gold, and silver at the Kazandol deposit in the country's southern region, citing environmental concerns. The parties involved are North Macedonia (the respondent state) and Ukraine (the investor's home state). The case falls within the economic sector of Mining and Quarrying, specifically Metal Ore Mining. The proceedings adhere to the arbitration rules of the ICSID (International Centre for Settlement of Investment Disputes), with the ICSID serving as the administering institution. The investor has claimed compensation of EUR 380.00 million (equivalent to USD 423.30 million).[57]

Cunico Resources N.V. vs Macedonia, former Yugoslav Republic, as identified by ICSID Case No. ARB/17/46 revolves around the ownership of FENI Industries, a local entity engaged in ferro-nickel mining and production activities within Macedonia. The case's

55 Case 26696/HBH *GAMA Güç Sistemleri Mühendislik ve Taahhüt AŞ v Republic of North Macedonia* (ICC, 2021) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1263/gama-v-north-macedonia> accessed 11 June 2023.

56 Case 2018-38 *Gokul Das Binani and Madhu Binani v Republic of North Macedonia (II)* (PCA, 2020) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1229/binani-v-north-macedonia-ii-> accessed 11 June 2023.

57 Case ARB/19/9 *Artem Skubenko and others v Republic of North Macedonia* (ICSID, 2019) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/960/skubenko-and-others-v-north-macedonia> accessed 11 June 2023.

essence is derived from allegations of governmental involvement hindering the claimant's planned sale of FENI Industries, leading to bankruptcy proceedings against the company. The participating entities include North Macedonia (the respondent state) and the Netherlands (the investor's home state). Legal representation is provided by Hogan Lovells from London, U.K., and Petrol Chilikov from Moscow, Russia, for the claimants. At the same time, White & Case from New York, NY, U.S.A. represents the respondent. The proceedings are conducted in English, and the case concluded with an outcome recorded on 31 January 2020, as the Tribunal acknowledged the discontinuance of the proceedings as per ICSID Arbitration Rule 43(1).[58]

4.2. Kosovo

In Kosovo, regular courts have jurisdiction over all matters. A newly established commercial court marks a significant milestone in Kosovo's legal system. By replacing outdated management structures and workflow processes, this court aims to address the inefficiencies and lengthy processing times experienced in commercial cases.[59]

The jurisdiction of the Commercial Court is clearly defined in the law. In broad terms, the court will have authority over all commercial disputes and business-related administrative disputes.[60] This includes cases that are currently handled by the Commercial Department of the Pristina Basic Court and the Fiscal Division of the Administrative Department of the Pristina Basic Court, as well as other business-related administrative cases. Additionally, within the Department for Economic Matters, there is a dedicated division for disputes involving foreign investors, with jurisdiction extending throughout Kosovo. The Commercial Court will also prioritise bankruptcy cases and handle the enforcement of both foreign and local arbitral awards.[61]

The establishment of the Commercial Court is expected to significantly enhance the judicial system's efficiency and effectiveness in handling business disputes, offering businesses more streamlined and timely access to justice.

The presence of specialised Commercial Courts is crucial for the smooth operation of businesses and the attraction of investments. Foreign investors need a court with a specific focus on commercial matters. However, more efforts should be made to

58 Case ARB/17/46 *Cunico Resources NV v Republic of Macedonia* (ICSID, 2017) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/859/cunico-v-macedonia> accessed 11 June 2023.

59 See more: *Commercial Court of the Republic of Kosovo* (2023) <https://komerciale.gjyqesori-rks.org/?lang=en> accessed 05 December 2023.

60 Law of the Republic of Kosovo no 08/L-015 of 21 January 2022 'On Commercial Court' [2022] Official Gazette of the Republic of Kosovo 7/3.

61 Valbon Mulaj, 'The Advantages and Disadvantages of Arbitration in Relation to the Regular Courts in Kosovo' (2018) 59(1) Hungarian Journal of Legal Studies 118, doi:10.1556/2052.2018.59.1.7.

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increase the professional capacity of judges and court staff in handling investor disputes more professionally.

However, when it comes to investment disputes, foreign investors are more inclined to use alternative dispute resolution methods, such as arbitration, to resolve their disputes with the state. The Law on Foreign Investments explicitly grants foreign investors the right to initiate legal proceedings against the state, and this right is widely exercised by foreign investors in Kosovo.[62] Thus far, there have been six instances of international arbitration in Kosovo, as allowed by Article 16 of the Law on Foreign Investment. Out of these cases, three have been successfully concluded, while the decisions on the remaining three are expected to be announced in the coming weeks. Notably, the favourable outcomes of the resolved cases have led to savings exceeding EUR 470 million. However, there is a potential risk of losses amounting to EUR 50 million in the ongoing cases.

Three ongoing cases with a combined value of approximately EUR 50 million involve "Coutur Global" and "Mabco". Coutur Global has demanded EUR 20 million in compensation. The dispute revolves around the contract between Coutur Global and Kosovo for the construction of the "Kosova e Re" thermal power plant. The power plant, with an estimated cost of EUR 1.3 billion, was expected to commence in 2020 and be completed by 2023. However, due to the contract's non-execution, the case was brought before the International Court of Arbitration.[63]

In July 2017, "Mabco" filed a lawsuit against the state of Kosovo in the International Court of Arbitration. Despite previous rulings by the Chamber of Special Supreme Court and Constitutional Court of Kosovo in favour of the Kosovo Privatization Agency, which had returned the Grand Hotel to its ownership after encountering buyer-related issues in 2015, Mabco sought compensation of EUR 6 million from Kosovo.[64]

The Ministry of Justice has undertaken procedures to select an international law firm to represent the government of Kosovo in these cases, ultimately choosing the law firm "Wagner Arbitration Part MBB" based in Berlin. The agreement for legal representation in the arbitration decision cost the government EUR 600,000.[65]

Another dispute revolved around the agreement signed between "Dardafon" and Telekom of Kosovo (a publicly owned enterprise) in January 2009. The agreement stipulated that "Z-Mobile" would serve as the virtual operator for "Vala" mobile telephony. However,

62 Law of the Republic of Kosovo no 04/L-220 (n 7).

63 Case ARB/20/50 *Contour Global Kosovo LLC v Republic of Kosovo and others (I)* (ICSID, 2020) <https://jusmundi.com/en/document/other/en-contour-global-kosovo-llc-v-republic-of-kosovo-and-others-i-request-for-arbitration-thursday-19th-november-2020> accessed 12 July 2023.

64 Case ARB/17/25 *Mabco Constructions SA v Republic of Kosovo* (ICSID, 2020) <https://jusmundi.com/en/document/decision/en-mabco-constructions-sa-v-republic-of-kosovo-decision-on-jurisdiction-friday-30th-october-2020> accessed 12 July 2023.

65 ibid.

conflicts emerged when Z-Mobile requested additional numbering, exceeding the initially allocated 200,000 numbers.

In December 2016, the Court of Arbitration ruled in favour of Z-Mobile. As per the decision, Telekom of Kosovo was obligated to pay approximately EUR 30 million in fines, compensating for damages, lost profits, and arbitration procedure costs. Following this, a second lawsuit was filed against the state subsequent to the dispute with Telekom, which dispute was won by Kosovo in international arbitration.

The defence costs incurred by Kosovo in three international arbitration cases amounted to over EUR 1.5 million.[66]

5 CONCLUSIONS

Based on the aforementioned, it is evident that Kosovo has a specific law granting foreign investors the right to initiate legal proceedings against the state, while in Macedonia, such arbitration cases can only be filed if there is an investment treaty in place. This provision in Kosovo's law has exposed the country to the risk of losing significant sums of money in investment arbitration cases. On the other hand, eight arbitration disputes worth almost EUR 1.4 billion are being conducted against North Macedonia, which is estimated to cost the state a quarter of the budget. Hence, Kosovo's approach must be reassessed to find a balance between providing investors legal certainty and mitigating the risks associated with such provision.

Furthermore, in terms of numbers, Macedonia has attracted more foreign direct investment (FDI) than Kosovo in the past three years. Only in the last year did Kosovo manage to parallel to some extent with North Macedonia. This suggests that the inclusion of the provision granting investors the right to initiate arbitration proceedings may not necessarily lead to an increase in FDI. Despite not having a similar provision, Macedonia outperformed Kosovo in terms of FDI.

Moreover, while this provision in the law on foreign investment does not guarantee an increase in FDI, it exposes Kosovo to the risk of losing millions of euros in disputes where the state is not directly involved and generates high legal representation costs.

Since the law's entry into force on foreign investments vested foreign investors with the right to sue the state in international arbitration, the effectiveness of this right in attracting foreign investors was debatable. Considering the presence of such a provision in the law did not significantly impact increasing foreign investments, perhaps more attention should be

66 Case 20990/MHM *Dardafon.net (Z-Mobile) v Kosovo Telecom (I)* (ICC, 2016) <https://jusmundi.com/en/document/other/en-dardafon-net-lcc-v-kosovo-telecom-j-s-c-ptk-settlement-agreement-wednesday-24th-may-2017> accessed 12 July 2023.

directed towards establishing a comprehensive legal framework that facilitates a favourable business environment and considers a case-by-case approach that considers the specific circumstances of each dispute.

While the effectiveness of dispute resolution is important for foreign investors, other important factors still influence their attraction. A comprehensive legal framework that ensures transparency, stability, and enforceability of contracts and protection of property rights may play a more significant role in fostering investor confidence, followed by efficient administrative processes, reduced bureaucracy, and addressing corruption-related issues.

Finally, balancing dispute resolution mechanisms and creating a favourable investment climate requires careful consideration. In particular, it is crucial to evaluate the effectiveness of existing provisions and consider eventual adjustments or alternative approaches to maximise the benefits of foreign investment while minimising potential risks and uncertainties associated with dispute resolution processes.

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AUTHORS INFORMATION

Njomëza Zejnullahu
Ph.D. (Law), Assistant Professor at the Faculty of Law, University for Business and Technology, Prishtina, Republic of Kosovo
njomeza.zejnullahu@ubt-uni.net
https://orcid.org/0000-0002-5373-8776
Author, responsible for conceptualization, formal analysis, project administration, validation.

Bashkim Nuredini*
Dr.Sc.(Law), Assistant Professor at the Faculty of Law, University for Business and Technology, Prishtina, Republic of Kosovo
bashkim.nuredini@ubt-uni.net
https://orcid.org/0000-0002-9748-2047
Corresponding author, responsible for research methodology, data curation, investigation, writing-original draft, visualization.

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RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

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Research Article

EXHAUSTION OF TRADEMARK RIGHTS IN KAZAKHSTAN UNDER REGIONAL EXHAUSTION IN THE EURASIAN ECONOMIC UNION

Zhanat Nurmagambetov* and Amanzhol Nurmagambetov

ABSTRACT

Background: *This article aims to examine the trademark rights exhaustion regime for Kazakhstan in the context of a high level of importation of goods and free trade in the Eurasian Economic Union[1] (hereinafter "EAEU"). It addresses consumers' interests and discusses business and intellectual property (hereinafter "IP") law in relation to the exhaustion regime. It discusses trademark use in Kazakhstan, the prohibition of such use by trademark owners, and the limits of a trademark owner's right to prohibit such use. While national and regional legislations introduce the regime of regional exhaustion of trademark rights in Kazakhstan, their legal constructions contain gaps and mutually exclusive provisions which create uncertainty for trademark owners and courts, thereby enabling infringement in the form of parallel import.*

Methods: *To achieve the goal of this article, the authors applied a set of methods consisting of content analysis and case study. Particularly, the authors analysed the national and regional legislation applicable in Kazakhstan and examined the existing court practice that reveals certain problems with the exhaustion of trademark rights. Moreover, the article includes a comparative analysis of legislation from the United Kingdom (hereinafter "UK"), the European Union (hereinafter "EU"), and select Eastern European countries.*

Results: *Thus, the paper provides an overview of the currently implemented regime of exhaustion in Kazakhstan and its application in the EAEU and examines the challenges created by uncertainties regarding which rights are being exhausted.*

1 The Eurasian Economic Union is an international organization for regional economic integration. It provides or free movement of goods, services, capital and labor, pursues coordinated, harmonized and single policy. The Member-States of the EAEU are Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia. See, *EAEU Eurasian Economic Union* (2023) <http://www.eaeunion.org/?lang=en> accessed 4 December 2023.

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Conclusions: *Kazakhstan is upholding the regime of regional exhaustion of trademark rights. At the same time, local and regional legislation contradict each other when the regulation concerns the national identification of a trademark. With the national registration of a trademark, the exhaustion regime becomes national. In contrast, in the case of international trademark registration, subject to several conditions, the exhaustion principle is regional.*

1 INTRODUCTION

According to Clause 4 of Article 4 of the Trademark Law of Kazakhstan,[1] no one may use the protected trademark without the owner's consent. That means that by obtaining trademark rights, the trademark owner in Kazakhstan also obtains a right to prohibit the use of that trademark by third parties if such use is made without the owner's consent. However, there are some exclusions when consent is not needed and when the right to prohibit trademark use is exhausted. Exhaustion of trademark rights is an effective instrument for limiting the monopoly over a certain mark. At the same time, the choice of a regime of exhaustion affects the business and its supply chains to the country, as it can either allow or prohibit phenomena such as parallel import of goods, i.e. the import of genuine branded goods that are imported into a market without relevant consent of a trademark owner in that market.[2]

A high volume of imported manufactured goods indicates that the country is receiving ready-to-use goods, most of which already bear the trademarks. According to the author's private practice, those goods could be imported through official channels controlled by the trademark owners or through parallel import. In this scenario, the choice of an exhaustion regime becomes pivotal as it empowers trademark owners to plan effective import strategies. Allowing parallel importation in a particular country implies lesser protection for the rights of trademark owners or their licensees. Consequently, this could deter investments in establishing proprietary infrastructure within that country.[3] In other words, a country's allowance for parallel imports could diminish its attractiveness for investment.

Currently, Kazakhstan uses a regional regime that exhausts trademark rights that apply to the Eurasian Economic Union (EAEU) countries.[4] Under this regime, when trademark rights are exhausted in one EAEU country, they are considered exhausted in all other EAEU countries. The main advantage of this regime is supposed to support the principle of free movement of goods among the member states of the EAEU, as declared in Article 1 of the

1 Law of the Republic of Kazakhstan no 456 of 26 July 1999 'On Trademarks, Service Marks, Geographical Indications and Appellation of Origin' <https://adilet.zan.kz/eng/docs/Z990000456_> accessed 04 December 2023.

2 International Trademark Association, *Position Paper on Parallel Imports* (INTA 2007) 1.

3 Frederick M Abbott, *Parallel Importation: Economic and Social Welfare Dimensions* (IISD 2007) 7.

4 Lazaros G Grigoriadis, 'Exhaustion of Trade Mark Rights in the Eurasian Economic Union' (2016) 11(8) Journal of Intellectual Property Law & Practice 572, doi:10.1093/jiplp/jpw083.

Agreement on the Eurasian Economic Union[5]. However, this approach also causes confusion among trademark owners in the EAEU and those outside of it but have trademarks in all or some countries of the EAEU, including Kazakhstan.

Confusion and problems particularly occur when different entities own the same trademarks in different countries of the EAEU. In this case, it remains unclear whose rights are being exhausted and at what point of time they are exhausted.

Even trademark owners who own a particular trademark in the entire EAEU are uncertain regarding which of their rights are being exhausted, that is, which actions they may prohibit or may not influence after exhaustion.

Last but not least, there is a lack of clarity when an entity is the sole owner of the same trademark across all countries within the EAEU. This presents a dilemma regarding whether the trademark rights are fully exhausted across all EAEU countries if the right is exhausted in just one country.

Thus, the main problems with trademark exhaustion are that (1) it is unclear whose rights are exhausted if the same trademarks in different countries of EAEU are owned by different entities, (2) it is unclear what kind of trademark use can be done after exhaustion – entire use or some partial, and (3) whether the trademark rights exhaust to all the trademarks protected in different countries of EAEU if the owner is the same entity.

Additionally, it may be mentioned that amidst these uncertainties, the licensee of a trademark in a particular country is the most suffering party as they experience the financial losses stemming from the low prices of parallel imported products[6]. Thus, the problem of exhaustion is not only theoretical but directly impacts the business.

The answers to these questions have a practical impact on the brand owner's import strategy because the exhaustion of trademark rights acts as an instrument to regulate the flow of goods within the EAEU and Kazakhstan, as well as between the countries of the EAEU. The latter causes serious concern for trademark owners located outside of the EAEU, who follow their states' international sanction policy and seek to limit the flow of goods from Kazakhstan to certain EAEU countries.

This article aims to understand the limits of exclusive trademark rights in Kazakhstan and the extension of such limits among the countries of the EAEU. It is an attempt to analyse the possible legislative discrepancies and find solutions for the practical application of the exhaustion. Moreover, since the EAEU is a regional integration unit, the regulation of trademark exhaustion in the other integration units, such as the EU, may also be valuable for this article.

5 Agreement on the Eurasian Economic Union (adopted 29 May 2014) <https://adilet.zan.kz/eng/docs/Z1400000240> accessed on 4 December 2022.

6 Sneha Jain, 'Parallel Imports and Trademark Law' (2009) 14(1) Journal of Intellectual Property Rights 16.

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2 MEANING OF TRADEMARK EXHAUSTION IN KAZAKHSTAN IN TERMS OF THE EAEU AGREEMENT

Kazakhstan is a developing economy whose main imports are manufactured goods, and its main exports are natural resources such as fuels and mining. According to the trade statistics of the World Trade Organization (hereinafter "WTO"), in 2021, Kazakhstan imported manufactured goods worth 32.9 billion USD, while its exports amounted to only 9.9 billion USD.[7]

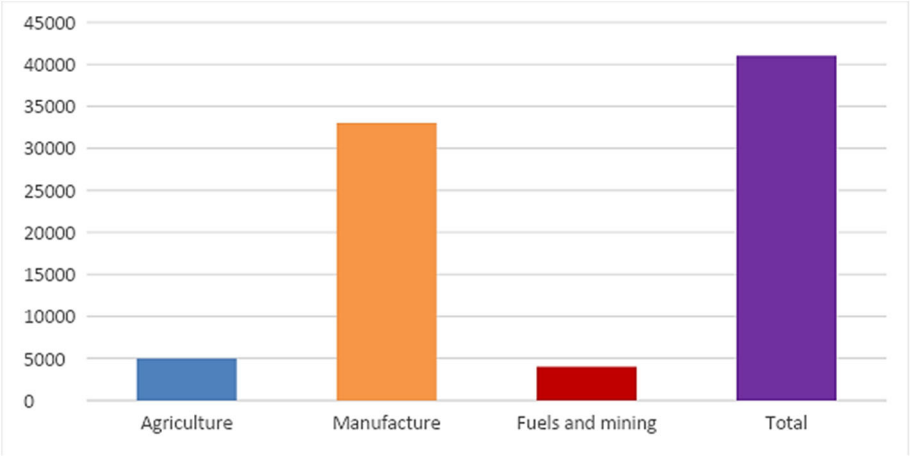

Figure 1. Merchandise imports by product group – annual – 2021 (Million USD)

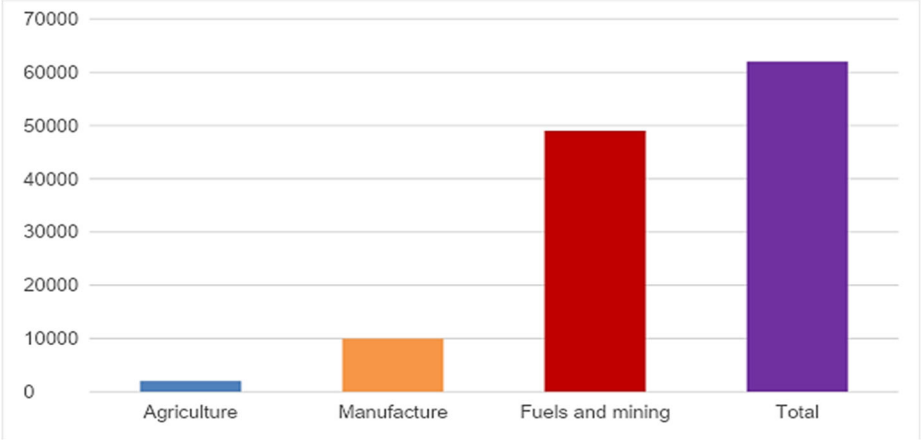

Figure 2. Merchandise exports by product group – annual – 2021 (Million USD)

7 'Kazakhstan and the WTO: Trade statistics' (*World Trade Organization (WTO)*, 2021) <https://www.wto.org/english/thewto_e/countries_e/kazakhstan_e.htm> accessed 29 November 2023.

According to the Trademarks Law of Kazakhstan, the exhaustion of exclusive trademark rights is provided in Article 43-1 as follows:

> *"The use of the trademark in relation to products that have been lawfully put into circulation in the territory of any of the member states of the Eurasian Economic Union directly by the owner (right holder) of the trademark or by other persons with his consent shall not be a violation of the exclusive right to a trademark."*[8]

Article 43-1 of the Trademarks Law of Kazakhstan is the starting point of our research on the exhaustion regime in Kazakhstan. It specifically explains that a trademark is not infringed if it is being used in relation to the product bearing that trademark, provided that the product was brought into the market either by the trademark owner himself or with his consent in the territory of EAEU countries.

Article 43-1 generally corresponds to the requirements of the higher level legislation, that is, to the Agreement on Eurasian Economic Union, and particularly to its Annex 26,[9] which provides the principles of exhaustion of exclusive rights to a trademark, trademark of the Union:

> *"Principle of exhaustion of exclusive right to the trademark, trademark of the Union shall be applied in the territories of the member states in accordance with which the use of this trademark, trademark of the Union in relation of goods, which were legally introduced to the civil circulation in the territory of any of the member states directly by the right holder of the trademark and (or) trademark of the Union or other persons with its consent, is not a violation of the exclusive right to the trademark, trademark of the Union."*[10]

The only difference between Article 43-1 and Article 16 of Annex 26 is that Annex 26 also addresses the Union's trademark,[11] an analogue of the EU trademark. The key conditions that must be met to invoke the exhaustion under Article 43-1 are (1) the presence of a trademark, (2) which is used in relation to products/goods, (3) that had been put into [market] circulation (4) in the territory of EAEU (5) by a trademark owner or with his consent.

Understanding and interpreting each of these key conditions is essential for the research on the current exhaustion regime in Kazakhstan. Hence, an observation of each condition is warranted at this point.

8 Law of the Republic of Kazakhstan no 456 (n 1) art 43-1.

9 Agreement on the Eurasian Economic Union (n 5) annex 26.

10 ibid, ann 26, art 16.

11 ibid, ann 26, art 14. According to Article 14 of the ANNEX No. 26 of the Agreement on Eurasian Economic Union the legal protection shall be provided to the trademark of the Union simultaneously in the territories of all member states.

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The words "goods" or "products"[12] in both cited pieces of legislation do not have exact interpretations and are not defined by case law. They could be interpreted in the same sense as in European countries, where "goods" means any product valued in money that could be subject to commercial transactions. It implies that free-of-charge products supplied to the market by a trademark owner, such as free samples, may not be the subject of the transaction and are not "goods."[13]

"Putting the product in market circulation" is also not defined in the national legislation of any country of the EAEU or the EAEU Agreement. The Civil Code of Kazakhstan[14] prescribes that any introduction of a trademark into circulation shall be considered as use of the trademark, which includes production, use, import, storage, offer for sale, sale of trademark or goods designated by the mark, and use in signs, advertising, printed materials or other business documents. However, purely putting goods into market circulation and putting a trademark into market circulation might have different meanings. In *Peak Holding*,[15] goods bearing a trademark cannot be regarded as being put into the market even if the trademark owner imported them to a certain market and offered them to consumers but did not actually sell them. This means that the goods shall be considered as being put into market circulation only after they are sold, and other preparations before the selling itself shall not be considered as putting into the market. This is probably the best example of goods being "put into circulation" under the Trademarks Law of Kazakhstan and goods being "introduced into the civil circulation" under Annex 26 of the EAEU Agreement.

The meaning of the words "in relation to products/goods" will be examined further in the article. In this section, the combined meaning of a "trademark" and "the territory of EAEU" is of greater interest.

According to the Trademarks Law of Kazakhstan, a "trademark" may be defined as a sign registered according to Law or protected without registration by the international agreements to which the Republic of Kazakhstan is party, serving to distinguish goods (services) of certain legal entities or individuals from goods (services) of the same kind of other legal entities or individuals.[16]

12 In the original language there is no difference between the word '*products*' in Article 43-1 and the word '*goods*' in Article 16 of Annex 26.

13 *Commission of the European Communities v Italian Republic* Case 7-68 (Court of Justice, 10 December 1968) cl B, para 2 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61968CJ0007> accessed 5 December 2023; *L'Oréal SA and Others v eBay International AG and Others* Case C-324/09, EU:C:2011:474 (Court of Justice (Grand Chamber), 12 July 2011) operative pt, para 2 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0324&qid=1713386945612> accessed 5 December 2023.

14 Civil Code of the Republic of Kazakhstan (Spec pt) no 409 of 1 July 1999. <https://adilet.zan.kz/eng/docs/K990000409_> accessed 5 December 2023.

15 *Peak Holding AB v Axolin-Elinor AB, formerly Handelskompaniet Factory Outlet i Löddeköpinge AB* Case C-16/03 (Court of Justice (Grand Chamber), 30 November 2004) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0016&qid=1713389790364> accessed 5 December 2023.

16 Law of the Republic of Kazakhstan no 456 (n 1) art 1, para 8.

Currently, Kazakhstan is party to three international agreements that regulate international trademark registration – the Madrid Agreement[17] and its Protocol[18] and the EAEU Agreement. While the Madrid Agreement and Protocol to it regulate international registrations in a broad range of countries, the EAEU Agreement regulates the registration of the so-called "trademark of the Union", meaning the trademark and service mark of the Eurasian Economic Union. The legal protection of the trademarks of the Union shall be provided simultaneously in the territories of all member states.[19]

Thus, two types of trademark registrations are available in Kazakhstan: registration according to the procedure provided by the Law (national registration) and protection under international agreements (international registration).[20]

As provided in the Preamble to the Trademarks Law of Kazakhstan, the Law regulates the relations arising from the registration, legal protection and use of trademarks, service marks, and appellations of origin in the Republic of Kazakhstan.[21]

The conjunction of the Preamble to the Trademarks Law of Kazakhstan and the definition of "trademark" clearly shows that at least a trademark with national registration is protected only in the territory of Kazakhstan. In other words, a "trademark" under national registration under the Trademarks Law of Kazakhstan is not valid outside of Kazakhstan; in other countries, the mark is either treated as an unregistered mark or protected by the laws of those countries.

This point of establishing the territorial effect of trademark laws in general, particularly of trademark rights, has been confirmed by theorists for ages. In particular, Graham B. Dinwoody wrote about this in his book *Trademarks and Territory: Separating Trademark Law from the Nation State*.[22] Kazakhstan uses a continental legal system and does not recognise case law, but still affords the owners of national trademark registrations a territoriality principle of exclusive trademark rights protection because the same principle is provided by Article 3 of the Paris Convention[23] and Article 3 of Agreement on Trade-

17 Madrid Agreement Concerning the International Registration of Marks (amended 28 September 1979) <https://www.wipo.int/wipolex/en/text/283530> accessed 5 December 2023.

18 Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (adopted 27 June 1989, amended 12 November 2007) <https://www.wipo.int/wipolex/en/text/283484> accessed 5 December 2023.

19 Agreement on the Eurasian Economic Union (n 5) annex 26, art 14.

20 Law of the Republic of Kazakhstan no 456 (n 1) art 1, para 8.

21 ibid, Preamble.

22 Graeme B Dinwoodie, 'Trademarks and Territory: Detaching Trademark Law from the Nation-State' (2003) 41(3) HOUSTON LAW REVIEW 885.

23 Paris Convention for the Protection of Industrial Property (amended 28 September 1979) <https://www.wipo.int/wipolex/en/text/288514> accessed 5 December 2023.

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Related Aspects of Intellectual Property Rights (hereinafter "TRIPS Agreement"),[24] as Kazakhstan is a member of both these international legal acts.

At the same time, a conflict arises between the legal construction and the territoriality principle when the legislator attempts to expand the territorially bound rights to other territories. This is shown in the key conditions for the exhaustion of trademark rights under Kazakhstan's legislation. Indeed, under Article 43-1 of the Trademarks Law of Kazakhstan and Article 16 of Annex 26 to the EAEU Agreement, the trademark rights are exhausted when the goods bearing that trademark are put into circulation in the territory of any member-state of the EAEU. However, that may not happen to the national registration of the Kazakhstani trademark since it does not exist in any country of EAEU (except Kazakhstan) as a trademark, that is, as a separate complex of legal rights and obligations. A trademark under Kazakhstani national registration may only be exhausted outside of Kazakhstan since there is nothing to exhaust.

The national territoriality principle in terms of exhaustion would mean that, for instance, two national trademarks in two different countries of EAEU, even if owned by the same entity, look identical and are protected to the same goods – but remain two different complexes of legal rights and obligations, and the exhaustion of rights to one national trademark in one country does not lead to the simultaneous exhaustion of rights to another national trademark in another country.

Notwithstanding that, intellectual property law experts call the exhaustion principle that applies to a whole region, such as the EU, or in this particular case in the EAEU, "a regional exhaustion principle"[25], the principle that relates to trademarks registered under a national procedure and that is bound to the national territory of a certain country still remains national, that is the "national exhaustion principle".

At the same time, the legal construction proposed by Article 43-1 of the Trademarks Law of Kazakhstan creates confusion as to what is involved in the exhaustion of national trademark rights in a region's territory. That confusion has already been seen in practice from a negative perspective for a national trademark owner.

In a decision of the Supreme Court of Kazakhstan of 21 February 2022, in the case of individual entrepreneur Ivan Krukgovykh v Zdorovaya Eda LLP,[26] Mr. Krugovykh, as the owner of the national registration for the trademark "Chyorniy Prince" (Black Prince) was

24 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (amended 23 January 2017) <https://www.wipo.int/wipolex/en/treaties/details/231> accessed 5 December 2023. This Agreement constitutes Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, which was concluded on April 15, 1994, and entered into force on January 1, 1995.

25 Kimberly Reed, 'Levi Strauss v Tesco and EU Trademark Exhaustion: A Proposal for Change' (2002) 23(1) Northwestern Journal of International Law & Business 139.

26 The decision on *Krugovykh v Zdorovaya Eda* (Case No. 6001-21-00-3r/7728) is not available in English language; a brief overview in English is done in this article.

protected, *inter alia*, in relation to a cheese product. He was authorised to prohibit Zdorovaya Eda LLP (Healthy Food LLP) from importing and selling the cheese bearing that trademark from Belarus to Kazakhstan. The court found that in Belarus, another entity called Kobrin Butter and Cheese Making Factory owned the trademark "Black Prince" used for cheese. This resulted in two identical trademarks being protected for the same goods but owned by different trademark owners. The court decided that since the trademark rights were exhausted when the product had been put into circulation for the first time in the EAEU member state (Belarus), the use of that trademark shall not lead to infringement in another EAEU member state (Kazakhstan).

In that case, the court overlooked the fact that the exhaustion happened in relation to the trademark of Belarus. Once the product crossed the border into Kazakhstan, the trademark of Belarus no longer existed. In its place was a trademark of Kazakhstan, and even though nothing physically happened to the product, the legal regime had changed. One way or another, this case shows that even the Supreme Court of Kazakhstan may be unclear by the existing legal construction of Article 43-1 of the Trademarks Law of Kazakhstan.

Another situation concerns the exhaustion of trademarks protected in Kazakhstan under an international procedure. As discussed above, there are at least two ways to obtain an international registration of a trademark with protection in Kazakhstan – under the Madrid Agreement and its Protocol and the EAEU Agreement. Under the Madrid Agreement and Protocol, the right owner may obtain trademark protection in a wide range of countries, which might also include the EAEU member-states. If, for example, such an international trademark registration would cover at least two EAEU member-states, it would mean that the same trademark, owned by the same entity, in relation to the same goods (in most cases) would be protected. Consequently, the exhaustion of rights to an international trademark protected in at least two member-states of the EAEU would lead to the exhaustion of those rights to that trademark in both member-states. The same would happen with international trademark registration under the EAEU Agreement. Through registration within the Union, trademark owners would possess trademark rights in all EAEU member-states, with these rights emerging simultaneously and, therefore, would be exhausted simultaneously across all member-states.

Therefore, in the case of national registration of a trademark, the exhaustion principle in Kazakhstan would be "national", though the legislation is rather arguable. However, in the case of international trademark registration, either under the Madrid Agreement, its Protocol or the EAEU Agreement, the exhaustion principle in Kazakhstan would be "regional". It could be said that depending on the type of trademark, Kazakhstan applies a dual exhaustion principle – national and regional.

The national principle of trademark rights exhaustion in relation to national trademark registrations conflicts with the main principle of the EAEU Agreement – the free movement of goods between the member countries. Simultaneously, it serves the national interests of those Kazakhstani trademark owners who do not have international registrations all over the EAEU.

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It is also worth mentioning that Article 43-1 of the Trademarks Law of Kazakhstan and Article 16 of Annex 26 of the EAEU Agreement are quite similar to Article 12 of the UK Trade Marks Act[27] and EU legislation related to trademarks, such as Article 13 of Council Regulation (EC) No 207/2009,[28] Article 7 of EU Directive 2008/95/EC,[29] and also Article 15 of the EU Directive 2015/2436[30] – all of these UK and EU legislations regulate the exhaustion of trademark rights in UK and EU, and propose a so-called "regional exhaustion regime".[31] The wording in the UK and EU legislations covering the exhaustion principle is rather similar to the wording of the Trademarks Law of Kazakhstan and Annex 26 of the EAEU Agreement.

Such a similarity in legal regulations of two different regions evokes a thought. Although it is not the goal of this particular study, the exhaustion principle applied in the UK and the EU member-states could also be reconsidered from pure "regional" to "national + regional", especially considering that in the UK and the EU, the same as in Kazakhstan and the EAEU, there are national and also international registrations of trademarks (again under Madrid Agreement, Protocol to it, and also under EU Directives and Council Regulations). That means that the UK and the EU legislation currently deal with parallel import problems similar to those of Kazakhstan and EAEU countries – by introducing only the regional principle of trademark exhaustion without clarifying that national exhaustion shall apply to the cases of national registration of trademarks.

In other countries of the world, for example, in Ukraine, the wording of the national legislation regulating the exhaustion of trademark rights might differ, though it has the same meaning. As stated in the Trademarks Law of Ukraine,[32] the exclusive right of a certificate holder to prohibit other persons from using the registered mark without his consent does not apply to the use of the trademark for a product put into civil circulation under this trademark by the certificate holder or by his consent.[33]

27 UK Trade Marks Act 1994 (amended 23 January 2020) <https://www.gov.uk/government/publications/trade-marks-act-1994> accessed 5 December 2023. This Act make up part of the Trade Mark Legislation in the UK (Ch. 26).

28 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community Trade Mark (codified version) (Text with EEA relevance) <http://data.europa.eu/eli/reg/2009/207/oj> accessed 5 December 2023.

29 Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to Approximate the Laws of the Member States Relating to Trade Marks (codified version) (text with EEA relevance) <http://data.europa.eu/eli/dir/2008/95/oj> accessed 5 December 2023.

30 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to Approximate the Laws of the Member States Relating to Trade Marks (recast) (Text with EEA relevance) <http://data.europa.eu/eli/dir/2015/2436/oj> accessed 5 December 2023.

31 Carsten Fink, 'Entering the Jungle of Intellectual Property Rights Exhaustion and Parallel Importation' in Carsten Fink and Keith E Maskus (eds), *Intellectual Property and Development: Lessons from Recent Economic Research* (World Bank OUP 2005) 189.

32 Law of Ukraine no 3689-XII of 15 December 1993 'On Protection of Rights to Marks for Goods and Services' (amended 27 July 2023) <https://zakon.rada.gov.ua/laws/show/3689-12#Text> accessed 5 December 2023.

33 ibid, art 16, para 6, cl 2.

Notwithstanding the relative similarity of Ukrainian legislation and, at first glance, the obvious "national" exhaustion regime, the decision of the High Commercial Court of Ukraine in *Kaeser Kompressoren SE*[34] showed that the country proposes an "international" exhaustion regime. In particular, the High Commercial Court said that:

> *"The norms of part 6 Article 16 of Law No. 3689 does not relate exhaustion of trademark rights with the introduction of goods onto the market by the trademark owner (or with its consent) exclusively on the territory of Ukraine. Therefore, the introduction of goods under a certain trademark onto the market by the trademark owner (or with its consent) could be conducted on the territory of other country(ies) and after that the owner can not limit or prohibit further resale of this product in a country where its rights are protected (including in Ukraine). The aforesaid, in the absence of territorial restrictions, gives grounds to affirm the existence in Ukraine of an international approach to exhaustion of rights."*

*I*n that regard, the trademark rights exhaustion regime of Eastern Europe striving to become a member of the EU, such as Ukraine in this case, should be clearly amended to the "regional" and/or "national" regime because the legislation of EU does not recognise the "international" exhaustion regime.

3 ACTIONS WHICH A TRADEMARK OWNER MAY NOT PROHIBIT AFTER EXHAUSTION OF TRADEMARK RIGHTS

According to Trademarks Law, infringement of trademark rights is understood as the introduction of a trademark into circulation without the consent of the owner (right holder) or the use of similar designations that may confuse, with respect to homogeneous products or services, and in the case of a well-known trademark, in relation to all products and services.[35] Thus, in a general sense, infringement constitutes unconsented circulation of a trademark or using similar designations concerning similar goods and services.

Putting or introducing[36] a trademark into circulation is described in the Civil Code of Kazakhstan and includes any type of use of a trademark, specifically production, use, import, store, offer for sale, sale of trademark or goods designated by the mark, and use in signs, advertising, printed materials, or other business documents.[37] It is rather hard to imagine how exactly the "production of a trademark" or "import of a trademark" can be

34 *Kaeser Kompressoren SE v Komprig Ltd* Case no 904/2029/15 (High Commercial Court of Ukraine, 20 November 2015) <https://reyestr.court.gov.ua/Review/52489825> accessed 5 December 2023.

35 Law of the Republic of Kazakhstan no 456 (n 1) art 43.

36 In the original texts of the Trademarks Law and the Civil Code of Kazakhstan 'putting into circulation' and 'introduction into circulation' have the same meaning.

37 Civil Code of the Republic of Kazakhstan no 268-XIII of 27 December 1994 (amended 23 December 2023) art 1025, para 2 <https://adilet.zan.kz/eng/docs/K940001000_> accessed 25 December 2023.

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done in practice. In this regard, the Trademarks Law of Kazakhstan clarifies the list of actions that are defined as the "use of a trademark" and structures them as follows:

1. placement of a trademark on a product in respect of which [it is][38] protected;
2. placement of a trademark in the provision of services in respect of which [it is] protected;
3. placement of a trademark on the packaging of products;
4. manufacturing of products with the designation of the trademark;
5. use of the product with the designation of the trademark;
6. importation of product with the designation of the trademark;
7. storage of product with the designation of the trademark;
8. offer for the sale of the product with the designation of the trademark;
9. sale of products with the designation of the trademark;
10. the use of the trademark in signboards;
11. the use of the trademark in advertising;
12. the use of the trademark in printed materials;
13. the use of the trademark in business documentation;
14. other introduction [of a trademark or goods bearing that trademark][39] into circulation[40].

The abovementioned pieces of Kazakhstani legislation make it clear that, in a general sense, the trademark owner has the right to request the court to prohibit any unconsented type of trademark use based on the Trademarks Law of Kazakhstan. In conjunction with definitions of "infringement" and "exhaustion" of trademark rights, it is worth mentioning that the right to prohibit particular actions can be exhausted. As stated in Article 43-1, "*The use of the trademark in relation to products… shall not be a violation of the exclusive right to a trademark*".[41] Thus, the trademark owner may not call certain actions a "violation" after the exhaustion. At the same time, the owner's rights to use the trademark and allow the third-party use (by virtue of license or in any other way) shall remain as conferred by the trademark registration. Only the right to prohibit certain actions is exhausted.

Concerning the exhaustion of trademark rights, it is important to understand which types of "use of a trademark" the owner may prohibit after the trademarked goods are put into circulation, that is, after the sale of goods. The available case law in Kazakhstan is rather

38 Original text relates not only to trademarks but also to appellations of origin and uses words 'they are' meaning trademark and appellation; since the article observes the exhaustion of trademark rights and does not relate to appellations of origin the words 'they are' are replaced with 'it is', and the appellations of origin are omitted.

39 Original text uses words 'their other introduction' covering the trademarks, the appellations of origin and goods bearing such trademarks and appellations of origin; for the purpose of this article the word 'their' is replaced with 'trademark' and 'goods bearing the trademark'.

40 Law of the Republic of Kazakhstan no 456 (n 1) art 1, para 1, cl 9.

41 ibid, art 43-1.

scarce on this particular question, and the national legislation also does not provide any clarity. One may think, and the existing legislation gives reason to such thoughts, that after the sale of a trademarked product, that is, after the right to trademark rights on that product is exhausted, the trademark can be used without the trademark owner's consent in any way, including the production of similar products, importation of other similar products, and different types of "use of a trademark". However, the available research (e.g. Lazaros G. Grigoriadis, *Trade Marks and Free Trade. A Global Analysis* [2014][42]) shows that the right can be exhausted only with respect to a particular trademarked product and not to all the products of the trademark owner (or his subsidiary, licensee, or distributor).

The deeper analysis of Article 43-1 of the Trademarks Law of Kazakhstan focusing on the words "*use of the trademark in relation to products that have been lawfully put into circulation*" confirms that the exhaustion relates only to particular products and not to the whole production line or the entire, exclusive trademark rights. This also confirms that exhaustion does not relate to services. Consequently, such trademark use as "placement of a trademark in the provision of services in respect of which [it is] protected" may not be exhausted.

Since exhaustion relates to particular products rather than the whole production line, such trademark use as "manufacturing of product with the designation of the trademark" may not be a subject of exhaustion. A consumer who buys a trademarked product does not receive the right to manufacture new products with that trademark, as he only has the rights over the purchased trademarked product. Therefore, it may be concluded that the consumer does not receive the right to place the trademark on the purchased product onto other products and their packaging without infringement, and thus exhaustion also does not apply to "placement of a trademark on the product in respect of which [it is] protected" and to "placement of a trademark on the packaging of products."

On the other hand, the "use of product with the designation of the trademark" is a primary goal from the consumer's perspective. Consumers, in most cases, buy a product to use it. In this context, exhaustion unequivocally applies. Once a product is sold by a trademark owner, whether by its subsidiary, licensee, or distributor, it can be used according to its direct purpose without infringement of trademark rights.

In general, "storage", "offer for sale", and "sale of product with the designation of the trademark" as types of trademark use also relate to the trademarked product itself and not to trademark rights. In this regard, these types of trademark use may also be exhausted under Article 43-1 of the Trademarks Law of Kazakhstan.

Another issue is the "importation of product with the designation of the trademark". If a trademarked product had never been imported to Kazakhstan and the entire EAEU, and such an import is unconsented, then according to exhaustion, the trademark owner's rights

42 Lazaros G Grigoriadis, *Trade Marks and Free Trade: A Global Analysis* (Springer 2014) 52-3.

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to that product are not exhausted. As observed in the first part of this article, if there is a national trademark registration, the exhaustion does not apply when the goods are imported to Kazakhstan from any country. However, suppose there is an international trademark registration (including the trademark of the Union), the trademark rights shall be deemed exhausted by Article 16 of Annex 26 to the EAEU Agreement in the country of the first import on the EAEU condition that the international trademark spreads also to Kazakhstan in the name of the same owner as in the country of the first import of the EAEU.

Therefore, a trademark right, particularly the right to prohibit the use of a trademark, is not exhausted if the product bearing the trademark is imported to Kazakhstan (or, in some cases, to an EAEU country member) without the trademark owner's consent. This phenomenon is called "parallel import" in most research papers.[43] As it can also be seen from Article 43-1 of the Trademarks Law of Kazakhstan and from Article 16 of Annex 26 to the EAEU Agreement, the parallel import in EAEU generally, and in Kazakhstan mainly, causes a trademark infringement, and therefore may be prohibited by the trademark owner.

A slight difference could come in sight when the product has been manufactured and trademarked in Kazakhstan, exported to another country, and then reimported back. As the author's practice shows, this might happen when Kazakhstani manufacturers seek to do business in the closest developing markets, such as Kyrgyzstan or Uzbekistan, and for that purpose, might provide those countries' consumers with lower prices than in Kazakhstan. Parallel importers, who engage in carrying out parallel imports to Kazakhstan, may buy whole batches of goods at relatively low prices and import them back to Kazakhstan, causing the Kazakhstani manufacturers to compete with their products and lose consumers in the market where the exported products were initially intended.

Initially, trademark rights may appear exhausted in such situations, but the answer is in the words "put into circulation", which needs clarification in the legal acts or the local case law, currently silent. However, as shown in *Peak Holding,*[44] goods are not considered to be put into circulation until they are sold in the local market. Thus, if the goods are not sold in the territory of Kazakhstan and were produced for sale in another country, their reimport would come into collision with the consent of the trademark owner – the consent was given for export from Kazakhstan and import to another country, and not to import to and further circulation in Kazakhstan. Therefore, the reimportation of trademarked goods would constitute trademark infringement, and the trademark rights would not be exhausted.

The types of trademark use, such as in signboards, advertising, printed materials, and business documentation, mostly relate to product marketing. In this type of use, too, a wrong impression could exist that once a trademarked product is purchased, the buyer may then use the trademark in any type of marketing activity. However, Article 43-1

43 Irene Calboli and Edward Lee (eds), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (Edward Elgar Pub Ltd 2016) 17.

44 *Peak Holding AB v Axolin-Elinor AB, formerly Handelskompaniet Factory Outlet i Löddeköpinge AB* (n 15).

strictly exhausts the trademark rights on a particular product, not the trademark itself. The use of a trademark in marketing is not infringement as long as the use is not purely of the trademark but of the trademarked product already in possession of the seller, on the condition that such marketing activities are not damaging the trademark's reputation. For example, when the seller uses only the trademark on a signboard or an official letterhead without any reference to the product, it means the seller is pretending to be associated with the trademark owner. The court came to the same conclusion in *Parfums Christian Dior v Evora*:

> *"It follows that, where a reseller makes use of a trade mark in order to bring the public's attention to further commercialisation of trade-marked goods, a balance must be struck between the legitimate interest of the trade mark owner in being protected against resellers using his trade mark for advertising in a manner which could damage the reputation of the trade mark and the reseller's legitimate interest in being able to resell the goods in question by using advertising methods which are customary in his sector of trade."*[45]

Therefore, using a trademark to commercialise the trademarked product after exhaustion in Kazakhstan and in EAEU is not infringing if it refers to that particular trademarked product and does not threaten to damage its reputation. In all other cases of commercialisation, the trademark right shall not be deeded exhausted with the sale of the trademarked product.

The last, and probably the broadest type of trademark use provided by the Trademarks Law of Kazakhstan, is "other introduction of a trademark or goods bearing that trademark into circulation". This could refer to a broad range of actions. The trademark itself could be the subject of an assignment agreement, pledged to the bank as a security for a loan, or could even be used as a share capital payment. However, all these actions with the trademark are not connected to actions with the product and, therefore, may not be subject to exhaustion.

Dissimilar to the actions with the trademark itself, the actions with the trademarked goods shall be examined separately. "Introduction of the goods bearing a trademark" could entail a variety of actions such as a pledge of the trademarked product to the bank, offering a trademarked product as a prize, or rent of a trademarked product, and so on. In terms of exhaustion, since these actions are being done with the products that were put into circulation, they may not constitute infringement and, therefore, may not be prohibited by the trademark owner. However, the legislation and the case law of Kazakhstan are silent on situations wherein the initial condition of the goods was changed or worsened after putting into circulation. An example could be relabeling or removing excise stamps. The legislation

45 *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV* Case C-337/95 (Court of Justice (Grand Chamber), 4 November 1997) para 44 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0337&qid=1713451341354> 5 December 2023.

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of Kazakhstan needs further improvement in this part. A good example could be the UK Trade Marks Act 1994, which provides the following regulation:

> *"Subsection (1)*[46] *does not apply where there exist legitimate reasons for the proprietor to oppose further dealings in the goods (in particular, where the condition of the goods has been changed or impaired after they have been put on the market)."*[47]

Thus, UK legislation has prearranged the situation, where the condition of a trademarked product could be changed to the extent that further use of such a product either changes its initial aim or worsens the quality and usability of the product. Though there are currently no precedents in Kazakhstan in which such a regulation would be needed, the appearance of such situations may not be excluded. Thus, prearrangement would be preferable rather than correcting the faults when they appear.

In summary, trademark rights could be exhausted in Kazakhstan as a result of trademark uses such as the use of a trademarked product as it is intended, the importation of a product from another EAEU country subject to the trademark having an international registration and covering the other country and Kazakhstan simultaneously, on the condition that the product was initially sold in the other country after the trademark owner's consent. In all these cases, the trademark rights are not deemed to be infringed. Moreover, the trademark owner may not prohibit the storage, offering for sale, and selling of the product which was put into circulation by him or with his consent. Using a trademark in signboards, advertising, printed materials, or business documentation may not constitute an infringement on the condition that commercialisation refers to a particular trademarked product, the right over which has been exhausted and does not lead to damage to the trademark's reputation. Finally, other ways of introducing trademarked products, whose trademark rights are exhausted, into market circulation shall not constitute infringement. However, it is advisable to create legal regulations to prevent the change and impairment of the product's condition.

4 EXHAUSTION AS AN INSTRUMENT OF BRAND PROTECTION

From the above analysis, it is clear that the exhaustion of trademark rights is an instrument which limits the monopoly of the trademark owner over a particular trademark. This limitation relates to the trademark owner's right to prohibit certain types of trademark use, which is definitely a positive point for consumers because at least they do not have to ask the trademark owner's consent to use a trademarked product as intended. Such a use would not constitute an infringement when the trademark rights are exhausted. As Donnelly noted, for any purchaser, the exhaustion also works as an instrument that allows reselling

46 UK Trade Marks Act (n 27) art 12, subs (1). Act provides the definition for 'Exhaustion of rights conferred by registered trade mark'.

47 ibid, art 12, subs (2).

the product without being liable for infringement.[48] Bonadio also stressed that without exhaustion, the trademark owner could maintain control over sales, transfer, and use of relevant trademarked products, as well as influence commercial relations.[49]

At the same time, when the exhaustion does not happen, as in the case of the national or regional regime used in Kazakhstan, the trademark owner's right to prohibit trademark use, including the import and further sale of trademarked genuine products in the territory of Kazakhstan, shall prevail. Such importation is called "parallel import", and the exhaustion regime is usually adapted to prevent it. A sufficiently clear definition of parallel import could be: "…genuine goods sold in the country of export with the permission of the rights holder, but imported by a reseller without the authority of the rights holder in the country of importation".[50]

There are various possible reasons for parallel imports in Kazakhstan. Parallel imported products might have quality differences in comparison to the authorised products[51]. Such products could be cheaper variations, outmoded varieties, or non-adapted to the local market requirements and customers' tastes.[52] Moreover, parallel imported products could come from countries with lower taxation regimes to Kazakhstan.[53] Another reason could be attempts by the local trademark owner's licensee to obtain higher profit margins from the local market in the absence of licensee competition, leading to higher prices.[54] Finally, parallel imports may occur due to parallel importers capitalising on marketing expenses as parallel importers do not bear the costs for marketing the products and, as a result, can offer products at lower prices – a practice known as free riding.[55]

Irrespective of the reasons for parallel imports, the exhaustion regime helps prevent parallel imports to Kazakhstan in most cases, reducing the negative effects of parallel trade. It serves as an instrument of brand protection policy and enables better sales planning. Referring again to Fink, it can be concluded that a ban on parallel import enables the transfer of technology and speeds up the licensing process while allowing parallel import leads to the reluctance of trademark owners to issue a license.[56]

48 Darren E Donnelly, 'Parallel Trade and International Harmonization of the Exhaustion of Rights Doctrine' (1997) 13(2) Santa Clara High Technology Law Journal 447.

49 Enrico Bonadio, 'Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?' (2011) 33(3) European Intellectual Property Review 153.

50 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement: Final Report ... to Senator the Hon Nicholas Minchin Minister for Industry, Science and Resources and the Hon Daryl Williams AM QC MP Attorney-General* (IP Australia 2000).

51 Joint Group on Trade and Competition, *Synthesis Report on Parallel Imports* (OECD 2002) 6, note 14.

52 ibid.

53 Goods coming to Kazakhstan from UAE are relatively cheaper because of a number of tax exemptions in UAE that are more favorable than in Kazakhstan.

54 Joint Group on Trade and Competition (n 52) 7, note 17.

55 ibid, note 18.

56 Fink (n 31) 180.

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As parallel imports increase the possibility of counterfeit goods entering the country,[57] the brand protection role of the exhaustion mechanism increases.[58] At the same, the Organization for Economic Co-operation and Development (hereinafter "OECD") treats counterfeiting along the same line as other types of organised crime and illicit trade, claiming that counterfeiting is more profitable and less risky:

Illicit activities (total) 770 billion	Figures (billions USD)
Drug trafficking	320.0
Counterfeits	461.0*
Forced labour by private enterprise	150.0
Illicit oil trade	10.8
Illicit wildlife trade	10.0
Fish	9.5
Timber	7.0
Art & cultural property	6.3
Gold (3 countries only)	2.3
Human organs	1.2
Small arms/ light weapons	1.0
Diamonds	0.9

Figure 3. Estimated revenues for illicit trade by sector[59]

Therefore, parallel import of genuine trademarked products could become another way to import counterfeit ones. Though the treatment of counterfeit goods and parallel imports is proposed to be different,[60] their routes might still be congruent, and thus, the threat of counterfeit goods hidden among parallel products in the same shipment may persist. The exhaustion regime in such a situation again favours the brand protection policy of the trademark owners.

Therefore, although the exhaustion of trademark rights in Kazakhstan limits the rights of trademark owners, it allows them to effectively structure the licensing strategy, fight against parallel imports, plan a brand protection policy and protect themselves from counterfeiting.

57 Joint Group on Trade and Competition (n 51) 186, note 24.

58 UNICRI, *Counterfeiting: A Global Spread, a Global Threat* (advanced unedited edn, UNICRI 2011) 58. Moreover, from authors' practice, the parallel importers of auto spare parts from UAE were not sure in the quality of those products claiming that 50% of those parts could be counterfeit since UAE was offering a large amount of fakes. See, Zainab Mansoor, 'Counterfeit Toyota parts worth Dhs10.5m confiscated in the UAE in 2020: A total of 21 raids were conducted for counterfeit parts during 2020' (*Gulf Business*, 16 March 2021) <https://gulfbusiness.com/counterfeit-toyota-parts-worth-dhs10-5m-confiscated-in-the-uae-in-2020/> accessed 5 December 2023.

59 OECD, *Illicit Trade: Converging Criminal Networks* (Reviews of Risk Management Policies, OECD Pub 2016) 24.

60 Bonadio (n 49).

5 CONCLUSIONS

Kazakhstan is upholding the regime of regional exhaustion of trademark rights, a concept encouraged by the Eurasian Economic Union. At the same time, local and regional legislations come into contradiction when the question is about the nationality of a trademark. With national trademark registration, the exhaustion regime becomes national, while in the case of international trademark registration, subject to a number of conditions, the exhaustion principle is regional. Though the political and economic intentions of the EAEU countries are to strive for regional exhaustion, there is still a position that such exhaustion is possible only in truly harmonised markets,[61] and Kazakhstan, before fully applying the regional regime of exhaustion, should bring the market conditions in harmony with other members of the EAEU. Before that, it should be clearly understood that national exhaustion is also in place and should be considered.

As a result of exhaustion in Kazakhstan, trademark owners may struggle to prohibit actions such as using a trademarked product for its intended purpose or conditionally importing a product from another EAEU country. Exhaustion also leads to allowing the storage, offering for sale, and selling of products put into circulation by the trademark owner or with their consent. If trademark rights are exhausted for a particular product, further commercialisation of that product through the use of the trademark in signboards, advertising, printed materials, or business documentation might also go unprohibited.

However, although exhaustion is advantageous to legitimate consumers and resellers, it might still serve as a trademark owner's brand protection against parallel import and hidden counterfeiting, enabling the effective planning of protection strategies and leading to potential license transfer.

To improve the situation with exhaustion, Kazakhstan should consider amending its national legislation, particularly the Trademarks Law, by clarifying that exhaustion applies only when trademarked goods are placed into the market by the trademark owner or with their consent in the territory of Kazakhstan (not the EAEU). Additionally, clarification is needed regarding permissible actions with a trademark after exhaustion happened. These amendments could be done in Article 43-1 of the Trademarks Law of Kazakhstan. This recommendation could be a subject for discussion among other EAEU countries and other regional integration units worldwide. Such clarity would benefit trademark owners and their customers, ensuring a clear understanding of what actions can be done with a trademark post-exhaustion and on which territory those actions could be done.

61 International Trademark Association, *Position Paper on Parallel Imports* (INTA 2007) 5.

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AUTHORS INFORMATION

Zhanat Nurmagambetov*
PhD candidate, Constitutional and civil law, L. N. Gumilyov Eurasian National University, Republic of Kazakhstan
njanat@gmail.com
https://orcid.org/0000-0003-2994-8500
Corresponding author, responsible for conceptualization, formal analysis, research methodology, data collection, writing, and supervising.

Amanzhol Nurmagambetov
Doctor of legal science, Professor, Department of constitutional and civil law, L. N. Gumilyov Eurasian National University, Republic of Kazakhstan
amanzhol.030650@gmail.com
https://orcid.org/0000-0001-9026-9019
Co-author, responsible for project administration, review and editing.

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RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

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Research Article

BANK-SPECIFIC, ECONOMIC AND LEGAL DETERMINANTS OF PROFITABILITY IN THE REPUBLIC OF NORTH MACEDONIA

Arbenita Kosumi* and Lutfi Zharku

ABSTRACT

Background: *Bank profitability is more than just a financial indicator; it is a reflection of the health and vitality of the banking sector and the economy as a whole. Profitable banks help to maintain financial stability by increasing resilience, facilitating capital formation and intermediation, promoting innovation and adaptability, and instilling confidence and trust. Hence, profitability is critical in the banking sector since it directly influences policymakers, regulators, and bank management. Therefore, the study will estimate the influence of specific bank and economic-legal determinants on return on assets in the Republic of North Macedonia. Thus, the study aims to estimate the influence of specific bank and economic-legal determinants on return on assets in the Republic of Northern Macedonia.*

Methods: *The study employs the methodology of the Vector Error Correction Model (VECM) and covers quarterly data from 2007 to 2022. To conduct the empirical analysis required to identify and assess the factors of bank profitability, quantitative data were gathered primarily from the National Bank of the Republic of North Macedonia, the International Monetary Fund (IMF), and the World Bank. Return on Assets was used as a dependent variable. The set of factors is composed into two groups: the first includes bank-specific (controlled) factors such as the sectors' size, credit risk, capital adequacy, liquidity, income diversification, efficiency of operations, and non-performing loans. The second group includes macroeconomic (uncontrolled) factors such as economic growth, inflation, and interest rates.*

Results and Conclusions: *Results reveal that the size of the banking sector, the risk of the credit, liquidity, income diversification and non-performing loans have a meaningful but negative influence on the response variable. However, capital adequacy, operational efficiency, GDP and interest rate have an important positive impact. Hence, based on the empirical analyses, to boost profitability, the Macedonian banking system should prioritise asset management as a size indication, raising the non-income ratio to diversify revenue, reducing credit risk and non-performing loans, and maintaining a good liquidity ratio.*

Furthermore, there is clear evidence that second-level banks should extend beyond national borders. Better loan portfolio management, greater technology with database processing and communication improvements, and expanded technology with database processing and communication improvements can strengthen the ability to deal with the next crisis. Additionally, banks should increase non-interest revenue by employing it as a risk outlet in banking and distributing it across many income-generating enterprises, enhancing profitability. These findings offer insights for bank executives and regulators interested in increasing bank profitability and stability.

1 INTRODUCTION

It is widely acknowledged that a country's banking system substantially impacts economic growth and development. The importance of the banking sector for a country and its intermediation is crucial as it smooths and stabilises economic activity and promotes its growth. Hence, sound and profitable banks maximise shareholders' investments by further stimulating investment within the country. On the other hand, in case of exogenous shocks, unsustainable banks may face difficulty surviving, leading to a huge financial crisis.

Moreover, the complex way a country's economy works, taking into account the differences between developing and less developed states, has posed difficulties in pursuing monetary policy. Indeed, after the COVID-19 pandemic and in the upheaval of the Russia-Ukraine war, central banks all over the world are struggling to find an innovative approach to make the sector profitable. The research shows that their profitability serves to absorb the external shocks that affect the financial system. Additionally, they affect the distribution of capital, firms' expansion, industries' growth, and economic development. Indeed, the banking sector's profitability is determined by bank-specific and macroeconomic-legal factors. Endogenous factors are individual factors related to the bank itself due to the results reflected in the financial statements.

In contrast, external or exogenous determinants are not controlled by the bank and are related to a country's political, legal and economic environment. Also, in a profitable banking system, the banks will have confidence and settle a sound relationship among banks. In such a case, the question might arise: What are the determinants of bank profitability? There is vast literature on the field of bank profitability, which is focused on developed economies, while the work on developing countries, especially in South-Eastern countries such as the North Republic of Macedonia, is scant so far.

In developed countries, the system is more "progressed"; the institutions and the central bank collaborate to fulfil their responsibilities. In contrast, in developing economies, the banking system does not work appropriately, and there is always a gap between "shadow banking" and lack of financial regulations; also, in those countries, the banking sector has the dominant role in the whole financial system. The same is true in the Republic of North Macedonia, where the banking sector dominates. Hence, the profitability and soundness of

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its banks are the backbone of the country.[1] At the end of 2022, it shows that the banking activity in the country supported 81.4 % of the financial sector while the lending activity composed 48.7 % of the country's GDP.[2] Thus, this shows the dependence of the country's financial system on its banking system's financial health.

Hoffmann and Fu state that in such countries, the importance of the banks is irreplaceable as they facilitate the process of the sources between the deficit and surplus sectors. This reveals that the soundness of the banking sector in less-developed countries is still traditional and backward, while it has a central role in allocating and providing resources to businesses and citizens. Therefore, following the prominent role of the banking sector, especially after the COVID-19 pandemic and the recent Russian-Ukrainian war, the study seeks to investigate the determinants of banks' profitability in the Republic of North Macedonia from 2007 to 2022. Moreover, the study seeks to examine how external and internal factors affect the banks.

This study adds to the ongoing theory by investigating how a set of external and endogenous factors affects a bank's profitability, measured through Return on Assets (ROA) through the lenses of error correction analysis. Second-level banks of a country must reveal their key determinants and how these factors have evolved through time. Identifying these factors provides essential information to stakeholders and, at the same time, to policymakers so that they can design the right policies for tackling external shocks. Therefore, the profits of the banking system are of vital importance for the traditional banking system of North Macedonia and the Southern- Europe area as a whole.

Hence, the paper will contribute to the prior state of the art by investigating how endogenous and exogenous factors affected the country's bank's profitability from 2007 to 2022. The findings reveal that the size, credit risk, liquidity, income diversification, and non-performing loans negatively and significantly influence ROA. However, capital adequacy, operational efficiency, GDP and net interest are significant and positive.

2 LITERATURE REVIEW

Profitability is a critical indicator for banks since it determines their long-term viability and ability to provide financial services/products to clients. Numerous studies have been conducted on bank profitability, and this literature review will look at some of the important findings and insights from those studies.

1 Decree of the *Republic of North Macedonia no 07-2327/1 of 21 May 2007* 'Banking Law' (Consolidated text) <https://www.mbdp.com.mk/Upload/Documents/banking-law-122-21.pdf> accessed 22 October 2023.

2 National Bank of the Republic of North Macedonia, *Financial Stability Report 2022* (Banking Regulations and Resolution Department 2022).

Return on assets (ROA), computed by dividing a bank's net revenue by its total assets, is one of the most generally used metrics of bank profitability. A study by Berger et al. discovered that large banks had lower ROA, while smaller banks had higher ROA. This is due to the fact that larger banks often have higher operating costs and more risk exposure, which can impact their profitability.[3]

Interest rates are another major factor influencing bank profitability. Larger interest rates typically result in larger net interest margins (NIM) for banks, calculated as the difference between the income collected on loans and the interest paid on deposits. According to a study by Akhtar et al., higher interest rates favour bank profitability, especially for banks with higher levels of non-performing loans (NPLs).[4] Aside from interest rates, the quality of a bank's loan portfolio can affect its profitability. Banks with a larger proportion of NPLs have poorer profitability because they must set aside more funds for loan loss provision. According to one study, banks with a larger level of NPLs have lower ROA, but banks with a higher level of loan loss provisions have lower return on equity (ROE).[5]

The legal environment also impacts bank profitability. According to one study, banks with higher capital requirements and liquidity regulations had worse ROA and ROE. However, the study discovered that increased regulatory control can lead to greater stability in the banking sector, benefiting the whole economy.[6]

As an outcome, evaluating bank performance is a complex process involving internal and external operations. Indeed, bank and state factors influence banking sector profitability. Endogenous elements are individual factors relating to the bank itself as a result of the financial statements results.[7] External or exogenous variables, on the other hand, are not under the bank's control and are tied to a country's legal and economic environment. Both of these characteristics impact the structure and performance of banks, either positively or negatively.[8]

Numerous empirical studies relate to the drivers of bank profitability. Based on the existing literature, we developed several empirical research from various places throughout the world.

3 Allen N Berger and Christa HS Bouwman, 'How Does Capital Affect Bank Performance During Financial Crises?' (2013) 109(1) Journal of Financial Economics 146, doi:10.2139/ssrn.1739089.

4 Shakeb Akhtar, Tasneem Khan and Parvez Alam Khan, 'Examine the Key Drivers Affecting Bottom Line: A Panel Estimation Study of Indian Commercial Bank' (2020) 7(9) Journal of Critical Reviews 1114, doi:10.31838/jcr.07.09.205.

5 Kamal Kishore, 'Risk Weighted Assets Density as a Parameter of Risk Profile of Bank Assets: A Study of Indian Banks' (2018) 15(2) IUP Journal of Financial Risk Management 62.

6 Asli Demirgüç-Kunt and Harry Huizinga, 'Bank Activity and Funding Strategies: The Impact on Risk and Returns' (2010) 98(3) Journal of Financial Economics 626, doi:10.1016/j.jfineco.2010.06.004.

7 Seyed Alireza Athari, 'Domestic Political Risk, Global Economic Policy Uncertainty, And Banks' Profitability: Evidence from Ukrainian Banks' (2021) 33(4) Post-Communist Economies 458, doi:10.1080/14631377.2020.1745563.

8 Agus Widarjono, 'Does the Volatility of Macroeconomic Variables Depress The Profitability of Islamic Banking?' (2020) 13(1) JEJAK 30, doi:10.15294/jejak.v13i1.19460.

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Neely and Wheelock attempt to explain why banks perform differently across states, suggesting that the key predictor is state-level economic activity or state per capita, which statistically benefits bank profitability.[9] Menicuci and Paolucci demonstrate that internal factors are derived from bank financial statements such as balance sheets and profit/loss accounts. These elements are specific to the bank's management and its policies. Therefore, those factors refer to those under the bank's management's control and are influenced by the bank's policies.[10] Kosmidou focuses on external issues and demonstrates how the bank's environment influences its strategic position. These determinants are broad or broad-ranging for a country and are outside the company's control, such as the legal and economic environment. The outcomes differ depending on the country, the time frame, the availability of the data, and the country-specific outcomes.[11] Molyneux and Thornton examine a group of eighteen EU member states and conclude that increasing equity and interest rates enhance earnings. Their findings corroborate the Theory of Expenditures and the Theory of Expense Preference.[12]

Similarly, Goddard et al. used the Generalized Method of Moments (GMM) to assess the soundness of the banking system in six European Union countries. Their findings show a positive relationship between the bank's size and the capital-asset ratio.[13] Athanasoglou et al. studied bank profitability in South Eastern European countries from 1998 to 2002, focusing on specific bank and industry-specific and macroeconomic factors, and discovered a positive relationship that supports the Structure-Conduct Performance Hypothesis.[14] Dietrich and Wanzenried, on the other hand, classified European countries according to their income level: low, middle, and high. They used macroeconomic, bank, and industry-specific factors and concluded that the effects differed depending on income, sign, and magnitude.[15] Djalilov and Piesse use GMM to investigate the determinants influencing bank earnings in Central and Eastern Europe. Their findings indicate that economic and legal

9 Michelle Clark Neely and David C Wheelock, 'Why Does Bank Performance Vary Across States?' (1997) 79(2) Federal Reserve Bank of St Louis Review 27, doi:10.20955/r.79.27-40.

10 Elisa Menicucci and Guido Paolucc, 'The Determinants of Bank Profitability: Empirical Evidence from European Banking Sector' (2016) 14(1) Journal of Financial Reporting and Accounting 86, doi:10.1108/JFRA-05-2015-0060.

11 Kyriaki Kosmidou, 'The Determinants of Banks' Profits in Greece During the Period of EU Financial Integration' (2008) 34(3) Managerial Finance 146, doi:10.1108/03074350810848036.

12 Philip Molyneux and John Thornton, 'Determinants of European Bank Profitability: A Note' (1992) 16(6) Journal of banking & Finance 1173, doi:10.1016/0378-4266(92)90065-8.

13 John Goddard, Phil Molyneux and John OS Wilson, 'The Profitability of European Banks: A Cross-Sectional and Dynamic Panel Analysis' (2004) 72(3) The Manchester School 363, doi:10.1111/j.1467-9957.2004.00397.x.

14 Panayiotis P Athanasoglou, Matthaios Delis and Christos Staikouras, *Determinants of Bank Profitability in the South Eastern European Region* (Working Paper 47, Bank of Greece 2006) doi:10.2139/ssrn.4163741.

15 Andreas Dietrich and Gabrielle Wanzenried, 'The Determinants of Commercial Banking Profitability in Low-, Middle-, and High-Income Countries' (2014) 54(3) The Quarterly Review of Economics and Finance 337, doi:10.1016/j.qref.2014.03.001.

factors influence bank profitability.[16] Kosmidou et al. examined commercial banks in Greece and investigated how macro and micro-determinants influence their soundness. The findings show that equity strength benefits profitability, whereas size and cost-to-income ratio have a negative effect.[17]

Furthermore, macroeconomic drivers like economic growth and the consumer price index favourably impact earnings. Research analysis for Switzerland determined that Swiss bank operations and industry-specific drivers, in addition to macroeconomic determinants, have a major impact on bank earnings.[18] Saeed conducted regression analysis in the United Kingdom to confirm that certain bank determinants and macroeconomic factors such as economic growth, loans, equity, interest, and consumer price index impact bank earnings.[19] Albertazzi et al. looked at Italian banks from 2005 to 2015 and discovered that lower economic growth leads to poorer bank profitability and bad debts.[20]

In addition, Tan et al. focused on Chinese commercial banks and how their approach to risk, competitiveness, and cost efficiency affect their benefits, and the results reveal a favourable relationship.[21] Analysis of bank determinants using vector error correction by Zahariev et al. determined that macroeconomic factors have a neutral impact on bank profitability and that management efficiency, level of risk, capital, innovation, and competition should be prioritised.[22] Research for developing countries discovered that factors such as interest rate, credit growth, financial cycle, and fiscal politics directly impacted bank profitability.[23]

Another empirical study on profitability divides the effect of determinants into two terms: long and short term, and the results show that in the long term, size and GDP are significant determinants, whereas, in the short term, different factors from income statements are

16 Khurshid Djalilov and Jenifer Piesse, 'Determinants of Bank Profitability in Transition Countries: What Matters Most?' (2016) 38 Research in International Business and Finance 69, doi:10.1016/j.ribaf.2016.03.015.

17 Kosmidou (n 11).

18 Andreas Dietrich and Gabrielle Wanzenried, 'Determinants of Bank Profitability Before and During the Crisis: Evidence from Switzerland' (2011) 21(3) Journal of International Financial Markets, Institutions and Money 307, doi:10.1016/j.intfin.2010.11.002.

19 Muhammad Sajid Saeed, 'Bank-Related, Industry-Related and Macroeconomic Factors Affecting Bank Profitability: A Case of the United Kingdom' (2014) 5(2) Research Journal of Finance and Accounting 42.

20 Ugo Albertazzi, Alessandro Notarpietro and Stefano Siviero, *An Inquiry into the Determinants of the Profitability of Italian Banks* (Bank of Italy Occasional Paper 364, Division of the Bank of Italy 2016).

21 Yong Tan, Christos Floros and John Anchor, 'The Profitability of Chinese Banks: Impacts of Risk, Competition and Efficiency' (2017) 16(1) Review of Accounting and Finance 86, doi:10.1108/RAF-05-2015-0072.

22 Andrey Zahariev, Petko Angelov and Silvia Zarkova, 'Estimation of Bank Profitability Using Vector Error Correction Model and Support Vector Regression' (2022) 28(2) Economic Alternatives 157, doi:10.37075/EA.2022.2.01.

23 Emanuel Kohlscheen, Andrés Murcia Pabón and Julieta Contreras, *Determinants of Bank Profitability in Emerging Markets* (Working Paper 686, BIS 2018).

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suggested. Revenue diversification is an important part of bank profitability; research conducted during the COVID-19 pandemic revealed that non-interest revenues positively improve bank profitability by minimising risk.[24]

Overall, the literature reveals that no commonly acknowledged conclusions on banking profitability exist, and the outcomes vary depending on the country. As a result, policymakers and academics are increasingly concerned, particularly in the aftermath of the Russian-Ukrainian war, with defining the primary determinants of the financial sector and addressing the ensuing crisis.

3 METHODOLOGY

3.1. The Model

The study employs the VECM (Vector Error Correction Model) methodology approach. The method assumes that the model's application is accurate and that the relationship between the indicators can be determined.[25] The construction of a mechanism for error correction for modelling dynamic relationships outperforms the other methodological options in that VECM has cointegration relationships built into the specification, which limits the long-term behaviour of endogenous variables.[26] This tries to remedy any long-term faults at the methodology level by preparatory short-term changes. This makes VECM more beneficial in this scenario than other available models. Hence, (VECM) is applied to estimate the impact of bank-specific and economic-legal factors features on return on assets, as it will be appropriate to give necessary information for the long and short run.[27]

The model is indicated as below:

Y-it = β0+ β1*SIZEit + β2*CRit + β3*XCAit + β4*LQit+ β5*RDit + β6*OEit + β7*NPLit + β8*GDPit + β9*INFit+ β10*Netinterestit ε t

Y defines the response variable while $\sum_{i=1}^{10} B_{t-1}$ indicates the explanatory variables, *t* is the time while to Ɛ is the error term.

24 Xingjian Li and other, 'The Effect of Revenue Diversification on Bank Profitability and Risk During the COVID-19 Pandemic' (2021) 43 Finance Research Letters 101957, doi:10.1016/j.frl.2021.101957.

25 Dalina Maria Andrei and Liviu C Andrei, 'Vector Error Correction Model in Explaining the Association of Some Macroeconomic Variables in Romania' (2015) 22 Procedia Economics and Finance 568, doi:10.1016/S2212-5671(15)00261-0.

26 PK Mishra, 'The Dynamics of Relationship between Exports and Economic Growth in India' (2011) 4(2) International Journal of Economic Sciences and Applied Research 53.

27 Olugbenga A Onafowora and Oluwole Owoye, 'Can Trade Liberalization Stimulate Economic Growth in Africa?' (1998) 26(3) World Development 497, doi:10.1016/S0305-750X(97)10058-4.

As indicated in Table 1,[28] Return on Assets was used as a dependent variable. Independent variables are classified into two groups: the first group includes bank-specific (controlled) factors such as the sector's size, credit risk, capital adequacy, liquidity, income diversification, efficiency of operations, and non-performing loans, and the second group includes macroeconomic (uncontrolled) factors such as economic growth, inflation, and interest rates.

***Table* 1. Examplion of the determinants included in the specified models**

Dependent factor	ROA
Bank specific factors	Size
	Credit risk
	Capital adequacy
	Liquidity
	Income diversification
	Efficiency of operations
	Non-performing loans
Economic and legal factors	GDP
	Inflation
	Interest rate policies

3.2. Data

The research sample comprises data about banks in the Republic of North Macedonia, spanning quarterly observations from 2007 to 2022. Due to time constraints and data availability, the study is based on secondary data at the macroeconomic level. Data related to internal factors - bank specifics - are collected from the National Bank of the Republic of Macedonia Central Bank website, while external macroeconomic factors are obtained from the International Monetary Fund (IMF) and the World Bank.

4 RESULTS

The model was chosen to determine the long-run relationship between the bank's specific and economic-legal variables and the relationship between these variables and profitability. Before beginning the economic analysis of the data, the first step involves checking the model's validity by validating whether the VECM regression model's assumptions have been met amongst the required tests. As a result, the model specification should provide evidence

28 Developed based on the literature.

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for the key assumptions of stationarity, co-integration, normality, autocorrelation, and heteroscedasticity.

4.1. Stationarity Check

The research applies the work of Dickey and Fuller to determine the stationarity of variables. This step is crucial as non-stationary data can produce erroneous results.[29] The results of the dependent variable tests indicated that ROA data series are stationary at the first difference in the Augmented Dickey–Fuller tests with probabilities less than 1%, except for the time series of the variable liquidity is stationary at a 10% margin. Table 1 shows the results of independent variables data series unit root testing.

***Table* 2. Results of the ADF test**

Variable	Level	First Difference
Size	0.98	0.00***
Credit Risk	0.73	1.14E-09***
Capital Adequacy	0.33	0.01**
Liquidity	0.08*	0.06*
Income Diversification	0.39	0.00***
Operational efficiency	0.55	1.72E-15***
Non-performing loans	0.40	8.22E-13***
GDP	0.00***	0.00***
Inflation	0.09*	0.00***
Interest rate policies	0.00***	5.21E-07***
ROA	0.40	0.00***

*** significant at 1%
** significant at 5%
* significant at 10%

29 David A Dickey and Wayne A Fuller, 'Distribution of the Estimators for Autoregressive Time Series with a Unit Root' (1979) 74(366a) Journal of the American Statistical Association 427, doi:10.2307/2286348.

The results of Table 2[30] indicated that except for the time series of the variable loans to deposit, which is stationary at a 10% margin, all variables are significant at 1%.

4.2. Co-integration Test

The Unrestricted Co-Integration Rank Test defines the log-run correlation and investigates if there is a co-integration between the variables.[31] Hence, the main goal of the Johansen Co-integration test is to assess whether or not time series are co-integrated. In the case of co-integration, the VECM model is employed; otherwise, the VAR model is utilised. The results of Johansen testing using the Unrestricted Co-integration Rank Test (Trace) are as follows: Table 3[32] revealed that the variables in the models are cointegrated with 9-time series out of 10 picked. This demonstrates that variables walk together in the long term, allowing the estimation of a VECM model to determine the relationship between the collection of variables and profitability.

***Table* 3. Johansen test results**

No. of CE(s)	Eigenvalue Test	Stat.	Trace Test	Prob.**
0*	0.94	785.94	285.14	0.00
1*	0.91	613.65	239.23	0.00
2*	0.86	466.04	197.37	0.00
3*	0.74	345.80	159.52	0.00
4*	0.72	263.46	125.61	0.00
5*	0.67	186.54	95.75	0.00
6*	0.48	119.35	69.81	0.00
7*	0.42	79.34	47.85	0.00
8*	0.37	45.96	29.79	0.00
9*	0.23	17.45	15.49	0.02
10	0.02	1.27	3.84	0.25

Trace test indicates 9 cointegrating eqn (s) at the 0.05 level
* denotes rejection of the hypothesis at the 0.05 level
**MacKinnon-Haug-Michelis (1999) p-values

30 Authors' calculations.

31 Søren Johansen, 'Statistical Analysis of Cointegration Vectors' (1988) 12(2-3) Journal of Economic Dynamics and Control 231, doi:10.1016/0165-1889(88)90041-3.

32 Authors' calculations.

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4.3. Normality Check

The assumption of normality is the following assumption of a regression model. The normality test examines how the regression model is spread out. This assumption should not be broken so that the model can be correctly described.

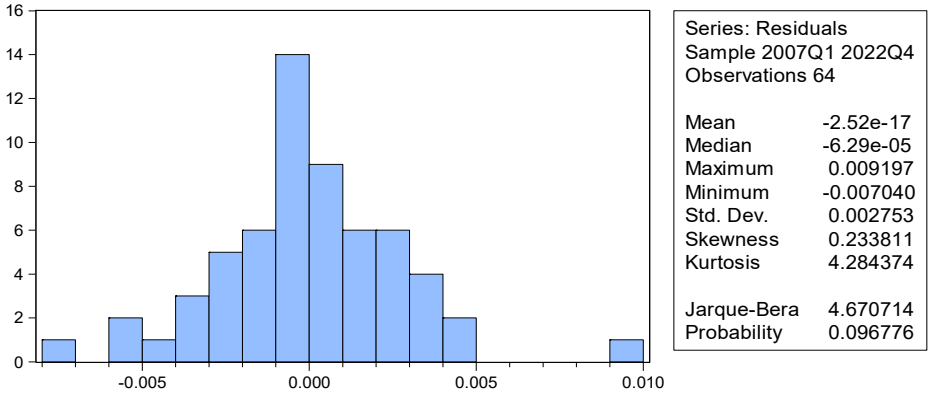

Figure 1. Normality test[33]

The histogram shows a normal distribution of the residual, with a probability of Jarque-Bera of 0.096776 less than 10%, affirming that the assumption of normality is not broken.

4.4. Autocorrelation

Another critical assumption that must not be violated is the presence of autocorrelation in the residuals of the developed model. For this objective, correlogram and Q statistics are employed to determine the presence of autocorrelation in residuals.

33 ibid.

***Table* 4. CoRrelogram and Q statistics**[34]

Sample: 2007Q1 2022Q4
Included observations: 60

Autocorrelation	Partial Correlation		AC	PAC	Q-Stat	Prob
.*| . |	.*| . |	1	-0.166	-0.166	1.7298	0.188
.*| . |	.*| . |	2	-0.160	-0.193	3.3745	0.185
.*| . |	**| . |	3	-0.153	-0.231	4.8934	0.180
. | . |	.*| . |	4	-0.006	-0.135	4.8959	0.298
. | . |	. | . |	5	0.061	-0.053	5.1475	0.398
.*| . |	**| . |	6	-0.133	-0.222	6.3666	0.383
. | . |	.*| . |	7	0.019	-0.109	6.3921	0.495
. | . |	.*| . |	8	-0.003	-0.125	6.3925	0.603
. | . |	.*| . |	9	-0.018	-0.170	6.4168	0.698
. |*. |	. | . |	10	0.154	0.046	8.1756	0.612
.*| . |	.*| . |	11	-0.085	-0.113	8.7303	0.647
. | . |	.*| . |	12	-0.041	-0.126	8.8575	0.715
. | . |	. | . |	13	0.035	-0.018	8.9520	0.777
. |*. |	. | . |	14	0.101	0.056	9.7809	0.778
. | . |	. | . |	15	-0.029	-0.033	9.8489	0.829
.*| . |	.*| . |	16	-0.171	-0.130	12.313	0.722
. | . |	. | . |	17	0.072	0.002	12.759	0.752
. | . |	.*| . |	18	-0.028	-0.117	12.828	0.802
. | . |	.*| . |	19	-0.026	-0.138	12.889	0.844
. | . |	.*| . |	20	-0.020	-0.148	12.924	0.881
. | . |	.*| . |	21	0.057	-0.088	13.230	0.900
. |*. |	. | . |	22	0.096	-0.040	14.124	0.897
. | . |	. | . |	23	0.039	0.016	14.275	0.919
. | . |	. | . |	24	-0.040	-0.065	14.442	0.936
. | . |	.*| . |	25	-0.064	-0.073	14.872	0.944
.*| . |	.*| . |	26	-0.070	-0.096	15.411	0.949
. |*. |	. | . |	27	0.147	0.045	17.855	0.908
. | . |	. | . |	28	-0.051	-0.063	18.156	0.922

4.5. Heteroskedasticity Examination

34 ibid.

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The Breusch-Pagan-Godfrey (BPG) test is a statistical test used in econometrics to determine whether or not a regression model contains heteroscedasticity. The likelihood of Chi-Square values of 0.2502 in this situation shows that the homoscedasticity assumption is not broken.

***Table* 5. Heteroskedasticity Test**[35]

Breusch-Pagan-Godfrey Heteroskedasticity Test: Breusch-Pagan-Godfrey			
F-statistic	1.685867	Prob. F (44,15)	0.1358
Obs * R-squared	49.90784	Prob. Chi-Square (44)	0.2502
Scaled explained SS	14.22882	Prob. Chi-Square (44)	1.0000

Furthermore, the results of the VECM estimate on the developed model with ROA as the dependent variable and the collection of macroeconomic and bank-specific factors are shown.

5 ESTIMATION

Identifying bank and economic-legal factors that affect profitability is critical since the banking system encompasses more than 80% of the financial system, and a breach of this system creates a severe shock to the entire financial system in the Republic of North Macedonia.[36] Without a doubt, if the profitability of the country's commercial banks is jeopardised, the financial system as a whole and the country's economy are jeopardised. The results reveal that the size variable has a negative sign in the long run and is significant at a 1% confidence level. This suggests that an increase in assets in the banking system as a result of bad management could imply a low level of ROA. The findings are comparable to those of Barros et al., who explored European bank performance and found that larger banks are more diversified and thus have higher credit risk, influencing poor return.[37] Similarly to our findings, Kosmidou et al., Bace, E., and De Leon discovered that a greater credit risk ratio

35 ibid.
36 National Bank of the Republic of North Macedonia (n 2).
37 Carlos Pestana Barros, Candida Ferreira and Jonathan Williams, 'Analysing the Determinants of Performance of Best and Worst European Banks: A Mixed Logit Approach' (2007) 31(7) Journal of Banking & Finance 2189, doi:10.1016/j.jbankfin.2006.11.010.

indicates poor credit quality and, as a result, lower profitability.[38] Also, our results show a significant but negative impact on the bank's profitability.

Similarly to the work of Heffernan and Fu, Coccorese and Girardone, and Nguyen, the sign of capital adequacy is positive and significant, showing that enough bank capital has a beneficial impact, and bank return leads to increased profits.[39] This shows that banks with a high capital-to-asset ratio are reasonably safe and profitable even in poor economic circumstances. This also reflects that banks must maintain a capital adequacy ratio of at least 8 %.[40] Furthermore, our investigation on the influence of liquidity on profitability concurs with Kosmidou et al., Vodova and Fungacova, and Turk and Weill, who also indicate the negative impact of liquidity on banks' profitability. This reflects the bank's management's ongoing need to have the highest deposit amount relative to the loan amount to be in a comfortable position to handle other operational aspects of banking management.[41] Our empirical findings confirm the work of Elsas et al. and Duho, Onumah, and Owodo, who state that income diversification hurts profitability.[42] The same is the case of the Macedonian banking sector, which is still traditional, and the majority of the sector's profits rely on interest income, and income diversification has a negative impact.

The operational efficiency variable appears to demonstrate a positive correlation with the dependent variable, indicating that improved cost management increases the efficiency and

38 Kyriaki Kosmidou, Sailesh Tanna and Fotios Pasiouras, 'Determinants of Profitability of Domestic UK Commercial Banks: Panel Evidence from the Period 1995-2002' (Money Macro and Finance (MMF) Research Group Conference 2005) vol 45, 1; Edward Bace, 'Bank Profitability: Liquidity, Capital and Asset Quality' (2016) 9(4) Journal of Risk Management in Financial Institutions 327; Myra V De Leon, 'The Impact of Credit Risk and Macroeconomic Factors on Profitability: The Case of the ASEAN Banks' (2020) 15(1) Banks and Bank Systems 21, doi:10.21511/bbs.15(1).2020.03.

39 Shelagh Heffernan and Maggie Fu, 'The Determinants of Bank Performance in China' (*SSRN*, 25 August 2008) <https://ssrn.com/abstract=1247713> accessed 22 October 2023; Thi Hien Nguyen, 'Impact of Bank Capital Adequacy on Bank Profitability Under Basel Ii Accord: Evidence from Vietnam' (2020) 45(1) Journal of Economic Development 31; Paolo Coccorese and Claudia Girardone, 'Bank Capital and Profitability: Evidence from a Global Sample' (2021) 27(9) The European Journal of Finance 827, doi:10.1080/1351847X.2020.1832902.

40 Decree no 07-2327/1 (n 1) art 65(1).

41 Kosmidou, Tanna and Pasiouras (n 38); Pavla Vodová, 'Liquidity of Czech Commercial Banks and its Determinants' (2011) 5(6) International Journal of Mathematical Models and Methods in Applied Sciences 1060; Zuzana Fungacova, Rima Turk and Laurent Weill, 'High liquidity Creation and Bank Failures' (2021) 57 Journal of Financial Stability 100937, doi:10.1016/j.jfs.2021.100937.

42 Ralf Elsas, Andreas Hackethal and Markus Holzhäuser, 'The Anatomy of Bank Diversification' (2010) 34(6) Journal of Banking & Finance 1274, doi:10.1016/j.jbankfin.2009.11.024; King Carl Tornam Duho, Joseph Mensah Onumah and Raymond Agbesi Owodo, 'Bank Diversification and Performance in An Emerging Market' (2020) 16(1) International Journal of Managerial Finance 120, doi:10.1108/IJMF-04-2019-0137.

profitability of the bank. This supports the findings of Hess and Francis.[43] Indeed, it reflects the nature of the banking sector in the Republic of Northern Macedonia, where the profits are generated through higher operative costs such as employee wages.

Our findings on the impact of non-performing loans (NPLs) on bank profitability are consistent with those of Ercegovac, Klinac, and Zdrili, who found that the bank's loan portfolio can significantly and negatively impact its profitability.[44] Also, research by Ozili and Uadiale revealed a similar relationship, indicating that larger levels of NPLs diminish bank profitability, which is consistent with our findings.[45]

Our empirical results on the impact of GDP on bank profitability are consistent with those of Bikker and Hu, Athanasoglou et al., and Garoui et al., who show that economic growth increases the level of consumption among economic agents and their willingness to invest, which can have a significant impact on bank profitability.[46] The same is the case of Macedonia's banking system, in which the country's economic development and legal interventions are linked to bank earnings. So, legal interventions aimed at maintaining price stability and fostering economic growth can have both positive and negative repercussions on bank profitability. Furthermore, our investigation into the impact of interest rates on profitability accords with Caliskana and Lecunab, who also emphasised the importance of interest rate policies in bank profitability. They hypothesised that greater interest rates would result in higher loan interest rates, improving bank profitability.[47] Last, the inflation and net interest variables determine a negative sign. However, the inflation is not significant.

43 Kurt Hess and Graham Francis, 'Cost Income Ratio Benchmarking in Banking: A Case Study' (2004) 11(3) Benchmarking: An International Journal 303, doi:10.1108/14635770410538772.

44 Roberto Ercegovac, Ivica Klinac and Ivica Zdrilić, 'Bank Specific Determinants of EU Banks Profitability after 2007 Financial Crisis' (2020) 25(1) Management: Journal of Contemporary Management Issues 89, doi:10.30924/mjcmi.25.1.5.

45 Peterson Kitakogelu Ozili and Olayinka Uadiale, 'Ownership Concentration and Bank Profitability' (2017) 3(2) Future Business Journal 159, doi:10.1016/j.fbj.2017.07.001.

46 Jacob A Bikker and Haixia Hu, 'Cyclical Patterns in Profits, Provisioning and Lending of Banks and Procyclicality of the New Basel Capital Requirements' (2002) 55(221) PSL Quarterly Review 143, doi:10.13133/2037-3643/9907; Panayiotis P Athanasoglou, Sophocles N Brissimis and Matthaios D Delis, 'Bank-Specific, Industry-Specific and Macroeconomic Determinants of Bank Profitability' (2008) 18(2) Journal of international financial Markets, Institutions and Money 121, doi:10.1016/j.intfin.2006.07.001; Nassreddine Garoui, Fatma Sessi and Anis Jarboui, 'Determinants of Banks Performance: Viewing Test by Cognitive Mapping Technique (A Case of Biat)' (2013) 3(1-2) International Journal of Contemporary Economics and Administrative Sciences 22.

47 MM Tuncer Caliskan and Hale Kirer Silva Lecuna, 'The Determinants of Banking Sector Profitability in Turkey' (2020) 11(1) Business and Economics Research Journal 161, doi:10.20409/berj.2020.242.

***Table* 6. VECM model**

ROA	Coefficient	t statistics
Size	-1.05E-07	[-2.72]***
Credit Risk	-0.04	[-2.80]***
Capital Adequacy	2.17E-07	[3.75]***
Liquidity	-0.06	[-5.05]***
Income Diversification	-0.09	[-17.67]***
Operational efficiency	0.05	[13.29]***
Non-performing loans	-0.04	[-15.00]***
GDP	0.00	[6.47]***
Inflation	-1.12E-05	[-0.14]
Interest rate policies	0.00	[2.90]***
Error term	0.06	[0.10]

Critical- table values on 60 observation

1%	5%	10%
1.658	1.980	2.617

R-squared	0.629063	Mean dependent var	-6.85E-06
Adjusted R-squared	0.124589	S.D. dependent var	0.004521
S.E. of regression	0.004230	Akaike info criterion	-7.802204
Sum squared reside	0.000447	Schwarz criterion	-6.580503
Log likelihood	269.0661	Hannan-Quinn criter.	-7.324330
Durbin-Watson stat	2.304496		

*** significant at 1%
** significant at 5%
* significant at 10%

The mode in Tabel 6[48] with bank profitability (ROA) as an independent variable has achieved an exploitability rate of 62.90%. The results of R-squared (Coefficient of Determination) indicate that the variables included in the study explain the variability of the dependent variable in the regression model to 62.90%. This percentage is adequate because the study does not consider numerous other internal and external factors that may

48 Author's calculations.

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affect the profitability of the Republic of North Macedonia banking system. However, these results imply that the variables included in our study have relatively high explanatory power and are very representative. Furthermore, if we refer to the values that the Durbin-Watson index takes, which is 2.304496, the model does not suffer from autocorrelation.

6 CONCLUDING REMARKS

The article investigated the profitability of the Macedonian banking system defined by the return on assets as dependent variable for the period 2007 to 2022. The empirical results show that the size of the banking sector, the credit risk, liquidity, income diversification, and non-performing loans have a meaningful but negative influence on the response variable. However, capital adequacy, operational efficiency, GDP, and interest rate have an important positive impact. Therefore, to improve profitability, the Macedonian banking system should focus on asset management as an indicator of size, increasing the non-income ratio to diversify the income to reduce credit risk and non-performing loans and maintain a favourable liquidity ratio.

Moreover, there are apparent indicators that second-level banks should expand outside national borders, improve loan portfolio management, and increase technology with database processing and communication improvements, which can strengthen the ability to deal with the next crisis. Furthermore, banks can enhance their non-interest revenue by using it as an outlet for risk in banking and spreading it across different income-generating operations, thus increasing profits. Also, by navigating the legal landscape strategically, banks can enhance profitability. Hence, the study's findings provide significant insights for policymakers, regulators and bank management in the Republic of North Macedonia.

Future research could expand the breadth of economic and legal, industry, and bank-specific variables influencing bank profitability, providing a more detailed picture of bank profitability determinants in the Republic of North Macedonia.

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AUTHORS INFORMATION

Arbenita Kosumi*
Dr.Sc., Ass. Prof. at Faculty of Economy, Public University "Kadri Zeka", Gjilan, Republic of Kosovo
arbenita.kosumi@uni-gjilan.net
https://orcid.org/0000-0001-9339-7913
Corresponding author, responsible for conceptualization, formal analysis, methodology, software, supervision, validation and writing.

Lutfi Zharku
Dr.Sc., Acos. Prof. Faculty of Economy, Public University "Kadri Zeka", Gjilan, Republic of Kosovo
zharku@gmail.com
https://orcid.org/0000-0002-5742-9436
Co-author, responsible for data curation, funding acquisition, investigation, project administration, resources and visualisation.

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Research Article

ALLEGIANCE BLINDNESS, EXTRA-TERRITORIAL EXUBERANCE, AND SECURITY AMBIVALENCE: A CRITICAL ANALYSIS OF THE RULING OF THE EUROPEAN COURT OF JUSTICE ON PRODUCTS ORIGINATING FROM WESTERN SAHARA

Mohammed El Hadi El Maknouzi* and Mamoun Alaoui Ismaili

ABSTRACT

Background: *The European Court of Justice recently annulled Council Decision (EU) No. 2019/217, which had authorised the conclusion of an agreement—in the form of an exchange of letters—between the European Union and the Kingdom of Morocco. This agreement initially extended coverage of preferential trade treatment between the two parties to products originating in Western Sahara and subject to the control of Moroccan customs authorities. The ECJ's ruling has removed those trade preferences and imposed a* de facto *EU embargo on the region. This article critically discusses the ECJ's ruling on both legal and policy grounds. From a legal standpoint, the ECJ's decision foregoes consideration of notions of sovereignty applicable to Western Sahara in virtue of Islamic law, which would have led to recognition of its enduring 'allegiance' to Morocco. Moreover, the same decision amounts to an instance of extra-territorial application of EU law and infringes the principle of indivisibility of agreements. From a policy standpoint, by acknowledging standing in virtue of mere non-State armed military presence, the ECJ's ruling has offered to terrorist groups and rebel militias—in a context of profound instability in the Sahel region—a blackmail strategy vis-à-vis regional governments.*

Methods: *This critical review uses the descriptive approach to outline, analyse, interpret, and criticise the 2021 ECJ ruling, which denies preferential trade treatment to products from the Western Sahara region, even when under the control of Moroccan customs authorities, while Moroccan products continue to receive such treatment.*

Results and conclusions: *The European Court of Justice partially used the concepts of international law as it paid no regard to the concept of sovereignty in the Islamic world, which is connected to tribe, allegiance and loyalty. Further, extending the application of the European Law to a third state, which has several agreements with the European Union, must be devoid of any political dimension affected by regional conflicts and international balances. The enforcement of the referred ruling is tantamount to the economic embargo on the Western Sahara Region, which will inevitably affect the security situation thereof and thus bring it closer to the influence of terrorist groups.*

1 INTRODUCTION

The European Union (EU) has recently been facing an internal crisis of legitimacy, marked by a polarised debate around the future of European integration, decreasing approval of the Union among the public, and the strengthening of "euro-sceptical" positions.[1] Nevertheless, on the international level, it retains the position of "exporter" of normative values to the wider international community. The EU can do this through legislation, political statements, and even the European Court of Justice (ECJ) judicial rulings. In this paper, we undertake a close scrutiny of ECJ ruling No. T-279/19 of September 29 2021.[2] This judgement invalidated part of the Euro-Mediterranean Association Agreement between the European Union and the Kingdom of Morocco. Namely, it quashed the joint declaration found in Protocol No. 4 of the Association Agreement on the 'application of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, on the one part, and the Kingdom of Morocco, on the other part.'[3] This decision was met by a joint declaration by Morocco and the EU, in which they affirmed that they 'will take the necessary measures to ensure the legal framework which guarantees the continuity and stability of trade relations.'[4]

1 Matthias Ruffert, 'The European Debt Crisis and European Union Law' (2011) 48(6) Common Market Law Review 1777, doi:10.54648/cola2011070.

2 Case T–279/19 *Front Polisario v Council* (General Court (EU), 29 September 2021) <https://curia.europa.eu/juris/documents.jsf?num=T-279/19> accessed 10 January 2024.

3 Council Decision (EU) 2019/217 of 28 January 2019 'On the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part' [2019] OJ L 34/1.
"Western Sahara" is the term used by the United Nations for the area under the sovereignty of the Kingdom of Morocco, which is located to the south of the state along the northern borders of Mauritania.

4 'Morocco: Joint Statement of HR/VP Borrell and Minister of Foreign Affairs, Bourita' (*EU Neighbours South*, 30 September 2021) <https://south.euneighbours.eu/news/morocco-joint-statement-hrvp-borrell-and-minister-foreign-affairs-bourita/> accessed 10 January 2024.

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Initially, the joint declaration was to extend the agreement's coverage to products originating from Western Sahara,[5] provided they were subject to the control of Moroccan customs authorities. This extension granted these products the same trade preferences as other products of Moroccan origin exported to the EU under Protocol No. 1.[6] However, through this ruling, the ECJ nullified Council Decision (EU) 2019/217, dated January 28 2019, which granted permission to conclude said agreement with Morocco in the form of the exchange of letters. The consequence of this decision has been to single out products from Western Sahara for a worse export treatment, vis-à-vis products originating from other parts of Moroccan territory.

In previous instalments of these ongoing disputes brought before European judges by the Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro (Polisario Front), the ECJ delivered judgments (C-104/16 P; C-266/16) excluding that trade liberalisation and fisheries agreements could apply to the territory of Western Sahara, without first having obtained the consent of the Saharawi people, a requirement stemming from the principles of self-determination and the relative effect of treaties. Unlike these earlier cases, the one discussed in this paper, ruling no. T-279/19,[7] also contains the controversial recognition of the Polisario Front's recognition regarding admissibility and standing to bring a lawsuit. The ECJ acknowledged that the Polisario Front had been deemed as the legitimate representative of the Saharawi people by several UN General Assembly resolutions.[8] Therefore, despite lacking international legal personality, the ECJ concluded that the Polisario Front should nevertheless be considered capable of filing a request for annulment against agreements that would impact the self-determination of the Saharawi people, according to the principles of treaty efficacy.

As for consent, the mentioned earlier judgments of the ECJ considered that trade liberalisation and fisheries agreements could not apply to the territory of Western Sahara without having obtained the 'consent of the Saharawi people', a requirement stemming from the principles of self-determination and the relative effect of treaties. In reaction, the European Union and Morocco negotiated a treaty extension on the territorial application of the agreements to Western Sahara while claiming to respect the conditions

5 "Western Sahara" is the denomination adopted by the United Nations to refer to an area – formally under the sovereignty of the Kingdom of Morocco – located to the south of the state, along the northern borders of Mauritania.

6 S van Berkum, *Trade Effects of the EU-Morocco Association Agreement: Impacts on horticultural markets of the 2012 amendments* (LEI Report 2013-070, LEI Wageningen UR 2013) <https://edepot.wur.nl/286919> accessed 10 January 2024.

7 Jed Odermatt, 'International Law as Challenge to EU acts: Front Polisario II' (2023) 60(1) Common Market Law Review 217, doi:10.54648/cola2023009.

8 Rose M D'Sa, 'Peacekeeping and Self-Determination in the Western Sahara: The Continuing Dilemma of the United Nations and the Organisation of African Unity' (1986) 9(3) Strategic Studies 45.

set by the ECJ.[9] To do this, the EU consulted groups and civil society organisations established in Western Sahara to obtain some form of approval for the conclusion of the new agreements. The Polisario Front denied the EU's invitation to participate in these consultations. In Case T–279/19, the ECJ held that the process of consultation led by the European Commission and involving mainly actors in favour of Morocco's position did not match the requirement for consent, as it could be conceived by treaty law. In addition, the European court stressed that the Council could obtain the consent of the Saharawi people through the Polisario Front, even though the latter refused to participate in the consultation process.

This article critically unpacks the multiple dimensions at play in such a decision, estimating that the EU is now in breach of its international obligations towards Morocco, which remain subject to international law. In particular, Section 2 focuses more closely on the legal aspects of the decision, beginning with the ECJ's assumptions concerning applicable law. Notably, the ECJ failed to consider notions of sovereignty—available under Islamic law—that would have been applicable to Western Sahara. This led the court to grant standing to the Polisario Front. Moreover, in making its decision, it relied implicitly on assumptions of "direct applicability" assumptions peculiar to the EU legal system but do not carry over to international treaties. Section 3 focuses instead on the contradiction the ECJ ruling creates with the principle of indivisibility of agreements, which limits the possibility to "sever" a party's obligations under a treaty. The section also traces some of the wider repercussions of the ruling, given the precarious security situation in the region. Finally, the conclusion draws together the findings from this two-pronged examination of what will be remembered as a controversial ECJ judgment.

2 THE ECJ'S JUDGMENT ON WESTERN SAHARA: PROBLEMATIC DEFINITIONS OF SOVEREIGNTY AND EXTRA-TERRITORIAL APPLICATION OF EU LAW

Issuing a judicial ruling requires that the competent court first determine the law applicable to the dispute—regardless of the type of dispute at hand. This is a necessary step because the dispositive section of the ruling (whenever the ruling carries a motivation) will stand on this preliminary determination. This section examines the ECJ's decision, beginning from the court's assumptions around the meaning of "sovereignty." Specifically, the ECJ's ruling failed to consider the rich concept of sovereignty available under Islamic law. In addition, the same ruling confuses the

9 Ángela Suárez-Collado and Davide Contini, 'The European Court of Justice on the EU-Morocco Agricultural and Fisheries Agreements: An Analysis of the Legal Proceedings and Consequences for the Actors Involved' (2022) 27(6) The Journal of North African Studies 1160, doi:10.1080/13629387.2021.1917122.

respective regimes of application of European law and international law. This double confusion is reflected in the content and motivation of the ECJ ruling, such that it violates basic principles of the rule of law in the relations between sovereign states.

2.1. Failure to Assess Sovereignty under Islamic Law and to Differentiate Allegiance from Military Control

While both European and Islamic legal traditions claim to be universal, they diverge on what universalism means. The European legal tradition was formative to international law. For this reason, it inherited the exclusionary attitude that characterised the colonial project. This means that international law reproduced the colonial classifications by refining binaries based on the European view of the world. This is evident in Article 38, issued by the International Court of Justice (ICJ), which states that the court applies the customs accepted as law by civilised nations.[10] Like the colonial mind, this stipulation typifies the peoples into civilised and uncivilised and assumes their customs as law accordingly. This way, legal otherness is subjected to the political test of the universalised Eurocentric notion of civilisation.

Critical approaches to Eurocentricity in international law have highlighted colonialism's impact on international law in response. Yet, Europe continues to influence historical knowledge, as Koskenniemi pointed out. [11] Ultimately, he showed how studying international law history depends on understanding it as a European cultural form. He argues that we must broaden our perspectives on legality beyond Eurocentric views. Without doing so, we cannot expect these historical narratives to diverge from epistemological colonialism and reveal overlooked governance experiences. Thus, scholarly advocacy should be directed to promoting a "legal relationality" and what Appleby Gabrielle and Eddie Synot called "political listening". [12] In fact, the sovereignty of international law in defining what qualifies as law extends beyond the Islamic legal tradition. This is evident in the critical perspective of Third World Approaches to International Law (TWAIL). Therefore, the issue with Eurocentrism in international law is not only one of universalism; it is also one of universalisation, which is a form of sovereignty in its own right. This ultimately leads to the old idea of the 'mission civilisatrice' with which the law as technique of social transformation was in solidarity.

Islamic universalism, in contrast, transcends nationalism, or ethnic particularism arises from the belief in God's sovereignty. What follows from this is an egalitarian

10 Statute of the International Court of Justice (adopted 25 June 1945) <https://www.icj-cij.org/statute> accessed 10 January 2024.

11 Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism* (Faculteit Geesteswetenschappen, Universiteit Utrecht 2011) 5.

12 Sophie Rigney, 'On Hearing Well and Being Well Heard: Indigenous International Law at the League of Nations' (2021) 2 TWAIL Review 122.

approach to positive conceptions of sovereignty regardless of their cultural origin since they are all human constructs. True sovereignty, according to Islamic belief, rests with God but is delegated to the rightly guided community. Islamic sovereignty has an all-encompassing ethical dimension, addressing not only the exercise of political power but the entirety of human existence. In Islam, the distinction between public and private life does not exist, and God's sovereignty is a comprehensive mode of human existence, extending from birth to death.

Some scholars argue that Islam's contributions to international law are significant, emphasising that international law and Islamic law share more similarities than they are often credited for.[13] But while this can hold true, a core difference lies in the fact that God's sovereignty speaks to humanity at large without pretending to invalidate other traditions' legal character. The special feature of modern Siyar, or the Islamic rules of international law, is reciprocity. Unlike domestic law, where customs, for instance, can become binding through consistent practice, international customs require consistent state practice over time and acceptance of the practice as law (opinio juris) to become binding.[14]

Islamic jurisprudence does not claim this ontological sovereignty over other legal systems. The classical approach offers a possible path for a dialogue of legal cultures based on mutual respect rather than exclusion. Classical Muslim jurists recognised a plurality of valid positive laws in the world.[15] For them, the validity of laws depended on their societal context, not abstract criteria imposed from the outside.[16] This offers a path of mutual respect between diverse legal cultures, as reflected in the classical Islamic juristic recognition of plural valid laws based on contextual validity rather than imposed abstract criteria.

That said, sovereignty is traditionally deemed to be the attribute of a state, embodying the highest level of exclusivity in exercising its powers on national territory. On an international level, this sovereignty is reflected in a state's independence vis-à-vis other states, encompassing both independence vis-à-vis foreign authorities and the capacity to protect oneself from interference by other states.[17] A corollary of this notion of sovereignty is that each state also has the right to determine, in a sovereign manner and at its sole

13 Emilia Justyna Powell, 'Complexity and Dissonance: Islamic Law States and the International Order' (2022) 24(1) International Studies Review viac001, doi:10.1093/isr/viac001.

14 Mohammad Hashim Kamali, 'A New Constitution for Somalia – the Workshop on "Shari'ah Law in constitutions of Muslim countries: challenges for the Somali constitution-building process" (Djibouti, 6-10 February 2010)' (2010) 1(4) Islam and Civilisational Renewal 735, doi:10.52282/icr.v1i4.720.

15 Wael B Hallaq, *An Introduction to Islamic Law* (CUP 2009).

16 Abd al-Wahhab Khallaf, *Les fondements du Droit Musulman: 'Ilm Ousoul Al-Fiqh* (Al Qalam 1997).

17 A detailed discussion of the historical and jurisprudential development of the concept of state sovereignty lies beyond the scope of this paper. For a richer discussion, see, e.g., Jerzy Kranz, 'Notion de Souveraineté et le Droit International' (1992) 30(4) Archiv des Völkerrechts 411.

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discretion, its internal political constitution, the attendant form of government, and its forms for exercising political power.[18]

The ECJ's ruling on the free trade agreement between Morocco and the EU presupposes a clear position on what constitutes sovereignty—one that will be first problematised and then read back into the judgment to highlight the contradictions to which it gives rise.[19] Sovereignty, in effect, has often been described in the literature as a "plural," "fluid," "elusive," "dynamic," and "scalable" concept.[20] Put otherwise, it is not a monolithic attribute but possesses dynamic and scalable dimensions that allow adaptation to various social configurations.[21] As a consequence, it is a minimum requirement that any scrutiny around the sovereignty of a disputed territory ought to include a careful contextualisation of the concept in relation to the specific situation in which it is meant to be employed.

Reading this understanding of sovereignty back into the ECJ ruling, one cannot help but notice the ECJ's application to Western Sahara of a notion of sovereignty that might apply to any European state, even though Western Sahara belongs to the Islamic world and is in principle subject to the rules of *Shari'ah* law. According to the latter, when Islam is the prevalent religion in a certain region, this entails the applicability of Islamic legal principles on a default basis (*dar al-islam*).[22] In support of this point, it is helpful to consider that, during the pre-Spanish colonisation period in the region, no administrative structure in the Western sense had ever been established in Western Sahara. Rather, the prevalent form of organisation consisted of social clusters in the form of tribes, where each tribe had a *sheikh* serving as chief and a council to take any decisions relating to the day-to-day life of tribe members and political and religious affairs.

At the same time, this form of social organisation does not automatically imply that the tribes occupying a definite geographical area like the Western Sahara should be stripped of *any* notion of sovereignty. In this respect, the concept of sovereignty under Islamic law is quite flexible, by recognising notions like "tribe," "allegiance", and "loyalty" explicitly.[23]

18 Dodzi Kokoroko, 'Souveraineté Étatique et Principe de Légitimité Démocratique' (2003) 16(1) Revue Quebecoise de Droit International 37, doi:10.7202/1069356ar.

19 Eva Kassoti and Ramses A Wessel, 'EU Trade Agreements and the Duty to Respect Human Rights Abroad: Introduction to the Theme' in Eva Kassoti and Ramses A Wessel (eds), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (CLEER 2020) 5.

20 Karim Benyekhlef, *Une Possible Histoire de la Norme: Les Normativités Emergentes de la Mondialisation* (Thémis 2008) 59.

21 Lider Bal, 'Le Mythe de la Souveraineté en Droit International: La Souveraineté des États à l'Épreuve des Mutations de l'Ordre Juridique International' (PhD thesis, University of Strasbourg 2012) 25.

22 Moussa Abou Ramadan, 'Muslim Jurists' Criteria for the Division of the World into Dar al-Harb and Dar al-Islam' in Martti Koskenniemi, Mónica García-Salmones Rovira and Paolo Amorosa (eds), *Ininternational Law and Religion: Historical and Contemporary Perspectives* (OUP 2017) 219, doi:10.1093/oso/9780198805878.003.0011.

23 Gianluca P Parolin, *Citizenship in the Arab World: Kin, Religion and Nation-State* (Amsterdam UP 2009). See also Mohamed Berween, 'Al-Wathiqa: The First Islamic State Constitution' (2003) 23(1) Journal of Muslim Minority Affairs 103, doi:10.1080/13602000305940.

These notions are not simply based in a religious tradition, separate from all legal relevance, but have played a material role in State formation in the Middle East—hence the suggestion that they should count for adapting expectations of "sovereignty" to a different legal culture.[24] They equally remain in use today in several contemporary Islamic-based legal systems, such as the Kingdom of Morocco, the United Arab Emirates, and the Kingdom of Saudi Arabia.

An additional basis for considering these categories, originating in Islamic law, could be found in human rights standards. Namely, Islamic law should be an indigenous or tribal legal system that requires enforcement of legal dealings with tribal contexts. The Indigenous and Tribal Peoples Convention of the International Labor Organization (ILO 169) protects the tribal and indigenous *legal* self-determination of the peoples in question. This is not the only international legal basis for this principle, as indicated in a 2019 United Nations Office of the High Commissioner report.[25] Accordingly, the timid recognition by the ICJ of *Shari'ah law*—which Western Sahara tribes share with Morocco—as a "sufficient" basis *for* Morocco's claim of sovereignty on the Western Sahara Case is plausible,[26] and only attenuated by the fact that the ICJ's 1975 advisory opinion preceded the birth of the modern regime for tribal and indigenous rights, which only saw the light in 1984 with the World Council of Indigenous Peoples Declaration of Principles.[27]

Nevertheless, it would be a contradiction to keep excluding Islamic legal categories that would be of material relevance to the case by discounting the import of the ICJ's 1975 advisory opinion while following the same opinion in other respects, such as when the ECJ characterised Western as a tribal society. These considerations substantiate the contradiction of a Eurocentric interpretation of sovereignty in former European colonies, whereby self-determination is encouraged, provided it takes European legal forms and discounting the aspect of self-determination that applies to a different legal culture.

It is worthwhile noting that the suggestion advocating for a flexible concept of sovereignty, inclusive of "allegiance" relations, based on the grounds of Western Sahara's inclusion in the domain of applicability of Islamic law, known as *dar al-islam*, is more than a simple argument by legal scholars. The same position was explicitly endorsed some time ago by the International Court of Justice (ICJ) in connection to Western Sahara. In its advisory

24 Philip S Khoury and Joseph Kostiner (eds), *Tribes and State Formation in the Middle East* (University of California Press 1991).

25 OHCHR, 'Indigenous Justice Systems and Harmonisation with the Ordinary Justice System: Report' (*UN Human Rights*, 2 August 2019) <https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples/indigenous-justice-systems-and-harmonisation-ordinary-justice-system-report> accessed 10 January 2024.

26 *Western Sahara,* Advisory Opinion (ICJ, 16 October 1975) <https://www.icj-cij.org/case/61> accessed 10 January 2024.

27 Jérémie Gilbert and Cathal Doyle, Cathal, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 289.

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opinion of October 16 1975, the ICJ relied on the principle of intertemporal law to conclude that Western Sahara never took on the status of *terra nullius* (territory belonging to no one).[28] But before relying on this passage of the ICJ's argumentation, it should be remembered that there is no clear-cut support for the thesis that the ICJ ever rejected Islamic law as a source of international law. On the contrary, as Lombardi correctly pointed out, the ICJ's Statute does not seem inclined in this direction, and the same court did resort to Islamic law in various manners in earlier cases.[29] In addition, the ICJ had already acknowledged the peculiar character of Morocco's system of government, even though it thereafter applied a vague notion of "constitutive insufficiency" to reject its claim to sovereignty over Western Sahara.[30] Having highlighted this preliminary point, the ICJ's inclusive position was also grounded in the observation that the practices of European states at the end of the nineteenth century gave precedence to cession (of sovereignty) over occupation (of *terra nullius*). By relying directly upon historical evidence of state practices during the period under consideration, the court was able to conclude—irrespective of possible differences in legal opinion across the adjudicating panel—that there was no record suggesting that lands inhabited by tribes or peoples with some form of social and political organisation had ever been treated as *terra nullius*.

In the same advisory opinion, the ICJ also tackled a second question on the presence of legal ties between the Kingdom of Morocco and Western Sahara. This question, unlike the first one, occasioned some dissenting opinions around the possibility of recognising non-European forms of territorial control under international law. In the case under consideration, both Morocco and Mauritania had asked the court to go beyond the *acquis* of international law and to try instead to imagine the social, political, and religious conditions prevailing in Northwest Africa on the eve of supposed Spanish colonisation. The majority opinion of the court seems to have taken up this invitation—leaning towards acknowledging non-European forms of territorial control—given how it eventually recognised the presence of legal ties between Morocco and the territory of Western Sahara.[31]

At the level of Islamic law, allegiance to the Sultan is deemed equivalent to allegiance to the state: it is precisely on this basis that the ICJ was able to ascertain the existence of Moroccan legal ties amongst the tribes of Western Sahara.[32] The reason for this equivalence is that, under Islamic law, the Sultan is vested with central authority as commander of the faithful. Accordingly, he is, at the same time, the religious head of the community of believers *and* the guarantor of its temporal government. Acceptance of the

28 *Western Sahara* (n 26).
29 Clark B Lombardi, 'Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis' (2007) 8(1) Chicago Journal of International Law 85.
30 Michelle L Burgis, *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Martinus Nijhoff 2009) 219.
31 ibid 203-5.
32 *Western Sahara* (n 26) Separate Opinion of Vice-President Ammoun.

Sultan's authority by the community of believers is manifested as "allegiance." Accordingly, whoever declares allegiance undertakes to obey the Sultan strictly and permanently as long as the latter remains faithful to the teachings of the *Qur'an*. This allegiance issues a duty of obedience analogous to the relation between a state and its subjects. The Sultan is, therefore, vested with supreme authority at the spiritual and political level, as he assumes, *inter alia*, the responsibility for defending the population and enhancing relations with foreign powers.[33] Contrastingly, the case that allegiance to the Sultan is deemed equivalent to allegiance to the state has no similar situations in modern European law. However, similar situations were reported in the fifteenth and sixteenth centuries, particularly during the Ottoman Empire. This is because allegiance to the Sultan is exclusively part of the Islamic political ideology.

As a consequence, it is submitted that the ECJ should have scrutinised the question of sovereignty over Western Sahara under the categories of tribe, allegiance, and loyalty since these would have played a central role in assessing the scope of territorial sovereignty in the region. Western Sahara includes tribes that profess the Islamic religion and, specifically, that adopt Islamic jurisprudence from the Maliki tradition. This confirms the historical connection to the central authority vested in the Sultan through allegiance.

"Allegiance" can, therefore, be used here as a "deconstructive" category vis-à-vis notions of sovereignty modelled after the typical forms of state authority—especially in light of the historical conditions that characterise Western Sahara. At the same time, the argument for recognising "allegiance" relations should not be taken as an isolated attempt to deconstruct an otherwise state-centric sovereignty paradigm. In fact, sovereignty as a concept *already* possesses a variable geometry, whereby it is ordinarily shared between state and non-state actors at all levels of government, depending on the nature of the issue under consideration.[34]

This argument suggests, therefore, that "sovereignty" is best understood not as an absolute category but rather in connection with different organisational layers through which it materialises in practice. Indeed, there is an ongoing trend towards a distributed notion of sovereignty, such that many organisations—territorial units, companies, governmental agencies and NGOs—complement the exercise of state sovereignty. The most enlightening example consists of the regime that applies to indigenous and tribal peoples. The international regime for indigenous rights is premised on the notion of internal tribal sovereignty, whereby peoples have the right to exercise self-government within their states' borders.[35] According

33 Abdessamad Belhaj, 'Fondements Religieux du Pouvoir au Maroc' (2007) 16(1) Mediterrán Tanulmányok 35.

34 Jens Bartelson, 'The Concept of Sovereignty Revisited' (2006) 17(2) The European Journal of International Law 466.

35 Andrea Muehlebach, 'What self in self-determination? Notes from the frontiers of transnational indigenous activism' (2003) 10(2) Global Studies in Culture and Power 241, doi:10.1080/10702890304329.

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to ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples, they also have the right to participate in decision-making processes concerning their identity or interests.

However, only four European States, namely Denmark (February 22 1996), the Netherlands (February 2 1998), Spain (February 15 2007) and Germany (June 23 2021), have ratified and included this principle in their domestic legislation.[36] Nevertheless, the European Parliament resolution of July 3 2018, on the Violation of the Rights of Indigenous Peoples in the World, including land grabbing, constitutes an important index of the traction that a less monolithic view of sovereignty is gaining even within EU institutions.[37]

In view of the foregoing, the ECJ's exclusion of products originating in Western Sahara from the free-trade agreement with Morocco appears to rest on a problematic notion of sovereignty: it associates it with the mere presence of a non-elected armed group (Polisario Front) in the Western Sahara region, and on this basis justifies granting a standing before the court to the mentioned armed group. This is not to deny that there is a dimension of sovereignty directly related to issues of power, territorial control, and international status. The provision of internal security does count in the Westphalian system, after all, because it counters anarchic tendencies. However, the same connection becomes less useful when it reinforces separatist groups in the pursuit of status and security. Separatist militias are a narrower phenomenon than ethnically-based claims to sovereignty, which come into being when a group claims status and attempts to act as if they were sovereign on a military but also a political, social, and institutional level.[38] Instead, the Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro (Polisario Front)—a non-elected armed group—were allowed to stand as plaintiffs in the ruling before the ECJ.[39] It follows that, in the ECJ's reasoning, the mere presence of a paramilitary group was deemed sufficient to treat the latter as an organisation with standing before the court.

2.2. Extra-Territorial Application of EU Law

EU law occupies a unique place vis-à-vis international law, given its regional scope of validity on the territories of EU member states. This regional scope makes it less general relative to international law norms. At the same time, the EU is often categorised in the literature as a unique regional normative order that comes closer to the architecture of

36 Sedfrey M Candelaria, *Comparative Analysis on the ILO Indigenous and Tribal Peoples Convention No 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Indigenous Peoples' Rights Act (IPRA) of the Philippines* (ILO 2012).

37 Theresa Reinold, *Sovereignty and the Responsibility to Protect: The Power of Norms and the Norms of the Powerful* (Routledge 2012).

38 Oliver P Richmond, 'States of Sovereignty, Sovereign States, and Ethnic Claims for International Status' (2002) 28(2) Review of International Studies 382.

39 Andreu Solà-Martín, 'The Western Sahara Cul-De-Sac' (2007) 12(3) Mediterranean Politics 399, doi:10.1080/13629390701622424.

international organisations.[40] On this basis, the primary constituency to which EU norms apply are member states (as well as the natural or legal persons to which certain classes of directly applicable—or directly effective—norms sometimes apply). Regarding non-member states these can be distinguished into those with agreements with the European Union and those that cannot rely on any such stipulations. It follows, nevertheless, that non-member states can only be defined in a negative way (i.e. in terms of rights and obligations that do *not* apply to them) relative to EU member states.[41]

In relation to the ECJ's pronouncement on Western Sahara, what is at issue is the possibility of extending the same principles and rules that govern EU law to a non-EU member state—effectively applying EU norms as though they were norms of international law. Such an outcome would manifestly contradict the principle of territoriality of European law and risk bringing about a degree of competition with the general rules of international law. Moreover, the eventuality of "extra-territorial" application of EU legal principles would end up placing the EU closer to an institution like the United Nations and its internal bodies—whose remit regularly involves drawing up, interpreting, and applying rules of international law.

What made this possible is the ambiguous attitude the ECJ adopted, which we submit constitutes an instance of imposing a European view of international law.[42] The ECJ decided, for example, in favour of the admissibility and the granting of standing to the Polisario Front based on its own interpretation of UN practice in light of the text of Art. 263(4) of the Treaty on the Functioning of the European Union (TFEU). This is shown very clearly in para. 103, where the court states the following:

> 'In so far as it is not disputed that the applicant was recognised by the UN bodies as the representative of the people of Western Sahara in the context of the self-determination process for that non-self-governing territory, their arguments relating to its not being the sole representative of the people of Western Sahara and to its representativeness of that people being limited to the self-determination process must, in any event, be rejected. The same applies to the arguments based on the fact that it has not been explicitly defined by the UN bodies as a national liberation movement or on the fact that it has not been given observer status with those bodies. For the same reasons, the argument that it has only 'functional' or 'transitional' legal personality must be rejected.'[43]

40 Myriam Benlolo-Carabot, Ulas Candas et Églantine Cujo (dir), *Union Européenne et Droit International: En l'honneur de Patrick Daillier* (Editions A Pedone 2012) 1.

41 Isabelle Bosse-Platière et Cécile Rapoport, *L'état Tiers en Droit de L'union Européenne* (Bruylant 2014) 2.

42 Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (CUP 2018) doi:10.1017/9781108289436.

43 Case T–279/19 (n 2) para 103.

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This position draws solely on the UN General Assembly resolutions 34/37 and 35/19 that cited the *Polisario Front* as the representative of the people of Western Sahara while ignoring subsequent UN practice that recognised *tribal chiefs* as representatives of the people of Western Sahara.[44] The report of the Secretary-General on the situation of Western Sahara of June 18 1990 (S/21360), approved by Security Council Resolution of June 27 1990 (658), has since set in motion a new UN practice confirming, throughout the 1990s, the work of the Saharan Identification Commission that identified how tribal chiefs do represent the people of Western Sahara. This evolution also occurred shortly after the adoption of the mentioned ILO 169 convention as the cornerstone of a new international legal regime for tribal and indigenous rights. In consequence, it is far-fetched to argue (as the ECJ did) that since the Polisario Front has been deemed *a* representative of Western Sahara's people, it should then be identified with *the* (sole)representative, considering that the word"the representative" has been withheld in consecutive UN resolutions.[45]

One additional consideration relates to the difficulty of positioning, within the global order, the extra-territorial application of EU law. Namely, the EU does not—to date—have a constitution.[46] This differentiates its decisions from those of a federal union, like the US. In the case of the US, its constitution regulates relationships between federal and state governments and informs US interventions in its *de facto* role as a global superpower. Compared to the US, the EU has a more limited remit of intervention, strictly for the benefit of member states. It follows that extra-territorial application of EU law (as a normative order limited in scope to the benefit of its member states) looks even less intelligible than (already controversial) instances of extra-territorial enforcement of US decisions.

The ruling issued by the ECJ, which affects the legal regime for products originating in Western Sahara, can be construed as an extra-territorial application of European law because, in some sense, it sanctions the supremacy of European law over the national law of Morocco. Namely, it restricts the scope of application of a free-trade deal to the exclusion of a territory that—under Moroccan law—is subject to Moroccan sovereignty. This amounts to an extra-territorial application of European law in that the EU legal order constitutes an *exception* to the general principle that treaty norms only bind states and do not directly confer rights to (or place obligations upon) their subjects. Under what has been called the 'European Way of Law,'[47] it has indeed become commonplace for norms produced by EU bodies to apply "as though" they were state law. This is because the EU

44 Léa Gervais Glaenzer, 'Self-Determination in the Western Sahara: Obstacles and Obligations' (2021) Senior Projects Spring 127 <https://digitalcommons.bard.edu/senproj_s2021/127/> accessed 10 January 2024.

45 Charles Dunbar, 'Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict' (2000) 54(4) The Middle East Journal 522.

46 Alina Kaczorowska, *European Union Law* (2nd edn, Routledge 2011) 28.

47 Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47(2) Harvard International Law Journal 329, doi:10.1093/acprof:oso/9780199231942.003.0006.

defines itself as an independent and *ad hoc* legal order, different from the wider body of international law, by virtue of the possibility of direct incorporation of its norms into the legal systems of its member states.[48] The first consequence of this European dimension is the insertion of a new, intermediate layer of normative organisation (EU law) between the national and international legal systems.[49] The direct incorporation of EU norms within national legal systems, therefore, issues a position of the supremacy of the EU order over national legal systems.[50] Secondly, and as a consequence, the EU normative system takes on an internally structured and hierarchical character.[51] This is because of the need for institutional enforcement of this supremacy of EU law,[52] which demands judicial review of member states' compliance.[53] At the same time, it is essential to note that the laws of a third state should not—ordinarily—be deemed "subordinate" to EU law, as it happens instead for the national laws of individual EU member states.

It follows that it is not justifiable for the ECJ simply to treat European law as equivalent to international law or to read international and European norms together to extend the scope of application of EU norms to third countries. Rather, this outcome could only validly hold in the case at hand, provided it could also withstand scrutiny based on (i) conventional concepts and rules in use in the legal system of the concerned state (in this case, the Kingdom of Morocco), and against (ii) the status of Western Sahara within *dar al-islam*, i.e. the sphere of applicability of Islamic law. In the case of Western Sahara, such scrutiny would invite an element of added complexity connected to the religious sources of international law—one that has been practically ignored by the ECJ's exclusion of Western Sahara products (subject to the control of the Moroccan customs authorities) from the trade preferences otherwise granted to products of Moroccan origin.[54]

This last point is not merely a "trend" in international legal scholarship, considering how the increased cultural and geographical scope of international legal history has brought to light the genuine contribution of the Islamic legal tradition to shaping the international

48 Constanc Grewe, 'Constitutions Nationales et Droit de l'Union Européenne', *Repertoire de Droit Europeen* (2009) vol C(2), 6.

49 Jean-Sylvestre Bergé, 'Droit International Privé et Droit de l'Union Européenne', *Repertoire de Droit Europeen* (2017) vol D(33), 27.

50 Marc Blanquet, 'Effet Direct du Droit Communautaire', *Repertoire de Droit Europeen* (2008) vol E(12), 8.

51 Jacques Schwob, 'Traités Communautaires: Sources et Révision', *Repertoire de Droit Europeen* (1992) vol T(20), 13.

52 Jürgen Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' (2012) 23(2) The European Journal of International Law 340, doi:10.1093/ejil/chs019.

53 Joël Molinier, 'Primauté du Droit de l'Union Européenne', *Repertoire de Droit Europeen* (2011) vol E(3), 4.

54 Jacques Eric Roussellier, 'Elusive Sovereignty – People, land and frontiers of the desert: The case of the Western Sahara and the International Court of Justice' (2007) 12(1) The Journal of North African Studies 55, doi:10.1080/13629380601099500.

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legal norms applicable at different times and in different regions.[55] Taking a view of sovereignty informed by the (applicable) Islamic law would have afforded more traction for understanding the complexity of the situation in Western Sahara. This region is inhabited by tribes, and those tribes have traditionally manifested their loyalty to the Kingdom of Morocco through allegiance—a category recognised under Islamic law—so this region ought to be considered as nevertheless part of that state. The effects of allegiance can also be noticed elsewhere in the Muslim world. For instance, the Turks pronounced an oath of loyalty to Muhammad as the prophet of the Islamic nation and thereby accepted to come to his just defence.[56] As a more general point, it should not come as a surprise that certain categories originating in religious practice have developed a legal dimension: church law, for instance, has also left vestigial forms in the legal system of most European states. The most common example in this regard is Germany, which has followed the Church's input to pass laws that prohibit or regulate biotechnological procedures.[57]

A separate critique that can be made of the ECJ's judgment concerns the creative liberty the court took in adjudicating the matter. A judge might orient on a motive transcending the facts of the case to support or affirm a general principle of law and do so through a combined reading of many sources.[58] These sorts of situations disclose a political character to legal decision-making.[59] In the case of the EU, the definition of European policy depends largely on the prerogatives enshrined in the policies of individual member states,[60] and it is subject to influence by their economic and political interests.

It is submitted that this sort of judicial creativity is not warranted in the Western Sahara case on the grounds of the basic rule of law principles enshrined in the architecture of the EU and binding on the court. First of all, it has been mentioned earlier that the EU's powers are limited when it comes to their regional scope, the subjects to which they apply, the domains of regulation they cover, and the functions

55 Ignacio de la Rasilla, 'Islam and the Global Turn in the History of International Law' in Ignacio de la Rasilla del Moral and Ayesha Shahid (eds), *International Law and Islam: Historical Explorations* (Brill, Nijhoff 2018) 10, doi:10.1163/9789004388376_002.

56 Luigi Nuzzo, 'Law, Religion and Power: Texts and Discourse of Conquest' in Ignacio de la Rasilla del Moral and Ayesha Shahid (eds), *International Law and Islam: Historical Explorations* (Brill, Nijhoff 2018) 219, doi:10.1163/9789004388376_011.

57 Mirjam Weiberg-Salzmann and Ulrich Willems, 'Moralizing Embryo Politics in Germany: Between Christian Inspired Values and Historical Constrains' in Mirjam Weiberg-Salzmann and Ulrich Willems (eds), *Religion and Biopolitics* (Springer International 2020) 281, doi:10.1007/978-3-030-14580-4_13.

58 Joël Molinier, 'Principes Généraux', *Repertoire de Droit Europeen* (2011) vol P(27), 15.

59 John D Haskell, 'Subjectivity and Structures: The Challenges of Methodology in the Study of the History of International Law and Religion' in Ignacio de la Rasilla del Moral and Ayesha Shahid (eds), *International Law and Islam: Historical Explorations* (Brill, Nijhoff 2018) 94, doi:10.1163/9789004388376_006.

60 Valérie Michel, 'Constitution pour l'Europe: Traité', *Repertoire de Droit Europeen* (2006) vol C(137), 51.

they pursue.[61] If one considers this latter point and reads it together with the basic notion that sovereignty is defined by the scope of powers vested in it, then it seems fair to conclude that the ruling of the ECJ on products originating in Western Sahara amounts to an unjustifiable extension—primarily taken on policy grounds—of the scope of application of European law to a non-EU territory.

Proceedings before the European Court of Justice are governed by rules in relevant treaties and their attendant protocols. Among these are the Statute of the European Court of Justice and the court's internal regulations.[62] These rules serve to ensure its judicial mission as a body tasked with reviewing the interpretation and application of EU law,[63] albeit with a scope limited to European space and the peoples of EU member states. This means that, when it comes to a third state that is a signatory to an agreement with the EU, political considerations should not come into the foreground. Greater deference should be paid to the rule of law principles that underpin the international legal order. In the case at hand, these could have warranted stronger consideration of alternative legal categories (such as those equating sovereignty with "allegiance") when these apply to the matter at hand, without prejudice for their legal framework of origin—in this case, *Shari'ah* law—that pushes its roots in religious culture.

3 CONTRADICTORY EFFECTS OF THE ECJ RULING: THE INDIVISIBILITY OF AGREEMENTS AND THE NEEDS OF REGIONAL SECURITY

Besides matters of law, a ruling can also be evaluated in light of the consequences it produces. In this respect, the ECJ's ruling to exclude Western Sahara products from the system of preferential trade for products originating within Morocco gives rise to important contradictions with the principle of indivisibility of international agreements and with the security needs of the region, as acknowledged by a variety of international reports.

3.1. Consequences of Non-Compliance with the Principle of Indivisibility of Agreements

In recent years, security matters have gained prominence within the Euro-Mediterranean Association Agreement (EMAA) framework between Morocco and the EU.[64] This trend is evidenced by the continuing interest towards closer integration with security and law

61 Vlad Constantinesco et Valérie Michel, 'Compétences de l'Union Européenne', *Repertoire de Droit Europeen* (2011) vol C(19), 22.

62 Fabrice Picod, 'Cour de Justice: Procédure', *Repertoire de Droit Europeen* (2021) vol C(2), 9.

63 Marco Darmon et Christophe Vahdat, 'Cour de Justice', *Repertoire de Droit Europeen* (2007) vol C(1), 1.

64 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L 70/2 <http://data.europa.eu/eli/agree_internation/2000/204/oj> accessed 10 January 2024.

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enforcement agencies on the Arab side of the Mediterranean. Against this background, the EMAA facilitates equipment sales from the EU to Morocco to help patrol the Mediterranean coast more efficiently, thereby guarding Spanish territory against migrant flows towards Europe. Separate from the EMAA framework are additional "special relations" that the EU has been cultivating with many Arab states—including Morocco—for the prevention of terrorism.[65] It follows that security cooperation between the EU and Morocco currently takes place along two complementary axes: the EMAA framework and the framework of special relations.

The EMAA was signed in 2000, and it has a broad remit spanning from cooperation over economic, legislative, social, and cultural affairs to security matters—such as cooperation over customs arrangements (Article 59), contrast of money laundering (Article 61), and contrast of drug trafficking (Articles 62 and 63). The pursuit of a 'special relation' in EU-Morocco cooperation is evidenced instead by the Joint EU-Morocco document on strengthening bilateral relations/Advanced Status of 2007. This document lays down a framework for political and strategic dialogue between both parties, making way for diversified cooperation in several areas—including security matters.[66] It is important to stress that this focus on security is not just a passing highlight of the EU-Morocco relationship but has been steadily gaining ground due to the increasing size and type of security threats at European borders. For instance, the importance of the security aspect was reiterated in a joint statement issued at the fourteenth meeting of the EU-Morocco Association Council (a joint body established by the EMAA).[67]

At the same time, security cooperation is a two-way street, meaning that the security of Europe's Southern neighbours—within their borders—cannot be considered a separate matter: international cooperation ought also to generate positive security spillovers for the EU's partners, like Morocco.[68] This means that the security of North Africa, the Sahel, and Morocco should also matter as a joint concern, with a view to preventing a void that would favour countries like Libya and the African Sahel States, characterised by pronounced fragility on security issues.

By proposing a multidimensional association with its southern neighbours, the EU is also not hiding its intention to promote a pure security approach for protection against real or

65 Francesco Cavatorta, *Raj Chari and Sylvia Kritzinger, The European Union and Morocco, Security Through Authoritarianism?* (Political Science Series 110, Institute for Advanced Studies 2006) 13-4.

66 Document Conjoint UE-Maroc sur le Renforcement des Relations Bilatérales / Statut Avancé (du 23 juillet 2007) <https://www.eeas.europa.eu/node/4327_en?s=204> accessed 10 January 2024.

67 Council of the EU, 'Joint Declaration by the European Union and Morocco for the Fourteenth Meeting of the Association Council: Press Release' (*European Council, Council of the EU*, 27 June 2019) <https://www.consilium.europa.eu/en/press/press-releases/2019/06/27/joint-declaration-by-the-european-union-and-the-kingdom-of-morocco-for-the-fourteenth-meeting-of-the-association-council/> accessed 10 January 2024.

68 Bénédicte Real, 'Cooperation Between Morocco and Europe in Terms of Security: Is the European Union an Inevitable Partner?' (2018) 6 Journal of International Law and International Relations 129.

potential risks that may originate in this region. This implies a close correlation between the security aspects highlighted by the Barcelona Declaration and the parallel European offer of cooperation on economic and financial matters.[69] It follows that this accent on security, which characterises the EU's broader policy to the Mediterranean region, should also govern the interpretation of any agreements between Morocco and the European Union insofar as they include security-related clauses. Even though these clauses take a general formulation, and despite the lack of a more organic agreement on security matters between the EU and Morocco, the reality of Euro-Mediterranean cooperation described above suggests that there is an unmissable focus on security in EU-Morocco relations, effectively vesting Morocco with the role of gatekeeper vis-à-vis terrorist threats, organised crime, and illegal cross-border migration.

These considerations suggest the centrality of bilateral security concerns at the heart of the EU-Morocco relationship. For this reason, it does not seem improbable that the removal of trade privileges on Western Sahara products might deteriorate the wider architecture of EU-Morocco relations and, particularly, warrant a suspension of all agreements between the parties, inclusive of their security clauses.

This suggestion would be a plausible application of the principle of indivisibility of international treaties, which equally applies to the agreements and protocols between Morocco and the European Union.[70] It implies that suspending the applicability of Protocol No. 1 to Western Sahara products can negatively impact all agreements between the parties, for instance, by casting uncertainty over the legal status of the residual trade privileges that the EU wishes to grant to Morocco to the exclusion of Western Sahara.

In support of this view, it is necessary to remind oneself that the residents of Western Sahara still benefit from the remaining agreements entered into between Morocco and the European Union: a point that was not disputed—and in fact reaffirmed—by the European Commission in its report of December 22 2021.[71] This point lends decisive credit to the

69 Bouchra Essebbani, 'La Coopération Entre le Maroc et l'Union Européenne: De l'Association au Partenariat' (PhD thesis, Université Nancy 2 2008) 331.

70 Euro-Mediterranean Agreement establishing an association (n 64) 62.
The EMAA consists of five protocols that focus on, respectively, arrangements applying to imports into the Community of agricultural products originating in Morocco (Protocol 1); arrangements applying to imports into the Community of fishery products originating in Morocco (Protocol 2); arrangements applying to imports into Morocco of agricultural products originating in the Community (Protocol 3); the definition of originating products and methods of administrative cooperation (protocol 4); mutual assistance in customs matters between the administrative authorities (Protocol 5).

71 European Commission, '2021 Report on the Benefits for the People of Western Sahara on Extending Tariff Preferences to Products from Western Sahara' (*European Commission*, 22 December 2021) <https://ec.europa.eu/taxation_customs/2021-report-benefits-people-western-sahara-extending-tariff-preferences-products-western-sahara_fr> accessed 10 January 2024.

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presumption that the European Court of Justice ruling wasn't adopted with a careful mapping of its possible ripple effects on the wider tapestry of EU-Morocco relations.

3.2. Security Risks Arising from the ECJ Ruling

The critical analysis developed thus far suggests that Morocco could hold a legitimate claim to sovereignty over Western Sahara on the grounds of "allegiance"—a category recognised by Islamic law and which applies to the region as part of *dar al-islam*. Secondly, the analysis has also shown how the ECJ's ruling that excludes Western Sahara products from the applicability of trade preferences under Protocol 1 of the EMAA fits poorly with the principle of indivisibility of international obligations and the wider repercussions on EU-Morocco relations. If the above is true, one might construe the ECJ's ruling on Western Sahara products as effectively an economic embargo on the disputed region. This will likely have repercussions on the economic and social situation of local residents and may increase the region's vulnerability to security and terrorist threats that are commonplace in the Sahel Region. Such an outcome would ultimately frustrate the stated intentions of European and international bodies. Additionally, this inconsistency could also be construed as a relinquishment—on the part of EU member states—of the international duty known as 'Responsibility to Protect' (RtoP).[72]

Let us consider, as an example, the 2021 European Parliament report on the 'New EU Strategic Priorities for the Sahel'.[73] The report recognises that recent events in the Sahel Region prove the extent of its political instability, offering troubling indications of weak democratic governance in the region. The activities of extremist groups and internal conflicts have weakened the region's democratic transition. This environment of political fragility and lack of government legitimacy has increased the difficulty of addressing security and humanitarian issues in the Sahel. Moreover, the persistent likelihood of rentierism posed by non-elected armed groups and an increasing pattern of violence against regions and resources have contributed to growing internal and cross-border displacements in the Sahel states. At the same time, the lack of adequate governance mechanisms to manage this displacement—further exacerbated by environmental degradation, resource scarcity, and population growth—has eventually led to an acute humanitarian crisis.

The same report observes that, since 2011, the European Union Strategy for the African Sahel has focused on both security and development in the hope of beginning to address such interconnected challenges. This notwithstanding, EU efforts have predominantly

72 Ivan Šimonović, 'The Responsibility to Protect' (2016) 8(4) UN Chronicle: Human Rights <https://www.un.org/en/chronicle/article/responsibility-protect> accessed 10 January 2024.

73 Eric Pichon and Mathilde Betant-Rasmussen, 'New EU Strategic Priorities for the Sahel: Addressing Regional Challenges Through Better Governance' (*European Parliament, Think Tank*, 7 July 2021) 1 <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)696161> accessed 10 January 2024.

focused on a military approach to combat the increased terrorist activity. This has secured tangible results but ultimately failed to provide long-term regional stability. In response to this, the European Union has also developed a new integrated strategy in the Sahel that explicitly targets the political dimension, with a focus on governance mechanisms, human rights, and cooperation with civil society and local authorities to safeguard the long-term integrity of security cooperation with the countries in the region.

Laying side-by-side the tone of this European Parliament report and the effect of the ECJ's ruling on Western Sahara products, it is difficult not to pick up profound contradictions. On the one hand, the EU recognises the instability of the African Sahel region (of which Western Sahara is an extension) and appears well aware of the risks to security and political stability and of conditions conducive to the rapid increase of terrorist activity. On the other hand, the ECJ ruling "embargoes" Western Sahara products, thereby reducing economic opportunities for inhabitants of the area.

The European Parliament's interest in the African Sahel Region has not been accidental; rather, it is borne of the awareness that this region is a source of migration flows and security threats for EU countries. Studies carried out by the North Atlantic Treaty Organization (NATO)have also underscored how the security architecture of the region—at least from a military point of view—invites action from the Arab side, with additional support necessary from North Africa, Europe and the international community, prioritising the need for dialogue with countries in the region.[74]

The NATO report suggests that NATO must adopt a cohesive approach towards the African Sahel. This entails being transparent about the priority of security concerns in the area and the seriousness of the threat they pose to NATO strategic interests and, second, having a shared notion of the action that needs to be taken.[75] In this respect, it is difficult to see how the ECJ ruling would contribute to either of those goals.

Taking a humanitarian approach, the United Nations High Commissioner for Refugees issued a report in 2021, arguing that the deteriorating situation in the Sahel Region forces people to flee from homes and deprives vulnerable communities of basic services. This is a consequence of the fact that non-State armed groups directly target schools, health centres, and other key infrastructure. In turn, this leaves the civilian population exposed to extortion, targeted killings, cattle rustling, looting of shops, and threats of eviction from their villages.[76]

74 Rabah Aynaou, NATO and the Security Challenges of the Sahel-Sahara Region Within the New Geopolitical Order (Research Paper 110, NATO Defense College 2015) 12 <https://www.ndc.nato.int/news/news.php?icode=774> accessed 10 January 2024.

75 NATO, *Strategic Foresight Analysis Regional Perspectives Report on North Africa and the Sahel* (HQ SACT Strategic Plans and Policy 2023).

76 UNHCR, 'Sahel Situation (Tillbéri and Tahoua Regions)' (*UNHCR Operational Update*, April 2021) 1 <https://reporting.unhcr.org/sites/default/files/Niger%20Sahel%20fact%20sheet-April2021.pdf> accessed 10 January 2024.

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A 2001 American report issued by the United States Commission on International Religious Freedom, titled 'Islamists in the Central Sahel Region',[77] complements the picture drawn by the previous two reports. It takes stock of the fact that violent Islamist groups have moved into parts of Mali, Burkina Faso, and Niger, threatened religious freedom there, imposed aberrant interpretations of Islamic law, restricted religious practice, and executed individuals for their beliefs. These events have resulted in the growth of religious tensions and religious persecution across West Africa. The report deemed similar developments extremely worrying in light of US regional policy and its efforts to promote religious freedom.

This picture also applies to Western Sahara, which is on the fringes of the Sahel region and not immune from its criticalities. Hence, the ECJ ruling appears difficult to comprehend—even on policy grounds—when placed in this degrading security situation. This precariousness is most evident in Libya, which bears the scars of terrorism and the security threats characteristic of the Sahel region as a whole.[78]

4 CONCLUSION

This article has undertaken a critical review of the 2021 ECJ ruling that excludes preferential trade treatment accorded to Moroccan products only those products originating in the Western Sahara region, even when they are subject to the control of Moroccan customs authorities. In legal terms, the ECJ's ruling is questionable on the grounds of taking for granted a picture of sovereignty that—if commonplace on the European continent—is narrower than what other legal systems allow. For instance, concepts such as "allegiance" significantly broaden the scope of sovereignty under Islamic law, such that Morocco's sovereignty over the region is not brought into question by the presence of a non-elected armed group and that the latter group does qualify for standing in international disputes. Instead, the ECJ seems to have made a political choice, as evidenced by its selective reading of international law, by casting to one side alternative possible notions of sovereignty under a non-Westphalian system like that of Islamic law—where categories like "tribe," "allegiance," and "loyalty" do make a difference. In doing so, the ECJ overlooked the international legal regime that applies to tribal and indigenous rights, which the European Union has endorsed, as well as the post-1990s practice within the UN for dealing with the uncertain representation of Western Saharas' people. Moreover, even on an understanding of sovereignty modelled after that of states, it begs the question of whether the mere non-state paramilitary presence in a region should suffice to clear the threshold for international

77 Madeline Vellturo, 'Islamists in Central Sahel: Violent Islamist Groups in the Central Sahel' (*USCIRF*, May 2021) 4 <https://www.uscirf.gov/publication/factsheet-islamists-central-sahel> accessed 10 January 2024.

78 Mohamed Eljarh, *Les Defis et Enjeux Securitaires Dans L'espace Sahelo-Saharien: la Perspective de la Libye* (Dialogues securitaires dans l'espace Sahalo-Saharien, Friedrich-Ebert-Stiftung, 2016) 5.

standing, as opposed to more encompassing notions of order and authority that transcend a narrow militaristic reading.

A second critique inheres in the extra-territorial application of EU law, which in the case at hand involves the invalidation of an international agreement by a court that has been set up under the EU legal architecture and whose remit is circumscribed to policing the legality of this order insofar as it applies to member states—but not to third parties like Morocco. Related to this is the critique of excessive judicial discretion in the ECJ's ruling, which seems more grounded in political considerations than in basic tenets of procedural justice. Indeed, these would have suggested a preliminary step of gathering—in a spirit of equanimity—the norms vying for application in the case, including those of a religiously established order like *Shari'ah* law. This aspect was, unfortunately, overlooked by the ECJ in its ruling.

Another strand of the argument involves the court's incomplete scrutiny of the practical consequences of its ruling. For example, in the context of alarming international reports suggesting deteriorating security conditions in the Sahel Region, a judgment that effectively imposes an embargo on Western Sahara products exacerbates vulnerability to terrorist groups and is difficult to square with a goal of enhanced stability in the Sahel region.

Last but not least, the ECJ's decision seems to fall foul of the principle of indivisibility of agreements by selectively misapplying only one part of its agreement with Morocco. This would be sufficient reason for Morocco to deem the remainder of the agreements and protocols between the parties as no longer binding—extending to political, economic, social, and cultural affairs, as well as to the security clauses that would be of particular interest to EU member states.

Given the foregoing, it is difficult to see a silver lining to the ECJ's ruling, which encourages non-elected armed groups in other regions of the world to follow suit and thereby enables them to use their position to threaten the economic interests of the state governments with whom they are in dispute over sovereignty. In the long run, this type of attitude could have material adverse effects on the relationship of the European Union with countries placed in the same position as Morocco.

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AUTHORS INFORMATION

Mohammed El Hadi El Maknouzi*
Dr.Sc. (Law), Professor of Business Law, Department of Private Law, University of Sharjah, Sharjah, United Arab Emirates
mmaknouzi@sharjah.ac.ae
https://orcid.org/0000-0003-3396-8985
Corresponding author, responsible for research methodology, data collection, writing, and supervising.

Mamoun Alaoui Ismaili
PhD (Interdisciplinary Studies), Interdisciplinary Center for Research in Performance and Competitiveness (CIRPEC), Mohammed V University, Rabat, Morocco
mamoun.ismaili@um5s.net.ma
https://orcid.org/0000-0001-9319-1042
Co-author, responsible for conceptualization, writing, and data collection.

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Research Article

THE DEVELOPMENT OF NOTARY AS FREE LEGAL PROFESSION IN KOSOVO

Bedri Bahtiri and Gani Asllani*

ABSTRACT

Background: *This paper analyses the role of notaries in Kosovo, individuals authorised by the state to draft, solemnise, and legalise legal civil documents. Today, notary services are performed by qualified lawyers who meet state-set criteria and pass a professional exam to practice as independent professionals. The experiences in the world show that notaries contribute to the relieving and efficiency of courts and administrative bodies, thereby expediting legal processes and safeguarding the rights and interests of natural and legal persons. The notary is a public service exercised by authorised persons licensed by the state to fulfil the requests of legal and natural persons through the preparation of notarial acts. In the Republic of Kosovo, notaries are also registered as individual businesses with the Business Registration Agency. During the preparation of these acts, notaries are expected to have high personal and professional integrity, directly impacting the fulfilment of the citizens' requests with high efficiency and professionalism. In terms of how it is organised and operated, the notary service is very complex in the eyes of the citizens and within the justice system itself. To increase confidence, the Kosovo Chamber of Notaries has identified the development of the notary as a permanent process of modernisation and harmonisation of notary services with the evolving needs of legal and natural persons receiving such services. This strategic focus ensures the effective protection of legal interests and promotes legal certainty.*

Methods: *In the present research, we employed the qualitative method, commonly utilised in the social sciences. Our study uses a combination of literature review and analysis approaches in conjunction with normative, comparative, and historical methods. We analyse the legal treatment that the Kosovo notary system has received from the legislative and academic literature and examine the system's benefits and drawbacks. This approach, which compares the notary system to the one used by the Kosovo courts before 2011, assists in defining the purpose, significance, and status of the notary system in Kosovo.*

Using the comparison method, we identify the common and distinctive elements of the notarial system in Kosovo as well as the directions for its development under international standards, giving a clear overview of its place, role, and importance of the notarial system in Kosovo.
Based on the legal analysis, we highlight the changes in the interior of legal relations, which were previously the responsibility of administrative bodies and courts but are now the responsibility of notaries.
***Results and Conclusions**: The existing normative framework provides a good basis for information on the work of notaries and the Chamber of Notaries. However, an even greater contribution should be made to better inform citizens about the functioning of the notary system, which is crucial for strengthening public confidence in the Notary.*

1 INTRODUCTION

Notary as a profession is very ancient. It is worth noting that the Notary's Office predates any other now connected with administration or jurisprudence in France. Like many other features of the laws and government of France, it has retained traces of Roman origin. However, it cannot be said that the Romans had any public functionary with duties equivalent to those of the modern notary. In the earliest times, public slaves served as scribes, taking notes of proceedings between individuals, preparing agreements for parties, and, in certain cases, entering into stipulations for them by their authority.[1]

The Institute of Notaries represents a novelty in the process of reforming Kosovo's modern legal system and its approximation and harmonisation with EU legislation, but also with international law. The notary institute is immanent in continental legal systems and Anglo-Saxon law with their respective differences in importance and action. The justice system comprises a wide range of bodies, whereby in addition to traditional justice bodies such as courts and prosecution offices, the system also includes free professions, including the Notary service, Bar, Mediation, Private Enforcement, and Bankruptcy Administration. The Notary service is very important as a large number of civil, administrative, and other legal relations are dealt with by this service, in particular, the conclusion of various contracts which enable the circulation of goods and the provision of various services to citizens in the function of facilitating the lives of citizens and developing businesses in general.

Notaries have the greatest impact in civil law, where the professionalism of notaries depends on the accuracy and legality of their acts, as they are always used as evidence in courts and other bodies. The establishment of the notary institution in the Kosovo legal system is relatively new, dating back to 2012 with the enactment of the Law on Notary.[2]

1 WW Smithers, 'History of the Franch Notarial system' (1911) 60(1) University of Pennsylvania Law Review 19.

2 Law of the Republic of Kosovo no 03/L-010 of 17 October 2008 'On Notary' [2008] Official Gazette of the Republic of Kosovo 42/1.

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Following the legal system model of most Western European countries, Kosovo has adopted the Latin notary model as a free profession.[3] The solutions adopted for the organisation and powers of the notaries imply that the notary service is a public service independent of any other service. Embracing contemporary legal solutions, the notary system in Kosovo prioritises legal certainty, ensuring that qualified and skilled persons carry out these jobs.

This marks an important step towards setting up a notary service dedicated to contributing to providing a distinct legal service aimed at enhancing legal certainty by relieving courts of redundant cases, many of which are non-judicial. This will consequently impact the effective realisation of citizens' rights and the creation of greater legal certainty.

With Kosovo's legislative decision to introduce a *"Latin notary"* service, significant dilemmas revolved around defining the scope of authority for the notary service. This included determining the extent of their responsibilities compared to those of courts, administrative bodies, and lawyers prior to their commencement of work. Due to the solutions adopted in the laws, the position of notaries and the notary service is mainly expressed in the obligations of notaries to abide by their powers in the exercise of their profession.

These obligations are, in particular, expressed in impartiality, which means that notaries are tasked with impartially defending and advising all parties involved in proceedings while protecting their interests. This obligation to inform and protect parties is particularly important in legal matters requiring notarial document drafting.

An important part of the court's jurisdiction, such as inheritance, has been transferred to notaries as a non-contentious procedure to establish uncontested facts. However, if disputed facts are presented, the parties are instructed to resolve their disputes in court in a contentious procedure.

The usefulness of this institute in the court's non-contentious procedures, particularly in inheritance proceedings, cannot be denied. Notaries exclusively handle legal affairs concerning the transfer or acquisition of ownership or other real rights in immovable property and the establishment of a mortgage on immovable property. In these cases, the form of the notarial act is mandatory, with any other form considered null and void, lacking any notarial effect.[4]

But, this does not mean that notaries cannot prepare acts for additional legal work. At the parties' request, notaries can draw up the notarial acts for other legal works that do not fall within their exclusive competence.

3 UINL, 'Fundamental Principles of the Latin Type Notarial System' (*International Union of Notaries (UINL)*, 8 November 2005) <https://www.uinl.org/en_GB/principio-fundamentales> accessed 10 November 2023.

4 Law of the Republic of Kosovo no 06/L-010 of 23 November 2018 'On Notary' [2018] Official Gazette of the Republic of Kosovo 23/22, art 40.

In addition to their traditional role in drafting documents, wills, and authenticating legal transactions, notaries' work extends to legal areas which, until the entry into force of inheritance legislation and uncontested procedure in 2018, were previously exclusively within the jurisdiction of the courts, such as inheritance proceedings.[5] Notaries are authorised to draw up a will outside of court, known legally in law as notarial wills.[6]

Contemporary trends are moving towards introducing a new legal regime for notaries in the inheritance procedure, as these procedures now fall under the competence of notaries. Before the drafters of the Kosovo civil legislation, which aimed to intensively work on harmonisation with EU law, there was a demand for complete harmonisation of the Law on Notary with other laws related to inheritance, non-contested matters, advocacy, etc.[7]

Therefore, the Law on Notary in Kosovo is entirely based on Europe's most developed notarial legislation, such as the German Law on Notary, French Law on Notary, Austrian Law on Notary, and Slovenian Law on Notary.[8] By transferring the powers governing the non-contentious cases, which they accept as entrusted work, the notaries discharge the courts from these cases and, through notarial acts, which are enforceable documents, create security for the parties in the procedure. This transition not only reduces the burden of contested cases on Kosovo's courts but also ensures quicker and more cost-effective handling of these matters by the notaries.

The interconnectedness of all free professions and the justice system highlights the necessity for complete harmonisation, as disputes over their powers and responsibilities often arise. To illustrate the issue, it is worth noting the recurring issue where lawyers draft contracts provided by the Law on Bar, but these contracts are not validated by notaries who claim that drafting and certifying contracts is an exclusive power within their domain.[9]

One of the persistent challenges has been the lack of adequate and updated registers, as well as the lack of access to public registers for notaries. This created legal uncertainty and posed a permanent risk for the parties involved, as well as for notaries, during the compilation and authentication of notarial acts. However, this has been overcome because, since last year, notaries have been obliged to record the contract number in the concrete column of the ownership certificate when drafting notarial deeds. This serves as a sign for the competent cadastral office that a new transaction has been completed concerning the property, which is expected to be deposited in the cadastral office for registration.

5 Bedri Bahtiri dhe Asllan Bilalli, *E Drejta Trashëgimore* (Universiteti i Prishtinës Hasan Prishtina 2021) 26-8.

6 Hamdi Podvorica dhe Fatlum Podvorica, *Komentari i Ligjit për Trashëgiminë së Kosovës* (Prishtina 2023) 328-32.

7 Ministry of Justice of the Republic of Kosovo, *Kosovo National Strategy on Property Rights* (US Agency for International Development Kosovo 2016) 108-9.

8 Bashkim Preteni dhe Aliriza Beshi, *Komentari i Ligjit për Noterinë* (Oda e Noterëve të Republikës së Kosovës 2021) 35.

9 Law of the Republic of Kosovo no 04/L-193 of 2 May 2013 'On the Bar' [2013] Official Gazette of the Republic of Kosovo 20/2, art 4, para 1.3.

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Also, a continuing problem is the issue of spouses' joint property as well as joint family property, including inherited property. In most cases, such properties are registered in real estate books under the name of sellers but have been in possession of bona fide buyers for decades, purchasing through informal contracts and not according to legal procedures.

Post-war Kosovo has faced numerous ownership legal problems in post-war Kosovo due to falsifications of property documentation and transactions, exacerbated by the absence of cadastral documentation in Serbia. This has led to cases in judicial practice whereby a property has been sold and purchased by several different owners, only to discover later that the documentation was forged.[10] Often, even state authorities fall prey to these documents.

It is worth mentioning that this situation was expressed especially before the establishment and functioning of the notary system, respectively, until 2010. Therefore, given the above, there is a need for further improvement of the notary service as a public service in Kosovo. This includes qualitative normative harmonisation of all the provisions and transferal of certain procedures conducted under the rules of non-contested procedure from the jurisdiction of the courts to the notary service.

While a notable degree of development of the notary service has been achieved in the past period, it needs to be further developed. It is worth emphasising the commitment of the Republic of Kosovo to the European integration process and the reform and development activities outlined in the Council of Europe's recommendations in the field of notary.

Moving forward, it is crucial to continue progressing in the reform process and creating conditions for sustained development while also focusing on enhancing the quality of notary services. Additionally, there is a need to establish a transparent and predictable framework for tracking up-to-date achievements and creating conditions for their sustainability.[11]

2 THE LEGAL FRAMEWORK OF THE NOTARY IN KOSOVO

The notary profession stands at a crossroads, operating within a world of traditional paper-based transactions where signatures and seals are mandatory and the emerging digital landscape where such practices and procedures must adapt. Establishing a framework for the authentication of computer-based information in today's commercial environment

10 For instance, see the judgment of the Basic Court in the municipality of Gjakova: Rasti nr 256/24 (Gjykata Themelore Në Gjakovë, 16 janar 2018) <https://gjakove.gjyqesori-rks.org/wp-content/uploads/verdicts/GJK_P_P.nr.256_14_SQ.pdf> aksesuar më 10 nëntor 2023.

11 European Commission, 'Kosovo* 2022 Report: Communication on EU Enlargement policy' (*European Commission*, 12 October 2022) 44 <https://neighbourhood-enlargement.ec.europa.eu/kosovo-report-2022_en> accessed 10 November 2023.

requires a familiarity with concepts and professional skills from both the legal and computer security fields.[12]

One of the fundamental components of the modern legal system and the rule of law is the notarial act and service.[13] In Kosovo's legal system, the notary is a new profession established by the Law on Notary No. 03/L-010. Implemented in 2011, respectively three years after its enactment, the Ministry of Justice, in consultation with municipal court presidents and the Chamber of Notaries, determined the initial number of 74 notaries headquartered in Pristina, the capital city.[14]

Currently, the field of the notary is regulated by Law No. 06/L-010, dated 23 November 2018, and Law No. 08/L-149, which amends and supplements Law No. 06/L-010, dated 8 November 2022. The notary aims to reduce the burden on the courts, speed up legal actions taken before notaries and install legal certainty in certain actions and procedures entrusted to notaries in citizens' best interests. According to the Law on Notary, the notary service is defined as a legal and public service for protecting the legal interests of natural and legal persons under the Constitution[15] and the laws of the Republic of Kosovo. This activity is overseen by a notary appointed by the Minister of Justice.[16]

The profession of a notary is performed by a professional in the field of justice—the notary, who is entrusted with public authorisations by law. As a professional lawyer and public official, the notary exercises his or her function within the scope of the law by adhering to the Notary's Code of Professional Ethics and professional conduct under the oath given. Notwithstanding the public nature of the service, notaries operate independently and impartially.[17]

To be appointed by the Minister of Justice, the notary must meet specific criteria, including being a citizen of the Republic of Kosovo, possessing legal capacity to act, demonstrating personal and professional integrity, holding a law degree from a four (4) year program or having completed master studies at a recognised law faculty in the Republic of Kosovo or in another country (upon recognition of such diploma in the Republic of Kosovo), having at least three (3) years of working experience in the field of Law, passing the notary examination in Kosovo, and being able to provide the necessary premises and equipment for the exercise of notary profession.

Additionally, the Law on Notary outlines conditions that disqualify individuals from serving as notaries, such as being convicted of a criminal offence, being heavily indebted or

12 Leslie G Smith, 'The Role of the Notary in Secure Electronic Commerce' (master thesis, Queensland University of Technology 2006).

13 Bashkim Preteni, 'Recognition and enforcement of Kosovo Notarial Acts' (2013) Juridica.

14 Law no 03/L-010 (n 2) art 76, para 9.

15 Constitution of Republic of Kosovo of 15 June 2008 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 10 November 2023.

16 Law no 06/L-010 (n 4) art 2, paras 1, 2.

17 ibid, art 2, paras 1, 3.

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bankrupt, holding a political position, or being subject to disciplinary action by a judge, prosecutor, or status of an attorney, notary, or civil servant in the Civil Service of the Republic of Kosovo, administrative staff employed in the judicial and prosecutorial systems, as well as other officers employed in the Kosovo Police, Kosovo Security Force, Kosovo Customs and Kosovo Correctional Service, for breaches of conduct and discipline in the last three (3) years from the filing of an application for notary duties (Law on Notary No 06/L-010, Article 4). An essential aspect in terms of legal certainty is the establishment of professional liability insurance for notaries.

Without a doubt, a lawyer's professional practice aids in applicants' proper professional preparation and increases their readiness for the competitive portion of the notary duties application process.[18]

It is worth noting that the operationalisation of the notary system has freed the courts from non-judicial cases and significantly improved the efficiency of handling movable and immovable assets within a short period. This has positively impacted Kosovo's economic development, as there are no significant delays in processing cases referred to notaries.

3 THE NOTARY'S AUTHORISATION

The authorisation, namely the competence of a notary in Kosovo, is mainly provided by the Law on Notary and partly by other laws that regulate specific legal areas. The Notary Law[19] provides that the notaries are competent to perform the following tasks:

1) compiling, certifying, and issuing notarial documents;
2) certifying notarial documents that a party or a third party has produced;
3) receiving and preserving documents, cash, payment orders, checks, public obligations securities, and other items;
4) undertaking all actions in non-contentious / hereditary procedure, including drafting notarial wills, reviewing hereditary property and deciding on inheritance in non-contentious cases, conducting public valuations and sales of movable and immovable property in non-contentious procedures, especially in voluntary sales cases, and safeguarding inheritance documents, money, securities or valuables.[20]

For the efficient exercise of all these delegated competencies and responsibilities, especially regarding the examination of inheritance, which, until 2018 in Kosovo, was the competence of the court, the qualifications of notaries must be raised. This entails requiring them to have completed the jurisprudence exam, as they now handle cases previously within the court's purview, necessitating a higher professional standard. With the new Draft Law on

18 Mimoza Sadushaj dhe Elona Saliaj, *Noteria* (Pegi 2009) 80.
19 ibid, art 3, para 1.
20 Preteni and Beshi (n 8) 49.

Notary in the Assembly of the Republic of Kosovo for further proceedings, the jurisprudence (bar) exam is also provided as a condition to submit to the notary exam.

As defined by law, the term "notarial acts" encompasses a decision on uncontested inheritance and legal documents and statements made by notaries. Additionally, notarial acts include:

a) documents produced by a party or a third party and certified/solemnised by the notary; and the certification of facts that, within the authorisations, is approved by the notary and the certification of copies, signatures, and notes other (notarial certificate).
b) minutes of the actions performed or attended by notaries (notary minutes).[21]

The law stipulates that the notarial documents issued under the Notary Law may be deemed public documents if they adhere to the basic formalities provided by law during drafting and issuance while also possessing evidentiary value and serving as an enforcement document in cases provided by law.[22]

4 AUTHORISATIONS ENTRUSTED TO NOTARIES

With the enactment of the new Notary Law in 2018, amendments and supplements have been made to certain laws that regulate specific words and actions now entrusted to notaries. These include the Law on Inheritance and the Law on Contested Procedure. The transitional provisions of the Notary Law - 2008 stipulate that amendments and supplements to inheritance and contested procedure legislation will be made within one year.[23]

The Law on Property and Other Real Rights stipulated that contracts for the transfer of immovable property, which require valid legal work between the parties, must be concluded in writing in the presence of both parties in a competent office, implying that the action is performed at the notary's office.[24] The Law on Obligations stipulates that the life care contract must be made in the form of a notarial act.[25]

With the legislative harmonisation that has been made in the laws covering the property, obligation, and business areas, and especially in the areas of inheritance and non-contentious procedures and in the new Notary Law (2018), three types of works are now distinguished which by law are delegated to the notaries powers: the work entrusted by the court; compilation and certification of documents; and deposit affairs.

21 Law no 06/L-010 (n 4) art 3, para 1.
22 ibid, art 3, para 2.
23 Law no 03/L-010 (n 2) art 76, para 10.
24 Law of the Republic of Kosovo no 03/L-154 of 25 June 2009 'On Property and Other Real Rights' [2009] Official Gazette of the Republic of Kosovo 57/8, art 36, para 2.
25 Law of the Republic of Kosovo no 04/L-077 of 10 May 2012 'On Obligational Relationships' [2012] Official Gazette of the Republic of Kosovo 16/117, art 561.

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We can distinguish non-public and public documents from documents compiled and certified by notaries. Non-public documents are notarial acts, which, if they contain all the elements provided by law, constitute an enforcement document. If notaries are not cautious in drafting their notarial acts, there will be unnecessary litigation over notarial acts that were issued with errors of various natures that infringed or violated subjective civil rights, a phenomenon that is present in several cases in Kosovo as well.[26]

The declaration of pledge has the mandatory form of a notary act, which means that the document must have the content and form prescribed by law to which the notary is responsible. The Pledge Statement, as a public document certified in the form of a notarial deed, is an enforcement document, which means that in the event of the compulsory sale of the immovable property subject to the Pledge Statement, the depositary creditor may claim, according to the rules of the contested procedure under the mortgage legal provisions.[27] Contracts for life legal custody and the will made by the notary must be compiled in the form of a notarial act.[28]

Contracts for the circulation of immovable property concluded between persons with the capability to act; in other words, contracts for the sale, exchange, and donation of immovable property, which constitute the basis for the transfer of property rights over immovable property, are certified in the exclusive notarial form, which means that the Notary is obliged to explain to the parties the meaning of the legal work, to ascertain whether the parties are legally authorised and capable of acting for such legal work while concerning the content the Notary shall make ex officio verifications whether the contract is under the mandatory provisions, legal order and good customs or not.

The exclusive territorial jurisdiction for drafting the contract for the circulation of immovable property shall be exercised by the notary in whose territory the immovable property or object of the contract is situated. In terms of legal certainty concerning the circulation of immovable property, Kosovo legislation provides for establishing the Unique Record of contracts[29] that have been certified in court or by notaries, respectively, the Register of Rights on Real Estates.[30]

Meanwhile, to prevent the possibility of a seller alienating two or more times the same real estate, which is happening in Kosovo, the notary who has signed (solemnised) the real estate contract must send the certified copy of that contract to the body responsible for maintaining the immovable property rights register. To prevent tax evasion, the notary who has solemnised the contract for circulating immovable property is obliged to send the

26 Preteni and Beshi (n 8) 38
27 Law no 03/L-154 (n 24).
28 Law no 06/L-010 (n 4) art 40.
29 Law of the Republic of Kosovo no 2002/5 of 20 August 2008 'On the Establishment of the Immovable Property Rights Register' [2008] Official Gazette of the Republic of Kosovo 34/44.
30 Law no 03/L-154 (n 24) art 287.

certified copy to the competent tax authority within ten days from the day the contract is concluded. Thus, the notarial documents solemnised by the notaries as non-public documents prove that the concept of freedom of contract in non-public documents has been preserved and that the parties may contract on the subject of their wish. In contrast, the notary only certifies and respectively solemnises the contract.

Due to non-amendment, the expiry of the Law on Legalization of Signatures, Manuscripts and Copies, issued by the Assembly of the Autonomous Socialist Province of Kosovo (KSAK) on December 28, 1971,[31] as a basic law in this field, which was applied even during the administration by United Nations Mission in Kosovo, respectively until the commencement of the notaries' work under the Notary Law of 2008, legally, there is parallel power between the notaries and the bodies of local self-government. This legal problem of parallelism of powers will have to be given special importance as part of the activity for harmonisation of normative acts with the new Law on Notary to determine whether the competence of notaries and parallel jurisdiction over the legalisation of signatures, manuscripts, and copies will exist, or according to legislation in the field of inheritance and uncontested procedure, even legally, shall be exclusively entrusted to notaries.

Introducing and implementing provisions for notaries as a new legal institute in our legal system assumes a comprehensive process of particular importance. It is necessary to regulate with the notary law or to issue a special law regarding the legalisation of signatures, manuscripts, and copies, as well as to specifically repeal the Law on the Legalization of Signatures, Manuscripts, and Copies of the previous system of former Yugoslavia, which is not repealed. With the new legal provisions, it should be specified that only notaries are competent in legalising signatures, manuscripts, and copies.

The fact that notary services were added to Montenegro's legal system was overlooked by the Montenegrin legislators when they adopted the new Law on Certification of Signatures, Manuscripts, and Transcripts. In contrast to the majority of comparable laws, certification of signatures, transcripts, and manuscripts has not been placed under the sole jurisdiction of notaries; instead, notaries, local government agencies, and the courts continue to compete with each other to complete these tasks. Retaining competitive jurisdiction in this regard is no longer appropriate. This solution does not lead to building legal certainty, protecting the public interest, or relieving the work of courts and administrative authorities, which were the underlying legal and political motivations for introducing the notarial

31 Law of the Autonomous Socialist Province of Kosovo of 28 December 1971 'On Legalization of Signatures, Manuscripts and Copies' (1971) Official Gazette of the Autonomous Socialist Province of Kosovo 37.
After the declaration of independence of the Republic of Kosovo, in its Constitution, Art. 145 para. 2 states that: Legislation applicable on the date of the entry into force of this Constitution shall continue to apply to the extent it is in conformity with this Constitution until repealed, superseded or amended in accordance with this Constitution.

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profession.[32] Parallel jurisdiction does not align with the standard of notarial services in European continental law, which has adopted the Latin model of the notary as an independent profession vested with public authority.[33]

5 THE NOTARY CHAMBER ON ITS BODIES

Notaries are usually organised in chambers. The Notaries Chamber of Kosovo[34] is a public entity in which all notaries within the territory of the Republic of Kosovo are compulsorily organised and, as such, it has the capacity of a legal entity. This means that the Chamber of Notaries is a professional notary organisation established to take care of the prestige, honour, and rights of notaries, ensuring that notaries perform their work responsibly and under applicable legislation as well as the Notary Code of Ethics and Professional Conduct,[35] following the oath given.

Notary chambers or any other notary association in countries where the Latin type of notary has been accepted are affiliated with the International Union of Latin Notaries (UINL).[36] UINL now consists of notaries from 84 countries, including Kosovo, from March 2013, which has been admitted as a full member. The Chamber has its revenues, which, by law, are determined to be the proceeds of membership fees and fines, donations, and other revenues. In the meantime, the Chamber should make all revenues transparent, publishing them in an Annual Report submitted to the Minister of Justice no later than 31 January each year and publishing it on the Chamber's website.[37]

To carry out professional and administrative duties within the Chamber, a professional service is established, headed by the Secretary of the Chamber, and elected by the Board of Directors of the Chamber.[38] The basic functions of the Chamber of Notaries are mainly concerned with:

1) assuring that notaries perform their professional duties responsibly and correctly, respect professional ethics, and act in a dignified manner;
2) harmonising professional activities of notaries;

32 Velibor Korać, 'Comperative Jurisdictions of Local Administration Authorities and Notaries for the Certification Purposes in Montenegro' (2021) 19(3) Lex localis 439, doi:10.4335/19.3.439-459(2021).

33 ibid.

34 Law no 06/L-010 (n 4) art 62; *Notary Chamber of the Republic of Kosovo* (2023) <https://www.noteria-ks.org/dokumentet> accessed 10 November 2023.

35 Council of Europe, *Code of Notary Ethics* (EU, CoE 2021) <https://rm.coe.int/hf6-code-of-notary-ethics-eng/1680a21dec> accessed 10 November 2023.

36 *Union Internationale du Notariat Latin (UINL)* (2023) <https://www.csn.notaires.fr/en/international-organisation-civil-law-notaries> accessed 10 November 2023.

37 Statute of the Notary Chamber of the Republic of Kosovo (26 January 2019) art 17 (1.11) <https://www.noteria-ks.org/dokumentet/statuti-i-onk-se> accessed 10 November 2023.

38 Law no 06/L-010 (n 4) art 62 para 6.

3) organising training of notaries and notary office workers;
4) representing notaries before state administration institutions and bodies to protect the rights and interests of the notary profession under the law and the Statute establishes and implements cooperation with chambers of notaries abroad;
5) preparing recommendations for the harmonisation of notary practices concerning the profession;
6) defining paid functions within the Chamber;
7) acquiring and managing immovable and movable property necessary for the performance of the duties specified in this Law and
8) carrying out all other activities under its Law and Statute of Notary.[39]

The bodies of the Notary Chamber, according to the Law on Notary (Art. 62, para. 3), are: 1) The Assembly of the Chamber; 2) the Steering Council; 3) the President of the Chamber; 4) the Disciplinary Committee;[40] and 5) the Audit Committee.

However, there is an inconsistency between the provisions of Article 7 of the Statute, which regulates some issues related to the bodies and powers of the Assembly of the Chamber, and Article 62 of the new Notary Law. Therefore, there is an urgent need to harmonise the existing Statute of the Chamber with the provisions of the new Law on the notary. The provision of Article 7 of the Statute, which regulates some issues related to the bodies and powers of the Assembly of the Chamber, differs from Article 62 of the new Notary Law. In other words, the regulation under the Statute is more extended and not fully in legal harmony with the Law on Notary.

Consequently, an urgent need exists for harmonisation of the existing Statute of the Chamber with the provisions of the Law on Notary. This is mandatory because the statute as a by-law must be harmonised with the law since the law has greater legal force than the statute; therefore, each change in the law must be reflected in the statute, contributing to legal certainty and the rule of law. This harmonisation of the statute with the new law on notaries has not happened yet, necessitating urgent action to rectify this.

39 ibid, art 63; Statute of the Notary Chamber (n 37) art 5. For more, see: Preteni and Beshi (n 8) 346.

40 Government of the Republic of Kosovo in January 2024, approved the Draft Law on Amendments and Supplements to the Law on Notary, which draft in principle has been approved also by the Committee on Legislation in the Assembly of the Republic of Kosovo, and is expected to pass the first reading in the next sessions. Based on this draft, there is a propose to take over Disciplinary Committee from the chamber of notaries as a body of the chamber and it is thought that it will be transferred to the competence of the Ministry of Justice in the first instance, also in a mixed composition of 2 judges and 1 notary. According to this logic, there will be no second level in the administrative procedure and this decision will be final, while the parties and the notary will have the right to open the administrative conflict before the relevant court. If we refer to the legislation of countries neighboring Kosovo such as: Croatia, Slovenia, Albania, Bosnia and Herzegovina, Macedonia, Montenegro, as well as Serbia, the Disciplinary Commission is a body of the Chamber of Notaries, with a mixed composition depending on state policies and nowhere we encountered that this commission is outside the Chamber of Notaries.

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6 THE SUPERVISION OF THE NOTARY'S WORK

Ministry of Justice exercises control over all notaries and notary archives and may order any specific control it deems necessary.[41] In the event of a violation being identified, it must first be looked at with preventive measures and then with other measures, which, as a rule, are foreseen and should be given in a scalable manner according to the type of violation and based on the gravity of the violation, the damage caused and the degree of guilt of the notary. However, before disciplinary action, the procedure must be followed to guarantee the right to be informed, seek clarification of facts, and be protected. Disciplinary proceedings against a notary may be initiated *"ex officio"* by the Ministry of Justice upon the proposal of the Notary Chamber or the complaint of the injured party when investigations by the responsible mechanisms of the Chamber and the Ministry have found a violation of the law or the Code of Ethics while exercising the activity of a notary. Finally, three institutions oversee the work of notaries: the Ministry of Justice, the court, and the Notary Chamber.[42]

6.1. The supervision by the Ministry of Justice

The supervision carried out by the respective organisational unit at the Ministry of Justice is seen in the control of the performance of the work of the bodies of the Notary Chamber concerning supervision and in the control of the business of the bodies of the Chamber. The Ministry may "*ex officio*" supervise or, based on requests from interested persons, assign control to the work of the Chamber and take the necessary measures to eliminate the irregularities found.[43]

The Ministry, in particular, controls the organisation of the notary service, the keeping of notary books, the operation of deposits, the application of the notary fees, the preservation of foreseen records, and the performance of work related to the internal business of the notary's office. The Notary Law[44] set out the Chamber's obligations to enable the Ministry to check the documentation and books. The Chamber also must submit an annual work report of the Chamber to the Ministry, which also contains the general assessment of the work of the notaries and may also include the proposal of measures to improve the conditions for exercising the notary service. The Ministry of Justice, in addition to overseeing the legality of the performance of the work of the bodies of the Chamber, oversees the work of the notaries and finds that all notarial acts have been exercised under applicable law.[45] Such supervision includes but is not limited to the preparation of notarial documents, archiving of notarial documents, and observance of notarial fees.[46]

41 Law no 06/L-010 (n 4) art 74 para 1.
42 ibid, arts 71-73.
43 ibid, art 64.
44 ibid, art 64, paras 2, 3.
45 ibid, art 74, para 1.
46 ibid, art 75.

Despite efforts by the department for the supervision of the work of notaries and the Chamber to bring results in the implementation of legislation in the field of notaries and even better results in the efficiency and updating of the work of notaries and the Chamber, from conversations held at the Department for Free Legal Professions and other relevant units as well as in the Chamber of Notaries and with notaries, it was announced that in the future, according to the new Law on Notary, the activities for exercising the function of supervision should be increased. In addition, the activities for harmonisation of the secondary legislation of the Chamber with the new Law on Notary should be accelerated.

In addition, the Ministry of Justice and the Chamber should be involved in the training of notaries, the professional staff employed in the Chamber and the Ministry of Justice,[47] through the organisation of training on legislative changes in the field of notary services, which should be crowned with a publication, of a sort of Notary Handbook, which would also cover the issue of supervision in this area. The focus should be on developing activities related to the implementation of issued normative acts, professional training of notaries and staff employed in the Chamber of Notaries, etc. Indeed, the continued reform of the notary field, namely undertaking activities to implement further reform, is intended to create solid foundations for the successful operation of an independent, impartial, and efficient notary service. Particular attention should also be paid to the training of notaries, their assistants, and the staff of the Notary Chamber on EU law, particularly training on the European Court of Human Rights case Law, which is necessary in our path toward EU accession. Article 53 of the Constitution of the Republic of Kosovo states, "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*".[48]

Based on the above, it is necessary to review the entire legal and by-laws of the notary field to bring it in line with the Strategy for the Rule of Law 2021-2026 issued by the Ministry of Justice,[49] where in this document, the directions of the general reform in the sector are defined, including the notarial system for the following period. The strategic goals would be strengthening:

1) the independence and freedom of the notary;
2) the efficiency of the notary;
3) access to administrative and justice bodies;
4) public confidence in notaries.

47 ibid, art 5; art 11, paras 5, 6; art 63, para 1.3.

48 Constitution (n 15) art 53; European Court of Human Rights (2023) accessed 10 November 2023.

49 Ministry of Justice of the Republic of Kosovo, 'Strategy on Rule of Law 2021-2026' (July 2021) <https://md.rks-gov.net/desk/inc/media/8EF86336-E250-4EA2-9780-D4B8F7E853B5.pdf> accessed 10 November 2023; Decision Government of the Republic of Kosovo no 04/24 of 11 August 2021 'Strategy on Rule of Law 2021-2026' <https://gzk.rks-gov.net/ActDetail.aspx?ActID=45816> accessed 10 November 2023.

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A functional review should encompass the notary service as part of the ongoing reform in the justice sector. The vision of Kosovo Notary is to be open to all and inspire confidence in notaries, who must ensure justice for all. The realisation of this vision is contingent upon achieving the strategic goals, wherein notaries should be independent, free, and functional; accessible to all; fair and respectful to all persons; effective, efficient and open; willing to act under the Constitution, law and international instruments while respecting without prejudice and consistent in ensuring the equitable provision of services.

Kosovo's legal framework lacks proper mechanisms for supervising the work of notaries, such as the inspectorate. Establishing a dedicated inspectorate to oversee the work of notaries would significantly affect the realisation of the mission and duties of the Ministry of Justice in terms of inspection. This mechanism for controlling the work of notaries should have as its primary objectives:

1) assessment of compliance with legal requirements by the inspection subject;
2) establishment of good practices in compliance with legal requirements and their spread;
3) advising the inspected notaries on the correct implementation of legal requirements;
4) ordering the correction of violations of legal requirements and elimination of the consequences arising from them;
5) implementing other administrative measures to avoid risks that may be caused to the public interest and the legal interests of natural and legal persons, according to the conditions and procedures provided in the law.

While ad hoc mechanisms for supervision may exist, relying solely on ministry officials and/or experts engaged ad hoc from abroad is not the best way to supervise and control the quality of work and respect for the law, as well as unify notarial practice. Therefore, the establishment of a notary service inspectorate is necessary.

6.2. Regular supervision by the Notary Chamber

Based on the Statute of the Chamber of Notaries, regular supervision is carried out by a Special Commission appointed by the Governing Council of the Chamber consisting of three members: two notaries and an employee of the administrative service of the Chamber in the capacity of process keeper. The notary who this commission inspects may propose one of the members of this commission.

The objective of regular supervision is to monitor the professional activities of notaries, including the availability of notarial services, the organisation of work and customer service in the notary office, statistics related to notarial acts, keeping books related to professional activities, maintaining documents, the electronic processing of personal data and the connection to the registers, the organisation of data storage, the existence of professional

liability insurance, the implementation of professional secrecy and that of professional confidentiality and the implementation of the law, general acts and decisions and positions of the Chamber. Every year, the Governing Council of the Chamber will report the inspections made to the Ministry of Justice.

6.3. Strengthen the access of the relevant competent bodies to the work notaries

The right of access to the work of notaries is one of the aspects of the right of supervisory bodies to the work of notaries and represents an international legal standard. The access to competent supervisory bodies and the equality of the parties are fundamental principles of fair conduct and have a common purpose, namely the assurance of the same equality, which is the basis of the principle of the rule of law. In the literal sense, the right of access to the work of notaries means the right of everyone to address the notary and the Notary Chamber to exercise and protect their rights and the obligation of the notaries and the Chamber to act within the powers set forth by law.[50] Special care should be taken in cases of fictitious transactions related to tax evasion, money laundering, or other criminal activity.[51]

In this sense, the Notary Chamber must be more active in identifying these cases and implementing unified practices, leaving no room for different treatment of the same cases in the proceedings before it. This should consider not only the legal obligation of every notary to register every transaction in the online notary register but also the reporting of any suspicious transaction to the competent authorities to prevent money laundering under the law.

We believe that continuing the digitisation of the justice system, in general, through information technology and the notary system, in particular, should remain a priority.

Creating an efficient system for online application in the real estate register by a notary remains a significant challenge in respecting and protecting citizens' rights through the provision of fast, quality, and effective services. Since the law of Notaries is one of the competences of notaries, inheritance matters, this requires the creation of a separate Register of Testaments, in which the notaries must register the wills signed before them, as well as the Register of Inheritance Declarations, in which the notaries record evidence of legal inheritance or the wills. The Chamber of Notaries should administer both registries under the supervision of the Ministry of Justice.

50 Law no 06/L-010 (n 4) art 64, para 1.

51 Joanna Brooks, Risk assessment for the Kosovo Chamber of Notaries (Swiss Cooperation Office Kosovo 2019) 33.

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6.4. Strengthening public confidence in the notary service

Compared to other areas of the legal profession, European notaries have generally been less affected by economic globalisation and European harmonisation. This has a straightforward explanation. As public officers tasked with creating public instruments, notaries are typically appointed by governments based on need in the majority of civil law regimes. The European Parliament viewed the partial delegation of state authority that is a necessary component of practising notarial work in 1994 as support for the decision that notaries were exempt from the provisions of Article 55 of the Treaty of Rome, which guarantees the freedom of establishment and the provision of services. In most European countries, notaries use their public office role to enforce the nationality requirement for their professional members. Latin notaries have thus far primarily operated in marketplaces shielded from domestic and, most likely, foreign competition. There has been variation in their readiness to even contemplate increased flexibility.[52]

In contrast, English notaries operating in a common law setting have legitimate concerns about being exposed to competitive pressures. Unlike their counterparts in civil law jurisdictions, they do not hold delegated authority from the state, their numbers are not subject to a numerus clausus, they are not protected by a nationality requirement, and there are very few legal specialities that only require their specific notarial knowledge that cannot—and frequently cannot—be performed by members of other professions. Even in the context of international business, the marginal standing of English notaries inside the common law system is starting to pose a major threat, as if this was not enough reason to be concerned.[53]

The Notary, as one of the important pillars of a democratic society, must exercise its function responsibly and ascertain the truth in a formalised and complex procedure. Given that notaries are also entrusted with some judicial powers, particularly in inheritance and non-contested procedures, a close relationship exists between the two categories of rights and freedoms of fair trial. This relationship emphasises the importance of respecting an individual's privacy and freedom of information.

Accordingly, current provisions stipulate that the work of notary offices is public and information regarding notarial work is provided by the notary or the person authorised. Notarial certifications contribute to greater legal certainty and are more accessible to citizens without excessive cost.[54] As a result, notaries must provide services with integrity, professionalism, and efficiency, adhering to current laws and honouring the notarial services charge.[55]

52 Gisela Shaw, 'Notaries in England and Wales: Modernising a Profession Frozen in Time' (2000) 7(2) International Journal of the Legal Profession 146-7, doi:10.1080/09695950020053719.

53 ibid 147.

54 Korać (n 32).

55 Hamdi Podvorica, Fatlum Podvorica dhe Enisa Haliti, *E Drejta Noteriale* (Trend 2018) 63.

Notaries are prohibited from disclosing information that could influence the development of the respective procedure. Procedural rules generally offer public access, except where the law excludes the public. When providing information in some instances, the confidentiality provisions of the proceedings and the prestige, privacy, and business interests of the parties and other participants must be respected. In cases where public disclosure is deemed appropriate, the notary and the Chamber may choose to inform the public about their work through organised press conferences. On the contrary, disregarding the principles of public information can lead to the dissemination of unprofessional information and undermine notarial procedures. We consider that failing to provide information may weaken public confidence in the work of notaries and the Chamber.

When two or more parties participate in creating a notarial act, the notary must exercise caution. They are not authorised to defend one party's interests at the expense of the other.[56]

7 CONCLUSIONS

Based on the research, to function more effectively in the notarial system in Kosovo as a free profession, several additional steps and activities should be undertaken in several directions:

1) strengthening the system of independence and accountability of notaries regarding the exercise of their powers and responsibilities;
2) further development of the legal framework and continuous training of notaries, including the appointment of new notaries to cover all places and official headquarters and the initiation of measures to address the shortage of notaries in some municipalities in Kosovo;
3) enhancing the criteria for obtaining a notary's license, ensuring that positions are not obtained through friendship, clan, family, and political ties, as well as maintaining full transparency in the selection process while promoting gender equality and the ever-greater promotion of female notaries;
4) ensuring full access to all public registers by notaries, with an obligation to maintain confidentiality and imposing punishment for disclosing professional secrets;
5) mandating that both current notaries and new notaries take the jurisprudence exam in addition to the notary exam;
6) establishing an inspectorate as a special mechanism for supervising the work of notaries;
7) harmonising by-laws in the field of notaries with the law on notaries, with particular emphasis on the harmonisation of the Statute of the Chamber of Notaries with the Law;

56 Arben A Hakani, *Noteria në Republikën e Shqipërisë* (2 botimi, Onufri 2011) 71.

8) explicitly repealing the Law on the legalisation of signatures, manuscripts, and copies issued by the Assembly of the Autonomous Socialist Province of Kosovo (KSAK) on 28 December 1971 and replacing it with a new law in this field;
9) ensuring coverage of all municipalities with a notary, as mandated by law;
10) increasing inter-institutional cooperation and improving the electronic systems of public registers, as well as the prevention of suspicious and fictitious transactions that may be linked to various criminal acts of corruption, organised crime, money laundering, and terrorist financing.

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AUTHORS INFORMATION

Bedri Bahtiri
Dr.Sc. (Law), Associate Professor, Civil Department, Faculty of Law, University of Pristina "Hasan Prishtina", Prishtina, Republic of Kosovo
bedri.bahtiri@uni-pr.edu
https://orcid.org/0000-0002-8216-808X
Co-author, responsible for research methodology, data collection, writing, and supervising.

Gani Asllani*
Dr.Sc. (Law), Professor, Financial Department, Faculty of Law, University "Haxhi Zeka", Peje, Republic of Kosovo
gani.asllani@unhz.eu
https://orcid.org/0000-0003-2416-9321
Corresponding author, responsible for conceptualization, writing, and data collection.

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RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

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Research Article

CONTRACTS IMPLIED-IN-FACT LIKE A FORM OF WILL EXPRESSION

Viktor Savchenko* and Roman Maydanyk

ABSTRACT

Background: *Implied-in-fact contracts have been a part of civil legal relations since ancient times. This study aims to test the hypothesis that implied-in-fact contracts are a way to express will. The author also analyses existing doctrinal approaches to understanding and defining implied-in-fact contracts. This makes it possible to create a unified and established knowledge of implied-in-fact contracts from the standpoint of law. The analysis scrutinises the problems of expression of will in implied-in-fact contracts. In addition, it affirms that the conclusion of implied-in-fact contracts is based on freedom of will, the expression of which is the basis for all civil legal relations.*

Methods: *The study employed the dialectical method to analyse international and national legislation. The comparative legal method determined similar and divergent characteristics based on empirical research of legal norms and common and continental law doctrine. The genesis of the contracts was demonstrated using the historical method. Contradictions were defined and clarified using formal and logical methods. Additionally, the dogmatic method made it possible to formulate new legal positions and concepts. All methods mentioned were used in their interdependence.*

Results and Conclusions: *The study explains the origins and ideas of implied-in-fact contracts, which trace their roots back to Roman law. "Contractus innominate" notably influenced their development, alongside synallagmatic agreement, the principle of "non concedit venire contra factum proprium" and "protestatio facto contraria non-valet". Implied-in-fact contracts are closely related to estoppel and the concept of stipulation. After all, implied-in-fact contracts have evolved to their modern state and have their counterpart in Continental law.*

At the heart of implied-in-fact contracts are conclusive actions, serving as a way of accepting an offer, determining the form of a contract and expressing will. Conclusive actions are the basis for implied-in-fact contracts. Conclusive actions are characterised by dynamic behaviour in the form of unambiguous actions aimed at the desire to conclude an agreement. However, the absence of a direct normative definition for conclusive actions leads to legal problems in their application.

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1 INTRODUCTION

Implied-in-fact contracts have been a part of civil legal relations since ancient times. Evolving from Roman law and continuing to the present day, contracts concluded based on fact have garnered recognition across different legal systems. Such agreements have become integral to everyday life and are concluded every second.

Different countries' legal doctrines interpret implied-in-fact contracts in different ways. The primary debate revolves around whether implied-in-fact contracts are a particular type of contract or if they are simply ordinary contracts wherein the contractors' agreement is expressed in a particular way.

The heterogeneous definition of implied-in-fact contracts by legal doctrine and judicial practice, the problem of distinguishing them from other contracts (for example, contracts from implied-in-law), and the lack of controversy regarding the recognition of these contracts as a separate type of contract or simply a form of their conclusion determines the need to conduct an in-depth study of the implied-in-fact contracts and decide on their legal nature.

This paper aims to prove that implied-in-fact contracts are not distinct types of contracts but ordinary contracts formed in a particular manner: the contractors' agreement to the contract is expressed through action rather than verbal or written means.

To achieve this objective, three tasks were set in this research: 1) analyse the origins and determination of implied-in-fact contracts; 2) examine the problems of expression of will in implied-in-fact contracts ; 3) prove a hypothesis about the definition of implied-in-fact contracts as a way of will expressing. The article concludes by confirming that implied-in-fact contracts are a way of will expression, not a genuine form of contract.

2 ORIGINS AND CONCEPTS OF CONTRACT IMPLIED IN FACT

As a starting point, we will consider implied-in-fact contracts as obligations produced by tacit consent through the act of committing actions. Such a concept is incomplete but sufficient for a preliminary understanding of the research subject.

Implied contracts are related to the concept of conclusive actions. The legal practice uses various definitions that are close in meaning. For example, conclusive evidence, implied conduct, explicit acts, implicative conduct, and appropriate and implied actions. However, an established doctrinal definition is conclusive actions – actions of a person expressing his will to develop legal relations, in particular, to conclude an agreement, expressed not in the form of a verbal or written offer but directly through behaviour from which it is possible to conclude such an intention.[1]

1 OM Sitko and NM Shapovalenko, *Dictionary of Legal Terms of Another Language Origin* (Odessa State University of Internal Affairs 2013) 21.

The legal basis of conclusive actions was laid out in Roman law, which used conclusive actions for various contracts. However, the peculiarity of the implied contract is that the performance of actual actions is a condition upon which the contract comes into force but is not an acceptance or an offer, respectively.

Q. M. Scaevola categorised them according to the way they arise: pronouncing specific words (*verbis*), performing acts that do not require words (*re*), or based on the sole agreement (*consensu*).[2]

These types of contracts became the prototype of modern implied-in-fact contracts. However, Roman law's limited range of contracts could not regulate all contractual relations, which led to the emergence of innominate contracts based on verbal formulas: *Do ut des* (I give so that you provide), *Do ut facias* (I give you to do), *Facio ut des* (I make you provide) and *Facio ut facias* (I do that you will do).[3]

Consequently, we can assert that conclusive actions used for these contracts arising from actions (*re)* are rooted in these innominate contracts. The utilisation of innominate contracts played a crucial role in the legal recognition of the variability of consensual agreements, particularly when one party's legally significant actions necessitated the fulfilment of obligations by the other party. The emergence of nameless contracts significantly contributed to the development of implied-in-fact contracts.

However, for the modern understanding of implied-in-fact contracts, it is necessary to mention the synallagmatic contract. It is separate from the innominate contracts type of agreement, which is analogue to modern bilateral contracts. Current implied-in-fact contracts can be bilateral. This makes their legal nature close to synallagmatic contracts. This approach was confirmed by Lord Diplock: "Every synallagmatic contract contains in it the seeds of the problem - in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done?".[4]

A one-sided contract does not provide for coordination of the parties' will and their mutual manifestation; the parties do not have counterclaims because one party is given rights, and the other party is given duties. Although every right gives rise to obligations, and obligations give rise to rights, the one-sidedness of relations is determined through the category of interest of the parties, which is not aimed at creating mutual obligations. Separating unilateral contracts and obligations from unilateral actions is necessary.

2 Paul J du Plessis, Clifford Ando and Kaius Tuori (eds), *The Oxford Handbook of Roman Law and Society* (OUP 2016) 587.

3 Geoffrey *MacCormack*, 'Contractual Theory and the Innominate Contracts' (*1985*) *51 Studia et documenta historiae et iuris 131.*

4 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1961] EWCA Civ 7 <https://www.bailii.org/ew/cases/EWCA/Civ/1961/7.html> accessed 07 January 2024.

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For example, when advertising a product, the company claims its properties and rewards anyone who disproves them. Such models can be seen in the activities of pharmaceutical companies (denying the effectiveness of drugs), IT companies (software hacking), etc. If someone fulfils the announced conditions, even without entering into a separate contract, this can be considered a unilateral action, not a unilateral contract.[5] Such cases differ in British, American, and European courts. British courts throughout the century remained content to reward those who supplied the requisite information in ignorance of the offer. American courts held this inconsistent with the contractual requirement of offer and acceptance. For them, a claim to a reward could only be based on a contract, and for a contract to exist, there had to be mutual consent, which required an intention to accept an offer.[6] In this matter, American case law is closer to civil law. For example, a public reward promise in Ukraine is classified as a non-contractual commitment.[7] Such contracts are implied contracts because they arise from the conduct of persons rather than from an oral or written agreement between the parties.

Implied-in-fact contracts are unilateral in the relationship of a gift of movable property. Gift deeds are regulated differently in common and civil law, but their content is reduced to transferring movable and immovable property without a counterclaim. For example, when a husband gives flowers to his wife, and she accepts them, a gift contract arises between them.

Therefore, implied-in-fact contracts can be applied to bilateral and some unilateral agreements, which is a fundamental aspect of understanding their essence. We will see this in more detail when considering the responsibility for the failure of contracts implied in fact and when analysing the mechanism of concluding such agreements.

These ideas are close to the principle of *non-concedit venire contra factum proprium*, which prohibits exercising rights contrary to one's previous behaviour. In modern contract law, *non concedit venire contra factum proprium* is akin to the principle of good faith, which prohibits the repudiation of an intention declared by the conduct of the person who testified to the desire to enter into the contract. Implied-in-fact contracts are rooted in this idea. Today, the principle *non concedit venire contra factum proprium* has adopted the form of inconsistent behaviour. Its application can be seen in Art. III.–1:103 of the Model Rules of European Private Law.[8]

5 *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1 <https://www.bailii.org/ew/cases/EWCA/Civ/1892/1.html> accessed 07 January 2024.

6 Oliver Wendell Holmes, *The Common Law* (Dover Pub Inc 1991).

7 Civil Code of Ukraine no 435-IV of 16 January 2003 (as amended of 01 January 2024) <https://zakon.rada.gov.ua/laws/show/435-15#Text> accessed 07 January 2024.

8 Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (interim outline edn, Sellier European Law Pub 2008).

The analysis of this norm allows us to say that behaviour contrary to good faith and fair business practice does not correspond to the previous statements or behaviour of the party, provided that the other party, acting to its detriment, reasonably relied on them.

The continuation *non concedit venire contra factum proprium* can also be found in Art. 1.8. UNIDROIT Principles 2016: "A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment."[9]

The application of the principle of good faith is reflected in Ukrainian court practice regarding fraudulent transactions. According to this practice, the legal consequences of invalid transactions that contradict the previous conduct of a party to the detriment of the other party are not recognised.

In the case № 390/34/17 in 2019, the Ukrainian Supreme Court applied the doctrine of *venire contra factum*, which is based on the principle of good faith in resolving the dispute. Contradictory behaviour is inconsistent with a party's previous statements or behaviour if the other party acts and relies on it to its detriment.[10]

This norm is also relevant to understanding implied-in-fact contracts. The content of this norm confirms that a person is responsible when performing actions that another person perceives as consent to enter into a contract. Here is an actual example of concluding a contract at an auction. If the visitor raises his hand, the auctioneer takes it as an agreement to enter into a contract. We will consider this example in more detail below.

In common law, *non concedit venire contra factum proprium* appeared in the estoppel form. Estoppel explains the legal relationship between previous and subsequent actions if the plaintiff's previous actions confirm no pretension.

S. Bower defines estoppel as follows: where one person has made a representation of fact to another person in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention – actual or presumptive – and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making or attempting to establish by evidence, any averment substantially at variance with his former representation, provided the representee timely and properly objects to it.[11]

Estoppel prohibits referring to some facts when justifying one's claims. For contracts, implied-in-fact estoppel became the basis for which a party cannot withdraw from the

9 *UNIDROIT Principles of International Commercial Contracts* (UNIDROIT 2016) art 1.8.

10 *Case of no 390/34/17* (Cassation Civil Court of the Supreme Court, 10 April 2019) <https://reyestr.court.gov.ua/Review/81263995> accessed 07 January 2024.

11 Piers Feltham, Tom Leech and Daniel Hochberg, *Spencer Bower the Law Relating to Estoppel by Representation* (4th edn, Bloomsbury Professional 2004) ch 1.

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contract, citing a false perception of the circumstances. For example, after paying for coffee through a vending machine, a person cannot deny that they understood the meaning of their actions. This example confirms that the estoppel mechanism embodies the idea of justice.

The most plausible definition of the principle of justice is to render each his due. It is precisely due to this principle of justice that we insist on the prohibition of retracting one's words or referring to a false understanding of the circumstances. The principle of justice would be violated if we recognised that the person who ordered coffee through the vending machine did not understand that he was entering a contractual relationship. In this case, the presumption of proper understanding is applied.

When a person independently orders a coffee through a vending machine, completes the payment, chooses a drink and receives it, he is aware of the cause-and-effect relationship. As per St. Leonards, it is immaterial whether there is a misrepresentation of a fact as it existed or a misrepresentation of an intention to do or abstain from doing an act which would lead to the damage of the party whom you thereby induced to deal in marriage, or the purchase, or in anything of that sort, on the faith of that representation.[12]

The fact of performing an action that expresses a willingness to conclude a deal is sufficient. For example, if you see an image of a cup of coffee with cream and vanilla flowers on the coffee machine, accompanied by a disclaimer in small font stating that the illustration is for informational purposes only, and you proceed to choose a drink and deposit money into the machine, you will receive a drink that is visually different from the picture. While the fact that the drink did not meet your expectations is unclear, the contractual terms are nonetheless fulfilled still fulfilled, as you have taken conclusive actions.

Here is another example to illustrate this concept: the inscription "delicious coffee" does not confirm that you will like this coffee, and the description "good price" does not guarantee the price is the lowest on the market.

Legal relations are established through action – whether making a payment, pressing a button, or getting on a bus. For instance, when you buy a computer, you enter into a sale contract. After payment and receipt of the goods, you become the computer owner. But upon opening the box, you may see an inscription, **"**By opening the box and removing the protective seals, you agree to the user agreement." At this point, you can return the product and withdraw from the contract. But if you open the box (perform conclusive actions), you lose the right to prove that you did not want to use the computer and disagree with the contract terms.

This confirms that it does not matter how we perceive unequivocal actions when performing them – such as pressing the buttons to order coffee and paying and collecting it.

12 See *Jorden v Money* [1854] UKHL J50 <https://www.bailii.org/uk/cases/UKHL/1854/J50.html> accessed 07 January 2024.

Violation of this concept could lead to legal anarchy. Imagine visiting a restaurant, placing an order and then claiming ignorance when the waiter brings you the bill, saying you did not know you had to pay for the food.

Private international law also uses the concept of estoppel, which serves as a mechanism for applying estoppel in the norms of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations is used by the International Court of Justice.[13]

Estoppel mandates compliance with obligations stemming from specific actions and limits the possibility of renouncing one's actions and intentions. Unlike civil law, reliance-based estoppels are recognised in case law, encompassing various forms such as (1) by the representation of fact, where one person asserts the truth of a set of facts to another; promissory estoppel, where one person makes a promise to another, but there is no enforceable contract; (2) and proprietary estoppel, where the parties are litigating the title to land.[14]

Estoppel and contracts implied in fact are different legal institutions. Estoppel operates as a bar or impediment raised by the law which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial conduct or admission, or consequence of final adjudication of the matter in a court of law.[15] While implied-in-fact contracts are a way to express one's will when seeking to conclude an agreement.

However, both estoppel and implied-in-fact contracts equally recognise the occurrence of obligations arising from specific actions.

Thus, estoppel and de facto contracts give rise to obligations arising from the performance of specific actions but differ in the legal basis for such obligations – a contract or other legal fact established by law.

The prototype of implied-in-fact contracts can be traced back to verbal agreements in Roman law, where contracts were concluded by pronouncing certain words. Several verbal contracts were enshrined in the Institutes of Gaius, including the stipulation, the

13 The court relied on estoppel during the conflict over the Preah Vihear temple. It rejected Thailand's claim, which referred to the incorrect map establishing the border between states in the temple area. The reason for refusing the allegations was that for 15 years, Thailand had not made a claim and enjoyed the benefits that this gave it. Thailand took advantage of the situation and made no demands. Thus, Thailand's actions confirmed the absence of pretensions. See: 'UN Court Rules for Cambodia in Preah Vihear Temple Dispute With Thailand' (*UN News*, 11 November 2013) <https://news.un.org/en/story/2013/11/455062> accessed 07 January 2024.

14 Lord Mackay, *Halsbury's Laws of England: Easements, Equity, Estoppel*, vol 16(2) (4th ed, LexisNexis 2003).

15 'ESTOPPEL Definition & Meaning' in *Black's Law Dictionary* (2nd edn, Lawbook Exchange Ltd 1995) <https://thelawdictionary.org/estoppel> accessed 03 January 2024.

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freedman's promise to the patron, and the dowry obligation. Verbal contracts had a question-answer form and involved specific phrases.[16]

By drawing an analogy between verbal and implied-in-fact contracts, we see that the basis for recognising the concluded agreement is a realisation of specific actions. This similarity features in the stipulation favouring the third person, where the basis for recognising the concluded agreement lies in the realisation of specific actions.

As SE. Abdel-Wahab and J. Brinsley said that the concept of transaction in which the contracting parties contemplate that their agreement should benefit a third person whom they have designated assumes that neither party has the mandate to stipulate in the name of a third person; it is a contract made in favour of a third person.[17]

Today, we can see the manifestation of this construction when a customer buys goods in a store and then leaves them in a special charity box. Any person can take a product from the charity box free of charge. This practice can qualify as a contract of donation, charity, or third-party beneficiary contract. We can consider such a situation as an implied-in-fact contract. For example, when a third-party beneficiary takes products from a charity box, he or she enters a legal relationship. The following legal relationship can be qualified as a gift or as exercising a third-party beneficiary's right to a product paid for in advance. Otherwise, we would have to qualify such actions as theft or godsend. Qualifying this situation as an ordinary bilateral sales contract is onerous. In particular, this is due to the condition that the store stores the wares and the obligation to hand over the goods at the request of a third party. Here, we can see an interesting legal structure.

Let us consider another example within the restaurant industry, showcasing a concept known as "Pay-it-Forward". Here is how it works: patrons can visit a coffee shop and pay for the coffee, which a third party can then claim. Some hospitality establishments have a signboard with a "pending meals" list. When a customer points to the selected position on the signboard to receive it, they are taking conclusive action. In this scenario, the visitor effectively concludes a contract without using the verbal or written form.

We agree with A. Zysov that the evolution of common law is distinctly different and reflects the stages or layers that constitute the history of the common law of contract. Two old forms of action, debt and assumpsit, are directly relevant to our inquiry as they are the origin of modern contract law.[18]

While common law contains many peculiarities, as seen above, implied-in-fact contracts have fundamental features derived from Roman law. At the core of all the described

16 Gaius, *The Institutes of Gaius* (Bloomsbury 3PL 1997).

17 Salah-Eldin Abdel-Wahab and John H Brinsley, 'The Stipulation for a Third Person in Egyptian Law' (1961) 10(1/2) *The American Journal of Comparative Law* 76, doi:10.1093/ajcl/10.1-2.76.

18 Aron Zysow, 'The Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law' (1985) 34(1) Cleveland State Law Review 69.

institutions lies human behaviour, from which the desire of the person to agree emerges. The analysis conducted paves the way for a doctrinal understanding of implied contracts.

The United States Supreme Court has defined an agreement implied as based on a deal and reconciliation of views and interests. This may not be embodied in a classic contract but is understood through the parties' conduct, confirming their unequivocal understanding.[19] Under the traditional conception, a contract implied in fact is drawn out by the trier of fact when circumstances warrant the conclusion, primarily from the parties' conduct, that the legal equivalent of mutual consent exists.[20] So, implied-in-fact contracts are based on behaviour that can be interpreted as an unambiguous expression of will within the limits of proper authority.

W. Boyd III and R. Huffman delineated several characteristics that typify implied-in-fact contracts: 1) the absence of necessity to express an oral or written manifestation of consent; 2) the absence of express offer or acceptance; 3) the necessary elements of the agreement are inferred from the parties' conduct in light of the surrounding circumstances; 4) no requirement to demonstrate mutuality of intent or mutual consent.[21]

A similar position can be found in philosophy. T. Dougherty argues that a private intention is insufficient for morally valid consent, which always requires public behaviour in the form of communication through nonverbal behaviour in the case of high-stakes consent.[22]

Combining the ideas and doctrines of philosophy and law, we conclude that for the conclusion of an agreement, only committed actions matter, and not the private intention, motive or desire. If somebody wants to agree but does not take appropriate actions, the expression of will cannot be considered an acceptance or an offer. The contract is considered completed only after the will expression of all parties. The contract is considered completed only after the will expression of all parties, but the implied-in-fact contract does not need written or verbal consent. A contract implied in fact demonstrates the parties' will by performing specific actions (raising a hand, pressing a button, etc.). Conclusive actions are an active manifestation of the will and express the intentions and consent of the parties.

A conclusive contract is an analogue of an implied-in-fact contract in Continental law. Some academics define a conclusive contract as embodying a person's will to agree.[23] But, this definition does not convey the specifics of this contract. It is correct to say that a conclusive

19 See *Baltimore & Ohio R Co v United States* [1923] 261 US 592 <https://supreme.justia.com/cases/federal/us/261/592/> accessed 07 January 2024.

20 See *JC Pitman & Sons, Inc v United States* [1963] 161 Ct Cl 701, 317 F.2d 366 <https://case-law.vlex.com/vid/891591044> accessed 07 January 2024.

21 Willard L Boyd III and Robert K Huffman, 'Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court' (1991) 40(3) The Catholic University Law Review 605.

22 Tom Dougherty, 'Yes Means Yes: Consent as Communication' (2015) 43(3) Philosophy & Public Affairs 224, doi:10.1111/papa.12059.

23 OV Dzera and HS Kuznjecova (eds), *Civil Law of Ukraine: Textbook*, vol 1 (Yurinkom Inter 2005) 633.

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contract involves agreeing to the parties by taking conclusive actions in which matters to us is not the motive itself and the party's intentions but whether we can infer a specific intention. We can conclude that the will to enter the contract depends on the party's actions. When a passenger boards a bus, it does not matter to us whether he wants to conclude a contract of carriage. From his actions, we conclude that he intends to enter the contract. This action is enough to create a legal relationship. This shows that conclusive actions are the main feature of conclusive contracts.

The law does not directly define the conclusive actions and conclusive contracts. However, the possibility of concluding a contract using conclusive actions is provided for in the legislation of many countries. Article 205 of the Civil Code of Ukraine establishes the form of transaction and ways of intention expressing: 1) A transaction can be effected in either verbal or written form; 2) A transaction for which the law does not prescribe a mandatory written form shall be considered concluded, provided the behaviour of the parties witnesses their intention before occurrence of the appropriate legal consequences; 3) In cases established by an agreement or the law, the intention of the party to conclude a transaction may be expressed by its silence.[24]

The above allows us to assert that the contract can be concluded in different forms due to the various ways of expressing an intention. We can conclude the contract using conclusive actions because they reflect the behaviour of the parties, which proves their will before the onset of the relevant legal consequences.

Silence and conclusive actions are not identical concepts. While silence is not an active action, it must be seen in specific contexts. For example, if A says, 'Speak up now if you have any objection to this marriage,' and B remains silent, this seems to imply the absence of an intent to object. At the same time, in economic activity, 'silence may be equivalent to a declaration of consent to an action, request or proposal that the silent person has noticed or is addressed to him or her'.[25]

Conclusive action is an active expression of will; silence is passive and does not mean automatic acceptance.

Courts in different countries confirm this idea. In the resolution of the Supreme Court of Ukraine, it is stated that acceptance can also occur through tacit consent and the form of certain behavioural acts (so-called conclusive actions) of the transactions' party (for example, accepting payment for goods for sales contracts).[26]

The conclusive actions are the way of accepting the offer, the form of the contract and the method of expressing will. Conclusive actions are characterised by dynamic behaviour in

24 Civil Code of Ukraine (n 7) art 205.

25 Commercial Code of Germany 'Handelsgesetzbuch-HGB' (as amended of 21 December 2023) <https://www.gesetze-im-internet.de/hgb/index.html> accessed 30 November 2023.

26 *Case of no* 3-59rc14 (Supreme Court of Ukraine, 19 August 2014) <https://reyestr.court.gov.ua/Review/40289257> accessed 07 January 2024.

the form of specific measures aimed at the desire to agree. Conclusive actions are the basis for concluding conclusive contracts and implied-in-fact contracts. However, conclusive actions do not have a direct normative definition, and the practice of their application creates legal problems. What has been said determines the relevance of understanding the specifics of expressing the parties' will in the implied-in-fact contract.

3 ISSUES OF EXPRESSION OF WILL IN IMPLIED-IN-FACT CONTRACT

All contracts are based on the expression of will, which should be characterised by principles of good faith, fairness, clarity and voluntariness. At the core lies the concept of free will, which is indispensable in civil law. As we concluded earlier, freedom of will in civil law is a person's ability to consciously, freely and independently make and implement decisions regarding participation in civil legal relations, whether through taking action or inaction, disposing of subjective civil rights, or performing duties.[27]

The conclusion of contracts requires free expression of will, which is based on the autonomy of the parties' will. This autonomy can be manifested in the performance of conclusive actions, serving as a form of acceptance of an offer and expression of will. As noted by O. Green, "accepting an offer includes verbal, written, silent and conclusive actions."[28] Although several ways exist to accept an offer, contracts are characterised by conclusive actions.

The conscious expression of will is a prerequisite to conclude a contract. Therefore, a person must understand that he is entering a legal relationship. On this issue, there is a particular problem with conclusive actions. In an implied contract, acceptance may be expressly communicated or inferred from the conduct of a party. Still, a quasi-contract refers to situations in which a defendant is bound as if there were a contract.

The study of quasi-contracts is not the focus of this paper. But we want to support the idea that, in some cases, we associate the emergence of legal relations under the contract implied in fact with the fact of taking conclusive actions. Awareness of the meaning of one's actions may not impact concluding a contract. In this situation, it is more relevant to talk about the "*protestatio facto contraria non-valet*", a Roman law norm, according to which an expressed reservation is invalid when contradicting one's own behaviour.[29]

Two well-known cases confirm this. The first example is the famous case of the Trier wine auction. This fictional legal doctrinal case illustrates in detail the legal consequences of unconscious expression of will. H. Isay offered the case when an auction visitor saw a friend and greeted him with a raised hand. Traditionally, at auctions, raising your hand

27 Viktor Savchenko, 'Issues of the Collective will of Legal Entities' (2022) 8 Entrepreneurship, Economy and Law 22, doi:10.32849/2663-5313/2022.8.03.

28 Oleksandr Green, *Contracts in the Civil Law of Ukraine: Album of Schemes* (Pub Breza AE 2012) 41.

29 Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts* (3 aufl, Springer 1979).

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means making a bid. Because of this, the auctioneer fixed a bid per visitor and demanded payment from him. The main argument of the case was that the visitor did not know about the internal rules of the auction, and his actions were not an expression of the will to conclude a contract.[30]

There are two main points of view regarding this situation among lawyers. C.-W. Canaris emphasised, "that this situation does not express the will because it violates private autonomy."[31] However, J. Ellenberger noted "that we should focus on external behaviour, even if it does not coincide with the person's motives."[32]

It is essential to acknowledge that a person can create legal consequences by his actions. The interpretation of such scenarios hinges on a person's ability to familiarise himself with the auction rules. Despite the lack of awareness of the declaration, there is a declaration of choice if the declarant, exercising the necessary care in transactions, could have avoided having his action interpreted as a declaration of intent in ordinary practice and if the recipient understood it as a declaration of intent.[33]

This allows us to conclude that the performance of conclusive actions may not directly correlate with the awareness of their significance. This position is not relevant for cases of agreements with defects of will, under the influence of delusion or when a person is not aware of his actions at all (mental illness, intoxication, incapacity, limited legal capacity).

Another illustrative example of the problem is the case of the parking lot in Hamburg. In 1953, the Hamburg senate converted certain parking areas into paid parking spaces. Near these places, signs were installed with the inscription "Parking is paid and guarded". Despite this signage, the defendant regularly parked their car and refused to pay for parking. The defendant argued that he did not require the protection of his vehicle. However, the court, notwithstanding, ordered him to pay for parking.[34]

During the court session, a critical opinion was voiced. The judge said that to conclude a contract, the party must consent. Since the defendant did not consent, the agreement was not established, leading to non-contractual relations between the parties. Such an approach enables us to seek compensation even if the party did not knowingly enter into the contract. We have to use two algorithms for contracts. The first arises when a person understands he has concluded to agree and consents willingly. The second occurs when a

30 Hermann Isay, *Die Willenserklärung im Thatbestande des Rechtsgeschäfts nach dem Bürgerlichen Gesetzbuch für das Deutsche Reich* (G Fischer 1899).

31 Claus-Wilhelm Canaris, 'BGH, 07-06-1984 - IX ZR 66/83: Ohne Erklärungsbewußtsein erfolgte tatsächliche Mitteilung als Willenserklärung' (1984) 40 Neue Juristische Wochenschrift 2279.

32 Jürgen Ellenberger, 'Einführung' in Palandt, *Kommentar zum BGB mit Nebengesetzen: Inkl WEG-Reform und COVID-19-Änderungen, Rechtsstand: 15.10.2020* (80 aufl, CH Beck 2021) 1.

33 *Erfordernis des Erklärungsbewusstseins ("Sparkassenfall")* [1984] BGHZ 91, 324 <http://lorenz.userweb.mwn.de/urteile/BGHZ_91_324.htm> accessed 06 March 2023.

34 *Hamburger Parkplatzfall* [1956] BGHZ 21, 319 <https://lorenz.userweb.mwn.de/urteile/bghz21_319.htm> accessed 06 March 2023.

person does not intend to enter into a contract but takes conclusive actions that cause damage to the other party.

A contract implied in fact expresses will when the parties enter into a legal relationship by performing actions the other party understands as a desire to enter into a contract. Because of this, the desire for clear consequences is essential. Each contract provides for the emergence of specific rights and obligations. If the parties attach a different meaning to their actions, the question of determining the deed's fictitiousness arises.

This can be illustrated using the example of an auction. Let us imagine that the auctioneer and the visitor have agreed that he will raise his hand to raise the bid. They aim to increase the lot's value, not make the deal. If the visitor raises his hand and no one raises the bid after him, no obligations will arise between him and the auctioneer. This is justified because their purpose was not to conclude a sales contract. And although conclusive actions were formally taken to agree, legal relations will not arise. The main feature of a fictitious deed lies in the inconsistency of the internal and external will of all involved participants in the legal relationship, and the underlying purpose may even be illegal (for example, hiding property from confiscation), yet this does not affect the recognition of the deed as fictitious.

4 ANALYSIS OF SOME PRACTICES OF APPLYING CONTRACT IMPLIED IN FACT

Contracts implied in fact are actively used in everyday life. Here are a few examples: buying or exchanging currency through machines, purchasing goods in self-service stores, paying for public transport through terminals, giving gifts by transferring a symbol (for example, car keys), paying for services without signing the corresponding act of services rendered.

D. Birk offered other examples: 1) a customer who puts goods on the cash register in a store declares that he wants to buy it; 2) a raised glass at the bar means: I will order the same drink again; 3) raising a hand during an auction means placing a bid; 4) passing through a customs gate with a green marking when entering the country is an implicit customs declaration and says: I declare that I have nothing to declare; 5) payment of a tax refund by the tax inspectorate after submitting a tax declaration.[35]

The given list of examples of implied-in-fact contracts in everyday life is indeed not exhaustive. Implied-in-fact contracts should be understood as a form of will expression, not a particular type of contract. Essentially, any contract can be construed as an implied-in-fact contract, except those mandated to be in written form. For example, a passenger and baggage transportation contract can be concluded in different forms (in writing, by conclusive actions or verbally). In this case, boarding the passenger on the bus or dropping the token into the turnstile will be conclusive actions. The indicated actions will be recognised as a direct expression of the passenger's will, which confirms his desire to

35 Dieter Birk, *Steuerrecht* (11 aufl, Müller CF in Hüthig Jehle Rehm 2008).

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conclude a contract of carriage. A similar situation can be cited for the retail sales contract. However, reducing conclusive actions only to use terminals and vending machines is incorrect.

M. Eisenberg considered an interesting case: "Every day Mary Moore passes a produce store on her way to work and stops to buy an apple for lunch. One day, Moore is in a hurry to catch her bus, so she takes an apple from a bin outside the store, catches the shopkeeper's eye, and waves the apple at him. The shopkeeper nods back. Even though Moore didn't say, "I offer to buy this apple for the price posted on the bin", that is implied from her waving the apple at the shopkeeper and her past practice, and even though the shopkeeper did not say, "I accept your offer," that is implied from his nodding his head and his past practice. Because an implied-in-fact contract is real, the usual remedy for breach of an implied-in-fact contract is expectation damages. Whether the defendant was unjustly enriched is normally irrelevant."[36]

This example demonstrates two principles that are necessary for implied-in-fact contracts. First, conclusive actions can be applied in the frames of customary law. In the proposed example, we saw that an established custom arose between Mary Moore and the seller when the buyer took the apple, waved his hand, and paid for the goods later. If another person did the same, his actions would be classified as theft or unjust enrichment. In this example, a retail sales contract concluded as an implied-in-fact contract. Customary norms created the rules of the agreement. Secondly, if conclusive actions were not agreed on to express will between the parties, there are grounds for compensatory relations. If a third party saw Mary Moore's actions and took the apple, but there was no nod from the seller, that person would have to reimburse the value of the apple. In this case, we would use a compensatory mechanism.

An implied contract is based on the presumption of intent, which allows us to recognise that the parties to the agreement a priori seek to achieve its purpose and fulfil its obligations. In this example, we see another confirmation of the hypothesis that contracts are based on the parties' intentions. For implied-in-fact contracts, the expression of the parties' will must indicate the desire to covenant. In the opposite case, the contract will not be concluded if no acceptance is received from the other party. In this case, obligations to compensate for damage will arise.

We know cases when implied-in-fact contracts are used in less common circumstances. Take the case Copyright v. Implied-in-Fact Contract as an example. Forest Park developed an idea for a series and pitched it to Universal TV, who liked the concept but declined to buy it. Later, Universal TV released a new series bearing striking similarities to Forest Park's ideas, leading to a dispute between the parties in question.

36 Melvin A Eisenberg, *Foundational Principles of Contract Law* (Oxford commentaries on American law, OUP 2018) 493-6, doi:10.1093/oso/9780199731404.003.0035.

To prove a violation of the terms of the contract, it is necessary to provide evidence of the existence of the agreement itself, which must contain a provision on the obligation to make payment in case of the presented ideas used. While Forest Park and Universal TV had agreements requiring payment for idea usage, it was a daily practice to conclude contracts implied in fact without compensating the creator. The court assumed that the parties understood the payment procedure for the proposed idea. Still, Universal insisted that the agreement did not specify the payment amount, so no contract was formed. Forest Park insisted that Universal had agreed to pay for using the idea at an "industry standard". In court, Forest Park had to prove the existence of an industry-standard price and establish similar arrangements.[37]

In this case, the application of the implied-in-fact contract is unambiguous. The main issue in this dispute should be proving the kinship of the ideas of the series. When Universal used Tove and Hayden's ideas, they took conclusive action. Even if it is recognised that there is no implied-in-fact contract between them, Universal has the obligation to compensate for damage and unreceived remuneration.

5 CONCLUSIONS

Implied-in-fact contracts, like all other contracts, require the parties' will. Guided by their own free will, the parties take actions that involve the conclusion of an agreement. Taking conclusive actions may not be directly related to the awareness of their meaning. However, for contracts implied in fact, even accidental activities can create legal consequences. This is demonstrated in detail in the Trier wine auction case example. However, this concept is not relevant for cases of agreements with defects of will, under the influence of delusion or when a person is not aware of his actions at all (mental illness, intoxication, incapacity, limited legal capacity).

Implied-in-fact contracts should not be understood as different types of contracts because they are a form of agreement and will expression. Any arrangement can be concluded like a implied-in-fact contract. The only exceptions are contracts for which written form is mandatory.

This is confirmed by the fact that the same contract can be concluded orally, in writing, or conclusively. For example, a passenger transportation contract can be concluded by signing a written agreement with the carrier, in verbal form, or as an implied-in-fact contract. The choice of contract form will not affect its content and subject matter.

At the same time, contracts must comply with all general requirements established for contracts. For example, the party should study the terms and conditions of the agreement,

37 Bruce Strauch, Bryan M Carson and Jack Montgomery, 'Cases of Note-Copyright vs Implied-in-Fact Contract' (2013) 25(2) Against the Grain 56, doi:10.7771/2380-176X.6490.

particularly when concluding a contract using vending machines and terminals. In such cases, the precise terms of the agreement must either be visibly displayed on the devices' surface or presented in electronic form for review. In any case, an individual must have the opportunity to familiarise himself with the terms of the contract in an accessible and understandable form. Failure to do so would violate the principles of contract law, leading to the deed's invalidity.

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AUTHORS INFORMATION

Viktor Savchenko*
Ph.D. (Law), Associate Professor, Research Fellow of the Oxford Uehiro Centre for Practical Ethics, University of Oxford, Oxford, UK;
Associate Professor of the Department of Civil Law Disciplines, V.N. Karazin Kharkiv National University, Kharkiv, Ukraine
savchenko.viktor@gmail.com
https://orcid.org/0000-0001-7104-3559
Corresponding author: Conceptualization, Funding acquisition, Project administration, Writing – original draft.

Roman Maydanyk
LL.D., Professor of Civil Law, Taras Shevchenko National University of Kyiv, Kyiv, Ukraine
roman.maydanyk@gmail.com
https://orcid.org/0000-0003-1661-0535
Co-author: Supervision, Validation, Writing – review & editing.

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RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

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Research Article

THE PUNITIVE POWER OF INDEPENDENT ADMINISTRATIVE AUTHORITIES: FOCUS ON FINANCIAL AND TAX VIOLATIONS (A COMPARATIVE STUDY)

Gehad Mohamed AbdelAziz and Alaa Abouahmed*

ABSTRACT

Background: In France, *some independent administrative authorities have been granted punitive powers concerning violations committed against stated regulatory rules. In this regard, the issue of the accumulation of penalties has been repeatedly raised concerning sanctions imposed by independent administrative authorities and criminal justice penalties. For example, a certain action could be criminalised by virtue of the Penal Law, necessitating a custodial sanction or a fine, while also considered a mere breach under financial and monetary laws, leading to the imposition of a certain financial penalty.*

This raises the question of whether the infliction of both criminal and administrative sanctions on financial and tax crimes violates the 'ne bis in idem' principle. The French Constitutional Council has addressed this issue extensively; it has banned the accumulation of criminal penalties and administrative sanctions of a punitive nature upon the fulfilment of certain conditions. Interestingly, these conditions did not apply to tax disputes, permitting the accumulation of penalties in this specific field. However, the accumulation of penalties was banned and deemed impermissible in financial markets. Therefore, a major question can be raised: Why has the Constitutional Council adopted two different approaches in those two similar fields?

Methods: *In pursuit of the research goals, this study employed a combination of comparative, historical, and analytical methodologies. By examining the legal nature of independent administrative authorities, this study conducts a comprehensive examination of relevant legal texts, encompassing constitutional provisions, legislation, and judicial decisions, to analyse the ne bis in idem principle in France. A comparative analysis approach was utilised to compare the rulings of the French Constitutional Council, the French Court of Cassation, and European judicial bodies.*

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Results and conclusions: *In various jurisdictions, including France and the EU, the principle of non-accumulation of criminal penalties and administrative sanctions is recognised, yet differences arise in its application. Jurisdictions vary in approach, with some strictly prohibiting accumulation while others allow flexibility based on factors like offence nature and societal interests. The French Constitutional Council sets standards, allowing dual penalties in tax matters but not in finance. Rulings by the French Constitutional Council and Court of Cassation offer insights into applying the principle, revealing complexities in balancing regulatory enforcement and individual rights.*

1 INTRODUCTION

Independent administrative authorities are established public entities vested with complete legal authority, enabling them to issue binding decisions and decrees. In 1978, some independent administrative authorities were instituted in France and then began to spread widely to establish some balances that were deemed necessary for the practice of economic activities, individual freedoms, and various other domains. These authorities were granted the legal power to issue decisions of control and supervision and impose sanctions in certain fields, such as economics and finance.

In this context, the French Constitutional Council has clarified that enabling these independent administrative authorities to issue and impose sanctions may not be considered contradictory to the principle of separation of powers, provided that these sanctions may not include any custodial penalties. Therefore, the issuance of these sanctions should be based on several standards and guarantees to protect the rights and freedoms granted by the Constitution.[1]

The Constitutional Council decided that all constitutional principles concerning criminal penalties should apply to any other sanctions of a punitive nature, even where the legislator has permitted independent authorities of a non-judicial nature to issue and impose such sanctions. Granting punitive powers to some independent administrative authorities is justified to maintain various financial and economic interests, considering the inefficiency of some criminal penalties imposed by competent criminal judges in the financial and economic sectors. Accordingly, it has been established that sanctions imposed by independent administrative authorities are effective.

However, granting independent administrative authorities the power to impose punitive administrative sanctions is debatable when criminal penalties for the same violations are still applicable. Such duality of sanctions may be considered contradictory to the *ne bis in idem* principle. Given that the accumulation of both criminal penalties and administrative sanctions of a punitive nature was permitted for tax disputes but was banned for financial market disputes, the French Constitutional Council addressed this issue.

1 Décision n 86-217 DC (Conseil Constitutionnel, 18 septembre 1986) <https://www.conseil-constitutionnel.fr/decision/1986/86217DC.htm> accede 10 février 2024.

2 THE EMERGENCE OF INDEPENDENT ADMINISTRATIVE AUTHORITIES IN FRANCE

In 1978, the first independent administrative authority, the National Commission on Informatics and Liberty, was established in France.[2] The establishment of such authorities marked the beginning of a trend that spread rapidly during the 1980s in response to the state's new role towards the establishment of some balances necessary for the practice of economic activities and freedoms.

The spread of these new authorities was further supported by the failure of traditional administrative structures to address the complexities of modern society.[3] Consequently, economics witnessed the emergence of these authorities for the first time in 1991, when an independent administrative authority was established for bank control.[4]

3 THE NON-DEPENDENCY OF ADMINISTRATIVE AUTHORITIES TO THE EXECUTIVE AUTHORITY

The independent administrative authorities are official and complete public authorities and not just advisory bodies; they have the legal power to issue decisions and decrees. Their functions are not limited to mere management procedures but are mainly concerned with control, that is, to develop the required frameworks and monitor certain activities in different fields (e.g. economics and finance). This aims to guarantee the smooth workflow of these activities, as well as the fulfilment and respect of specific balances. Therefore, the legislator has granted these authorities several legal powers to ensure the complete and due performance of their assigned duties, including the required powers of regulation, supervision, and infliction of sanctions. Hence, the French legislator preferred to call these entities 'authorities' rather than organisations or bodies to manifest their special nature and distinguish them from other traditional administrative bodies.[5]

Accordingly, an issue has been raised as to whether establishing a new authority not included in the traditional bodies of the state is permissible. In fact, the French Constitutional Council has duly answered this question while addressing the issue of the National Commission on Informatics and Liberty. The council emphasised the full

2 Dominique Custos, 'Independent Administrative Authorities in France: Structural and Procedural Change at the Intersection of Americanization, Europeanization and Gallicization' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Research Handbooks in Comparative Law series, Edward Elgar Pub 2010) 277, doi:10.4337/9781849808101.00026.

3 Kawthar Bougheita, 'The Independent Administrative Authorities in the Economic and Financial Fields' (Master's thesis, Faculty of Law and Political Science, University Center of Maghnia 2016) 13.

4 Bruno Genevois et Louis Favoreu, 'Le Conseil constitutionnel et l'extension des pouvoirs de la Commission des opérations de bourse' (1989) 4 Revue Française de Droit Administratif 671.

5 Bougheita (n 3) 17.

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independence of this authority[6]; therefore, the presence of another new authority (i.e. other than the three known major authorities) may not be considered contradictory to the French Constitution. It is permissible to establish such a new authority and acknowledge its independence and regulatory power, considering that control authorities shall be entitled to self-legislation; that is, they are permitted to escape the traditional shackles of administrative dependency and hierarchical order.[7]

Consequently, the legal powers of these independent authorities may not be subject to supervision by executive authorities. These authorities may also be entitled to all other powers as required. For instance, they may exercise legislative authority over the development and application of their own executive regulations.

The French Constitutional Council has acknowledged the right of these authorities to develop their executive regulations, noting that Article (21) of the Constitution may not be considered a legal impediment to the permissibility of granting the power of legislation to another authority other than the Prime Minister, when concerning the development of executive regulations.[8] However, this should be limited to specific fields determined by laws and regulations. It is noteworthy, though, that the Constitutional Council held a legislative provision unconstitutional because it failed to specify the standards for developing executive regulations by independent authorities, as this unconstitutional provision was limited to the general rules of the General Commission.[9]

Moreover, these independent authorities may be entitled to exercise the role of judicial authority regarding the imposition of sanctions. However, this judicial role arguably conflicts with the principle of separation of powers. Evidently, the right to exercise the power of imposing punishment makes independent administrative authorities appear as semi-judicial authorities, hence presenting them as contradictory to the principle of separation of powers, given in Article (16) of the Declaration of the Rights of Man and of the Citizen of 1789.[10]

The French Constitutional Council has clarified that granting independent administrative authorities the power to punish may not be considered contradictory to the separation of powers principle, as such power is merely exercised within the framework of a necessary administrative mandate. This mandate must be their commitment to the stated technical restrictions as well as the desired targets of constitutional value.[11]

6 Décision n 86-217 DC (n 1).
7 Genevois and Favoreu (n 4) 684.
8 Décision n 86-217 DC (n 1).
9 Décision n 88-248/DC (Conseil Constitutionnel, 17 Janvier 1989) <https://www.conseil-constitutionnel.fr/decision/1989/88248DC.htm> accede 10 février 2024.
10 Jean Waline, *Droit Administratif* (26e édn, Dalloz 2016).
11 ibid.

Furthermore, in another decision, the Constitutional Council added that the legislator granted the power to punish any independent administrative authority, provided that the potential penalty does not include a custodial sanction. Additionally, it requires that the exercise of such power is based on certain legal grounds accompanied by specific measures that shall guarantee the protection of all rights and freedoms granted to all people by virtue of the Constitution.[12]

In this sense, the independent authorities' exercise of the power to punish is, in fact, subject to all established constitutional principles (e.g. the principles of 'non-retroactively of criminal penalties' and 'necessity and proportionality of penalties'). Moreover, according to the constitutional judiciary, all constitutional principles regarding criminal penalties shall also apply to any other sanctions of a punitive nature, even if the legislator has granted the power to impose such sanctions to any other non-judicial authority.[13]

4 JUSTIFICATIONS FOR GRANTING THE INDEPENDENT ADMINISTRATIVE AUTHORITIES THE PUNITIVE POWER

4.1. Maintaining the State's Financial and Economic Interests (The Unique Nature of Independent Administrative Authorities)

Over the years, a large arsenal of criminal laws has continually interfered with the financial and economic fields by criminalising several types of actions, thereby causing severe damage to the state's financial and economic interests. Consequently, a new attitude has been adopted, calling for the exclusion of these actions from the scope of criminal law, as they should be addressed by independent administrative authorities with certain punitive powers that may be used against such actions. Consequently, the power to punish was transferred entirely or partially from the criminal judiciary to these new independent authorities.

Granting punitive power to these new independent administrative authorities is meant to replace the criminal penalties with other administrative sanctions; it removes the criminal judge's oppressive power in favour of other competent authorities.[14] Interestingly, most sanctions imposed by these independent administrative authorities in the financial and economic fields have been so severe that they are similar to criminal penalties. Hence, they

12 Décision n 89-260/DC (Conseil Constitutionnel, 28 Juillet 1989 <https://www.conseil-constitutionnel.fr/decision/1989/89260DC.htm> accede 10 février 2024.

13 Louis Favoreu et Loïc Philip, *Les Grandes Décisions du Conseil Constitutionnel* (Grands arrêts - Grandes décisions, 12e édn, Dalloz 2003).

14 Mousa Rahmouni, 'The Judicial Oversight of Independent Control Authorities in Algerian Legislation' (Master's thesis, University of Batna 1 - Hadj Lakhdar 2012/2013) 66.

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are known as 'Administrative Sanctions of Punitive Nature', taking into consideration that these sanctions may vary between financial and non-financial penalties.[15]

4.2. The Inefficiency of Criminal Penalties Imposed by Criminal Judiciary in the Economic and Financial Sectors

Granting competent judges punitive powers after the introduction of independent administrative authorities proved inadequate. The judicial system suffers several problems, including delays in adjudicating cases and the lack of any significant criminal errors by the concerned party in many cases.[16] Consequently, the desired deterrent effect of the criminal penalty shall not be achieved because of the delay in the adjudication process.[17] This problem is mainly caused by the huge body of legislation in criminal law and the enormous number of claims submitted before the judiciary. Accordingly, most defendants enjoyed many legal guarantees granted to them by virtue of criminal law, not to mention that some criminal penalties (especially the penalty of imprisonment) were widely considered inadequate for the nature of these activities, as well as the inability to adjust many administrative violations as criminal actions punishable by such penalties.[18]

4.3. The Efficiency of Sanctions Imposed by Independent Administrative Authorities

The legislator granted independent administrative authorities the legal power required to impose sanctions due to various significant justifications. The legislator's main objective is to seek the best and most efficient ways to control economic activity in different sectors, to ensure good market functioning and conduct, and to minimise the judge's role in these sectors, which should be solely subject to the economic control of independent administrative authorities.[19]

Independent administrative authorities have been practically proven more efficient in exercising such legal powers. They are capable of providing diversity and gradation in their sanctions, with the fulfilment of a number of guarantees that avoid any deviations in implementation.[20] Additionally, they are capable of finding innovative solutions that could

15 Najwa Sultani and Mounira Rakti, 'The Independent Administrative Authorities between Independency and Dependency' (Master's thesis, Faculty of Law and Political Science, University 8 May 1945 Guelma 2015/2016) 67.

16 Mireille Delmas-Marty et Catherine Teitgen-Colly, *Punir sans Juger? De la Répression Administrative au Droit Administratif Pénal* (Economica 1992) 18.

17 Rahmouni (n 14) 66.

18 Mohamed Bahi Abuyounis, *Judicial Oversight of the Legitimacy of General Administrative Sanctions* (Dar Al Gamaa Al Gadida 2000) 29.

19 Ghanam Mohamed Ghanam, *The Administrative Criminal Law* (Dar Al-Nahda Al-Arabia 1998) 3-5.

20 Radia Shebouti, 'The Independent Administrative Authorities in Algeria: A Comparative Study' (PhD thesis, University of Mentouri 2014/2015) 20.

be unusual to traditional laws, a fact granted to independent administrative authorities by virtue of the punitive power transferred to them from ordinary criminal judges.

Moreover, the sanctions imposed by those independent administrative authorities are, in fact, faster and far more deterrent than the traditional penalties of ordinary criminal judges (e.g. the suspension of licences or approvals, the ban from practising a profession, or the ban from certain markets), which will undoubtedly be more damaging and effective than criminal fines or suspended imprisonment.

5 THE CONSTITUTIONALITY OF GRANTING PUNITIVE POWERS TO THE INDEPENDENT ADMINISTRATIVE AUTHORITIES

The French Constitutional Council initially rejected granting punitive power to independent administrative authorities. Then, the Council changed its position and granted this power to such authorities in certain fields only. Later, the Council upheld the punitive power of these authorities in all fields upon the fulfilment of certain controls.[21]

To this effect, on 28 July 1989, the French Constitutional Council issued a decree confirming the constitutionality of granting punitive powers to the independent administrative authorities. In this decree, the French Constitutional Council explicitly acknowledged the power and right of these authorities to impose general administrative sanctions. The decree stated that:

> "There is no constitutional principle whatsoever that might prohibit an administrative authority from imposing sanctions through the exercise of their powers and privileges as a public authority, provided that the imposed sanction does not include a custodial penalty and that this power is exercised pursuant to the stated measures of rights and freedoms protection as granted to all by virtue of the Constitution."[22]

Additionally, on 17 January 1989, the French Constitutional Council clarified that pursuant to Article (6) of the Declaration of the Rights of Man and the Citizen, all sanctions imposed by public authorities (even if they are non-judicial authorities) shall be subject to the same guarantees governing judicial penalties.[23]

21 Décision n 89-260/DC (n 12).

22 ibid, para 6.

23 Décision n 88-248/DC (n 9); Rahmouni (n 14) 69.

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6 THE ACCUMULATION OF CRIMINAL PENALTIES AND ADMINISTRATIVE SANCTIONS OF PUNITIVE NATURE

6.1. The Ne Bis in Idem Principle

6.1.1. The Legislative Basis for the Ne Bis in Idem Principle

Justice requires that any person be subject to legal punishment for their crime only once. In other words, imposing more than one penalty for infringement is impermissible. In contemporary legal systems, this principle is considered a major pillar of criminal and administrative law. For instance, the Fifth Amendment of the U.S. Constitution provides an explicit legal provision that prevents an accused person from being tried or sentenced again on the same charge (i.e. Double Jeopardy).[24] This legal principle is meant to ensure respect for the binding force of the final court rulings.

Furthermore, Article (50) of the Charter of Fundamental Rights of the European Union (CFR) explicitly refers to the same legal principle, which is also emphasised by the European Court of Justice (ECJ), pursuant to the provision of Article (4) of the protocol annexed to the Convention for the Protection of Human Rights and Fundamental Freedoms.[25] Several other legislations, such as German and American legislation, have granted this legal principle high constitutional value. Accordingly, the German Judiciary does not acknowledge the implementation of multiple penalties for the same act, even if these penalties fall within two different areas of law: criminal and administrative.[26]

Article (454) of the Egyptian Criminal Procedures Law states:

> "A criminal claim initiated against a defendant shall be considered as concluded by the issuance of a final court ruling, whether it is an acquittal or a conviction; thus, if a court ruling is issued on the subject-matter of this criminal claim, the claim may not be reheard again unless it is through one of the legally stated methods of an appeal."[27]

Similarly, in the UAE, Article (268) of the UAE Criminal Procedures Act states:

> "A criminal claim initiated against a defendant shall be considered as concluded by the issuance of a final court ruling, whether it is an acquittal or a conviction; thus, if a court ruling is issued on the subject-matter of this criminal claim, the

24 Saba Khan, 'A Defendant's Fifth Amendment Right and Double Jeopardy in Contempt Cases' (2016) 32(4) Touro Law Review 833.

25 'Charter of Fundamental Rights' (*Citizens Information*, 31 January 2023) <https://www.citizensinformation.ie/en/government-in-ireland/european-government/eu-law/charter-of-fundamental-rights/> accessed 10 February 2024.

26 ibid.

27 Criminal Procedure Code of the Arab Republic of Egypt no 150 of 1950, art 454 <https://manshurat.org/node/14419> accessed 10 February 2024.

> claim may not be reheard again, unless it is through one of the legally stated methods of appeal."[28]

Therefore, the *ne bis in idem* principle is mainly based on two legal grounds: the principle of legality and the principle of *res judicata*. According to the latter principle, it is illegal to have a second adjudication for the same incident; hence, the disciplinary authority may not be entitled to reconsider the same incident.[29]

Furthermore, it is worth noting that the application of the *ne bis in idem* principle in the disciplinary field is actually based on the principle of double jeopardy in the criminal field.[30] That is, if a person is punished again for the same act, this punishment is considered unjustified and excessive, contradicting the principle of proportionality. In other words, an employee at fault may not be subject to more than one disciplinary penalty for the same violation.[31]

Nonetheless, this principle does not prohibit the infliction of a criminal penalty alongside the disciplinary penalty,[32] as both belong to two different areas of law. Hence, this might not be considered contradictory to the *ne bis in idem* principle.[33] For instance, a public official who has committed an act of forgery may be subject to a disciplinary penalty in addition to a criminal penalty. To conclude, criminal liability does not preclude disciplinary liability, but both liabilities may be invoked together.[34]

6.1.2. The Judicial Basis for the Ne Bis in Idem Principle

The *ne bis in idem* principle is considered one of the most important legal principles for guaranteeing rights and protecting freedoms. Therefore, the Supreme Constitutional Court in Egypt has adopted it as a constitutional principle.[35] In this context, the Court ruled on the unconstitutionality of the First Clause of Article (43) of the General Sales Tax Act, issued by virtue of Law No. 11 of 1991 (and amended in 1996), that is, the obligation to order all perpetrators jointly to pay a compensation whose value is no more than the tax itself.[36]

28 Federal Decree-Law no 38 of 2022 'Promulgating the Criminal Procedures Law', art 268 <https://uaelegislation.gov.ae/en/legislations/1609> accessed 10 February 2024.

29 Abdel-Fattah Abdel-Barr, *The Disciplinary Guarantees of Public Office* (Dar Al-Nahda Al-Arabia 1979) 452.

30 Abdel-Aziz Khalifa, *The Disciplinary Guarantees of Public Office* (Dar Al-Nahda Al-Arabia 1997) 175.

31 Youssef Helmy Khater Sherif, *Means of Administrative Activity of the State (Public Employee - Administrative Decision)* (Dar Al-Nahda Al -Arabia 2007) 232.

32 Mohamed Majed Yakout, *Explanation of Disciplinary Procedures in Public Employment, Trade Union Professions, and Private Work* (Monshaat Al-Maaref 2004)665.

33 Khalifa (n 30) 175.

34 Abdel-Kader Abdel-Hafez, *The Disciplinary Penalties of Public Officials* (Dar Al-Fiker 1983) 106.

35 Case no 22 Judicial Year 8 'Constitutional' (Supreme Constitutional Court of the Arab Republic of Egypt, 4 January 1992) <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-22-Y8.html> accessed 10 February 2024.

36 Case no 9 Judicial Year 28 'Constitutional' (Supreme Constitutional Court of the Arab Republic of Egypt, 4 November 2007) <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-9-Y28.html> accessed 10 February 2024.

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The Court has provided the following reasoning in its ruling:

> "According to the contested legal provision, the legislator has stipulated that a taxpayer who has been convicted of tax evasion shall pay compensation whose value is no more than the tax itself; hence, the competent judge will have no choice but to order such compensation in all cases (i.e. pursuant to the phrase 'all perpetrators jointly'); and that is in addition to the other criminal penalties that might be ordered as stated in the provision of this contested provision (i.e. imprisonment, fine or both penalties). In this sense, all of those penalties concern only one action, which is committing a violation of any of the clauses stated in the provision of Article (44) of the General Sales Tax Act, issued by virtue of Law No. 11 of 1991."

Therefore, the Court concluded that the state's legislation may not jeopardise any of the rights and freedoms granted naturally to all people in democratic societies as basic guarantees for the protection of human rights and dignity. Of course, these rights comprise all rights concerning personal freedom, including the right not to be punished more than once for the same act; thus, whether the penalty is civil or criminal, the imposed punishment may not be excessive but rather proportional and gradual in accordance with the committed violation.[37]

There is no doubt that any violation of the *ne bis in idem* principle is contradictory to the principle of legality. In other words, the most important principles of justice would be deemed violated if it is permissible to bring the defendant to a retrial and impose more than one penalty for the same action.[38]

Therefore, the Supreme Constitutional Court has ruled:

> "An authority may exercise its disciplinary power by imposing a certain penalty for a specific action. However, this authority may not impose a second penalty for the same incident. Therefore, the administrative authority shall always seek balanced discretion, based on the apparent appropriateness between the gravity of the committed administrative violation on one hand, and the type and magnitude of the imposed penalty on the other hand. otherwise, such discretion will be deemed as a deviation by the disciplinary power from its purposes."[39]

37 Case no 3 Judicial Year 10 'Constitutional' (Supreme Constitutional Court of the Arab Republic of Egypt, 2 January 1993) <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-3-Y10.html> accessed 10 February 2024.

38 Mohamed Gawdat El-Malat, 'The Disciplinary Liability of Public Officials' (DrSc(Law) thesis, Cairo University 1967) 311.

39 Case no 24 Judicial Year 18 'Constitutional' (Supreme Constitutional Court of the Arab Republic of Egypt, 5 July 1997) <http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-24-Y18.html> accessed 10 February 2024.

> Both Egypt and France have adopted this legal principle. The Supreme Administrative Court in Egypt has stated: "As one of the most important and unquestionable basics of justice, it is impermissible to punish an employee twice for the same administrative violation."[40]

6.2. The Accumulation of Criminal Penalties and Administrative Sanctions of Punitive Nature

Originally, the issue of combining two or more penalties has always been raised in relation to the sanctions imposed by independent administrative authorities on the one hand and the penalties of the criminal judiciary on the other. A similar issue of equivalent importance concerns the different nature of criminal penalties and administrative sanctions issued by independent administrative authorities, considering the issuing authority and the regulation of the committed action itself. A certain action could be criminalised by virtue of the Penal Law, hence necessitating a custodial sanction or a fine or considered a mere violation pursuant to financial and monetary laws, thus imposing a certain financial penalty. Accordingly, could the same person be punished twice for the same act?

The principle of non-accumulation of penalties is considered one of the basic doctrines of Criminal Law and prohibits any cases of double jeopardy.[41] Nonetheless, this field involves another application of this principle. For example, it is permissible to combine a criminal penalty and a disciplinary penalty based on the diversity and variance of protected interests (e.g. public interest, administrative interest, or professional interest).[42] Hence, what is the case with the criminal penalties and administrative sanctions imposed by independent administrative authorities?

Article (27) of Federal Law No. 4 of 2000 concerning the UAE securities and commodities market, the Securities and Commodities Authority may impose various disciplinary sanctions on market mediators, including a fine of no more than one hundred thousand Dirhams. In addition, as those sanctions are disciplinary in nature, they may be combined with other criminal penalties. This duality may not be considered contradictory to the *ne bis in idem* principle, as each penalty has a different purpose.

The UAE legislator has emphasised that the scope of administrative sanctions is different from that of criminal penalties, avoiding any duality that might be considered a violation of the *ne bis in idem* principle. However, it is fair to say that UAE Law indeed

40 Case no 4360 Judicial Year 53 (Supreme Administrative Court of the Arab Republic of Egypt, 13 June 2009) <https://www.elmodawanaeg.com> accessed 10 February 2024.

41 Martin Wasmeier, 'The Principle of ne Bis in Idem' (2006) 77 (1-2) Revue International de Droit Pénal 121, doi:10.3917/ridp.771.0121.

42 Libor Klimek, 'Ne Bis in Idem as a Modern Guarantee in Criminal Proceedings in Europe' (2022) 5(4) Access to Justice in Eastern Europe 103, doi:10.33327/AJEE-18-5.4-a000439.

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involves a combination of criminal penalties and administrative sanctions of a punitive nature in the field of taxes.[43]

For example, with regard to Tax Procedures, the provision of Article (25) of Federal Law No. 7 of 2017 states the following:

> "1. The authority shall issue an assessment for the entity's administrative fines and shall notify this entity of the matter within the period of (5) working days, with regard to any of the following violations: … 3) The taxpayer's failure to pay the tax stated as 'Payable' in his submitted tax return, or in his tax assessment after his notification during the period stated in the Tax Law."[44]

In addition, with regard to Tax Evasion, Article (26) states that:

> "1. Without prejudice to any harsher penalty that might be stated in another law, the following entities shall be subject to punishment by imprisonment and paying a fine of no more than five-fold of the due tax, or by either one of those two penalties:1.1) A taxpayer who has deliberately abstained from paying his/her payable tax or administrative fines."[45]

Hence, pursuant to those two articles, there is a clear duality of penalties imposed for the same action, represented basically in the taxpayer's abstention from paying his due tax, as such an action is considered a criminal crime and an administrative violation at the same time.

Moreover, despite the severity of the sanctions imposed by independent administrative authorities, competent criminal judges may also add further financial sanctions for the same actions. Therefore, the legislator has to adopt a clear position in such a case so that an appropriate proportion between the committed action and the imposed sanction may be reached, irrespective of the precedence of inflicting a financial sanction. In other words, given that both criminal and administrative sanctions have the same (repressive) purpose, the principle of proportionality shall permit the accumulation of penalties of the same type while also providing a basic guarantee against the excessive punishment of someone with a penalty.

6.3. Position of Constitutional Judiciary regarding the Accumulation of Criminal Penalties and Administrative Sanctions of Punitive Nature

Initially, by virtue of Decree No. (248/88) issued on 17 January 1989,[46] the French Constitutional Council adopted a legal principle stating that combining administrative, financial sanctions, and criminal penalties is impermissible. Nonetheless, this adopted legal

43 ibid 104.
44 Federal Decree-Law no 7 of 2017 'Concerning Excise Tax', art 25 <https://uaelegislation.gov.ae/en/legislations/1223> accessed 10 February 2024.
45 ibid, art 26.
46 Décision n 88-248/DC (n 9).

principle was later modified in Decree No. (260-89) issued on 28 July 1989.[47] The Constitutional Council decided that the Stock Exchange Commission may issue financial sanctions in addition to the penalty imposed by the criminal judge, provided that the total amount of all imposed financial sanctions not exceed the amount with the highest value of one of the two imposed sanctions.

It also stipulated that this legal principle may not take effect in cases of accumulated criminal penalties and administrative sanctions unless otherwise stated by law. In fact, the French Constitutional Judiciary does not give much constitutional value to this legal principle. Pursuant to French legislation, it is permissible to combine a criminal penalty and administrative sanction, especially when those sanctions are imposed for an action that fulfils both the criminal and administrative aspects.

In this sense, in its 28 July 1989 decree, the French Constitutional Council emphasised that the ban on the accumulation of penalties indeed lacks the necessary constitutional character, especially when those various sanctions belong to two different penal systems (e.g. to combine a criminal penalty and an administrative sanction); as in this case, there are different causes for the infliction of each penalty. However, despite its approval of the permissibility of combining the criminal penalty and administrative sanctions, the French Constitutional Council highlighted the importance of adhering to the principle of proportionality, especially when each sanction is attributed to the same cause and nature. For instance, if both the criminal and administrative sanctions imposed for a violation are financial fines, the criminal and administrative fines may not exceed the maximum limit stated for each sanction in both cases.[48]

The Judicial Court of Paris adopted the same approach. In one famous incident, the court ruled that a person who has been sanctioned by the Commission with a fine of 10,000,000.00 francs may not be subject to any other fines.[49] Considering this legal provision is limited to the assumption that a competent judge will decide on the case, a major issue could be raised after the issuance of a final decision by the Stock Exchange Commission. Hence, if the Commission has yet to decide on the committed violation, the competent judge will not pay much attention to the possibility of combining the two sanctions (pursuant to the Decree issued on 3 December 1993).

In this context, it is fair to say that an independent administrative authority will not interfere in the first place unless the committed violation constitutes a criminal act. Otherwise, the authority may ask the Public Prosecution to enforce the Criminal Procedure Law, pursuant to the well-known principle that "criminal claims shall suspend administrative ones". Nonetheless, this solution may be considered contradictory to the independence of

47 Décision n 89-260 DC (Conseil Constitutionnel, 28 juillet 1989) <https://www.conseil-constitutionnel.fr/decision/1989/89260DC.htm> accede 10 février 2024.

48 ibid.

49 Wasmeier (n 41) 121.

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procedures, as the independent administrative authority is not obligated to postpone its consideration of the committed violation until criminal adjudication on the matter is concluded. In addition, this solution could be considered contradictory to the ultimate purpose of granting punitive powers to independent administrative authorities, which is to ensure fast and flexible intervention, as well as effective sanctions.

6.3.1. The Principle of Non-Accumulation of Criminal Penalties and Administrative Sanctions

The French Constitutional Council has adopted the principle of non-accumulation of criminal penalties and administrative sanctions as long as all four requirements are fulfilled:

- the committed action itself shall be punishable in accordance with the concerned legal provisions;
- the imposed sanctions shall protect the same social interests;
- the imposed sanctions shall be of a similar nature;
- and the imposed sanctions shall be issued by virtue of the same legal system.[50]

6.3.2. Contradiction of the Preferential Approach towards the Accumulation of Criminal and Administrative Sanctions between the Taxation and Financial Law

The French Constitutional Council has permitted the accumulation of criminal penalties and administrative sanctions of a punitive nature in the field of tax disputes based on the following two standards: a) the grossness of the committed action itself and b) the integration of tax and criminal procedures.[51] There could be a clear contradiction in the French Constitutional Council's application of these standards. While acknowledging these standards in the field of tax disputes, they have been dismissed in the field of market or financial disputes, thus banning any duality of sanctions regarding the latter.

In French Law, Article (1729) of the General Tax Law determines some tax sanctions for fraudulent actions and other intentional violations concerning tax returns, while Article (1741) of the same law determines criminal penalties for the taxpayer who deliberately

50 Décision n 2014-453/454 QPC et 2015-462 QPC (Conseil Constitutionnel, 18 mars 2015) <https://www.conseil-constitutionnel.fr/decision/2015/2014453_454QPCet2015462QPC.htm> accede 10 février 2024.

51 Décisions n 2016-545 QPC (Conseil Constitutionnel, 24 juin 2016) considérants 22 <https://www.conseil-constitutionnel.fr/decision/2016/2016545QPC.htm> accede 10 février 2024 ; Décision n 2016-546 QPC (Conseil Constitutionnel, 24 juin 2016) considérants 22 <https://www.conseil-constitutionnel.fr/decision/2016/2016546QPC.htm> accede 10 février 2024 Décision n 2018-745 QPC (Conseil Constitutionnel, 23 novembre 2018) considérant 19 <https://www.conseil-constitutionnel.fr/decision/2018/2018745QPC.htm> accede 10 février 2024; Vincent Dussart, 'Cumul des sanctions pénales et fiscales : une validation constitutionnelle définitive?' (*Lexbase freemium,* 12 juillet 2016) N3859BWT <https://www.lexbase.fr/article-juridique/33333856-jurisprudence-cumul-des-sanctions-penales-et-fiscales-une-validation-constitutionnelle-definitive > accede 10 février 2024.

conceals part of the money subject to the stated tax.[52] In this regard, the French Constitutional Council confirmed that both legal provisions may apply to the same person committing the same actions. In addition, they stress that tax evasion control is based on the ultimate goal of constitutional value,[53] which is mainly based on Article (13) of the Declaration of the Rights of Man and the Citizen. The Constitutional Council added that both criminal penalties and tax sanctions should protect social interests.

To justify their exclusion of the *ne bis in idem* principle from the tax dispute field, the French Constitutional Council explained that the adopted procedures for inflicting both criminal and tax sanctions are not different from each other and may be considered integrative procedures.[54]

A thorough investigation should have been conducted regarding the fulfilment of all four standards, as issued on 18 March 2015.[55] This could prevent any duality of sanctions, as previously mentioned. However, the French Constitutional Council has clarified its logic through a different approach, as it has confirmed that criminal and administrative procedures may together enable the protection of the state's financial interests and ensure equality before the tax authority.[56]

Therefore, we respectfully disagree with the French Constitutional Council, believing that a reference to the constitutional value of public contribution to taxes shall systematically constitute any incident of tax evasion as a gross action, hence leading to the duality of sanctions in all conditions, despite the fact that the concept of the grossness of actions shall be left solely to the discretion of the legislator. In addition, all criminal actions may originally be considered gross actions; hence, the legislator intervenes by making such actions subject to criminal penalties.

However, who decides cases where actions of greater grossness justify the initiation of different procedures, leading to the infliction of several penalties? For instance, by virtue of Articles (L.228) and (231a) of the Tax Procedures Act, the initiation of any criminal prosecution for tax evasion shall be based on prior complaints by the Tax Department after the approval of these complaints by the Tax Crimes Commission. In this way, the French Constitutional Council grants the administrative authority the power to evaluate any duality of sanctions, which will, in turn, lead to the cancellation of any criminal penalties in favour of the administrative sanctions in case it decides not to submit these complaints to the competent criminal prosecution authorities.[57]

52 Code général des impôts (1950) arts 1729, 1741 <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069577/> accessed 10 February 2024.

53 Anne-Valérie Le Fur et Dominique Schmidt, 'Le Traitement du Cumul des Sanctions Administratives et Pénales en Droit Interne: Entre Incohérences et Insécurité Juridique' (2016) 36 Recueil Dalloz 4.

54 *A and B v Norway* App nos 24130/11, 29758/11 (ECtHR, 15 November 2016) <https://hudoc.echr.coe.int/eng?i=001-168972> accessed 10 February 2024.

55 Décision n 2014-453/454 QPC (n 50).

56 ibid.

57 ibid.

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6.3.3. Grossness of Actions is a Standard of Inconsistency and Contradiction concerning the Duality of Sanctions

The French Constitutional Council permits the accumulation of criminal penalties and administrative sanctions of a punitive nature in the field of tax disputes based on the fulfilment of the standard of grossness of actions. Why would the French Constitutional Council adopt the same approach as the financial markets? If its logic is based on the fact that tax fraud control shall have priority over financial markets fraud control, as the state's role is to protect collective interests (e.g. tax disputes), then we will find that public funds deserve much larger protection than investors' interests, justifying the application of a double punishment, which is not the case here.[58]

However, we believe that this conclusion is far from realistic. In other words, the misuse of financial market rules will undermine the reliability of those markets, a problem that could produce serious repercussions for the state's economy as a whole. Therefore, we believe that the French Constitutional Council should have permitted the duality of sanctions for financial markets as well, considering that it has clearly stated that the objectives desired from the infliction of both criminal penalties and administrative sanctions in the field of stock market disputes are the same, the ultimate goal of which is the protection of public interest.

6.4. The Position of the French Court of Cassation and European Judiciary regarding the Accumulation of Criminal Penalties and Administrative Sanctions of Punitive Nature

In a well-known case, the Sanctions Commission, affiliated with the Financial Market Authority, fined an investor EUR 250,000.00. Subsequently, the public prosecution initiated prosecution procedures before the criminal judiciary, litigation which was concluded by the issuance of a court ruling for three-month imprisonment with suspension to avoid any obstruction to the market function pursuant to Article (465-2) of the Monetary and Financial Law.

This court ruling was appealed before the French Court of Cassation on the grounds that the administrative sanctions imposed by the Financial Market Authority are sanctions of a punitive nature and, hence, may not be accumulated with other penalties issued for the same actions as the result of criminal procedures. In other words, the procedures of criminal prosecution should not have been initiated on the basis of the defendant's right to avoid double jeopardy, which has been clearly stated by virtue of all of the following legal provisions: Article (4) of Additional Protocol No. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Article (14) of Part VII of the International

58 Le Fur and Schmidt (n 53) 5.

Covenant on Civil and Political Rights (ICCPR); and Article (50) of the Charter of Fundamental Rights of the European Union (CFR).

However, the French Court of Cassation dismissed this appeal in a precedent that ended any controversy regarding the duality of criminal and administrative sanctions in the financial field. The Court of Cassation decided that there is no contradiction between Article (50) of the CFR and the permissibility of accumulating administrative sanctions imposed by the Financial Markets Authority and criminal penalties for the same actions, which are, in fact, misdemeanours,[59] provided the fulfilment of the following two conditions:

1) This duality of sanctions shall always be based on the principle of inflicting a punishment that is effective, proportional, and deterrent. This is supported by Article (14-1) of Directive No. (CE/6/2003) issued on 28 January 2003, commonly used as a basis for the fulfilment of public interest as recognised by the European Union.[60] This is also affirmed by Article (52) of the Charter to ensure the integration of European financial markets and the consolidation of investor trust.

2) The total value of the applicable fine may not exceed the maximum limit of the imposed higher sanctions.

On this basis, it is evident that the legitimacy of the principle of accumulation of penalties (i.e. criminal and administrative sanctions) has been subject to a process of modification through a number of procedural developments. For instance, the Coulon Report suggested that public prosecutors should be concerned with evaluating the appropriateness of criminal prosecutions and selecting the most appropriate methods for such prosecution.[61]

In a decision dated 13 September 2017, the Criminal Chamber of the Court of Cassation ruled that the Financial Markets Council did not qualify as a criminal court within the context of the *ne bis in idem* principle. Therefore, it was deemed entirely permissible for the accused, who had previously received sanctions from the Financial Markets Council for actions that were also subject to prosecution before a criminal court, to be found guilty of fraud and subsequently sentenced by the criminal court.[62]

Hence, acts falling under the jurisdiction of independent administrative authorities, tax administration, and administrative courts can be excluded from the offences falling within the jurisdiction of French courts in criminal matters[63]. Additionally, in a decision issued on

59 Pourvoi n 12-83.579 (Cour de cassation, Chambre criminelle, 22 janvier 2014) <https://www.legifrance.gouv.fr/juri/id/JURITEXT000028511881> accede 10 février 2024.

60 ibid.

61 Jean-Marie Coulon, *La dépénalisation de la vie des affaires: Rapport au garde des Sceaux, ministre de la Justice* (Coll des rapports officiels, La Documentation française 2008).

62 Pourvoi n 15-84.823 (Cour de cassation, Chambre criminelle, 13 septembre 2017) <https://www.legifrance.gouv.fr/juri/id/JURITEXT000035574367> accede 10 février 2024.

63 Pierpaolo Rossi-Maccanico, 'A Reasoned Approach to Prohibiting the Bis in Idem: Between the Double and the Triple Identities' (2021) 4 EU Crim 268, doi:10.30709/eucrim-2021-032.

6 December 2017, the Criminal Chamber rejected the application of Article 4P7 to a defendant charged with tax fraud in criminal court, citing that they had already been penalised by the tax administration for the same acts.[64] The Criminal Chamber of the Court of Cassation has determined that the European rule of *non bis in idem* applies exclusively to offences falling under French law within the jurisdiction of courts handling criminal matters. It does not prohibit the imposition of tax sanctions in addition to penalties imposed by the criminal court[65]. This interpretation is supported by the legislative basis in tax law, specifically the first paragraph of Article 1741 of the General Tax Code, which states that prescribed penalties are applicable "independently of any applicable tax sanctions."

6.5. Position of the European Court of Human Rights and the European Court of Justice

The European Court of Human Rights has stated that pursuant to the Convention for the Protection of Human Rights and Fundamental Freedoms; there is indeed a contradiction between the *ne bis in idem* principle in the field of taxes—Article (4) of Protocol No. 7 of the Convention issued on 22 November 1984—and the permissibility of criminal prosecution of the same person in this field, after already incurring another criminal or semi-criminal sanction for the same actions.[66]

However, the European Court of Justice (ECJ) has emphasised that to safeguard the financial interests of the European Union; each member state shall be entitled to determine its own applicable sanctions, as those sanctions may take the form of administrative sanctions, criminal penalties, or a combination of both types. That is, Article (50) does not prohibit the initiation of new criminal procedures to issue a criminal penalty against the same person if the already issued tax sanction is punitive.[67]

The national legislation may authorise criminal proceedings against an individual for failing to pay value-added tax within specified time limits, even if the person has already received a final administrative penalty of a criminal nature for the same acts. This authorisation is contingent upon the legislation aiming to achieve the public interest objective that justifies

64 Pourvoi n 16-81.857 (Cour de cassation, Chambre criminelle, 6 décembre 2017) <https://www.legifrance.gouv.fr/juri/id/JURITEXT000036176844> accede 10 février 2024.

65 Pourvoi n 94-85.796 (Cour de cassation, Chambre crimine, 20 juin 1996) <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007067811/> accede 10 février 2024.

66 *Sergey Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009) <https://hudoc.echr.coe.int/?i=001-91222> accessed 10 February 2024; *Ruotsalainen v Finland* App no 13079 (ECtHR, 16 June 2009) <https://hudoc.echr.coe.int/?i=001-92961> accessed 10 February 2024.

67 Marie-Claire Sgarra, 'La CJUE se prononce sur le cumul des sanctions pénales et fiscales : le juge français au pied du mur!' (*LexBase freemium*, 11 mai 2022) N1397BZR <https://www.lexbase.fr/article-juridique/84739394-breveslacjueseprononcesurlecumuldessanctionspenalesetfiscaleslejugefrancaisaupied> accede 10 février 2024.

any duplication of procedures and penalties, particularly in combating VAT fraud, and ensuring that these measures also serve any additional necessary objectives. Additionally, the legislation must incorporate rules that ensure coordination to minimise the additional harm caused to individuals by duplicative procedures and establish rules to ensure that the severity of all imposed penalties is proportional to the seriousness of the crime committed.[68]

Furthermore, the European Court of Human Rights has decided to evaluate the nature of the imposed sanctions (to decide whether they are criminal penalties or administrative sanctions of a punitive nature) based on their own concept of the criminal field.[69] The European Court of Justice (ECJ) has, however, decided that this discretionary power does not fall within its jurisdiction but is a matter for the criminal judiciary, in accordance with the three major standards as stated by the European Court of Justice (ECJ):

Standard (I): the legal characterisation of the committed action itself as stated by virtue of the internal laws;

Standard (II): the nature of the committed crime itself;

and Standard (III): the nature and grossness of the imposed sanction. In this sense, the national judiciary shall consider and respect all stated national principles concerning the *ne bis in idem* principle, considering that the imposed sanctions shall be effective, proportional, and deterrent.[70]

The European Court of Human Rights, in its landmark judgment A and B vs Norway[71], allowed for an exception to the principle of *ne bis in idem*, which prohibits double jeopardy. It determined that the accumulation of criminal and administrative proceedings is permissible when integrated to form a coherent whole.[72] When the procedures involved are connected by a "sufficiently close material and temporal link,"[73] this link "must be sufficiently close so that the individual is not exposed to uncertainty and delays."[74] Regarding the assessment of the material connection, the Court states that four relevant

68 Case C-524/15 *Luca Menci* (CJEU (Grand Chamber) ECJ, 20 March 2018) <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-524/15> accessed 10 February 2024.

69 *Sergey Zolotukhin v Russia* (n 66); *Ruotsalainen v Finland* (n 66).

70 Case C-617/10 *Aklagaren v Hans Akerberg Fransson* (CJUE (Grand Chamber), 26 February 2013) <https://curia.europa.eu/juris/liste.jsf?num=C-617/10> accessed 10 February 2024; Case C-399/11 *Stefano Melloni v Ministerio Fiscal* (CJUE (Grand Chamber), 26 February 2013) Consid 60: Juris-Data N 2013-004004 <https://curia.europa.eu/juris/liste.jsf?num=C-399/11&language=EN> accessed 10 February 2024; C-570/20 *BV* (CJUE (First Chamber), 5 May 2022) <https://curia.europa.eu/juris/liste.jsf?num=C-570/20> accessed 10 February 2024.

71 *A and B v Norway* (n 54).

72 Rossi-Maccanico (n 63) 268.

73 *A and B v Norway* (n 54) para 130; *Jóhannesson and others v Iceland* App no 22007/11 (ECtHR, 18 May 2017) para 49 <https://hudoc.echr.coe.int/eng?i=001-173498> accessed 10 February 2024.

74 Rossi-Maccanico (n 63) 268.

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elements must be taken into account[75], which, when available, allows the combination of administrative and criminal penalties in separate proceedings to be allowed under four conditions, which are:

(i) the complementary purposes pursued by the proceedings, addressing different aspects of the prohibited conduct;
(ii) whether the duplication of proceedings is a foreseeable consequence, both in law and in practice, of the same prohibited conduct;
(iii) whether there is coordination between the relevant sets of proceedings to avoid duplication in the collection and assessment of evidence and
(iv) the proportionality of the overall amount of the imposed penalties.

7 CONCLUSIONS

The French Constitutional Council has affirmed the constitutionality of independent administrative authorities imposing sanctions, asserting that neither the principle of separation of powers nor any other constitutional principles hinder their legal authority, provided sanctions fall within their jurisdiction. Additionally, the Council has ruled that combining criminal penalties and administrative sanctions is impermissible unless four conditions are met: the action is punishable under the law, both sanctions protect the same social interests, they are of a similar nature, and all proceedings and sanctions fall under the same legal system. These rulings uphold the balance between administrative powers and constitutional principles, ensuring fairness and consistency in the enforcement of penalties.

The French Constitutional Council has adopted varying standards regarding the principle of non-accumulation of penalties, permitting it in certain fields while prohibiting it in others. For example, in tax matters, the combination of criminal penalties and punitive administrative sanctions is allowed based on the severity of the offences. Yet, in the financial sector, it is strictly forbidden. We advocate for extending this principle to the financial domain, aligning with the French Court of Cassation's stance. Regarding the Council's reservations on dual penalties in tax disputes, particularly when imprisonment is involved, legislative intervention for clarity is recommended. The *ne bis in idem* principle should only be restricted when absolutely necessary, requiring clear rules for individuals to anticipate potential duplications in legal proceedings and penalties.

75 Benjamin Ricou, 'Actualité du cumul de sanctions pénales et fiscales : des divergences aux convergences' (*LexBase freemium*, 27 Février 2019) N7870BXR <https://www.lexbase.fr/article-juridique/50112027-lepointsuractualiteducumuldesanctionspenalesetfiscalesdesdivergencesauxconvergences> accede 10 février 2024.

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AUTHORS INFORMATION

Gehad Mohamed AbdelAziz
Dr.Sc. (Law), Associate Professor at the College of Law, United Arab Emirates University, Al Ain, United Arab Emirates; Associate Professor at the College of Law, Zagazig University, Zagazig, Egypt.
gehad_m@uaeu.ac.ae
https://orcid.org/0009-0006-1883-9412
Co-author, responsible for conceptualization, writing, review & editing, and data collection.

Alaa Abouahmed*
Dr.Sc.(Law), Associate Professor at the College of Law, United Arab Emirates University, Al Ain, United Arab Emirates; Associate Professor at the College of Law, Helwan University, Helwan, Egypt.
alaa.m@uaeu.ac.ae
https://orcid.org/0000-0002-2276-260X
Corresponding author, responsible for research methodology, data collection, investigation, writing, review & editing, and supervising.

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Criminal Penalties and Administrative Sanctions. – 6.3.2. Contradiction of the Preferential Approach towards the Accumulation of Criminal and Administrative Sanctions between the Taxation and Financial Law. – 6.3.3. Grossness of Actions is a Standard of Inconsistency and Contradiction concerning the Duality of Sanctions. – 6.4. The Position of the French Court of Cassation and European Judiciary regarding the Accumulation of Criminal Penalties and Administrative Sanctions of Punitive Nature. – 6.5. Position of the European Court of Human Rights and the European Court of Justice. – 7. Conclusions.

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RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

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Research Article

SUBSTANTIVE CRIMINAL PROTECTION FOR THE RIGHT TO IMAGE IN THE DIGITAL ERA UNDER UAE AND FRENCH LEGISLATION

Abdulaziz Alhassan*, Hamoud Tannar, Raed S A Faqir, Alaeldin Mansour Maghaireh and Habis Mshhour Al Fawara

ABSTRACT

Background: *The right to image is considered one of the most important personal rights related to the person, simply because the image does recognise its owner from his or her peers, thus constituting a vital element of one's private life. Accordingly, legal protection of the right to image is highly required on both civil and criminal levels. There is no doubt that such a requirement can be attributed to the notable developments in the field of information technology, and what has been produced by digital devices and misused by people has led to the rapid spread of images in the virtual space, where any individuals have become subject to the violation of their private life. Based on this, the legal provisions of both Emirati and French legislators have adopted legal provisions that would ensure full and substantive criminal protection of the right to image, confirming the criminalisation of all forms of assault on this right, in addition to defining the controls and penalties that shall be applied against these attacks.*

Methods: *To thoroughly tackle our research issue and its consequences, we will employ a descriptive, analytical, and comparative method. This approach is structured to meticulously explore every aspect of the research subject, albeit succinctly, and integrate jurisprudential principles with current judicial precedents.*

Results and Conclusions: *The current research results show that comparative legislation lacks a precise definition concerning the violation of the right to image, thus leaving its interpretation to be determined by jurisprudence and the judiciary. In Emirati and French legal frameworks, this offence is not explicitly delineated but is rather encompassed within regulations safeguarding private life. The right to image is not absolute, with exceptions permitting capturing photographs for public interest. Protection of images is deemed essential within the context of private life rights. While UAE legislation mandates the use of devices for such*

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violations, French law offers flexibility, allowing for various means of perpetration. Both legal systems stipulate that the act must occur in a private, unauthorised context and prohibit alterations to photographs without consent. Unlike UAE law, French legislation imposes penalties for the dissemination of sexually explicit images. Finally, the infringement upon the right to image is categorised as an intentional offence in both legal systems.

1 INTRODUCTION

It should be noted that human rights have undergone several stages of development until reaching the current stage, in which they have become an integrated, indivisible system. Among these rights is one's private life, which has been ensured by divine religions, national constitutions, and international agreements. Besides, criminal laws have been legislated to protect private life from attack or violation.

Developments in the field of information technology and digital devices have unquestionably facilitated the dissemination of images and photos across the virtual space, exposing individuals to potential violations of their privacy. As stated above, certain laws have been legislated for the protection of personal life. Nevertheless, these laws have come up with different concepts of this right that vary in determining the scope of criminal protection.

Due to the exploitation of technological development by some groups or individuals, a new pattern of assault on an image or photo copyright has emerged, such as blackmail, insulting, and defaming the image or photo owner. Thus, information technology and social media sites have become like a curse on the lives of those who would prefer to keep their private lives somehow confidential. Accordingly, Emirati legislation has been obliged to strengthen the protection of people's private lives, with special emphasis on the right to image, as this issue has been subject to increasing violations. As a matter of fact, the protection process of personal images or photos from any type of attack represents, indeed, a noble attempt to save the whole moral entity as defined by laws and religions.

1.1. Research Importance

Criminal protection of the right to image is deemed of great importance in our contemporary lives, as we live in a globalised world in which almost everything is open to everybody. Accordingly, any photo of any person in a private situation can be published on the Internet or via social media, regardless of the reasons behind such action. Yet there is no doubt that it would lead to uncovering one's private life, and thus, it might cause harm to that person's reputation and honour. Such a situation threatens both the individual and society; therefore, it is quite expected that the legislator will interfere to protect this right.

1.2. Research Problem

Our research problem is fundamentally driven by the imperative to scrutinise the robustness of penal provisions in preserving the right to image within the legal reteams of both Emirati and French legislations. Moreover, it is imperative to ascertain the adequacy of the penal provisions in criminalising violations and defining appropriate penalties for such transgressions. Additionally, a comprehensive understanding of the legislator's policy regarding the criminalisation of this type of violation is essential, whether within the traditional criminal law framework or in its modern manifestation aimed at combating rumours and electronic crimes in the UAE Anti-Rumors and Cybercrime Law (34) of 2021.

Yet, the aforementioned research problem can be succinctly encapsulated through a series of questions outlined as follows:

1. What constitutes the concept and nature of the right to image?
2. Is an individual's right to protect their photos absolute or subject to restrictions?
3. What are the limitations and controls surrounding the violation of the right to image?
4. What are the various dimensions of a violation of crimes against the right to image?
5. Does obtaining consent to take someone's photo imply approval for its publication?
6. If image protection is confined to private spaces, how does it apply to public ones?
7. How should we categorise crimes against the right to image – as intentional or unintentional?
8. What types of penalties are appropriate for violations against the right to image?

1.3. Research Plan

There are two primary sections to the current research. The first centres on the provisions related to criminalisation, while the second delves into the numerous penalties imposed by legislators on individuals who commit such crimes.

2 ASPECTS OF OFFENCES PERPETRATED AGAINST THE RIGHT TO IMAGE

It is pertinent to underscore that the elements of an offence against the right to image encompass, firstly, the crime's subject, represented by the photograph of an ordinary individual. Subsequently, consideration should be given to both its tangible and moral dimensions, guided by the stipulations outlined in Article 430 (2) of the UAE Crime and Penal Code, Article 44 of the UAE Anti-Rumors and Cybercrime Law and Article 226 (2) of the French Penal Code.

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2.1. Subject of the Crime (Natural Person Photo)

The infringement upon the right to image is not legally categorised as a crime unless it pertains to a natural person. However, due to the absence of a specific legislative definition of the term "right to image", jurisprudence and the judiciary have relied on a technical definition of this term, in which an image or a photo is defined as a representation of a person or thing, being engraved, sculptured, painted, photographed, or filmed, etc.[1]

In accordance with the aforementioned definition, an image or photograph may depict an individual in a manner that allows for their unequivocal identification by others. However, some might claim that an image or a photo is an optical representation of a certain figure that could be something or someone.[2] In one option, an image or a photo reflects a person's external form,[3] expressing his emotions and feelings and translating the style he adopts or follows to some extent. The Italian jurist François Dini assumes that an image is a distinctive feature of one's individuality and an external imprint of his or her ego.[4] It could alternatively be defined as the fixation or depiction of human physical characteristics through light on any material substrate.[5]

In this context, an image is considered a proprietary object owned by its possessor, serving as a reflective representation of certain attributes of the individual in question. Based on this assumption, we believe that the owners have the right to protect their personal images or photos, i.e., they can be protected by criminal law, which prevents other people from sculpting, taking, or painting them by any means without the owner's consent.[6] This legal authority empowers individuals to initiate legal action against anyone capturing their images without consent, employing either conventional methods or information technology.

As an image or photograph serves as a manifestation of an individual's personality, expressing their concealed feelings and emotions, any transgression against such an image should pertain exclusively to a natural person, namely, an individual of flesh and blood. Moreover, this individual is presumed to be in a private situation unintended for public observation. In other words, criminal protection would be restricted to an image or a photo

1 Talal Abdul Hussein Al-Badrani and Issra Younis Hadi Al-Moulla, 'Criminal Evidence in Cases of Assault on the Right to the Image' (2023) 12 (45/2) Journal of College of Law for Legal and Political Sciences 165.

2 Aladdin Abdullah Fawaz Al-Khasawna and Bashar Talal Al-Moumani, 'The Legal System of the Photograph the Rights and Legal Protections: A Comparative Study on General Rules and Rules for the Protection of Intellectual Property Rights' (2013) 53 UAEU Law Journal 213.

3 Saeed Saad Abdul Salam, *Al-Wajeez on Freedom of the Press and Publishing Crimes* (Arab Renaissance 2007) 126.

4 Reda Muhammad Othman Desouky, *Balancing between Freedom of the Press and the Sanctity of Private Life: A Comparative Study in Egypt and France* (Arab Renaissance 2009) 738.

5 Kadhim Al-Sayed Attia, *Criminal Protection of the Accused Right to Privacy: A Comparative Study of Egyptian, French, American and English Laws* (Arab Renaissance 2007) 345.

6 Saeed Jabur, *Photo Copyright* (Arab Renaissance sa) 24.

that belongs to a person only, where the crime occurs at the moment the picture is taken, regardless of the victim's situation – whether mundane or embarrassing. Moreover, the appearance of the individual in the photo, whether clothed, awake or asleep, is irrelevant. What is important is that the photo belongs to a natural person while being in a private situation, and it has been taken without their consent.

In addition to living people, violations of the right to image include dead people. This interpretation has been adopted by the French Court of Cassation in several decisions,[7] in which photos taken of living or dead people are considered legally prohibited unless there is approval for such behaviour.[8]

Notably, the UAE legislator has confirmed in Article 44 (4) of the Anti-Rumors and Cybercrime Law that violation of the right to image shall extend to all people, including the dead and injured or victims of accidents and disasters unless approval is obtained from the concerned parties.[9]

Conversely, images depicting inanimate objects, animals, and natural scenes are explicitly excluded from the purview of this application. This exclusion persists irrespective of their importance or the potential harm arising from their portrayal, even if they fall within the ambit of intellectual property protection laws. For example, it is not considered a crime if a pet is photographed, transferred, or published without the prior consent of its owner. Nevertheless, civil liability might raise this issue with the related person having to be compensated, but this is another matter. Another example regards inanimate things, such as clothes, house decorations, or souvenirs, that their owners are not inclined to show publicly. If these things are photographed and pictures are published, this act cannot be considered a crime against the right to image.[10]

2.2. Tangible and Intangible Aspects of the Right to Image in UAE and French Criminal Laws

The commission of an offence against the right to an image requires the presence of two primary aspects: tangible and intangible.[11]

7 See, *William Edenn Baronnet c/ Mac Neil Whistler* n°49.16 (Cour de Cassation Première Chambre Civile, 14 mars 1900) D.199-1-497; Cass crim 16 Ferrier 2010 [2020] AJ Penal 7/340; De pourvoi n 97-84.621 (Cour de Cassation Chambre criminelle, 20 octobre 1998) [1998] Bulletin criminel 264/765.

8 Tariq Siddiq Rasheed, *Protection of Personal Freedom in Criminal Law: A Comparative Analytical Study* (Al-Halabi Legal Pub 2015) 222.

9 Khaled Mohmed Al-Daqani, 'Criminal Protection of the Sanctity of the Right to Image within the Scope of Information Technology in Emirati Legislation: A Comparative Study' (2020) 1 Journal of Sharia and Legal Sciences 321.

10 Husam Al-Din Kamel Al-Ahwani, *Respect of Private Life: the Right to Privacy: A Comparative Study* (Arab Renaissance 1978) 76.

11 Ahmed Mohammed Atiya, 'The Essence of the Right to Image: Present Challenges and Future Prospects: A Comparative Study' (2020) 43 Helwan Rights Journal for Legal and Economic Studies 211.

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2.2.1. Tangible Aspect

Emirati and French laws explicitly addressed violations of the right to image, outlining instances where such actions constitute criminal offences, considering the variations in provisions within both legal systems. These laws categorised various manifestations associated with the violation of the right to image, with examination focused on the UAE Crimes and Penalty Code of 2021, the UAE Anti-Rumors and Cybercrimes Law of 2021, and the French Penal Code of 1992.[12] Some manifestations are common across all three laws, while others are specific to individual legal frameworks. Common criminal behaviours in UAE and French laws include capturing, transmitting, recording, and broadcasting photographs, which will be further explored in subsequent paragraphs.

A. Common Manifestations of Criminal Behavior in UAE and French Criminal Laws

Common facets of criminal behaviour within the legal framework of both UAE and French law involve the acts of capturing photographs, transmitting, recording and broadcasting them. The subsequent sections will undertake a detailed exploration of these aspects.

- ***Capturing Photographs***

Engaging in capturing an individual's photos without obtaining explicit approval or consent and subsequently affixing or attacking this photograph to any medium or material is considered a criminal offence.[13] Besides, it is argued that this behaviour shall have the features of a crime even if the perpetrator has failed to establish the photo by using sensitive chemical material.[14] Furthermore, the crime cannot be negated despite the modifications that the perpetrator might make to the photo to delete or add certain features through modern techniques.[15]

Conversely, the commission of the crime does not transpire merely through surveillance, observation, or voyeuristic activities,[16] such as discreetly peeping or observing an individual through a doorhole or an open window, even when the subject is in a compromising situation and wishes to remain unseen by others. Moreover, these circumstances fall beyond the scope of the crime against the right to the image, even if the perpetrators convey what

12 See, Federal Decree Law no (31) of 2021 'Promulgating the Crimes and Penalties Law' art 431-2 <https://uaelegislation.gov.ae/en/legislations/1529> accessed 22 December 2023; Federal Decree Law no (34) of 2021 'On Countering Rumors and Cybercrimes' art 44 <https://uaelegislation.gov.ae/en/legislations/1526> accessed 22 December 2023; French Penal Code of 1992, arts 226-2, 226-3-1 <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719> accessed 22 December 2023.

13 Ali Ahmed Al-Zou'bi, *The Right to Privacy in Criminal Law: A Comparative Study* (Modern Book Foundation 2006) 113.

14 Mustafa Muhammad Musa, *Criminal Investigation into Electronic Crimes* (Police Press 2008) 117.

15 Heba Ahmed Hassanein, *Criminal Protection of Private Life Sanctity* (Arab Renaissance 2004) 467.

16 Raed SA Faqir, 'Digital Criminal Investigations in the Era of Artificial Intelligence: A Comprehensive Overview' (2023) 17(2) International Journal of Cyber Criminology 77.

they have witnessed to others, simply, as the act of seeing or watching is not considered a constituent element of this particular offence. Nevertheless, such conduct may be construed as indecent assault, and the individual committing it may face legal repercussions.

Similarly, the right to image is not violated when binoculars are employed to observe the private lives of others. Likewise, if an individual utilises advanced technological devices emitting rays, enabling them to discern activities transpiring behind walls, there is no substantiation for the aforementioned offence. In both instances, there is no evidence of the related crime since no image or photo has been affixed and later published and transferred to others.

- ***Transmission of Photos***

The term "transmission of photos" refers to relocating an image or photograph from one location to another, irrespective of whether the new place is public or private. The paramount significance is that the person who receives the photo can distinctly discern all the features of the individual depicted in the photo.[17] The preparation of the crime against the right to image occurs regardless of whether the same individual captured and transmitted the photograph or if two separate individuals were involved, one capturing the image and the other affecting its transfer. Under UAE law, both scenarios evolve into a violation crime. For instance, if an individual acquires an image of another individual with consent and subsequently disseminates it on social media sites, the whole process constitutes a criminal offence.[18]

Conversely, the tangible dimension of the crime against the right to image is non-existent when considering a scenario involving a painter or sculptor crafting a depiction of an individual in a private situation and subsequently disseminating it without the owner's consent, regardless of its accuracy. This exemption arises since the implement employed in creating the design is not deemed one of the instruments specified by the legislator for criminalising violations of image rights. This exemption is explicitly evident in Article 431/2 of the UAE Crimes and Penal Code, which stipulates that the image shall be transmitted "by a device of any type."[19] Therefore, we contend that legislative intervention is required to broaden the scope of provisions, encompassing any means employed to execute image capture or transmission. Such an amendment would align with the provisions established

17 Ahmed Al-Sayed Al-Sawadfi Ali Al-Najjar, 'Criminal Protection of the Right to Image: A Comparative Study' (2022) 12(80) Journal of Legal and Economic Research 538.

18 Mahmoud Najeeb Hosni, *Explanation of Penal Code: Special Section* (Judges Club Edition 1981) 764.

19 See, Federal Decree Law no (31) (n 12) art 431(2). This Article states that "anyone who violates the sanctity of private or family life of individuals by committing the following acts, outside of the conditions permitted by law or without the consent of the victim, shall be punished by imprisonment or fine…. (2) Capturing or transmitting a photograph of a person in a private place using any type of device".

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by the UAE Anti-Rumors and Cybercrime Law and mirror the specifications outlined in Article 226/1 of the Penal Code.[20]

In fact, the provision pertaining to the Act of Transfer in the Anti-Rumors and Cybercrime Law aligns with corresponding provisions in the Crimes and Penal Code, save for a singular divergence. Specifically, regarding image transmission, the Anti-Rumors and Cybercrime Law specifies that such transmission must be conducted through any means of information technology or information system.[21]

- ***Preservation of Photos***

The preservation of photos refers to preserving an individual's photographs or images without their consent and approval on a visual device, such as a cellphone or computer, employing technical means to facilitate subsequent viewing or broadcasting.[22]

- **Broadcasting Photos**

According to the UAE Penal Code, broadcasting is defined as the act of making photos associated with an individual's private life accessible to an unrestricted audience or facilitating such access to those individuals. The Emirati legislator has stipulated that publication shall be done on any public device, such as television, cinema, press, or advertisement. Therefore, the offence persists even though the published photos are genuine, provided they pertain to an individual's private life without acquiring their explicit consent.[23] The broadcasting manifestation involves transferring or sending an image from one location to another in a manner that increases the audience following that image. In essence, the act of broadcasting enables the perpetrator to disseminate the image, expanding its viewership to a broader audience.[24]

The Federal Supreme Court of the UAE has rendered a decision specifying that an act of insult perpetrated through the WhatsApp application does not fall within the preview of the Anti-Rumors and Cybercrime Law if it occurs within a confined space, invisible to others, irrespective of whether it transpires in an open space. This decision is attributed to the absence of publicity, primarily due to the configuration of the WhatsApp platform, wherein the content is restricted to the communicators, and no other individuals can access it. It is essential to note, nonetheless, that the provisions of the Crimes and Penal Code do not

20 French Penal Code (n 12) art 226-2 : Est puni d'un an d'emprisonnement et de 45 000 euros d'amende le fait, au moyen d'un procédé quelconque, volontairement de porter atteinte à l'intimité de la vie privée d'autrui: 2° En fixant, enregistrant ou transmettant, sans le consentement de celle-ci, l'image d'une personne se trouvant dans un lieu privé.

21 Hosni Al-Jundi, *Special Criminal Legislation in the United Arab Emirates*, book 3: *Law on Combating Information Technology Crimes* (sn 2009) 135.

22 Muhammad Amin Al-Roumi, *Computer and Internet Crimes* (University Press House 2004) 76.

23 Al-Daqani (n 9) 325-7.

24 Shaaban Mahmoud Muhammad Al-Hawari, 'Criminal Protection of the Right to Image' (2020) 7(2) Journal of Legal Research 63.

extend their jurisdiction to cover it. In this case, the characterisation of the incident shifts from the charge of cursing via information technology to the charge of cursing by a phone.[25]

In accordance with the UAE Anti-Rumors and Cybercrime Law, facilitating viewing of a victim's image or photo by others is mandated through any means of information technology, including various social media websites. The act of publishing is considered to exist if the page privacy settings permit anyone access to and viewing of the content by anyone. In French law, publication should be done by any means, whether traditional or informational.[26]

B. Special Criminal Conducts of Violations against the Right to Image under the UAE Anti-Rumors and Cybercrime Law:

The UAE Anti-Rumors and Cybercrime Law uniquely includes additional facets of criminal conduct related to the infringement of the right to image compared to the UAE Crime and Penal Code. These manifestations involve preparing, disclosing, copying, or preserving the image.

- ***Preparation***

Preparing digital images involves electronically altering others' photos without consent and using information technology tools, such as Photoshop or AI applications, which violates legal provisions. Such manipulation may depict victims in a fabricated scenario, intending to defame or insult them.

- ***Broadcasting***

The broadcasting manifestation involves transferring or sending an image from one location to another in a manner that increases the audience following that image. In essence, the act of broadcasting enables the perpetrator to disseminate the image, expanding its viewership to a broader audience.[27]

- ***Disclosure***

Disclosing an image pertains to allowing others to view that image through the utilisation of information technology, thereby resembling the concept of disclosure.

- ***Copying***

Copying an image entails creating an exact duplicate of the original and temporarily storing it, often using the clipboard or other information technology methods. For instance, someone might replicate a photo from someone's Facebook account without permission. However,

25 App no 248/2018 (UAE Federal Supreme Court, 20 May 2018).

26 Stéphane Detraz, 'Les nouvelles dispositions réprimant les atteintes à l'intimité sexuelle : faire compliqué quand on peut faire simple (Commentaire de l'article 226-2-1 du code pénal issu de la loi n 2016-1321 du 7 octobre 2016)' (2016) 4 RSC Revue de science criminelle et de droit pénal comparé 741.

27 Al-Hawari (n 24) 63.

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copying photos from websites without the owner's consent constitutes a criminal offence, indicating legislative efforts to bolster protection for individual images on social media.

- ***Retention***

Retention refers to unlawfully storing images within an electronic system, either for personal use or dissemination to others' accounts. It is crucial to differentiate between private retention for personal use and public dissemination of these images to other's accounts.[28]

- ***Modifying or Manipulating an Image***

Modifying or manipulating means making alterations, additions, or deletions to another person's image, irrespective of the method through which it is obtained, whether legal or illegal. This behaviour occurs when the perpetrator edits or manipulates the image, regardless of whether the image is subsequently published.[29] The Emirati legislator considers this behaviour a crime against the right to image.[30] Notably, the French legislator, as stipulated in Article 226-8 of the Penal Code, considers the publication of a modified image of individuals without their consent a crime of aggravating circumstances.

C. Manifestations of Criminal Conduct under French Legislation: Voyeurism or Visual Spying

Since 2018, French legislators have stood as the sole authority to criminalise voyeurism or visual spying. Eavesdropping or spying pertains to the intentional invasion of other's privacy, which may involve the use of information technology without the explicit act of capturing photos or recording videos. These practices predominantly target women, focusing on sensitive body parts without their awareness or consent, often occurring in densely populated areas such as public transportation, metro stations, escalators, and other public places. In such environments, females may find it challenging to discern that their privacy is violated due to severe crowding.

Prior to 2018, the French judiciary did not categorise these actions as a crime of sexual assault unless there was physical contact between the perpetrator and the victim.[31] Moreover, these actions were not deemed as crimes of honour assault simply because no violence was inflicted upon the victim. Accordingly, legislative intervention in 2018 included Article 226-3-1 within the French Penal Code, ensuring that those engaged in acts of voyeurism or visual spying could be duly penalised.[32]

28 Ibrahim Abd Al-Nayel, *Criminal Protection of Private Life Sanctity as per French Penal Code* (Arab Renaissance 2000) 6.
29 Al-Daqani (n 9) 364-71.
30 Al-Najjar (n 17) 530.
31 Christine Lazerges, 'Politique criminelle et droit de la pédophilie' (2010) 3 RSC Revue de science criminelle et de droit pénal comparé 731.
32 Detraz (n 26) 747.

Regarding UAE legislation, both the Anti-Rumors and Cybercrime Law and the Crimes and Penal Code lack explicit provisions addressing such cases. It is our belief that these instances could be considered crimes of indecent assault, even in the absence of physical violence by the perpetrators. Certainly, an indecent assault crime involves observing or physically connecting specific parts of the human body considered private or highly sensitive without obtaining the victim's consent. Therefore, the perpetrator would be subject to criminalisation for indecent assault only if these conditions are satisfied. Otherwise, the act itself cannot be considered a crime of indecent assault.[33]

It is noteworthy that criminal behaviour, as manifested in its previous forms, is concretely by tangible actions, rendering the violation of the right to image a positive crime.[34]

2.2.2. Means and location of Violating the Right to Image in UAE and French Legislations

The present section deals with two primary issues: the means employed in committing the crime and where the offence occurs.

A. Means of Violating the Right to Image

The UAE legislator, as per Article 431-2 of the Crimes and Penal Code, defines the violation of the right to image as encompassing the act of capturing photos, recording videos, or transferring them using any device, including modern photographic tools. However, this definition excludes paintings or sculptures created without the use of such devices. Therefore, sculpting or painting a person without his or her consent is not a crime unless these artworks are photographed and shared. It would have been preferable if the Emirati legislation had adopted a broader terminology such as "any means", including information technology to encompass contemporary and future technologies. Despite this, Article 44 of the Anti-Rumors and Cybercrime law expands the scope of image violation, including capturing, transmitting, retaining, and copying images through information technology. However, the decision to segregate the means of committing the crime between the two laws, despite both being promulgated in 2021, lacks reasonable justification. In contrast, French legislation utilises comprehensive language such as "by any means" to avoid the need for specific delineation of traditional or modern devices, as this term inherently covers all potential means used to commit the crime.[35]

It is essential to note that, despite the above confirmations, certain cases involving the sculpturing, painting, or engraving of an individual's mage have been subject to the provisions of Article 45 of Law No. 38 of 2021 regarding Copyright and Related Rights, which addresses the infringement of the right to image. According to this Article, it is strictly forbidden for someone formally designated to capture a photo or record audio or video to retain, show, publish or distribute the original image without the owner's consent.

33 Ahmed Mahmoud Khalil, *Crimes of Indecent Assault and Corruption of Morals: With Comments by the Rulings of the Egyptian Court of Cassation* (Modern University Office 2009) 37.

34 Ahmed Fathi Sorour, *The Mediator in the Penal Code* (Arab Renaissance 1986) 308.

35 Isabelle Lalies, *La protection pénale de la vie privée* (Presses Universitaire d'Aix-Marseille 1999) 45.

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B. Location of Violating the Right to Image

The UAE Crimes and Penal Code, along with the French Law, refrains from criminalising the act of capturing a photo of another natural person unless it occurs in a private place. On the other hand, the UAE Anti-Rumors and Cybercrime Law criminalises capturing a photo of another person through the use of information technology devices, regardless of whether it occurs in a public or private place.

Hence, the tangible aspect of the crime against the right to materialises only when the act of capturing a photo or transmitting it occurs within a private space. This condition is confirmed by Article 431/2 of the UAE Law, which stipulates that any person who commits the act of "capturing a photo of a person in a private place or transmitting it" shall be criminalised, and in cases other than those permitted by law or without the consent of the victim. The justification for criminalising the act of capturing photos of individuals in private without their consent lies in the imperative to safeguard the sanctity of individuals' private lives.

Moreover, there are legal provisions that criminalise capturing photos in private places without the consent of their owners, such as Article 220-1 of the French Penal Code, which criminalises the violation of the privacy of individuals by means of capturing, recording, or transmitting the image of a person without their approval when they are in a private setting where they have a reasonable expectation of privacy. Article 226-2 of the same Code also penalises the invasion of privacy by the use of a person's image without their consent, especially if the image is used for profit or to harm the person's reputation. Article 9 of the French Civil Code also enshrines the right to respect for private life and personal image, as it says that everyone has the right to respect for the private life and personal image, and any unauthorised use or dissemination of a person's image can be considered a violation of this right.

The French Court of Cassation has ruled several times that unauthorised dissemination of a person's private image, especially when capturing in private settings or used for profit without consent, is an invasion of privacy, infringing on individuals' right to preserve their image and potentially amounting to legal liability.[36] In brief, French criminal law does criminalise taking a private photo of a natural person without their permission, particularly when it infringes upon their right to privacy in a private setting.

The contention posits that the crime against the right to image persists when an image of an individual is captured in a private place without his or her consent, regardless of his or her state of undress, whether fully clothed or unclothed. The legal standing of the perpetrator does not affect the commission of the crime. The perpetrator may have gained access to the private space through various means or may be situated remotely yet still able to capture or transmit the photo through the use of advanced devices.[37]

36 De pourvoi n 20-13.753 (Cour de cassation, Chambre civile 1, 2 juin 2021).

37 Raed SA Faqir and Ehab Alrousan, 'Reimagining Criminology: The Transformative Power of the Postmodern Paradigm' (2023) 15(3) Pakistan Journal of Criminology 151.

While both Emirati and French laws underscore that the act in question must take place in a private space for it to be subject to criminalisation, they have not explicitly defined the exact meaning of "private place". This approach aligns with that observed in many comparative penal legislations. Accordingly, jurisprudence and the judiciary have been compelled to grapple with this issue.

Jurisprudence has diverged into two approaches in the attempt to define the concept of a private place. One direction relies on personal criterion for its definition, while the other direction employs an objective criterion in delineating what constitutes a private place. The two approaches can be explained as follows:

- ***Private Place according to Personal Criterion***

Under this criterion, a place is considered private as long as the entry is prohibited without explicit permission from its owner.[38] When a person is in a state of privacy, the associated location and place shall be deemed private. In essence, according to this criterion, the privacy of any place is contingent upon the owner's status, i.e. they are the ones who have the power to determine whether to permit or reject access to their place, thus differentiating between public and private places. Based on that perspective, numerous legal scholars have designated a car a private place, similarly to how a hotel room is considered private.[39] In contrast, the lobby of a hotel is considered a public place, as it is open for access to all without the need for specific permission.

- ***Private Place according to Objective Criterion***

Proponents of this approach define the private place on an objective criterion, where the inherent features of the place determine its classification as public or private. In other words, the design of a place determines that quality, such as parks, squares, streets, cafes, universities, and stadiums, which unequivocally fall under the category of public. Similarly, certain places are considered private by their design and inherent characteristics. For example, a bedroom, for instance, can never be construed as a public space.[40]

The French Judiciary leans towards adopting the objective criterion when defining a private place. Some Courts consider the nature and usage of a place a reflection of the objective criterion in their assessments. However, other Courts have been inclined to adopt the criterion of analysing the facts.

In a notable decision, the French Court of Appeal in the City of Besancon considered the nature and usage of a hotel's reception hall. They determined that the reception hall was a

38 Paulette Kayser, *La protection de la vie privée par le droit: Protection du secret de la vie privée* (3e édn, Economica 1995) 75.

39 Ghanem Mohammed Ghanem, 'Legal Issues Arising from the Use of Surveillance Cameras in Public and Private Places: A Comparative Study' (2021) 45(4) Journal of law 271.

40 Lalies (n 35) 67.

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public place due to its open accessibility to everyone without requiring explicit permission.[41] Thus, the Court's Judgment was rendered based on the nature and usage of the place.[42]

As previously mentioned, certain French Courts have inclined towards establishing a standard grounded in the analysis of facts and tangible elements to determine the nature of a place. This criterion was embraced by the Paris Court of Appeal when categorising hospital rooms as private places. On this basis, this Court convicted a journalist for photographing an artist while she was lying in a private room in a hospital.[43]

Despite the crime against the right to image occurring in a private place, it is essential to acknowledge the existence of other cases where the violation has taken place in a location that cannot be considered private. For example, the French Court of Cassation has regarded the act of capturing a photo of someone in his or her private car as a violation of crime, in accordance with the provisions of Article 226-2 of the Penal Code of France. [44]

On the other hand, some argue that crime against the right to image should be confined to instances occurring in a private place, asserting that capturing a photo in a public place is protected under the freedom of expression guaranteed by Constitutions.[45] Simultaneously, individuals are expected not to freely bring or engage in their private matters in public spaces without any restrictions. Consequently, they may seek protection against intrusions violating their privacy, as per their claims.[46] We advocate for a reconciliation between the two concerns, namely the right to publicise information and the protection of an individual's privacy.

Moreover, we also contend that the legislator's priority is to protect people's rights, recognising them as integral aspects of the moral entity of human beings across all places and periods. It is imperative to acknowledge that the UAE legislator has effectively addressed the matter of combating rumours and cybercrime by considering the commission of the crime against the right to image, irrespective of whether the place is public or private. Consequently, a fundamental criterion for privacy infringement has been established, applicable regardless of the place of its occurrence.

41 Lazerges (n 31) 737.

42 De pourvoi n 11-80.266 (Cour de cassation Chambre criminelle, 25 octobre 2011) [2011] Bulletin criminel 214.

43 Crim, 8 December 1983, BC n 333; D 1985, IR 17, obs Lindon; Gaz Pal 1984, 1, note JP Doucet; RSC 1985, 84, obs Levasseur; Rouen, 19 March 1987, Gaz Pal 1987, 2, somm, 384. Cited by Jameel Abdelbaki Al-Sakeir, 'The Right to Image and Forensic Evidence' (2015) 3(10) Kuwait International Law School Journal 292.

44 Joelle Verbrugge, *Droit à l'image et droit de faire des images* (2e édn, KnowWare 2017) 47.

45 Mashallah Othman Muhammad, 'Criminal Protection of the Image of Person in Human Rights: A study in the French, Bahraini, and Libyan Legislations' (2021) 86 UAEU Law Journal 416.

46 Al-Khasawna and Al-Moumani (n 2) 190.

C. The Individual's Consent or Permission by Law

Article 431 of the UAE Crimes and Penal Code, Article No 44 of the UAE Anti-Rumors and Cybercrime Law, and Article 226-2 of the French Penal Code stipulate that the violation crime against the right to image occurs when the act of capturing or transferring a photo of an individual is carried out without the victim's consent or in circumstances not permitted by law. This section of the current study will address two key issues: the absence of the victim's approval and cases unauthorised by law, as follows:

- *Absence of the Victim's Approval*

For the tangible element of the violation crime against the right to image to be fully realised, the perpetrator must have committed the act, as described previously, without the victim's approval. It is crucial to note that the victim's consent transforms the act, automatically shifting it from the sphere of privacy to the sphere of publicity. In such instances, no crime would be deemed to have occurred.

Based on the aforementioned discussion, this type of crime primarily hinges on the victim's approval or refusal. Nevertheless, it is noteworthy that criminal law places significant emphasis on protecting the interests of society as a whole. However, the legislator has the discretion to consider the victim's consent, leading to the permissibility of the act. Both Emirati and French legislators specify that "if a victim's photo is captured or transmitted with approval, the crime against the right to image does not occur in such cases".[47]

Accordingly, the victim's consent for such infringement of his or her personal rights could be taken as a reason for permissibility, such as, for instance, the approval given by public figures to photographers to capture their photos. It is argued that this permissibility is attributed to the fact that capturing or transferring the photo is for the benefit of such individuals.[48] Meanwhile, it does not harm or threaten the public interests of society in any way. Consent, therefore, may be regarded as a form of limitation or restriction to the violation of the individual's right to image.

However, for the victim's consent to have legal significance regarding capturing, transmitting or publishing a photo, it must be valid consent, i.e. it should be the result of completely free will and not being subject to coercion or deception. Additionally, it must originate from a competent individual with the authority to grant such approval.[49] Furthermore, consent should be confined to the subject in question and not be extended beyond that. It may also be given in exchange for compensation.

47 Ghanem (n 39) 261-2.

48 Mahmoud Najeeb Hosni, 'Criminal Protection of Private Life' (1987) 6 Judges Magazine 270.

49 French Penal Code (n 12) art 226-1. French Law stipulates that if the act of taking or transmitting a photo of a minor is committed, in this case consent must be obtained from those who are in charge of this minor. There is no counterpart to this text in the UAE Law.

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In both Emirati and French laws, consent might also manifest in the form of a presumption.[50] For example, if the photo is captured in a public place during a meeting or an event, being heard and seen by all attendees, their consent is presumed. On the other hand, the assumption does not exist if the photos are captured surreptitiously and without the knowledge of those people.[51]

It is posited that this consent should be obtained prior to the act of capturing or transferring the photo or at least contemporaneously with it. Any approval subsequent to committing the act has no effect since it does not remove what has already occurred. In this specific issue, we note a difference between French and Emirati law. According to French law, subsequent consent shall lead to dropping the crime since the French legislator has considered this act a crime of complaint, based on the provisions of Article 226-6 of the French Penal Code, amended by the Law of 2016 regarding Digital Government. As for the UAE Law, subsequent consent does not affect the realisation of the crime because there is no procedural restriction on the Public Prosecution's Authority to initiate a criminal case, like that of the French Law.[52]

- ***Cases Unauthorised by Law***

The crime against the right to image exists not only due to the victim's absence of consent but also in circumstances not permitted by law. In other words, such an act is not deemed a crime if it is permitted by law, which includes capturing, broadcasting, transmitting, or publishing photos. It is well-known that the law, in certain cases, permits capturing photos of the injured, deceased, or victims of accidents or disasters. Similarly, the law permits photographing public events and activities organised on special occasions, such as covering and broadcasting parliamentary sessions on air.[53]

Furthermore, both UAE and French laws permit the capturing of photos for the public interest, such as publishing a photo of a wanted person. Additionally, surveillance cameras are allowed in banks, airports, shops, and government sites to monitor individuals who visit or work there.[54]

Finally, we should note that both laws allow photographers to take and publish photos of celebrities or famous figures without obtaining approval, provided that these photos are related to public events and avoid private occasions that might negatively affect the personal lives of those figures.[55]

50 French Penal Code (n 12) art 622-1.

51 Nabil Fzai', *Criminal Protection of the Right to Image in Egyptian Law* (Dar Mahmoud Pub & Distribution 2016) 155.

52 Abdel Kader Rahal, 'The Legal Structure of the Crime of Taking and Publishing a Photo in Algerian and French Legislation: A Comparative Procedural Objective Study' (2022) 15(1) Journal of Law and Human Sciences 355-6.

53 Al-Najjar (n 17) 523.

54 Khalid Mustafa Fahmy, *Civil Liability of Journalist for his Work* (New University Pub House 2003) 219.

55 Al-Ahwani (n 10) 278.

2.2.3. Intangible Aspect

It can be noted that the crime against the right to image is considered intentional according to the UAE and French laws,[56] and its moral element takes the form of general criminal intent, mainly based on the elements of knowledge and will. Hence, this crime does not occur if the act of capturing or transmitting a photo has been unintentional, such as when a person inadvertently activates a camera in a private place. By chance, it captures an image of a person present there.

The establishment of general criminal intent "*mens rea*" occurs when the perpetrator is fully aware of capturing, transmitting, or publishing an image/photo utilising a device or some type of electronic information system of an individual in a private place. In other words, the offender must be aware of all the tangible elements, which include the means he or she uses, the nature of the place where the crime is committed, and the lack of consent. If the perpetrator lacks awareness of these elements, the criminal intent in this case is absent, and consequently, the crime does not exist.

In addition to the perpetrator's awareness of the elements that constitute the tangible element mentioned above, the perpetrator's intention must be directed towards committing the crime through the use of a device or a specific technical means without obtaining the victim's consent. Even if all these conditions are met, the crime might not exist if a person captures a photo of a natural scene and is subsequently surprised to find an individual in an intimate state with another person captured in that photo.

Thus, the crime is founded on the elements of knowledge and will, irrespective of the motive, as long as the general criminal intent is present. Nevertheless, it is important to acknowledge that the perpetrator's motive for committing the crime could be to obtain a sum of money, harm the victim, satisfy curiosity, or seek revenge.

Moreover, we may need to address certain forms of image infringement that require not only general criminal intent but also what we may term 'specific criminal intent, as outlined in clause 3 of Article 44 of Anti-Rumors and Cybercrime Law, which stipulates that the crime of capturing and/or publishing of an individual photo with certain changes or modifications shall be accompanied to harm the victim. Such behaviour falls under the category of "specific criminal intent". In essence, the objective behind capturing the photo and altering it is to harm, defame or insult the image owner.

In case of a perpetrator utilising an electronic information system or an information technology means to manipulate or modify another person's image to defame or offend, specific and general intent must be present (Article 44 of the Anti-Rumors and Cybercrime Law).[57]

56 Fadlallah Muhammad Al-Hassan Fadlallah, 'Violation Crime against Private Life Sanctity in Emirati Law: Analytical Study' (2020) 5(44) Generation of In-depth Legal Research Journal 47.

57 ibid 37.

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3 PENALTIES PRESCRIBED FOR THE VIOLATION CRIME AGAINST IMAGE / PHOTO COPYRIGHT

It is noteworthy to highlight that both Emirati and French legislators have established various penalties and measures for all forms of criminal violations of an individual's right to image, encompassing both non-aggravated and aggravated offences.

3.1. Punishment of Simple Form Crimes

The forthcoming subsections deal with the types of punishment for simple-form crimes as outlined by the UAE laws and the French Penal Code; these are as follows:

3.1.1. Punishment according to UAE Penal Legislation

The UAE legislator has stipulated various penalties in terms of amount and duration in Emirati law, Crimes and Penal Code, as well as Anti-Rumors and Cybercrime Laws.

A. Punishment according to UAE Crimes and Penal Code[58]

Article 431-2 of the UAE Crimes and Penal Code stipulates that individuals who capture or transmit a photo of a person in privacy shall be subject to punishment, including imprisonment and a fine.

The analysis of Article 431-2 of the Crimes and Penal Code reveals several key points regarding the punishment for violating the right to image. Firstly, the article mandates that individuals who capture or transmit photos of a person in privacy are subject to imprisonment and a fine without giving the judge discretionary power to select between the two penalties. This dual punishment is obligatory upon the conviction. However, the legislator has not specified the duration of imprisonment or the amount of the fine, entrusting the court with this decision based on the case circumstances while adhering to the prescribed minimum and maximum limits for each penalty.

Since the crime against the right to image is a misdemeanour, the court is required to set the prison sentence within the range of one month to three years, as outlined in Article 72 of the same law. Similarly, concerning fines, the court has the discretion to impose an amount not less than one thousand Emirati Dirhams and not exceeding AED 5 million[59] under Article 72.

58 Federal Decree Law no (31) (n 12).

59 1000 United Arab Emirates Dirham equals (10387.03) Ukrainian hryvnia and 5,000,000 United Arab Emirates Dirham equals (51935169.40) Ukrainian hryvnia, while 1000 United Arab Emirates Dirham equals (251.28 Euro) and 5,000,000 United Arab Emirates Dirham equals to (1,256,384.49 Euro).

It should be noted that the legal provisions stipulate that publicly publishing photos related to the personal lives of families or individuals[60] using a method that lends the act gravity necessitates punishment.[61] If one of these two conditions, i.e. public publishing and privacy, does not exist, the act cannot be considered a crime.

B. Punishment according to Anti-Rumors and Cybercrime Law[62]

Article 44 of the Anti-Rumors and Cybercrime Law stipulates that anyone using a computer network or electronic information system intending to invade someone's life privacy without consent shall be subject to punishment in cases not authorised by law. The penalty involves imprisonment for a period of not less than six months and a fine ranging from AED 150,000 to AED 500,000,[63] or one of these two penalties. These penalties must be imposed in cases of using any IT means with the intention of invading one's privacy without consent and in cases other than those authorised by law in one of the following ways:[64]

1. Anyone who takes photos of others in any public or private place or prepares, transmits, discloses, copies, or keeps electronic images of those people.
2. Anyone who publishes electronic images or photographs to someone, even if they are correct and real, with the intention of harming this person. The legislator here requires availability, i.e. the publication of these photos has been done with the intention to cause harm to the victim, and therefore, the crime does not exist unless there is evidence that they have been published to cause harm, regardless of whether these photos are real or fake.
3. Anyone who takes photos of injured, dead, or victims of accidents or disasters and transmits or publishes them without the permission or approval of concerned people. Here, we note that the legislator links the crime of capturing photos to a lack of permission that should be obtained from public authorities or their families.

60 Article No. 10 of the Crimes and Penal Code stipulates that: "Within the provisions of this Law, they shall be considered methods of publicity: 1. Say or Shout if it happens in public or transmitted by any means in a Crowd, Public Place, or a Place available to the Public; 2. Actions, Signals, or Movements if they occur in a Crowd or in a Public Place or a place available to the Public, or transmitted to someone does exist in these places by any means, or seen by someone who has no involvement in them; 3. Writing, Drawings, Pictures, Symbols, Audio, Visual or Read Materials, Films and other Methods of Expression if they are displayed among a group, or in a Public Place or a place available to the Public or distributed or circulated without discrimination by any means or sold to people or offered to them for sale. anywhere".

61 Al-Jundi (n 21) 204.

62 Federal Decree Law no (34) (n 12).

63 150,000 United Arab Emirates Dirham equals (37,636.81 Euro) and 500,000 United Arab Emirates Dirham equals (125,456.03 Euro).

64 Khalid Iraqi, *Law on Combating Cybercrimes and Rumors: in accordance with Federal Decree Law no (34) of 2021 regarding Combating Cybercrimes and Rumors in the United Arab Emirates* (United Pub & Distribution 2022) 401.

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C. Punishment according to the French Penal Code[65]

Article 226-1 of the French Penal Code stipulates that anyone who intentionally captures, transmits, or records a photograph of another person in privacy without his consent shall be punished with imprisonment and a fine of EUR 45,000. Besides, the French Law, in Article 226-3-1, also punishes anyone who commits the act of visual voyeurism with one-year imprisonment and a fine of EUR 15,000, as well as anyone who resorts to using any means whatsoever to view one's sensitive organs due to the way he or she dresses or being in a closed place, and does not want others to see them in that situation. This Punishment applies to all those who commit the act without the knowledge or consent of the victim.

3.1.2. Complementary Punishments

A. Complementary Punishments according to UAE Crimes and Penal Code:

Article 431 of the UAE Crimes and Penal Code stipulates that in all cases, a judgment shall be issued to confiscate devices and other items that may have been used in the violation of the right to image. Besides, all recordings obtained from those devices shall be destroyed as well.

B. Complementary Punishments according to Anti-Cybercrime Law

Article 56 of the Emirati Anti-Rumors and Cybercrime Law stipulates that if the perpetrator is convicted of committing the violation crime against the right to image, the Court shall order confiscation of the devices, programs, or any means used to commit this crime and even the funds obtained from that act. All recordings, information, or data obtained from those devices shall be destroyed so that they cannot be used again, whereas the confiscation penalty is considered complementary and obligatory, and its imposition shall not prejudice the rights of bona fide third parties.[66]

3.1.3. Penal Measures and Violation Penalty

A. Penal Measures

Article 59 of Anti-Rumors and Cybercrime Law permits the Court, in case of a crime against the right to image, to take any of the following measures:

1. The Court might issue an order to place the convict either under supervision, subject him to an electronic monitoring system, deny him or her of using any IT means, or place him or her in a therapeutic shelter or rehabilitation centre for a period that the court deems appropriate.
2. The Court may completely or partially close the violating site whenever technically possible.
3. The violating website might be blocked completely or partially for the period determined by the court.

65 French Penal Code (n 12).
66 Iraqi (n 64) 505.

B. Violation of Penal Measures

Article 59 of the same law punishes anyone who violates any of the penal measures by imprisonment for a period not exceeding one year or a fine not exceeding AED 5,000.[67] The Court may prolong the imprisonment for a period not exceeding half the original period provided, and the total duration shall not be more than (3) three years, or it might be replaced by another measure as stated above.

3.1.4. Initiation Punishment according to UAE and French Laws

The Emirati legislator punishes the attempt to assault the right as a misdemeanour in the form stipulated in Article 44 of Federal Law on Anti-Rumors and Cybercrimes; based on the provisions of Article 57 of this law, the Emirati legislator penalises any attempt at misdemeanour with half the penalty prescribed for the complete crime.

However, the Emirati legislator does not penalise a misdemeanour attempt to infringe upon the right to image, as stipulated in Article 431 of the Crimes and Penal Code. This law lacks specific provisions for punishing such behaviour. Accordingly, we advocate for legislative intervention to stipulate penalties for attempts to commit crimes against personal images and photos, as it represents a serious violation of one's right to protect his or her photos. In other words, the Crimes and Penal Code should be somehow consistent with the Federal Law on Anti-Rumors and Cybercrimes.[68]

The French Penal Code explicitly stipulates in Article 226-5 that an attempt to capture or transmit one's photo without permission shall be penalised with the same penalty prescribed for a fully committed crime. After all, it is possible to imagine an attempt to violate the right to image, such as, for example, when someone is arrested while trying to capture a photo of an individual in privacy. There is no doubt that this behaviour would be considered an attempt to commit a crime.

3.2. Crime Penalty in Aggravated Form

Both UAE and French laws should be taken into consideration when discussing the crime penalty in aggravated form.

3.2.1. UAE Laws

A. UAE Crimes and Penal Code

Article 431 of the Crimes and Penal Law has determined the penalty to imprisonment for a period not exceeding seven years with a fine if a public employee commits one of the acts constituting a violation of the right to image, based on his or her position of authority.

Therefore, it is quite evident that aggravating circumstances can be applied if the offender is a public employee in accordance with the meaning of Article 5 of the same law, if he has

67 5,000 United Arab Emirates Dirham equals (1,254.56 Euro).

68 Iraqi (n 64) 500.

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committed one of the forms of violation crime stated before, i.e. taking, transmitting, publishing a photo, and exploiting for this purpose the authorities granted to him by virtue of being in a public position.

It should also be noted that the legislator has set a maximum for the imprisonment penalty without identifying a minimum, leaving it to the judge to impose the appropriate penalty. The fine also has to be determined by the court. However, the legislator has made both imprisonment and fine as obligatory punishments.

B. Anti-Rumors and Cybercrime Law

In Anti-Rumors and Cybercrime Law, the legislator distinguishes between two types of aggravating circumstances: specific aggravating circumstances related to violating private life sanctity, including the crime already described above, and general aggravating circumstances associated with committing any cybercrime stipulated in the Anti-Rumors and Cybercrime Law.

Article 44 of the Anti-Rumors and Cybercrime Law includes a few **specific aggravating circumstances**. The Penalties for such type crimes are identified below:[69]

- Article 44 of the Law in question stipulates that anyone who uses an electronic information system, or any IT means, shall be punished with imprisonment for a period of not less than one year and a fine of not less than two hundred and fifty thousand Dirhams and not exceeding AED 5,000, or one of these two penalties. The crime shall encompass any alteration or manipulation of a recording or a photo with the intent to defame or offend another person. It should be noted, however, that three conditions are required to increase the penalty: editing a photo and then publishing it through IT means to defame and insult the photo owner.
- The final paragraph of Article 44 of the Anti-Rumors and Cybercrime Law increases the penalty to imprisonment for a period of no less than one year and a fine of no less than AED 250,000 and not exceeding AED 500,000 for anyone who uses an electronic information system or any technical means to make any modification or manipulation to one's photo to defame or offend the owner of that photo. The Court has the discretion to apply one or both penalties: imprisonment or a fine.

On the other hand, Article 60 of the Law on Anti-Rumors and Cybercrime stipulates **general aggravating circumstances** that apply to the offender who commits any crime stipulated in this Law, which are:

- The perpetrator commits any crime stipulated in the Anti-Rumors and Cybercrime Law by exploiting his or her authorities at work.
- The perpetrator commits any crime stipulated in this Law on behalf of or for the benefit of a foreign country, any hostile, terrorist group, or illegal organisation.

69 ibid 510.

3.2.2. French Law

French law increases the penalty for the violation of a crime against the right to image in the following cases:

1. Publishing a photo of a spouse or partner: Article 226-1 of the Penal Code stipulates that the penalty for a spouse, boyfriend, and victim partner as per a civil solidarity pact who commits an act that includes a violation of right to image shall be increased to two-year imprisonment and a fine of EUR 60,000.
2. Publishing modified photo (Montage Process): Under Article 226-8 of the Penal Code, the penalty for the offender who publishes an image of a person after modifying it intentionally without the victim's approval is one-year imprisonment and a fine of EUR 15,000. It is argued that the punishment increase is attributed to the perpetrator's attempt to change the original photo by adding or deleting certain elements of the image without the victim's consent.[70]

It is remarkable to note that French Law tightens the penalty for modifying the photo by any means, while the UAE Anti-Rumors and Cybercrime Law confines the penalty to those who use electronic information systems or IT means in their modification to the photo. Another difference between the two laws is that the UAE law punishes merely the modification of an image without referring to the publishing process. In contrast, French law stipulates that the perpetrator should be punished for publishing a modified photo, regardless of whether the modification has been carried out by the perpetrator himself or someone else.

However, both UAE and French laws converge on the notion that the modification or publication of a photo must have occurred without the victim's consent and with the intent to harm the involved person.

3. The French Law, in Article No. 226-3-1, increases the penalty for visual voyeurism to up to two-year imprisonment and a fine of EUR 30,000 if this crime is committed by a public employee who exploits the powers granted to them by their position or when the victim is a minor, or suffering from weakness, due to age, illness, physical disability, mental or psychological conditions, or because of pregnancy, whether being apparent or known by the perpetrator, or when the crime is committed by more than one person, whether they are perpetrators or accomplices, or it has been committed on public transportation, or in a place designated for access to public transportation, or when photos of the victim's sensitive organs are taken, published, or recorded.
4. Publishing photos of a sexual nature: In Article 226-2-1 of the Penal Code, the French legislator has increased the penalty for the offender who publishes a photo of a person, whether in a public or private place, that is of a sexual nature or related

70 ECtHR, *Right to the protection of one's image: Factsheet* (Press Unit ECtHR 2021).

to sexual matters, to become two-year imprisonment and a fine of EUR 60,000. This penalty is applied even if the victim consents to having a photo of a sexual nature taken,[71] but does not agree to publishing. This has become a common case nowadays due to the development of information technology.[72]

The French legislator has done well in enshrining this text, which accurately addresses the case of the perpetrator who obtains the victim's photos with his/her consent but is published without approval for various reasons. With this text, the French legislator has put an end to the impunity of these perpetrators in such cases.[73]

4 CONCLUSIONS AND RECOMMENDATIONS

In this research, we intend to offer a comprehensive overview of the violation of the right to image, delineating it into two main parts. The first part is related to the elements of the crime, while the second is dedicated to the penalties prescribed for this type of crime, whether in its simple or aggravated forms. From our analysis, several conclusions and recommendations have emerged.

4.1. Conclusions

Comparative legislation has not identified a specific definition of a crime against the right to image, leaving this matter to the consideration of jurisprudence and the judiciary.

Emirati and French law have not included independent provisions regarding the crime against the right to image due to its inclusion within the framework of rules governing the protection of private life.

The right to image is not absolute; instead, it is subject to exceptions that allow the capture and publication of a photo when it serves the public interest.

Image or photoprotection is considered one of the rights associated with the elements of private life.

The UAE Crimes and Penal Code requires the use of any device to commit a crime against the right to image, whereas the UAE Anti-Rumors and Cybercrime Law stipulates that this crime is committed exclusively by means of information technology. The French Law, on the other hand, states that the crime can be committed by any means.

71 Detraz (n 26) 741.

72 De pourvoi n 15-82.039 (Cour de cassation Chambre criminelle, 30 mars 2016) [2016] Bulletin criminel 112.

73 Catherine Berlaud, 'QPC: diffusion d'enregistrements présentant un caractère sexuel' (*Lextenso*, 5 octobre 2021) <https://www.actu-juridique.fr/breves/qpc/qpc-diffusion-denregistrements-presentant-un-caractere-sexuel/> accédé 22 décembre 2023.

Consenting to capture a photo does not automatically grant permission to publish it. Explicit consent is typically required for publication, especially for commercial use or if the photo could be seen as invasive or defamatory. Context matters and legal frameworks vary by jurisdiction, with special considerations for public figures and minors. Additionally, contractual agreements in professional settings may dictate photo ownership and usage rights.

UAE and French law stipulate that the crime against the right to image does not exist unless committed privately and without obtaining permission.

The UAE Anti-Rumors and Cybercrime Law and the French Penal Code criminalise modifying or processing a Photo without the victim's approval.

The French Penal Code punishes with a severe penalty anyone who publishes a photo of a person in a sexual situation, while there is no such penalty in the UAE legislation.

Finally, it is essential to note that the crime against the right to image is categorised as an Intentional offence.

4.2. Recommendations

Listed below are some vital recommendations.

We propose that the second clause of Article 431 of the UAE Crimes and Penal Code shall be amended by replacing the statement "anyone captures or transmits, by any device, a photo of a person in private" with the following provision: "anyone captures or transmits, by any means, a photo of a person in private", similar to that of the French Penal Code.

We recommend that the Emirati legislator devote a special text to criminalising the violation of the right to image without the victim's consent through the acts of painting, sculpturing, engraving, publishing, or distributing.

We suggest that the UAE legislator amend Article No. 431 of the Crimes and Penal Code to criminalise taking a photo of another person without his consent, whether in privacy or at a public place, similar to the text in the Anti-Rumors and Cybercrime Law.

It would be better if the UAE legislator in the Crimes and Penal Code criminalises violations of the right to image through deleting, adding, or distorting, similar to what is stipulated in the Anti-Rumors and Cybercrime Law.

Finally, we do recommend that the Emirati legislator introduce a new text, whether in the Crimes and Penal Code or in the Anti-Rumors and Cybercrime Law, under which anyone who publishes an image of another person in a sexual situation or of a sexual nature without the approval of related people shall be criminalised, similar to that of the French Penal Code.

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AUTHORS INFORMATION

Abdulaziz Alhassan*
Dr.Sc. (Law), Department of Public Law, Faculty of Law, Ajman University, Ajman, United Arab Emirates
a.alhassan@ajman.ac.ae
https://orcid.org/0009-0006-5514-672X
Corresponding author, responsible for research methodology, data collection, writing, and supervising.

Hamoud Tannar
Dr.Sc. (Law), Department of Public Law, Faculty of Law, University of Sharjah, Sharjah, United Arab Emirates
htannar@sharjah.ac.ae
https://orcid.org/0009-0002-0934-5374
Co-author, responsible for conceptualization, writing, and data collection.

Raed S A Faqir
Dr.Sc. (Law), Department of Public Law, Faculty of Law, American University in the Emirates, Dubai, United Arab Emirates
r.faqir@cuca.ae
https://orcid.org/0000-0002-6102-0983
Co-author, responsible for conceptualization, writing, and data collection.

Alaeldin Mahsour Maghaireh
Dr.Sc. (Law), Department of Public Law, Faculty of Law, Ajman University, Ajman, United Arab Emirates
a.maghaireh@ajman.ac.ae
https://orcid.org/0000-0001-9248-1195
Co-author, responsible for conceptualization, writing, and data collection.

Habis Mshhour Al Fawara
Dr.Sc. (Law), Department of Criminal Law, Faculty of Law, Naif Arab University for Security Sciences, Riyadh, Saudi Arabia
halfawara@nauss.edu.sa
https://orcid.org/0009-0008-0298-7562
Co-author, responsible for conceptualization, writing, and data collection.

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RIGHTS AND PERMISSIONS

REVIEW ARTICLE

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Review Article

E-WASTE MANAGEMENT SYSTEM IN UKRAINE: LEGAL FRAMEWORK AND SWOT-ANALYSIS

Euvgenia Nosova*, Olena Iafinovych, Nataliia Miedviedkova, Vitalina Delas, Nataliia Plieshakova

ABSTRACT

Background: *Waste management has been the subject of interest for both Ukrainian and foreign scientists. While Ukrainian researchers have studied waste management and focused on the viability of waste incineration for economic and environmental protection, foreign scientists have directed their attention towards examining the environmental impact of electronic devices. By analysing complex issues related to social-ecological systems, these foreign scientists have studied e-waste management (EWM) approaches to guarantee environmental sustainability and raise public knowledge of EWM. This comparative scrutiny has revealed a research gap, prompting the need to investigate the current state of the e-waste management system (EWMS) in Ukraine to determine the directions for improving EWM.*

Methods: *To meet the objectives outlined in this paper, various scientific and specialised methods were employed. The structural-functional method was used to consider stakeholders' interests and level of influence in the EWMS by dividing them into four groups. A SWOT analysis was performed to determine the EWMS's opportunities, threats, weaknesses, and strengths. The comparison method was used when Ukraine's regulatory framework in the EWMS was approximated and compared with EU legal actions.*

Results and Conclusions: *The study examined stakeholders' interests and level of influence over EWMS, categorising them into four categories: KEEP INFORMED (mass media), MANAGE CLOSELY (the Ukrainian Cabinet of Ministers, various ministries, and state organisations in Ukraine), KEEP SATISFIED (the President of Ukraine and Verkhovna Rada of Ukraine), and KEEP INFORMED + TWO-WAY COMMUNICATION (international organisations, non-governmental and public organisations, activists, and environmental organisations). A SWOT analysis revealed the EWM system's advantages, disadvantages, opportunities, and threats. Taking these factors into account will advance the deployment of EWMS in Ukraine and provide insight into the issues impeding its advancement.*

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Our analysis of Ukraine's EWM regulatory framework and its adherence to EU law enabled us to conclude that, to effectively manage all waste streams, including e-waste flows, national sectoral laws and regulations that consider international standards and progressive foreign experience should be adopted as the next step in reforming the waste management sector.

1 INTRODUCTION

In modern society, electrical and electronic equipment (EEE) permeates every aspect of daily life. Society's increasing informatisation accelerates equipment obsolescence, prompting enterprises to increase production volumes of constantly updated products. However, the quality of these new products is diminishing, resulting in decreased reliability and shortened service life. Repairing such products often proves impossible or extremely expensive compared to purchasing new equipment. Consequently, this leads to an increase in the consumption of EEE and, consequently, the generation of e-waste. Alarmingly, e-waste accumulates three times faster than other waste.[1]

Global statistics paint a concerning picture: in 2016, 44.7 million tons of e-waste[2] were generated worldwide, in 2019 - 53.6,[3] in 2021 - 57,[4] and in 2023 - 61 million tons.[5] According to forecasts, in 2030, their volume will be 74.7 million tons[6]; that is, it will increase by 22.5% compared to 2023 (over seven years). According to the Global Monitoring of Electronic Waste,[7] 324,000 tons of e-waste were generated in Ukraine in 2019, averaging 7.7 kg per person. However, calculations by the NGO Let's Do It GREEN Ukraine suggest a higher figure of 28.5 kg per person annually in Ukraine.[8]

1 Marija Pazynich, 'E-Waste: Market Analysis and Disposal Issues' (*Ukrainian Society for Nature Conservation*, August 2013) <http://www.ukrpryroda.org/2013/08/blog-post_10.html> accessed 19 September 2023.

2 PACE, *A New Circular Vision for Electronics: Time for a Global Reboot* (World Economic Forum 2019) <https://www.weforum.org/publications/a-new-circular-vision-for-electronics-time-for-a-global-reboot> accessed 19 September 2023.

3 Vanessa Forti and other, *The Global E-Waste Monitor 2020: Quantities, Flows, and the Circular Economy Potential* (UNU/UNITAR, ITU 2020) <https://collections.unu.edu/view/UNU:7737#viewAttachments> accessed 29 October 2023.

4 'We Dispose of Old Equipment Correctly: Where to Donate Power Banks, Smartphones and other Devices' (*We are Ukraine*, 22 September 2023) <https://weukraine.tv/top/utylizovuyemo-staru-tehniku-pravylno-kudy-zdavaty-poverbanky-smartfony-ta-inshi-prylady/> accessed 29 October 2023.

5 Gavin Miller, 'E-Waste Day 2023: Is it time to dial back on how we treat our tech?' (*Sustainable Future News*, 11 October 2023) <https://sustainablefuturenews.com/features/e-waste-is-it-time-to-dial-back-on-how-we-treat-our-tech/#_ftn2> accessed 29 October 2023.

6 Forti and other (n 3).

7 ibid (n 3).

8 'Culture of E-Waste Management in Ukraine: Launch of the first E-Waste Ukraine in Ukraine' (*Ukrinform*, 3 December 2020) <https://www.ukrinform.ua/rubric-culture/3148300-v-ukraini-startuvav-ekoproekt-zi-zboru-elektronnogo-smitta.html> accessed 29 October 2023.

In general, data on the volume of e-waste generation in Ukraine can be obtained based on EEE sales. Despite challenges such as the reduction in electronics sales due to wartime conditions in 2022 (3.3 million smartphones and 657,000 mobile push-button phones were sold, 32% and 42% less than in 2021, respectively),[9] there has been a demand for EEE, such as batteries, chargers and starting chargers, etc.[10] These data give grounds to assert that, despite the hostilities in Ukraine, the volume of e-waste formation shows growing trends.

Household and office EEE contain a large number of hazardous compounds and substances, the release of which into water and soil, causing colossal damage to the environment and, as a consequence, to human health. Although e-waste represents a relatively small portion of municipal solid waste (estimated at 6.8%, according to the RPE "Ecological Laboratory"[11] and 2%, according to the PACE report),[12] its level of danger to nature and human health is colossal. Thus, the RPE "Ecological Laboratory" determines that e-waste in landfills provides 40% of the heavy metals entering water and soil. Meanwhile, the PACE report[13] suggests that it could account for up to 70% of hazardous waste in landfills.

At the same time, e-waste also contains useful, expensive elements (gold, silver, platinum, copper, iron, aluminium) that can be reused. After all, their primary extraction is a costly process. Thus, modern human management requires both measures to reduce the rate of generation of this type of waste and proper handling (reuse, recycling, recovery and disposal). This will not only be a significant contribution to the preservation of the ecosystem and human health but also to the development of the economy.

Specialised enterprises have the capacity to reuse up to 80% of e-waste components, significantly contributing to resource conservation and recycling efforts. The annual cost of e-waste in the world in 2019 amounted to $62,5 billion, surpassing most countries' GDP. However, despite the economic potential, the PACE report[14] indicates that only 20% of all e-waste is collected and recycled globally, and in Ukraine, according to the Global Monitoring of Electronic Waste,[15] the recycling rate was 12,3% of the total amount of generated e-waste in 2019.

9 Oleksandr Sharipov, 'During the Great War, the Smartphone Market Fell by a Third, and Push-Button Mobile Phones – by more than 42%' (*Forbes*, 8 February 2023) <https://forbes.ua/news/rinok-smartfoniv-pid-chas-velikoi-viyni-vpav-na-tretinu-knopkovikh-mobilnikh-na-ponad-42-08022023-11592> accessed 29 October 2023.

10 '"Epicenter" has Sold almost 30 thousand Generators Since the Start of the Shelling of Energy Infrastructure' (*Interfax-Ukraine*, 22 March 2023) <https://interfax.com.ua/news/economic/899194.html> accessed 15 November 2023.

11 Culture of E-Waste Management in Ukraine (n 8).

12 PACE (n 2).

13 ibid (n 2)

14 ibid.

15 Forti and other (n 3).

Taking into account the indicated threats to environmental safety and, as a consequence, to economic security, the purpose of this article is to study the practical aspects of e-waste handling in the context of EWM and provide recommendations for its improvement, which is a prerequisite for improving the environment, social standard of living and ensuring environmental safety.

Recent examination of current research and publications underscores the pressing need to address Russia's armed aggression and safeguard Ukraine alongside ongoing environmental concerns. Despite the turmoil, environmental issues and environmental protection remain important. Every day, experts record environmental damage, which, as of January 2024, is estimated at more than $56 billion (excluding mined and occupied territories of Ukraine)[16] and is growing daily.

Ukrainian scientists such as O. Skoryk,[17] A. Voitsikhovskaya, O. Kravchenko, O. Melen-Zabramna, and M. Pankevich[18] have made notable contributions to the discourse on waste management. They have considered the best European practices for preventing waste generation, reuse and recycling, focusing on the feasibility of both economic and environmental protection of waste incineration.

Additionally, scientists like I. Krajnov, V. Krylyuk, E. Shago, and V. Bakharev have focused on environmental safety management in the field of e-waste.[19] Meanwhile, foreign scientists, such as Samuel Abalansa, Badr El Mahrad, John Icely, and Alice Newton,[20] used the DPSIR framework in their research to analyse complex problems associated with social-ecological systems and LCA life cycle assessment for analysis of the environmental impact of electronic devices from their production to recycling.[21] A group of scientists, such as Rahul S Mor, Kuldip Singh Sangwan, Sarbjit Singh, Atul Singhc, and Manjeet Kharub,[22] researched EWM techniques to ensure environmental sustainability and people's awareness of EWM.

16 'Andriy Yermak and Margot Wallström held the fifth meeting of the International Working Group on the Environmental Consequences of War' (*President of Ukraine*, 8 January 2024) <https://www.president.gov.ua/en/news/andrij-yermak-i-margot-valstrem-proveli-pyate-zasidannya-miz-88149> accessed 18 January 2024.

17 O Skoryk, 'Forming the Economic Mechanism of Electronic Waste Management in Ukraine' (2017) 2 Efficient economy <http://www.economy.nayka.com.ua/?op=1&z=5433> accessed 18 January 2024.

18 Alla Voitsikhovskaya and other, *Best European Waste Management Practices: Manual* (Olena Kravchenko ed, Manuscript Company 2019).

19 IP Krajnov and other, 'Ecological Safety Management in the Field of Waste Electrical and Electronic Equipment' (2012) 1 Ecological Safety 13.

20 Samuel Abalansa and other, 'Electronic Waste, an Environmental Problem Exported to Developing Countries: The GOOD, the BAD and the UGLY' (2021) 13(9) Sustainability 5302, doi:10.3390/su13095302.

21 M Khurrum S Bhutta, Adnan Omar and Xiaozhe Yang, 'Electronic Waste: A Growing Concern in Today's Environment' [2011] Economics Research International 474230, doi:10.1155/2011/474230.

22 Rahul S Mor and other, 'E-Waste Management for Environmental Sustainability: An Exploratory Study' (The 28th CIRP Conference on Life Cycle Engineering, Jaipur, India, 10-12 March 2021) vol 98, 193, doi:10.1016/j.procir.2021.01.029.

In terms of methodology, the article uses the Ukrainian regulatory framework and EU directives to analyse Environmental Waste Management Systems (EWMS). This analysis incorporates legal, professional and regulatory documents, serving as valuable resources for stakeholder analysis and constructing a SWOT analysis of the EWMS in Ukraine. Furthermore, the analysis of EWM practices is based on information gathered from mass media and information available on the websites of Ukrainian and international organisations.

2 RESEARCH RESULTS

2.1. Regulatory Support for E-Waste Management in Ukraine and its Compliance with EU Legislation in this Area

Ukraine's acquisition of candidate status for EU membership in June 2022 motivates and obliges it to gradually bring national legislation into line with EU directives in this area. It should be noted that the European Parliament and the Council of the European Union are constantly modernising environmental regulations, which are becoming more stringent every year. Thus, Directive 2015/863 (known as RoHS3)[23] expands the list of hazardous substances (four more are added) and imposes restrictions on their use in EEE; from 2018, Directive 2012/19/EU[24] applies to all EEE, even though e-waste previously only covered certain equipment of this kind.

Furthermore, starting from December 2020, revisions to directives concerning the handling of batteries and accumulators, including waste batteries, led to the adoption on 12 July 2023 by the Council of the European Union of a new Regulation (EU) 2023/1542[25] on batteries and waste batteries. This provision will regulate the entire life cycle of batteries - from production to reuse and recycling, in connection with the ban on smartphones without a removable battery; at the end of 2022, the EU approved the introduction of a single standard for chargers (USB Type-C),[26] the transition period for which for small electronic gadgets is 24 months from the date of approval (i.e. from the fall of 2024), for laptops - 40 months.

23 Commission Delegated Directive (EU) 2015/863 of 31 March 2015 amending Annex II to Directive 2011/65/EU of the European Parliament and of the Council as regards the list of restricted substances (Text with EEA relevance) [2015] OJ L 137/10.

24 Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) (recast) (Text with EEA relevance) [2012] OJ L 197/38.

25 Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC (Text with EEA relevance) [2023] OJ L 191/1.

26 Directive (EU) 2022/2380 of the European Parliament and of the Council of 23 November 2022 amending Directive 2014/53/EU on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment (Text with EEA relevance) [2022] OJ L 315/30; Commission Delegated Regulation (EU) 2023/1717 of 27 June 2023 amending Directive 2014/53/EU of the European Parliament and of the Council as regards the technical specifications for the charging receptacle and charging communication protocol for all the categories or classes of radio equipment capable of being recharged by means of wired charging (Text with EEA relevance) [2023] OJ L 223/1.

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Currently, the domestic legal framework for waste management consists of fundamental legislative acts, including the Laws of Ukraine "On Environmental Protection"[27] and "On Waste Management"[28] (known as "On Waste" until 9 July 2023),[29] alongside legislative acts relating to individual flows waste. However, significant legislative developments in this direction do not yet allow us to discuss the functioning of a modern and effective waste management model in Ukraine.

A pivotal step towards reforming the waste management system commenced on 9 July 2023, with the official initiation of reforms entry into force of the framework Law of Ukraine "On Waste Management". This legislation marks a significant milestone as it integrates fundamental European principles and provisions into Ukraine's waste management framework. Key elements introduced by this law include:

- a system of long-term waste management planning at all levels of management (national, regional, and local);
- hierarchy of waste management, which is the determination of the priority order for the protection of the natural environment for the management of waste of all types;
- extended producer responsibility (EPR), which is based on the "polluter pays" principle;
- gradual creation of modern infrastructure and waste collection and treatment facilities;
- improvement of waste management processes, incl. licensing and permitting systems and information support in waste management.

The law is the basis for the development of sectoral legislation.[30] The sectoral bills are intended to give rise to the system of EPR, which is especially significant for the management of e-waste. Implementing EPR will allow the use of new methods and tools for e-waste collection and make this process as efficient as possible (for example, by organising the collection of EEE at their points of sale or by manufacturers). Currently, collection points in Ukraine are voluntarily funded by the environmentally responsible corporate sector. Since waste is accepted by the population free of charge, the activities of such centres are unprofitable.

Table 1 shows the steps taken by the central authorities to modernise Ukraine's regulatory framework regarding e-waste in accordance with EU law. Among the priority areas of government activity in waste management regulation is the development of completely new regulatory initiatives for managing batteries, accumulators, and e-waste.

27 Law of Ukraine no 1264-XII 25 June 1991 "On Environmental Protection" [1991] Sheets of the Verkhovna Rada of Ukraine 41/546.

28 Law of Ukraine no 2320-IX of 20 June 2022 'On Waste Management' [2023] Sheets of the Verkhovna Rada of Ukraine 17/75.

29 Law of Ukraine no 187/98-VR of 5 March 1998 'On Waste' [1998] Sheets of the Verkhovna Rada of Ukraine 36-37/242.

30 Law of Ukraine no 2320-IX (n 28).

***Table* 1. Comparative analysis of the approximation of the regulatory framework of Ukraine in the EWMS with EU legal acts**

Current regulatory legal act of Ukraine	Current EU/EEC legislation
1. Law of Ukraine "On Waste" dated 5 March 1998 No. 187/98-VR (repealed 09.07.2023) Law of Ukraine "On Waste Management" dated 20 June 2022, No. 2320-IX (came into force on 9 July 2023); 2. Procedure for waste classification (20 October 2023); 3. National list of waste (20 October 2023); 4. Resolution of the Cabinet of Ministers of Ukraine dated 30 June 2023, No. 667 "On approval of the Procedure for the development and approval of regional waste management plans"; 5. Guidelines for the development of regional waste management plans (10 September 2021)	Directive (91/689 / EEC) "On hazardous waste"; Directive (2008/98 / EU) "Waste and repealing certain Directives'
1. Law of Ukraine "On Chemical Current Sources" dated 23 February 2006 No. 3503-IV; 2. Regulations on the procedure for collecting and recycling used lead-acid batteries (31 December 1996); 3. Rules for the operation of rechargeable lead starter batteries of wheeled vehicles and special machines made on a wheeled chassis (2 July 2008).	Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 on batteries and waste batteries
1. Guidelines for the collection of waste electrical and electronic equipment contained in household waste (22 January 2013); 2. Technical Regulations for Restricting the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (10 March 2017).	Directive (2011/65/EU) on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS 2) Directive (2012/19/EU) on waste electrical and electronic equipment (WEEE 2)

The draft Law of Ukraine, "On Electrical and Electronic Equipment and Waste Electrical and Electronic Equipment," developed by the Ministry of Environmental Protection and Natural Resources of Ukraine, has been under public discussion since 26 December 2023.[31]

31 'Notice of promulgating the draft Law "On Electrical and Electronic Equipment and Waste Electrical and Electronic Equipment"' (*Ministry of Environmental Protection and Natural Resources of Ukraine*,

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It should be noted that Ukraine demonstrates a systematic approach to modernising its waste management system. This happens through the development and approval of national plans in this area. These plans represent a comprehensive vision of the measures that need to be implemented by the state on the path to reforming waste management - from the adoption/improvement of regulations to introducing new technologies and creating the necessary infrastructure.

Thus, in 2017 and 2019, the National Strategy and the National Waste Management Plan until 2030 were adopted, respectively.[32] To bring into compliance with the requirements of the new framework Law of Ukraine "On Waste Management" and European standards on the structure of these documents, in 2023, the Ministry of Environmental Protection and Natural Resources of Ukraine, together with European experts, developed the National Waste Management Plan of Ukraine until 2033 of the year.[33]

A strategic environmental assessment for the new document was launched in December 2023, and its adoption is scheduled for 2024. For the first time, this plan contains separate components - a biowaste reduction program and a waste prevention program, the last of which plays an important role in EWM. In addition, an innovation of the National Plan until 2033 is the development of indicators for monitoring and evaluating the plan's implementation according to EU standards. It is planned that the source of data for this assessment will be data from the waste management information system designed for waste accounting and reporting, transfer of waste from the generator to the processor, and obtaining a license for hazardous waste management[34]. Creating a waste management information system provides the state, the public, and residents of populated areas with information about the volume of waste generated in the territory, waste management operations, etc. Based on foreign practice, the Ministry of Environment launched an

26 December 2023) <https://mepr.gov.ua/povidomlennya-pro-oprylyudnennya-proyektu-zakonu-pro-elektrychne-ta-elektronne-obladnannya-ta-vidhody-elektrychnogo-ta-elektronnogo-obladnannya> accessed 15 January 2024.

32 Resolution of the Cabinet of Ministers of Ukraine no 820-r of 8 November 2017 'On approval of the National Waste Management Strategy in Ukraine until 2030' <https://zakon.rada.gov.ua/laws/show/en/820-2017-%D1%80?lang=uk#Text> accessed 21 November 2023; Resolution of the Cabinet of Ministers of Ukraine no 117-r of 20 February 2019 'On approval of the National Waste Management Plan until 2030' <https://zakon.rada.gov.ua/laws/show/117-2019-%D1%80#Text> accessed 21 November 2023.

33 'Draft National Waste Management Plan for Ukraine until 2033' (*Ministry of Environmental Protection and Natural Resources of Ukraine*, November 2023) <https://mepr.gov.ua/diyalnist/reformy/efektyvne-upravlinnya-vidhodamy/?fbclid=IwAR0UM_1pZGmvlTUxuzbLR0xiHxbl7C7tPk__PUec-t_RYQ1jgzYzwg8tJmc> accessed 10 January 2024.

34 'How to Work in a Waste Management Information System?' (*Ministry of Environmental Protection and Natural Resources of Ukraine*, 29 August 2023) <https://mepr.gov.ua/yak-pratsyuvaty-u-informatsijnij-systemi-upravlinnya-vidhodamy/> accessed 20 December 2023.

information system in December 2023, which considered business proposals for its improvement based on beta testing.

It should be noted that the national plans approved until 2030 in this area involve the identification of two subsystems - the managing (legislative and executive authorities) and the managed (business entity). In conditions of decentralisation, regional and local governments play an important role in building a waste management system. Their focus is exclusively on improving household waste management, including e-waste. They act as an intermediate link, on the one hand, between central government bodies and local communities and economic entities, on the other hand. That is why it is worth noting the domestic practice of developing regional waste management plans, which began in 2020 and improved with the adoption of the Law "On Waste Management," as an important element of the entire system, where special attention is paid to the EWM.

So, in order to properly manage all waste streams, including e-waste flows, the next step in reforming the waste management sector should be adopting appropriate packages of national sectoral laws and regulations, which should consider the progressive experience of foreign countries and international standards.

2.2. Stakeholders in the E-Waste Management System

After studying the regulatory framework in the EWMS, it is advisable to move to its institutional component, consisting of stakeholders. Let us analyse stakeholders' degree of impact and interest by putting them into four sectors (Fig.1).

Veto players are the main stakeholders providing support, and their absence makes it impossible to achieve the target results of political initiatives. At the same time, such stakeholders can veto the program and block its implementation. The President of Ukraine and the Verkhovna Rada of Ukraine are such stakeholders.

The "KEEP SATISFIED" sector includes central authorities vested in improving the environmental situation nationwide.

The relevant ministries and other executive authorities related to the "MANAGE CLOSELY" sector are assigned specific missions to improve the environment and ecological situation. The degree of interest of the Cabinet of Ministers of Ukraine is evidenced by the latest developments in strategic documents on the importance and priority of environmental safety. Local authorities are interested in achieving the target indicators for waste management. At the same time, they require infrastructure and budget optimisation for waste management, which is extremely difficult due to the priority tasks for the front.

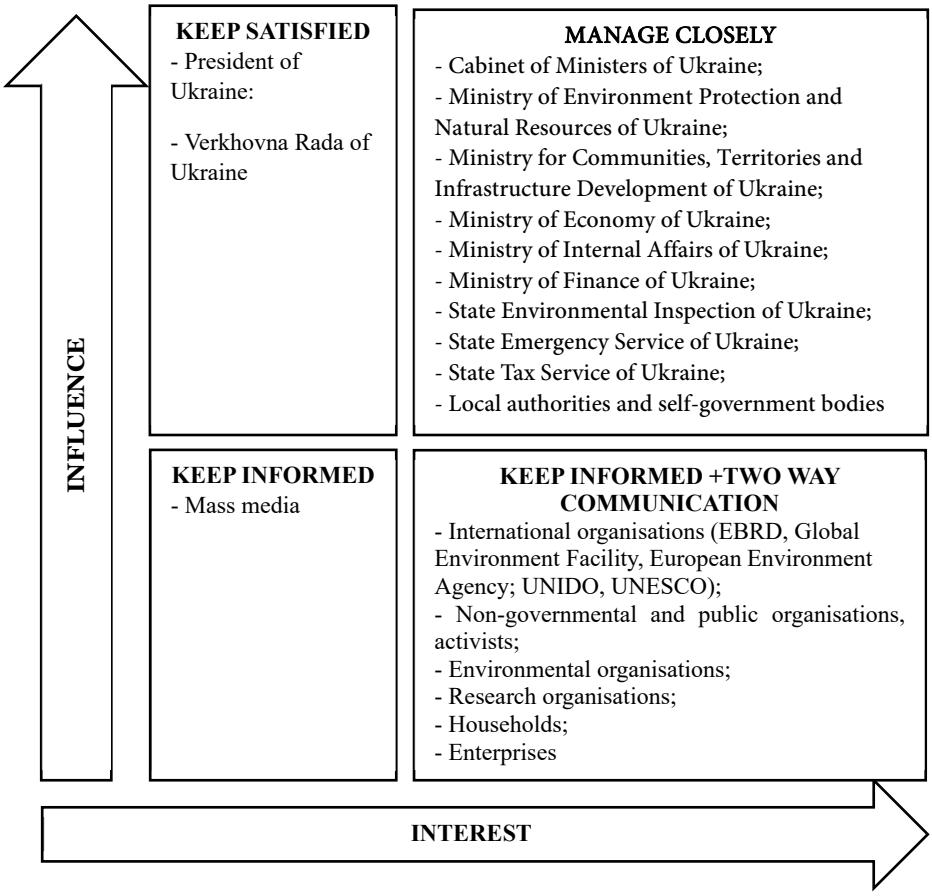

Figure 1. Matrix of stakeholders and veto players *(source: developed by the authors)*

The "KEEP INFORMED" sector includes mass media. The rapid development of telecommunications and information technologies has changed the very nature of the media, and they are becoming an integral part of what is happening. Before the Russian invasion, household waste was the top topic at all levels in all publications. Building an effective EWMS at the state and local levels is possible only if the importance of proper e-waste disposal is widely covered in the media, the existing requirements for EWM and the existing liability for their violation are communicated to the public, and the public is aware of existing environmental projects implemented by NGOs and their importance in terms of environmental safety.

The "KEEP INFORMED + TWO WAY COMMUNICATION" has many stakeholders, each with a different degree of influence.

International organisations in solving environmental problems are the following:

1) ***International organisations, such as UNESCO and UNIDO, contribute to the improvement of the environmental situation in countries worldwide***. In Ukraine, priority areas of cooperation are environmental protection, conservation of natural resources, and the implementation of resource-saving technologies. Even before the war, Ukraine, like the rest of the world, faced serious environmental challenges: a shortage of fresh water, pollution of rivers and seas, droughts, and forest fires. The war in Ukraine increased the relevance of the study of this issue and showed the depth of the environmental crisis and the importance of preserving natural capital. Therefore, environmental protection, the conservation of natural resources, and the introduction of resource-saving technologies remain important areas of cooperation for Ukraine.
2) ***International organisations promoting information support for the current state of the environment in the country*** (for example, the European Environment Agency (EEA), the main goal of which is to provide independent information on the state of the environment.
3) ***International organisations providing financial assistance to environmental protection and ecological projects*****, such as:**

- *The European Investment Bank (EIB)*[35] finances projects up to 50% of the total cost and often collaborates with other international financial institutions, such as the European Bank for Reconstruction and Development (EBRD).[36]

In Ukraine, the EBRD is the largest institutional investor, and today, its key focus is restoring Ukrainian cities. This recovery challenge aims to apply the principle of green technologies - creating greener and more energy-efficient cities, enhancing energy security, and using green transport.

To date, as part of the coordinated EU and international response to the war, the EIB provides financial support under the EIB Ukraine Solidarity Package. Active work continues to resolve issues of further funding for Ukraine to provide critical government services to the population who remain in the country.

In addition, EIB funds are used to address the impacts of climate change on vulnerable groups, protect biodiversity, and promote sustainable agriculture. Thus, the bank sees one of the goals of its activities as preserving natural resources and ensuring the environment is safe for future generations. All projects supported by the EIB must meet the bank's climate objectives.

35 'Who We Are' (*European Investment Bank*, 2023) <https://www.eib.org/en/about/index.htm > accessed 30 October 2023.

36 'European Investment Bank' (*Ministry of Environmental Protection and Natural Resources of Ukraine*, 2023) <https://mepr.gov.ua/diyalnist/mizhnarodna-diyalnist/spivrobitnytstvo-z-mizhnarodnymy-organizatsiyamy/yevropejskyj-investytsijnyj-bank/> accessed 30 October 2023.

- *The Global Environment Facility (GEF)* provides funds to finance additional costs to make the project environmentally attractive.[37]

In the modern system of public relations, the influence of non-state (non-governmental) and public institutions, as well as activists, is growing. They influence the world political process both globally and regionally, exert direct pressure on governments, and control the implementation of international agreements, including environmental agreements.

From year to year, the number of supporters of environmental organisations is growing, and their contribution to the solution of global environmental problems is increasing. In Ukraine, one can single out influential environmental organisations such as "MAMA-86", "Let's Do It GREEN Ukraine", and the All-Ukrainian Ecological League.[38] Representatives of public organisations take an active part in legislative activities, keeping legislative acts concerning the impact on the environment under control. Environmental organisations are an important driving force in protecting eco-interests, as they can really influence government decisions and society. In 2019, the Professional Organization of Ecologists of Ukraine was created.

The NGO "Let's Make Ukraine Clean Together" has projects such as the "National Green Challenge", "EcoSchool", "Green School", "Eco Hike" eco application, and "E-Waste Ukraine" (a research project to study the impact of solid waste on flora and fauna of Ukraine).

Public Union "Association of Enterprises in the Field of Hazardous Waste Management" unites enterprises that have all the necessary documents, resources and specialised equipment for the collection, storage, processing, and disposal of hazardous waste.

Households are required to dispose of waste, unnecessary bulky items, and electronic equipment and comply with current legislation in the field of waste management.

It is advisable to divide enterprises into those which produce waste and those which recycle it. At the moment, there is practically no waste management infrastructure in Ukraine. There are only a few incomplete recycling enterprises (Waste Management Center[39], SPE "Ecological Laboratory"[40], State Enterprise "Argentum") and sorting stations ("Ukraine without waste"),[41] which are engaged only in waste collection. Collection and recycling projects are implemented exclusively with the support of socially responsible businesses.

37 'Who We Are' (*GEF Global Environment Facility*, 2023) <https://www.thegef.org/who-we-are> accessed 30 October 2023.

38 Kateryna Dudnyk, 'International Environmental Cooperation' *Legal Newspaper* (Kyjiv, 8 November 2016) 24.

39 'Waste Management Center: The First Service Company Organizing the Proper Disposal of a Large List of Waste' (*Waste Management Center*, 2014) <https://recycle.com.ua> accessed 30 October 2023.

40 'About the company "Ecological Laboratory"' (*Scientific and Production Enterprise "Ecological Laboratory"*, 2010) <http://www.eco-lab.com.ua> accessed 30 October 2023.

41 'Waste Sorting Station' (*Ukraine Without Waste*, 2017) <https://nowaste.com.ua/sort-station-2/> accessed 30 October 2023.

The Association of Enterprises in the Field of Hazardous Waste Management inspected about 200 licensees involved in recycling and only 20 of them have at least some equipment for waste disposal; that is, they are unscrupulous players in the market.

In 2020, the NGO "Let's Do It GREEN Ukraine" launched the "E-WasteUkraine" project,[42] implemented with the support of five ministries, socially responsible businesses, which include enterprises operating in various fields and taking an active part in environmental projects as investors, producers' electronic equipment and retail chains that trade in it. The goal is to create a culture of social responsibility among the population. The program consists of educational activities among the population, adolescents, and children, with the involvement of adults; the introduction of separate waste collection in educational institutions; and the installation of containers in individual cities.

2.3. SWOT Analysis of the e-Waste Management System in Ukraine

The study of EWM performance, regulatory framework, and the impact of stakeholders allowed us to build a SWOT analysis of the strengths, weaknesses, threats and opportunities in the system of EWM in Ukraine. Let us begin with the identified strengths of the EWMS:

1. Access to modern recycling technologies worldwide
2. The presence of public organisations that popularise an environmental lifestyle and socially responsible businesses that support the development of environmental projects.
3. Availability of EEE manufacturers and large retail chains willing to finance environmental projects and participate in their implementation.
4. Declaration by the leadership of the state, regions, and local governments to create the prerequisites for the existence of a waste management system and to promote its development.
5. Availability of industrial facilities capable of serving as the foundation for e-waste processing and utilisation infrastructure.
6. Convenient geographical location and extensive transport network.
7. Availability of existing regional programs and waste management plans.

At the same time, the EWMS is not devoid of certain shortcomings, as evidenced by several weaknesses:

1. Current lack of a sectoral regulatory framework governing the collection, storage, transportation, recycling, recovery, disposal and extended responsibility of producers and exporters for certain waste streams, particularly EEE.
2. Partial absence and non-compliance with EU standards of the regulatory framework for organising accounting and reporting of EEE. Lack of a well-

42 'E-Waste Ukraine' (*Let's do it, GREEN Ukraine*, 2020) <https://letsdoitgreenukraine.com.ua/project/e-waste-ukraine/> accessed 30 October 2023.

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functioning and tested information system for accounting and recording indicators in EEE waste management since it is only at the implementation stage.
3. Absence of extended producer responsibility.
4. Lack of control over waste disposal by the State Environmental Inspection and inexistence of proper mechanisms for holding people accountable for non-compliance with legislation.
5. Low incentives for waste prevention and compliance with the waste management hierarchy due to a lack of tools, stimuli, and incentives, low waste disposal tariffs, and low waste disposal taxes.
6. Lack of targets for recycling and recovery of waste products falling under EPR, including e-waste (currently, the minimum targets for preparation for reuse, recycling, and recovery of e-waste are indicated in the draft sectoral legislative initiative of the Ministry of Environment).
7. Non-transparency of the activities of enterprises involved in recycling, the presence of a "grey" and "black" market.
8. Low investment attractiveness due to the war and the unstable political and economic situation in Ukraine.
9. Limited environmental awareness and knowledge from the population on environmental issues and its impact on the social standard of living and personal health.
10. Low population paying capacity leads to an unwillingness to pay for durable and high-quality products and their disposal.
11. Lack of infrastructure for e-waste collection, accumulation, sorting and disposal.
12. Insufficient statistical data on the volume of waste and the volume of its processing, caused by the lack of systematic collection and analysis of information.
13. Lack of motivation among individuals and legal entities for separate waste collection.
14. Low profitability or even unprofitability of the activities of entities involved in collecting and disposing of e-waste due to low processing volumes and lack of infrastructure.
15. Non-compliance of waste management facilities with safety requirements and their low technological level.
16. Low level of communication and cooperation between local authorities at different levels.
17. Disinterest of real estate associations, such as local building-utilities administrator offices and condominiums, in matters of separate waste collection and environmental safety.
18. Unclear vision for resolving the issue of collecting and recycling e-waste.
19. Insufficient number of qualified personnel.

The future opportunities in the EWMS are as follows:

1. The high profitability of projects for e-waste utilisation, subject to the existence of appropriate infrastructure, creates opportunities for sustainable development of the country's economy, obtaining additional revenues to the state and local budgets.
2. There is a global demand for e-waste recycling capacity, but the current existing recycling capacity is limited (about five countries have recycling capacity at this time).
3. The volume of e-waste is growing consistently every year, presenting ongoing opportunities.
4. Potential to attract funds from International Financial Institutions and foreign investors to implement projects for e-waste utilisation.
5. Raising the environmental population's awareness and pressure on the authorities to implement environmental projects.
6. Prerequisites for the creation of recycling facilities for e-waste (there are a territory, personnel, enterprises that are ready to do this, and raw materials) (will be realistic after the end of the war in Ukraine).
7. Opportunities for domestic consumption will allow the development of other industries experiencing a shortage of raw materials and exports obtained from the processing of secondary raw materials.
8. Creation of new jobs.
9. Overcoming the problem of overflowing landfills and environmental pollution, reducing the negative impact on the health and social standards of living in future.

The imperfection of the legislative and regulatory framework, as well as a clear mechanism for managing environmental projects regarding the management of e-waste, leads to the emergence of threats in the EWMS:

1. High level of corruption and abuse of official duties, in part of issuing licenses and exercising control.
2. Increase in the number of "pseudo-utilizers" of EEE with all the resulting consequences.
3. Low level of social responsibility of individuals and legal entities, including the awareness of the need for separate waste collection and disposal.
4. Lack of funds to finance environmental projects, including those related to waste management.
5. The high cost of implementing projects for their high manufacturability (the need to build factories equipped with the latest science and technology).
6. Gaps in legislation, lack of an effective mechanism for implementing the legislative provisions, the possibility of non-compliance with legislation and the lack of inevitable responsibility for its violation. An increase in illegal operating points for the extraction of components from e-waste, where, as a rule, the extraction of useful components occurs in conditions that do not meet environmental standards and are harmful to both people and the environment.

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7. Low level of secondary resource use and loss of a significant part of the scarce raw materials contained in e-waste due to poor management of this waste stream.
8. Lack of an effective unified waste management system at the country level, to which subsystems created in accordance with the territorial administrative structure are subordinated through the initial stage of its implementation.
9. Difficulty in determining places intended for processing and disposal of waste through the so-called effect of "someone else's waste", that is, the reluctance of the population of the region to agree to waste recycling from other settlements on their territory.

By strategically addressing the identified weaknesses and leveraging the strengths outlined above, along with minimising the potential threats and maximising available opportunities, Ukraine can build an effective EWMS and create the prerequisites for successfully implementing projects in the environmental sphere.

3 CONCLUDING REMARKS

Nowadays, the acute issue of building a waste management system extends globally, including in Ukraine. Overcoming the problem of e-waste accumulation and minimising its negative impact as much as possible necessitates collaborative efforts and alignment of interests among various stakeholders. This entails harmonising the interests of the state as a regulator, producers and consumers, organisations involved in utilisation and the public sector through educational activities and coordination of actions. Such cooperation can achieve a synergistic effect and create effective waste system management by coordinating the interests of all interested parties.

The role of the state is to implement such a policy that will help to increase the interest of households and businesses in efficient waste management practices and create the infrastructure for their safe disposal. To do this, it is necessary to set standards by adopting regulations and by-laws or by making changes to existing ones. Additionally, defining control mechanisms for oversight is crucial to regulate the actions of stakeholders, including state and local authorities and private businesses with households. At the same time, the legislation should include, first of all, a regulatory function, and not a repressive one, which will make it possible to build an effective financial and economic model that is beneficial for all parties.

Public authorities need to look for leverage that will motivate local authorities to actively participate in environmental projects for household waste management, including e-waste. This involves not only developing and approving regional waste management plans, as had been initiated in Ukraine but also continuous monitoring of the implementation and control over it. Local authorities should look for ways to cooperate with citizens' associations that generate e-waste and involve them in building the e-waste recycling system at the local level, together with specialised organisations licensed to do this.

It should be noted that without legislative regulation of waste management, regional plans will be improperly developed, resulting in their non-fulfilment.

The regulatory influence of the state should be accompanied by an increase in the social responsibility of legal entities and individuals with the support of public organisations, which play a decisive role in the creation of educational projects to popularise the idea of separate waste collection and inform the households of the need for its disposal for environment protection, increase the interest of the households in the waste collection process and the level of awareness in terms of waste management, which will improve the culture of the citizens on handling e-waste.

Individuals should be responsible for their consumption habits, namely the choice to refuse to purchase equipment or repair existing ones, give preference to high-quality equipment with a long life cycle, reduce consumption, and transfer equipment for disposal while choosing a reliable recycling company and contributing to the creation of a network of e-waste collection points.

In Ukraine, there is a lack of production capacities for e-waste recycling and utilisation. High-tech full-cycle enterprises are generally absent, which requires stimulating investment in this area. A large number of entities work partially or completely in the shadow economy, creating additional threats to the environment. Such steps will allow for the establishment of an effective system for e-waste generation, collection, sorting and disposal, which will eventually help achieve the results already achieved by some environmentally oriented countries.

Waste recycling within Ukraine can impetus the development of the economy because a large number of countries need recycling but do not have the capacity for it.

The start of waste management reform in Ukraine in July 2023 begins a long journey to create an effective waste management system, especially during armed Russian aggression. The problem of implementing EWMS is multifaceted and will be the subject of further scientific research, in particular on:

- finding sources of financing for projects, methods and tools for stimulating the interest of subjects involved in the implementation of these projects;
- identifying the reasons that hinder the adoption and implementation of progressive domestic legislation which aims to prevent e-waste creation and set the rules for its management;
- creating a Ukrainian legal framework for the formation of an effective system of extended liability, taking into account its two elements - producer and consumer liability, the latter of which is currently ignored by the legislator;
- reviewing the extent of liability of legal entities and individuals for improper disposal of e-waste and introducing stricter control over non-compliance with the law in this area.

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AUTHORS INFORMATION

Euvgenia Nosova*
PhD (Economic), Assoc. Prof., Faculty of Economics, Taras Shevchenko National University of Kyiv, Kyiv, Ukraine
euvgenianosova@knu.ua
https://orcid.org/0000-0002-7975-0984
Corresponding author, responsible for conceptualization, data collection, writing (original draft, review & editing) and supervising.

Olena Iafinovych
PhD (Economic), Assoc. Prof., Faculty of Economics, Taras Shevchenko National University of Kyiv, Kyiv, Ukraine
olenayafinovych@knu.ua
https://orcid.org/0000-0002-6804-0848
Co-author, responsible for conceptualization, writing (original draft, review & editing), data collection and validation.

Nataliia Miedviedkova
PhD (Economic), Assoc. Prof., Faculty of Economics, Taras Shevchenko National University of Kyiv, Kyiv, Ukraine
nsmedvedkova@knu.ua
https://orcid.org/0000-0001-6359-561X
Co-author, responsible for research methodology, writing (original draft), data collection and validation.

Vitalina Delas
PhD (Economic), Assoc. Prof., Faculty of Economics, Taras Shevchenko National University of Kyiv, Kyiv, Ukraine
delasvitalina@knu.ua
https://orcid.org/0000-0002-9570-1875
Co-author, responsible for responsible for writing (original draft) and data collection.

Nataliia Plieshakova
PhD (Economic), Assoc. Prof., Faculty of Economics, Taras Shevchenko National University of Kyiv, Kyiv, Ukraine
pleshakova@knu.ua
https://orcid.org/0000-0002-0381-067X
Co-author, responsible for writing (original draft), data collection and visualization.

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RIGHTS AND PERMISSIONS

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Note and Comment

THE CASE OF SKRYPKA AS THE EPITOME OF THE EFFECTIVENESS OF CONSTITUTIONAL COMPLAINTS IN UKRAINE

Dmytro Terletskyi* and Rodion Nehara

ABSTRACT

Background: *The article thoroughly examines the efficacy of constitutional complaints within Ukraine, utilising the Skrypka case as a pivotal illustration. Through comprehensive scrutiny, the authors analysed factual circumstances, national legislative frameworks governing contentious legal issues, and judicial precedents pertinent to the Skrypka case. The authors' contention revolves around the primary role of a constitutional complaint in safeguarding an individual's violated constitutional rights, concurrently serving to fortify the constitutional order of the state.*

Methods: *To comprehensively understand the subject, the authors conducted an in-depth review of relevant court decisions, meticulously analysing the legal arguments presented by judges. Additionally, they examined the positions of knowledgeable scholars to identify and comprehend the current expert assessments and proposals.*

Results and Conclusions: *Through an in-depth review of judicial practices, the article delineates three predominant perspectives regarding the influence of decisions emanating from Ukraine's Constitutional Court subsequent to constitutional complaint reviews on the reevaluation of conclusive court decisions in specific cases: (1) The decisions of the Constitutional Court of Ukraine cannot impact contested legal relationships because these relationships existed prior to the adoption of these decisions by the Constitutional Court of Ukraine; (2) Review under exceptional circumstances is applicable only to decisions where the claims have been fully or partially satisfied (i.e., are subject to execution) but have not yet been enforced; (3) The decisions of the Constitutional Court of Ukraine are primarily significant as rulings of a general nature, establishing legal conclusions for resolving future cases.*

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The article asserts that rectifying final court decisions owing to the use of unconstitutional statutes imposes stringent constraints, addressing only issues arising post the statutes' unconstitutional determination, excluding considerations predating such rulings, irrespective of the potential restoration of violated constitutional rights. Consequently, reestablishing a complainant's previous legal status via a constitutional complaint does not transpire. Therefore, a complainant, having exhausted alternative legal remedies and diligently formulated their case, cannot pursue substantive reconsideration of a final court decision, even if predicated on applying a law deemed unconstitutional per their complaint, contrary to explicit provisions within Ukrainian procedural legislation.

The article emphasises the imperative necessity for concerted revisions to Ukraine's Constitution and extant legal frameworks to attain a balanced, coherent, and unequivocal articulation of the legal ramifications ensuing from decisions rendered by Ukraine's Constitutional Court, encompassing those originating from constitutional complaints—an objective presently beyond reach.

1 INTRODUCTION

It has been over seven years since the amendments to Ukraine's Constitution regarding the judiciary came into effect.[1] These changes affirmed the evolution of the constitutional jurisdiction body's status, involving a substantial review and expansion of its powers. Notably, they introduced a new legal remedy, the constitutional complaint, to the national legal framework.

During this period, the bodies of the Constitutional Court of Ukraine, namely the Grand Chamber and the Senates, have considered and issued decisions in 45 cases initiated specifically through constitutional complaints.[2] While the importance and impact of these decisions on legislative, interpretative, and law application activities are unquestionable, they require systematic analysis.

These decisions unequivocally demonstrate the institutional capability of the Constitutional Court of Ukraine and underscore its fundamental role in upholding constitutional order within the state. Simultaneously, they emphasise the practical significance of constitutional complaints as vital legal instruments, safeguarding the constitutional rights of individuals. These complaints actualise the state's accountability for its actions, embodying the core functional purpose of constitutional complaints in legal regulation — serving as a means of legal protection for the violated constitutional rights of individuals.

1 Law of Ukraine no 1401-VIII of 02 June 2016 'On Amending the Constitution of Ukraine (as to justice)' [2016] Official Gazette of Ukraine 51/1799.

2 The statistical data are provided in accordance with the information available on the official website of the Constitutional Court of Ukraine as of 30 September 2023.
Constitutional Court of Ukraine <https://ccu.gov.ua> accessed 30 September 2023.

The seven-year timeframe provides a substantial period to draw thoughtful and well-founded conclusions regarding the state, trends, peculiarities, and issues associated with the practical use of constitutional complaints. It is reasonable and rational to do so, using the Skrypka case as an example, which, for various reasons, epitomises the effectiveness of a constitutional complaint in Ukraine.

2 FACTS OF THE CASE

In 1987, Anatolii Volodymyrovych Skrypka (hereinafter "the complainant") was drafted as a conscript for training to eliminate the consequences of the Chernobyl Nuclear Power Plant disaster. The complainant was an individual who suffered due to the Chernobyl disaster and received a pension according to the Law of Ukraine 'On the Status and Social Protection of Citizens Affected by the Chernobyl Disaster' of February 1991, No. 796-XII (hereinafter 'Law No 796-XII')[3] as a participant in the elimination of the consequences of the Chernobyl nuclear power plant disaster.

On 3 October 2017, the parliament of Ukraine passed the Law of Ukraine 'On Amending Certain Legislative Acts of Ukraine Regarding Increasing Pensions' No. 2148-VIII, which, among other things, revised the calculation of pensions for military personnel who participated in the elimination of the consequences of the Chernobyl disaster.[4]

In March 2018, the complainant applied to the territorial office of the Pension Fund of Ukraine (hereinafter 'the Pension Fund Department'), requesting a recalculation of the pension in accordance with Law No. 796-XII, taking into account the relevant changes. The Pension Fund Department refused to recalculate the pension, stating that the complainant participated in eliminating the consequences of the Chernobyl disaster during military training, not during actual military service. Therefore, the applicant did not have the right to a pension recalculation under Law No. 796-XII with regard to the relevant amendments.

In May 2018, the complainant filed a lawsuit against the Pension Fund Department. The Circuit Administrative Court of Sumskyi Region, by its decision of 13 June 2018, partially satisfied the claim by recognising the actions of the Pension Fund Department, refusing the complainant's request for a pension re-calculation as a participant in the liquidation of the consequences of the Chernobyl nuclear disaster in accordance with Law No. 796-XII, as unlawful. It ordered the Pension Fund Department to recalculate the disability pension in accordance with Law No. 796-XII, taking into account the respective changes, and to pay

3 Law of Ukraine no 796-XII of 28 February 1991 'On the Status and Social Protection of Citizens Affected by the Chernobyl Disaster' <https://zakon.rada.gov.ua/laws/show/796-12#Text> accessed 18 January 2024.

4 Law of Ukraine no 2148-VIII of 03 October 2017 'On Amending Certain Legislative Acts of Ukraine Regarding Increasing Pensions' <https://zakon.rada.gov.ua/laws/show/2148-19#n24> accessed 18 January 2024.

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the difference between the amount due and the pension actually paid for the corresponding period. However, the demands regarding recognising actions in addressing the appeal as discriminatory were denied.[5]

The Kharkiv Administrative Court of Appeal, by its judgment of 17 October 2018, overturned the decision of the Circuit Administrative Court of Sumskyi Region and denied the plaintiff's claims. The appellate court stated that the plaintiff did not meet all the criteria that would entitle him to a pension recalculation under Law No. 796-XII with the relevant amendments taken into account. Specifically, because the plaintiff participated in the elimination of the consequences of the Chernobyl disaster during military training and not during actual military service, he did not acquire the right to have his pension recalculated in accordance with Law No. 796-XII with the relevant amendments taken into account.[6]

The Supreme Court (in the composition of the panel of judges of the Cassation Administrative Court) denied the opening of cassation proceedings on the appellant's cassation complaint by its order of 23 November 2018.[7]

The complainant filed a constitutional complaint with the Constitutional Court of Ukraine regarding the constitutionality of the relevant provisions of Law No. 796-XII, taking into account the corresponding amendments, namely the provisions of the third part of Article 59 of Law No. 796-XII.

The complainant argued that according to these provisions, the legal regulations regarding the calculation of disability pensions do not apply to servicemen among the conscripts called up for military training to eliminate the consequences of the Chernobyl disaster. As a result, they receive a pension "three times lower than conscript soldiers," which violates their constitutional rights.[8]

On 25 April 2019, the Constitutional Court of Ukraine declared that the provision denying the complainant the pension recalculation was unconstitutional.[9] Decision No. 1-p(II)/2019 was issued under constitutional complaints filed by the complainant and Oleksiy Yakovych Bobyr, consolidated into a single constitutional proceeding.[10]

5 Case no 818/1793/18 (Circuit Administrative Court of Sumskyi Region, 13 June 2018) <https://reyestr.court.gov.ua/Review/74724489> accessed 18 January 2024.

6 Case no 818/1793/18 (Kharkiv Administrative Court of Appeal, 17 October 2018) <https://reyestr.court.gov.ua/Review/77159099> accessed 18 January 2024.

7 Case no 818/1793/18 (Administrative Court of Cassation of the Supreme Court, 23 November 2018) <https://reyestr.court.gov.ua/Review/78077171> accessed 18 January 2024.

8 Legal Summary of the Secretariat of the Constitutional Court of Ukraine no 21/630 of 30 January 2019 on the Constitutional Complaint of AV Skrypka <https://ccu.gov.ua/sites/default/files/docs/m_s_1_p2_2019_0.rar> accessed 18 January 2024.

9 Case no 3-14/2019(402/19, 1737/19), Decision no 1-p(II)/2019 (Constitutional Court of Ukraine, 25 April 2019) [2019] Official Gazette of Ukraine 42/1468.

10 Order no 6-уп(II)/2019 (Second Senate of the Constitutional Court of Ukraine, 15 April 2019) <https://ccu.gov.ua/sites/default/files/docs/m_s_1_p2_2019_0.rar> accessed 18 January 2024.

On 6 May 2019, the complainant appealed to the appellate court with a motion to review the decision of the Kharkiv Administrative Court of Appeal of 17 October 2018 under exceptional circumstances. The basis for this motion was rooted in the Constitutional Court of Ukraine's decision on 25 April 2019, No. 1-p(II)/2019, rendered after the consideration of constitutional complaints filed by the applicant and Oleksiy Yakovych Bobyr.

The Second Administrative Court of Appeal, by its judgment of 27 August 2019, revoked the judgment of the Kharkiv Administrative Court of Appeal and partially granted the motion for review under exceptional circumstances. The court ordered the Pension Fund Department to recalculate the disability pension for the complainant under Law No. 796-XII, taking into account the decision of the Constitutional Court of Ukraine of 25 April 2019 No. 1-p(II)/2019. The Second Administrative Court of Appeal noted that the right to a pension recalculation according to Article 59, part 3 of Law No. 796-XII has been recognised for the complainant since the date of the Constitutional Court of Ukraine's decision of 25 April 2019 No. 1-p(II)/2019.[11]

In September 2019, the complainant appealed to the Supreme Court with a cassation complaint against the judgment of the Second Administrative Court of Appeal. In the complaint, the complainant requested the annulment of this judgment and the issuance of a new judgment, fully satisfying the request for a review of the decision of the Kharkiv Administrative Court of Appeal under exceptional circumstances. The complainant argued that the judgment of the Second Administrative Court of Appeal contradicts the Decision of the Constitutional Court of Ukraine of 25 April 2019 No. 1-p(II)/2019 and renders the request for a review of the court decision under exceptional circumstances ineffective.

By its order of 7 October 2019, the Supreme Court initiated cassation proceedings based on the complainant's cassation appeal.[12] On 7 July 2023, the Supreme Court, sitting as the Joint Chamber of the Administrative Court of Cassation, annulled the judgment of the Second Administrative Court of Appeal of 27 August 2019 and rejected the request for a review of the decision of the Kharkiv Administrative Court of Appeal under exceptional circumstances. The judgment of the Kharkiv Administrative Court of Appeal of 17 October 2018 has been upheld.[13]

11 Case no B/851/5/19 (Second Administrative Court of Appeal, 27 August 2019) <https://reyestr.court.gov.ua/Review/83942090> accessed 18 January 2024.

12 Case no 818/1793/18 (Administrative Court of Cassation of the Supreme Court, 07 October 2019) <https://reyestr.court.gov.ua/Review/84805145> accessed 18 January 2024.

13 Case no 818/1793/18 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 07 July 2023) <https://reyestr.court.gov.ua/Review/112096007> accessed 18 January 2024.

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3 LEGAL FRAMEWORK AND THEORETICAL ANALYSIS

As mentioned, the introduction of the constitutional complaint in Ukraine was a consequence of the constitutional reform regarding justice in 2016.[14] Prior to that, throughout the Constitutional Court of Ukraine's twenty-year activity, individuals and legal entities were not granted the right to address issues of conformity to the Constitution of Ukraine through any legal means. The only available avenue for them until 30 September 2016 – the effective date of the amendments to the Constitution of Ukraine[15] – was the form of appeal (constitutional appeal), allowing them to petition only for the official interpretation of the Constitution and statutes. Although the exercise of the right to a constitutional appeal was affected by its ambiguous application, primarily by the courts, decisions of the Constitutional Court of Ukraine on these appeals did not influence final judicial decisions. This is because the official interpretation of the Constitution and statutes provided by the Constitutional Court of Ukraine has never been acknowledged as a basis for the review of final court decisions by procedural legislation.

The statements above do not diminish the Constitutional Court of Ukraine's significant role in confirming and safeguarding constitutional rights before the 2016 reform. However, they clarify why a constitutional appeal was not considered an effective remedy for constitutional rights in connection with a specific case.

The introduced form of constitutional complaint in Ukraine allows the resolution of issues solely concerning the constitutionality of a statute (a law of Ukraine). Therefore, it should be classified as a normative complaint. Moreover, it is justifiable to argue that this represents a unique constitutional complaint for which there are currently no equivalents. This is because the subject of constitutional adjudication initiated through a constitutional complaint excludes individual legal acts, including final court decisions, as well as sub-legislative normative legal acts. This rationale supports categorising the introduced constitutional complaint in Ukraine as specifically statutory rather than normative.[16]

14 Article 55 of the Constitution of Ukraine was amended with a new part, according to which everyone shall be guaranteed the right to lodge a constitutional complaint to the Constitutional Court of Ukraine on grounds defined in this Constitution and under the procedure prescribed by law. Furthermore, the Constitution of Ukraine has been enriched with a new article, Article 151-1, stipulating that the Constitutional Court of Ukraine decides on conformity to the Constitution of Ukraine (constitutionality) of a law of Ukraine upon constitutional complaint of a person alleging that the law of Ukraine applied in the final court decision in his or her case contradicts the Constitution of Ukraine. A constitutional complaint may be lodged after exhaustion of all other domestic legal remedies.

15 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 18 January 2024.

16 SV Riznyk, *Constitutionality of Legal Acts: Essence, Evaluation Methodology and Providing System in Ukraine* (Ivan Franko National University of Lviv 2020) 416-7.

Another notable aspect introduced by the constitutional complaint is the acknowledgement, as outlined in the Law of Ukraine 'On the Constitutional Court of Ukraine',[17] of the rights of individuals, regardless of their citizenship status, and private legal entities to lodge constitutional complaints. However, this right is not recognised for legal entities of public law, which includes those established by the executive decree of the President of Ukraine, a state authority, an authority of the Autonomous Republic of Crimea, or a local self-government body.

Simultaneously, a complaint submitted to the Constitutional Court of Ukraine is distinctly and unequivocally linked to a particular court case. This linkage arises from the fact that the assessment of the conformity of the law applied in a person's final court decision to the Constitution of Ukraine can only be determined through the complaint filed by that person.

Additionally, according to Article 55 of the Law of Ukraine 'On the Constitutional Court of Ukraine', a person must specify in their complaint which of their human rights safeguarded by the Constitution of Ukraine, in their opinion, have been violated due to the application of the law by the court. Therefore, a constitutional complaint may safeguard the complete spectrum of a person's constitutional rights, including social and economic rights. However, this evaluation must be conducted within Article 22 of the Constitution of Ukraine, which establishes the non-exhaustive nature of constitutionally recognised rights and freedoms.

Indeed, the functional purpose of a constitutional complaint transcends the singular protection of constitutional rights and should be construed in a broader context – as a mechanism essential for upholding the constitutional order within the state. This role includes the affirmation of fundamental values and principles, such as holding the state accountable for its actions, preventing the curtailment of existing rights and freedoms during the enactment or amendment of laws, and ensuring their alignment with the Constitution of Ukraine. The profound implications stemming from the Constitutional Court of Ukraine's rulings on constitutional complaints, including these significant aspects, are unequivocal. However, the dual functional role of a constitutional complaint in legal regulation, while crucial, should not diminish its primary purpose – namely, serving as a legal instrument to safeguard the specific constitutional rights of a person. As "the subject of any constitutional complaint involves both private and public interests…,"[18] it pertains to both the public and private rights of a specific person.

Accordingly, a person's submission of a constitutional complaint is directly motivated by their aspiration to protect their constitutional rights, which are perceived to be violated due to the application of an unconstitutional law in a specific judicial case. Consequently, it is

17 Law of Ukraine no 2136-VIII of 13 July 2017 'On the Constitutional Court of Ukraine' <https://zakon.rada.gov.ua/laws/show/en/2136-19#Text> accessed 18 January 2024.

18 Mykhailo Savchyn, 'Doctrinal Issues of Introduction of the Constitutional Complaint in Ukraine' (2018) 12 Law of Ukraine 50, doi:10.33498/louu-2018-12-039.

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indisputable that persons, having exhausted alternative legal remedies within the national framework, resort to the body of constitutional jurisdiction primarily to pursue the restoration of their infringed constitutional rights in the future. This process includes reviewing the final court decision in their case and seeking compensation from the state for the damages incurred due to the application of an unconstitutional law in Ukraine.

This conclusion is entirely consistent with (1) the conditions of admissibility of a constitutional complaint[19] and (2) the legislatively recognised right to appeal to the court with a request for a review of a court decision due to the established unconstitutionality of the law of Ukraine applied by the court in the case's resolution.

The existing procedural legislation (Art. 361, pt. 5, s. 1 of the Code of Administrative Procedure of Ukraine;[20] Art. 320, pt. 3, s. 1 of the Commercial Procedure Code of Ukraine;[21] Art. 423, pt. 3, s. 1 of the Civil Procedure Code of Ukraine;[22] Art. 459, pt. 3, s. 1 of the Criminal Procedure Code of Ukraine[23]) recognises the court's application of an unconstitutional law of Ukraine in a case as a valid basis for the review of final court decisions under exceptional circumstances. This review is admissible in all cases except those falling under criminal proceedings, contingent upon the condition that the final court decision remains unexecuted.[24]

Implementing the exceptional circumstances mechanism for reviewing court decisions and establishing the determined unconstitutionality of a legal act or its specific provision following the 2017 procedural reform is entirely justified. "The purpose of the exceptional circumstances mechanism is to facilitate the reconsideration of court decisions rendered with significant violations that substantially impacted the case's outcome. … Consequently,

19 According to Article 77 (1) of the Law of Ukraine 'On the Constitutional Court of Ukraine' a constitutional complaint shall be deemed as admissible subject to its compliance with Articles 55 and 56 of this Law and where: 1) all domestic legal remedies have been exhausted (subject to the availability of a legally valid judicial judgment delivered on appeal, or, where the law provides for cassation appeal, – of a judicial judgment delivered on cassation); 2) Not more than three months have passed from the effective date of a final judicial judgment that applies the law of Ukraine (specific provisions thereof).

20 Code of Administrative Procedure of Ukraine no 2747-IV of 06 July 2005 <https://zakon.rada.gov.ua/laws/show/2747-15#Text> accessed 18 January 2024.

21 Commercial Procedure Code of Ukraine no 1798-XII of 6 November 1991 (as amended by Law no 2147-VIII of 03 October 2017) <https://zakon.rada.gov.ua/laws/show/1798-12#Text> accessed 18 January 2024.

22 Civil Procedure Code of Ukraine no 1618-IV of 18 March 2004 (as amended by Law no 2147-VIII of 03 October 2017) <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 18 January 2024.

23 Criminal Procedure Code of Ukraine no 4651-VI of 13 April 2012 (as amended by Law no 2147-VIII of 03 October 2017) <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 18 January 2024.

24 The Criminal Procedure Code of Ukraine, which does not contain such a provision, constitutes the sole exception to this rule. In other words, the possibility of reviewing legally binding court decisions in criminal proceedings is not contingent upon their execution.

the mechanism for reviewing court decisions under exceptional circumstances is designed to rectify errors committed by the state, rather than by the judiciary."[25]

Notwithstanding the potential imposition of considerably stricter constraints, it is unwarranted to assert that procedural legislation mandates an unconditional review of all final court decisions in which the court applied a legal act (or its provisions) subsequently deemed unconstitutional. Conversely, the conditions for initiating proceedings under exceptional circumstances are normatively circumscribed in terms of time, the scope of persons involved, and, as a general rule, reservations concerning the execution of final court decisions. In essence, reasonable safeguards are instituted to preserve a requisite balance between public and private interests.[26]

When assessing the effectiveness of a constitutional complaint, considering its legitimate purpose and primary functional role, it is essential to note that the Constitutional Court of Ukraine does not have the authority to initiate a review of the final court decision in the complainant's case or determine the question of compensation for damages caused by the application of an unconstitutional law. In this context, it is important to note that the authority vested in the Grand Chamber of the Constitutional Court of Ukraine, aimed at securing constitutional complaints to prevent irreversible consequences that may arise from the execution of final court decisions, represents an exception (though, as of September 2023, the interim order has been issued only in one case upon the constitutional complaint of A.V. Dermendzhy).[27]

The above statement does not imply that a constitutional complaint is inevitably ineffective in Ukraine as a means of legal protection for constitutional rights. Instead, the Constitutional Court of Ukraine is authorised solely to halt violations of constitutional rights by laws that, once declared unconstitutional, lose their validity and cannot be applied. It is necessary to agree with the opinion that "in essence, the Court, by its decision on the complaint, can only create conditions for the review of the court decision in the

25 A Yezerov, 'Unconstitutionality of the Law as a Basis for Review of Court Decisions in Exceptional Circumstances in Administrative Proceedings' (2020) 3 Bulletin of the Constitutional Court of Ukraine 118-9.

26 Dmytro Terletskyi, 'The Effect of Decisions Passed by the Constitutional Court of Ukraine over Time: Theoretical and Practical Aspects' in M Smokovych and other (eds), *Legal Consequences of Determining a Normative Act Unconstitutional for the Protection of Human Rights in Administrative Justice Process: Collection of the Workshop Materials, Kyiv, 31 July 2020* (Pravo 2020) 82; Dmytro S Terletskyi, 'The Case of Skrypka as an Epitome of the Effectiveness of Constitutional Complaint in the National Legal Order' in SV Kivalov (ed*), European Benchmarks for Ukraine's Development in the Context of War and Global Challenges of the 21st Century: Synergy of Scientific, Educational, and Technological Solutions: Materials of the International scientific and practical conference, Odesa, 19 May 2021* (Jurydyka 2021) vol 1, 272.

27 'The Constitutional Court of Ukraine has Issued an Enforcement Order' (*Constitutional Court of Ukraine*, 16 April 2019) <https://ccu.gov.ua/novyna/konstytuciynyy-sud-ukrayiny-vydav-zabezpechuvalnyy-nakaz> accessed 18 January 2024.

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complainant's case, providing an opportunity to restore violated fundamental rights."[28] The restoration of the complainant's previous legal status, including reconsideration of their case by the court, as well as the reinstatement of proceedings and compensation for damages, are intricately linked within the systemic and functional context of other legal methods of protecting rights. Courts of general jurisdiction can implement these remedies.

It is important to emphasise that despite the consistently high academic interest in the phenomenon of a constitutional complaint in Ukraine and a series of notable studies by well-known legal scholars,[29] there is currently no consensus within the scientific and expert community regarding the ways to address the situation that has arisen.

4 COURTS' PRACTICE

The judicial practice of general jurisdiction courts, as outlined above, is a vital benchmark for evaluating the effectiveness of a constitutional complaint as a legal remedy to protect the constitutional rights of individuals that have been violated.

A thorough examination of judicial practice allows for a reasonable assertion of the widespread dominance of specific legal conclusions concerning the impact of decisions made by the Constitutional Court of Ukraine upon constitutional complaints on the review of final court judgments in specific cases. For a comprehensive understanding, it is important to note that administrative courts, including the Administrative Court of Cassation within the Supreme Court, currently play a leading role in shaping these legal conclusions. However, this should not be construed as evidence of restricting the applicability of such legal conclusions solely to the realm of administrative jurisdiction. Instead, it alludes to an alternative, more pragmatic explanation. This situation is primarily explained by the fact that Decision No. 1-p(II)/2019, the first decision of the Constitutional Court of Ukraine on constitutional complaints, is directly related to administrative jurisdiction. Accordingly, the administrative courts were the first to engage in the review of final court decisions under such exceptional circumstances.

28 Yurii Barabash, '"Means for the Protection of Rights vs Legal Certainty" as a Dilemma of the Domestic Official Constitutional Doctrine in the Context of Functioning of the Institute of Individual Constitutional Complaint' (2020) 4 Ukrainian Journal of Constitutional Law 51, doi:10.30970/jcl.4.2020.2.

29 ibid 47; Yu Barabash and H Berchenko, 'The Effectiveness of Individual Constitutional Complaint as a Means of Protecting the Rights of Individual in Ukraine' (2021) 5 Bulletin of the Constitutional Court of Ukraine 9; Hryhorii Berchenko, Andriy Maryniv and Serhii Fedchyshyn, 'Some Issues of Constitutional Justice in Ukraine' (2021) 4(2) Access to Justice in Eastern Europe 128, doi:10.33327/AJEE-18-4.2-n000064; Viacheslav Pleskach, 'Effectiveness of the Constitutional Complaint as a Domestic Remedy in the Practice of the European Court of Human Rights' (2020) 1 Ukrainian Journal of Constitutional Law 38, doi.org/10.30970/jcl.1.2020.4; Riznyk (n 16); Savchyn (n 18) 39; Yezerov (n 25) 112.

(1) The decisions of the Constitutional Court of Ukraine cannot impact contested legal relationships because these relationships existed prior to the adoption of these decisions by the Constitutional Court of Ukraine.[30]

Certainly, within this interpretation of the temporal impact of decisions by the Constitutional Court of Ukraine, utilising the established unconstitutionality of a legal act, whether in whole or in part, as grounds for a substantive review of a final court decision under exceptional circumstances is impossible. This is due to the fact that the pertinent legal relationships and the final court decision itself, even if not executed when applying for a review, will consistently predate any judgment made by the Constitutional Court of Ukraine.[31]

In 2020, the Grand Chamber of the Supreme Court, reviewing the verdict under exceptional circumstances, established a fundamentally different approach to determining the temporal effect of decisions by the Constitutional Court of Ukraine. The judgment of the Grand Chamber of the Supreme Court of 18 November 2020 (Case No 4819/49/19) states that the decision of the Constitutional Court of Ukraine has a direct

30 Case no 747/1151/16-a (Administrative Court of Cassation of the Supreme Court, 09 November 2018) <https://reyestr.court.gov.ua/Review/77798946> accessed 18 January 2024; Case no 755/4893/18 (755/18431/15-a) (Administrative Court of Cassation of the Supreme Court, 19 November 2018) <https://reyestr.court.gov.ua/Review/77968276> accessed 18 January 2024; Case no 537/2348/16-a (Administrative Court of Cassation of the Supreme Court, 27 November 2018) <https://reyestr.court.gov.ua/Review/78159477> accessed 18 January 2024; Case no 826/562/16 (Administrative Court of Cassation of the Supreme Court, 22 January 2019) <https://reyestr.court.gov.ua/Review/79388058> accessed 18 January 2024; Case no 820/2462/17 (Administrative Court of Cassation of the Supreme Court, 23 January 2019) <https://reyestr.court.gov.ua/Review/79509410> accessed 18 January 2024; Case no 804/3790/17 (Administrative Court of Cassation of the Supreme Court, 25 July 2019) <https://reyestr.court.gov.ua/Review/83244148> accessed 18 January 2024; Case no 2a-1131/11/1470 (Administrative Court of Cassation of the Supreme Court, 02 August 2019) <https://reyestr.court.gov.ua/Review/83413323> accessed 18 January 2024; Case no 808/2492/18 (Administrative Court of Cassation of the Supreme Court, 17 December 2019) <https://reyestr.court.gov.ua/Review/86387767> accessed 18 January 2024; Case no 814/1274/17 (Administrative Court of Cassation of the Supreme Court, 23 December 2019) <https://reyestr.court.gov.ua/Review/86552326> accessed 18 January 2024; Case no 620/614/20 (Administrative Court of Cassation of the Supreme Court, 30 March 2021) <https://reyestr.court.gov.ua/Review/95904413> accessed 18 January 2024; Case no 200/941/20-a (Administrative Court of Cassation of the Supreme Court, 25 November 2021) <https://reyestr.court.gov.ua/Review/101370586> accessed 18 January 2024; Case no 280/5907/19 (Administrative Court of Cassation of the Supreme Court, 04 August 2022) <https://reyestr.court.gov.ua/Review/105577762> accessed 18 January 2024; Case no 640/14168/20 (Administrative Court of Cassation of the Supreme Court, 13 September 2022) <https://reyestr.court.gov.ua/Review/101370586> accessed 18 January 2024.

31 Dmytro Terletskyi, 'Legally Significant Implications of the Decisions of the Constitutional Court of Ukraine in Criminal Proceeding' (2020) 4 Ukrainian Journal of Constitutional Law 109, doi:10.30970/jcl.4.2020.6.

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(perspective) effect, meaning it applies to legal relationships that arose or continue after its adoption (except in cases where the Constitutional Court of Ukraine directly establishes otherwise in the text of the decision[32]) (para. 34).[33]

Despite its true novelty, this legal conclusion did not result in far-reaching consequences. In particular, the Court Chamber on cases related to the protection of social rights in the Administrative Court of Cassation in the judgment of 21 March 2023 (Case No 240/7411/21) referenced the legal conclusion of the Grand Chamber of the Supreme Court dated 18 November 2020. Nevertheless, it stated that considering the direct temporal effect of the Constitutional Court of Ukraine's decisions, the extension of the legal position expressed in such a decision to relations that arose before the date of its adoption contradicts part 2 of Article 152 of the Constitution of Ukraine (para. 35).[34] It should be noted that the judgment of the Court Chamber lacks any attempt to analyse whether the disputed relations in the case are still ongoing and, if they have ceased, when this occurred.

Similarly, the Administrative Court of Cassation, in its judgment of 27 September 2023 (Case No 260/1656/22), ruled that the decisions of the Constitutional Court of Ukraine possess solely direct (perspective) temporal effect, changing specific provisions of the law of Ukraine (legislative regulation) instead of the Verkhovna Rada of Ukraine. This guarantees the constitutional principle of the separation of powers, ensures the stability of social and administrative relations in Ukraine, and prevents unforeseen consequences (para. 61).[35] For this very reason, the legal positions of the Constitutional Court of Ukraine cannot be applied to legal relations that existed before the Constitutional Court issued the respective decision. As in the previous case, the Administrative Court of Cassation overlooked whether the disputed relations are still ongoing and, if they have ceased, when this occurred.

In other words, the courts seek to bypass the distinction between the direct and prospective effects of decisions of the Constitutional Court of Ukraine. Instead, they unjustifiably equate them, arguing against the retroactive effect of decisions of the Constitutional Court of Ukraine. An unexpected positive outcome of such an approach, however, is that the courts consistently emphasise that the legal regulation of legal relations arising after the adoption of the decision of the Constitutional Court of Ukraine must be carried out with mandatory

32 It is imperative to underscore that, in accordance with Article 152 (2) of the Constitution of Ukraine, laws, other acts, or their separate provisions declared unconstitutional lose legal force from the day the Constitutional Court of Ukraine adopts the decision on their unconstitutionality, unless otherwise stipulated by the decision itself, but not earlier than the day of its adoption. Due to the mentioned reason, the act cannot lose its legal force before the day on which the respective decision is adopted by the Constitutional Court of Ukraine.

33 Case no 4819/49/19 (Grand Chamber of the Supreme Court, 18 November 2020) <https://reyestr.court.gov.ua/Review/93081749> accessed 18 January 2024.

34 Case no 240/7411/21 (Administrative Court of Cassation of the Supreme Court, 21 March 2023) <https://reyestr.court.gov.ua/Review/109856868> accessed 18 January 2024.

35 Case no 260/1656/22 (Administrative Court of Cassation of the Supreme Court, 27 September 2023) <https://reyestr.court.gov.ua/Review/113768001> accessed 18 January 2024.

consideration of the respective decision of the Constitutional Court of Ukraine. A noteworthy legal conclusion is presented in the decision of the Administrative Court of Cassation of 18 May 2023, in case No. 420/24821/21, stating that "…damages cannot be inflicted after the Constitutional Court of Ukraine has declared an act unconstitutional... Harm arises before its [decision's] issuance when the act was still in force and had not yet been recognised as unconstitutional" (para. 60).[36]

It is also important to note that despite having the relevant powers, the Constitutional Court of Ukraine usually avoids determining the execution procedure in its decisions, including decisions on constitutional complaints. In this context, an illustrative and exceptional case is the decision of 21 July 2021 No. 4-p(II)/2021.[37] In this decision, the Constitutional Court of Ukraine explicitly stated that it does not apply to legal relations that arose when the provision of the law of Ukraine became unconstitutional and continue to exist after the day of the Constitutional Court of Ukraine's adoption of this Decision.

(2) Review under exceptional circumstances is applicable only to decisions where the claims have been fully or partially satisfied (i.e., are subject to execution) but have not yet been enforced.[38] In turn, court decisions in which the plaintiff's claims have been denied cannot be deemed unenforced, as such decisions do not require compulsory execution. Consequently, they are not eligible for review under exceptional circumstances. Guided by this reasoning, the Supreme Court rejected the application for reconsideration under exceptional circumstances of the final court decision in the Skrypka case.[39]

The legal conclusion consistently adhered to by the courts holds particular practical significance. Indeed, in the vast majority of cases, the review of final court decisions is motivated by the desire to reconsider cases where the court, applying the subsequently recognised unconstitutional law of Ukraine, has denied the plaintiff's claims. Accordingly, in public law disputes, such a legal conclusion precludes the exceptional review of court decisions regarding appeals by individuals and legal entities against rulings, actions, or inaction of authorities. It should be noted that the Administrative Cassation Court

36 Case no 420/24821/21 (Administrative Court of Cassation of the Supreme Court, 18 May 2023) <https://reyestr.court.gov.ua/Review/110951140> accessed 18 January 2024.

37 Case no 3-107/2020(221/20), Decision no 4-p(II)/2021 (Constitutional Court of Ukraine, 21 July 2021) [2021] Official Gazette of Ukraine 65/4138.

38 Case no 808/1628/18 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 19 February 2021) <https://reyestr.court.gov.ua/Review/95010526> accessed 18 January 2024; Case no 140/2217/19 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 21 December 2022) <https://reyestr.court.gov.ua/Review/107984435> accessed 18 January 2024; Case no 420/4196/20 (Administrative Court of Cassation of the Supreme Court, 30 May 2023) <https://reyestr.court.gov.ua/Review/111267362 > accessed 18 January 2024.

39 Case no 818/1793/18 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 07 July 2023) (n 13) para 10.

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attempted several times to deviate from such a legal conclusion.[40] However, despite the sound reasoning, these attempts were not supported and did not succeed.[41]

However, the final word on this matter may rest with the Constitutional Court of Ukraine. As of January 2024, there are currently several cases involving constitutional complaints in the proceedings of the First and Second Senates of the Constitutional Court of Ukraine. These cases challenge provisions of the Code of Administrative Procedure of Ukraine, which allow for the review of final court decisions under exceptional circumstances, contingent upon the condition that the final court decision remains unexecuted.[42]

In this context, we support the opinion, argued in relation to a similar provision in the Commercial Procedure Code of Ukraine, that "… it is more appropriate to assert not unconstitutionality but the incorrect interpretation of procedural legislation by the courts. The Constitutional Court of Ukraine has ample leeway to provide a conformed interpretation in line with the Constitution of Ukraine for the relevant provisions (directly permitted by Article 89(3) of the Law) and refrain from declaring the provisions themselves as unconstitutional."[43] The interpretive criterion, through which achieving a conformed interpretation with the provisions of the Constitution of Ukraine seems possible, is the characterisation of the disputed legal relations in the respective case as ongoing.

(3) The decisions of the Constitutional Court of Ukraine are primarily significant as rulings of a general nature, establishing legal conclusions for resolving future cases, rather than as grounds for reviewing a case with a retrospective application of a new legal position that alters the legal certainty already established by the final court judgment in the case.[44]

In other words, the substantive review of final court decisions due to the established unconstitutionality of the law applied by the court is perceived by the judiciary as a clear threat to legal certainty. It is crucial to note that this conclusion is applied by courts in all

40 Case no 808/1628/18 (Administrative Court of Cassation of the Supreme Court, 20 February 2020) <https://reyestr.court.gov.ua/Review/87758201> accessed 18 January 2024.

41 Case no 808/1628/18 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 19 February 2021) (n 38).

42 'The Court will examine for constitutionality a specific provision of the Code of Administrative Procedure of Ukraine regarding the review of court decisions under exceptional circumstances, provided that the court decision remains unexecuted' (*Constitutional Court of Ukraine*, 6 December 2023) <https://ccu.gov.ua/novyna/sud-pereviryt-na-konstytuciynist-okreme-polozhennya-kodeksu-administratyvnogo-sudochynstva> accessed 18 January 2024.

43 Barabash and Berchenko (n 29) 15.

44 Case no 922/1391/18 (Commercial Court of Cassation of the Supreme Court, 29 October 2019) <https://reyestr.court.gov.ua/Review/85327051> accessed 18 January 2024; Case no 4819/49/19 (Grand Chamber of the Supreme Court, 18 November 2020) (n 33); Case no 320/4700/20 (Administrative Court of Cassation of the Supreme Court, 31 January 2023) <https://reyestr.court.gov.ua/Review/108696095> accessed 18 January 2024; Case no 466/6062/21 (Second Chamber of the Civil Court of Cassation of the Supreme Court, 16 June 2023) <https://reyestr.court.gov.ua/Review/111742179> accessed 18 January 2024.

cases, irrespective of any connection with a constitutional complaint, including whether the complainant is the subject of the right to file a constitutional complaint. This legal conclusion was precisely applied by the Supreme Court in the composition of the Joint Chamber of the Cassation Administrative Court in the Skrypka case.[45]

5 CONCLUDING REMARKS

The analysis of judicial practice indicates that the review of final court decisions due to the unconstitutionality of the law applied by the court is unequivocally and strictly limited to resolving issues that arose after the establishment of the law's unconstitutionality. Importantly, this review does not extend to the period before the law of Ukraine was deemed unconstitutional and does not guarantee the restoration of violated constitutional rights. This provides reasonable grounds to assert that restoring the complainant's previous legal status through a constitutional complaint does not occur. Therefore, a subject exercising the right to a constitutional complaint, having exhausted other legal remedies, diligently complied with the requirements in filing and substantiating the constitutional complaint, cannot achieve a substantive review of the final court decision in their own case, wherein a Ukrainian law or its provision, recognised as unconstitutional following their complaint, was applied by the court, despite the explicit provision for such a possibility in Ukraine's procedural legislation.

This conclusion is supported by numerous court decisions made as a result of proceedings under exceptional circumstances. It is very indicative that courts have recently identified a number of compelling reasons explaining why the unconstitutionality of the law of Ukraine or other legal acts applied by the court in final court decisions does not, cannot, and must not necessitate a substantive review of such decisions. However, to this day, the courts have not identified any reasons explaining when the unconstitutionality of the law of Ukraine or other legal acts applied by the court in final court decisions can and must necessitate a substantive review of such decisions. A notable example of this practice is the Skrypka case, in which the Constitutional Court of Ukraine issued its first historic decision under his constitutional complaint (together with the complaint of Bobyr).

After systemically and rationally assessing all the factors that have led to such a judicial practice, it is our conviction that without coordinated changes to the Constitution of Ukraine and the existing legislation, achieving a balanced, clear, and unambiguous determination of the legal consequences of decisions of the Constitutional Court of Ukraine, including decisions under constitutional complaints, is unattainable.

45 Case no 818/1793/18 (Joint Chamber of the Administrative Court of Cassation of the Supreme Court, 07 July 2023) (n 13) para 10.

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AUTHORS INFORMATION

Terletskyi Dmytro*
PhD (Law), Head of the Constitutional Law Department, National University "Odesa Law Academy", Odesa, Ukraine
terletskyi@onua.edu.ua
https://orcid.org/0000-0003-4588-7517
Corresponding author, responsible for the conceptualization, research methodology, writing and supervising, and responsible for ensuring that the descriptions and the manuscript are accurate and agreed upon by the co-author.
Competing interests: No competing interests were declared.
Disclaimer: The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

Nehara Rodion
PhD (Law), Associate Professor of the Department of Administrative and Financial Law, National University "Odesa Law Academy", Odesa, Ukraine
negara@onua.edu.ua
https://orcid.org/0000-0003-3942-708X
Co-author, responsible for writing and data collection.
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RIGHTS AND PERMISSIONS

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Case Note

THE MODEL OF PROSECUTORIAL SELF-GOVERNANCE IN UKRAINE AND THE BALTIC COUNTRIES: A COMPARATIVE ASPECT

Oksana Khotynska-Nor*, Sergii Podkopaiev, Hanna Ponomarova and Dmytro Lukianov

ABSTRACT

Background: *New legislation in Ukraine has introduced a significant change in the function of the prosecutor's office by establishing bodies of prosecutorial self-governance. Their implementation stems from the change in the constitutional status of the prosecutor's office and the need to strengthen the independence of prosecutors while minimising external political and internal systemic influence on their work. Such reforms align with a pan-European tendency, which was formed as a result of the modernisation of approaches to the perception of the prosecutor's office. The independence of the judiciary and the effectiveness of the administration of justice depends on the independent activity of such body as the prosecutor's office. This necessitates the formation and development of the principle of political neutrality, which should form the basis of the organisation and activity of the prosecutor's office in a state governed by the rule of law.*

Orientation to international standards and best practices allows us to hypothesise about the progressiveness of the Ukrainian model of prosecutorial self-governance. This hypothesis can be tested through a comparative analysis with other countries. We have chosen the Baltic countries for comparison as they are connected with Ukraine by a common Soviet past; however, they decided on the European course of their development much faster.

The article offers an overview of models of prosecutorial self-governance in Latvia, Lithuania, Estonia and Ukraine, outlining the structure and competence of their bodies. Based on a comparative analysis of Ukraine's example, the researchers have identified the main directions for strengthening the institutional capacity of prosecutorial self-governance bodies.

Methods: *In conducting the scientific work, the authors employed several special legal methods, which allowed them to realise both the collection and generalisation of factual data, as well as to carry out a multi-level comparison of selected research objects at the proper level. The study relied on, in particular, formal-legal, logical-legal, historical-legal and comparative-legal methods of scientific learning.*

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Results and Conclusions: *It has been concluded that the introduction of prosecutorial self-governance in the states is a necessary step in the direction of strengthening the independence of prosecutors as a component of effective justice. This makes it possible to minimise external political and internal systemic influence on personnel processes in the prosecutor's office system, contributes to ensuring its political neutrality, as well as solves issues of financial, material, technical, and other provisions for prosecutors. In this sense, the Ukrainian model of prosecutorial self-governance is quite progressive, although it is not without disadvantages. In particular, the dispersion of personnel powers among different subjects makes prosecutors vulnerable in career advancement, specifically regarding clarity in the demarcation of their competence. This focuses on further developing prosecutorial self-governance, strengthening its institutional capacity.*

1 INTRODUCTION

One of the stages of the public prosecutor's office reform has recently ended in Ukraine. Among its results is a consolidation of the constitutional status of the public prosecutor's office in the justice system and determination at the legislative level of additional guarantees of independence of prosecutors, which tend to be analogous to those of judges. One is the functioning of prosecutorial self-governance bodies provided for the Law of Ukraine 'On the Public Prosecutor's Office' (2014).[1]

The institutionalisation of prosecutorial self-governance aligns with the trend observed in many European countries. While there is no general standard or requirement for organisational forms of self-governance of prosecutors, their existence serves as a mechanism to uphold the independence of prosecutors, which, in turn, affects the independence of the judiciary. The substantive content of the independence of the judiciary, as stated in para. IV of Opinion No.9 (2014),[2] para. 3 of Opinion No.13 (2018) of the Consultative Council of European Prosecutors,[3] has led to changes in approaches to determining the status of prosecutors, establishing additional guarantees of their independence and, in general, increasing the level of autonomy. Similarly, we can conclude that the experts considered the functioning of prosecutors' self-governance bodies from the point of view of a greater goal, namely the independence of the judiciary.

1 Law of Ukraine no 1697-VII of 14 October 2014 '*On the Prosecutor's Office*' <https://zakon.rada.gov.ua/laws/show/1697-18> accessed 27 October 2023.

2 Opinion of the CCPE no 9 (2014) of 17 December 2014 'On European Norms and Principles Concerning Prosecutors' <https://rm.coe.int/168074738b> accessed 27 October 2023.

3 Opinion of the CCPE no 13 (2018) of 23 November 2018 'Independence, Accountability and Ethics of Prosecutors' <https://rm.coe.int/opinion-13-ccpe-2018-2e-independence-accountability-and-ethics-of-pros/1680907e9d> accessed 27 October 2023.

The content of para. 3 of Introduction, section X (Prosecutorial Council) of the Report of the Venice Commission, adopted in December 2010, is the basis for such conclusion.[4]

Prosecutorial self-governance bodies in different countries differ in their status and degree of influence on the national prosecutorial system. Of course, they are not considered means of solving all problems in the system, but they, at least, serve as a kind of buffer between prosecutors and the political elite. It was the provision to avoid misuse of the prosecutor's office for political purposes that formed the basis for the introduction of prosecutors' self-governance.[5]

The stated goal of avoiding using the public prosecutor's office for political purposes has always been admitted as relevant. A number of legislative restrictions for achieving it have been introduced in Ukraine. For example, political neutrality is recognised as a fundamental provision of the prosecutor's office activity, which is embodied in various legislative acts by establishing various prescriptions: prosecutors cannot be members of political parties; prosecutors are obliged to observe political neutrality to avoid demonstrating of their own political convictions or views in any form while carrying out their official powers, not to use their official powers in the interests of political parties or their branches or individual politicians; a prosecutor cannot belong to a political party, participate in political actions, rallies, strikes and involve subordinate employees in them, publicly demonstrate own political convictions, etc.

The Venice Commission specifically noted the inclusion in the list of principles of the prosecutor's office activities of several new principles, in particular, the principle of political neutrality of the prosecutor's office at the stage of work on the draft law on the public prosecutor's office. Thus, over the past few years, the principle of political neutrality has been gradually formed and implemented as a principle of functioning of the prosecutor's office. Today, this principle is fundamental and unchangeable.

The issue is all the more important for Ukraine due to the direct involvement of the Verkhovna Rada of Ukraine, a political body involved in the procedure of appointing and dismissing the Prosecutor General, as it grants approach for such appointments or dismissals. The Parliament of Ukraine retains the authority to express no confidence in the Prosecutor General, leading to their actual resignation from office (para. 25 of Art. 85 of the Constitution of Ukraine).[6]

4 Report of the Venice Commission CDL-AD (2010) 040 of 3 January 2011 'On European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service' <https://rm.coe.int/1680700a60> accessed 27 October 2023.

5 Laura Stefan and Idlir Peci, *Comparative Study on Prosecutorial Self-Governance in the Council of Europe Member States* (Council of Europe 2018) 5.

6 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (amended on 01 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 27 October 2023.

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Despite criticism, notably from international experts[7], regarding the Ukrainian parliament's competence to express no confidence in the Prosecutor General, considering it primarily as a purely political tool, this relevant legal norm remains in the text of the Basic Law. Therefore, the introduction of the institution of prosecutorial self-governance in Ukraine is, to a certain extent, intended to minimise political influence on the procedural activities of prosecutors, particularly considering the specifics of the procedures for the appointment and resignation of the Prosecutor General.

Furthermore, the self-governance of prosecutors should, if not minimise, significantly reduce the internal systemic managerial impact on solving a list of entirely organisational and personnel issues in a traditionally centralised system, until recently with the dominant principle of unity of command.[8]

That is, it is the bodies of prosecutorial self-governance are tasked with assuming a leading role in ensuring (1) the independence of prosecutors inside the system and outside it and (2) the independence of the public prosecutor's office as a state institution, which is a component of the justice system in Ukraine. This independence of prosecutors, akin to that of judges, is not a prerogative or a privilege for them but rather a guarantee of fair, impartial and effective administration of justice, thereby safeguarding the interests of society and individuals.[9] The independence of prosecutors is admitted as a natural consequence of the independence of the judiciary,[10] and is also considered a necessary prerequisite for the rule of law,[11] one of the elements of which is access to justice. Accordingly, there exists a profound link between the proper functioning of prosecutorial self-governance in the country, serving as a guarantee of the independence of public prosecutors, and the independence of the judiciary, ensuring the implementation of the principle of the rule of law and access to justice.

Eventually, the prosecutorial self-governance bodies are called upon to implement a number of key tasks for a state governed by the rule of law:

(a) to contribute to the independence of the justice system;
(b) to act as a kind of "link" between the public prosecutor's office and society;

7 Opinion of the Venice Commission CDL-AD (2012) 019 of 15 October 2012 'On the Draft Law on the Public Prosecutor's Office of Ukraine' <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)019-e> accessed 27 October 2023.

8 The principle of unity of command provided, for example, that the Prosecutor General or regional level prosecutors solely decided personnel issues.

9 Opinion of the CCJE no 12 (2009) and Opinion of the CCPE no 4 (2009) of 8 December 2009 'On the Relations between Judges and Prosecutors in a Democratic Society' **Explanatory note,** para 27 <https://rm.coe.int/1680747391> accessed 27 October 2023.

10 Opinion of the CCPE no 9 (2014) (n 2) para 4.

11 Opinion of the CCPE no 16 (2021) of 26 November 2021 'Implications of the Decisions of International Courts and Treaty Bodies as Regards the Practical Independence of Prosecutors', para 4 <https://rm.coe.int/opinion-no-16-2021-en/1680a4bd26> accessed 27 October 2023.

(c) to motivate the professional prosecutorial community to self-development (self-correction);
(d) to ensure the functioning of the public prosecutor's office within the justice system and the development of the public prosecutor's office's system.

The prosecutorial self-governance is a relatively new institution for Ukraine's legal system in general and the system of the public prosecutor's office in particular. Therefore, its study is interesting in identifying existing problematic issues and developing possible ways to solve them to strengthen the institutional capacity of prosecutorial self-governance to address the assigned tasks. This examination holds relevance for all European states, considering that the Ukrainian model is new and has been formed based on established international standards while also drawing from leading practices in this matter.

In this sense, we consider it possible to refer to the relevant experience of the Baltic countries, which share a common Soviet past with Ukraine and have been members of the European Union for almost two decades. The comparison will make it possible to evaluate the existing models of prosecutorial self-governance and their competence in the context of their development progress.

2 THE STRUCTURE OF PROSECUTORIAL SELF-GOVERNANCE AND ITS COMPETENCE IN THE BALTIC STATES AND UKRAINE

In our comparison, we proceed from the fact that the Advisory Council of European Prosecutors in its Opinion No. 18 (2023) on Councils of Prosecutors as key bodies of prosecutorial self-governance considers such organisational forms as assemblies, congresses, boards, commissions as "other" bodies of prosecutorial self-governance. This underscores the variety of organisational models of the public prosecutor's office and the need ipso facto to extend the same recommendations, rules and conditions specified in this conclusion to them. This extension aims to exclude political influence on them and ensure their activities are geared towards strengthening the independence and impartiality of the prosecutor's office (para. 86, para. 88). At the same time, organisationally formalised subjects such as the Councils of Prosecutors have a greater "institutional value", taking into account their importance for ensuring the effective and impartial functioning of public prosecutor's offices and individual prosecutors through their independent decision-making (para. 1 of Chapter VIII).[12]

12 Opinion of the CCPE no 18 (2023) of 20 October 2023 'On Councils of Prosecutors as Key Bodies of Prosecutorial Self-Governance' <https://rm.coe.int/opinion-no-18-2023-final/1680ad1b36> accessed 27 October 2023.

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Latvia

According to Art. 1 of the Law 'On the Public Prosecutor's Office, ' the Prosecutor's Office of Latvia is a body of judicial power.[13] Such institutions as *the Council of the Prosecutor General and the Attestation and Qualification Commissions* created on July 1 1994, are functioning in the country. In addition, *the Council of Justice*, created in 2010 and called the 'self-governance body of the judicial system', is also competent for the public prosecutor's office. The purpose of *the Council of Justice* is to balance relations between branches of government. It plays a decisive role in the evaluation and appointment of a candidate for the post of the Prosecutor General.[14]

The Council of the Prosecutor General is established by order of the Prosecutor General for an indefinite term. Today, it consists of 16 members, with only one not being a prosecutor. According to Art. 29 of the Law 'On the Public Prosecutor's Office', the Council of the Prosecutor General is a collegial advisory body that considers the main issues of the organisation and activity of the public prosecutor's office and also performs other functions provided for by this Law. Thus, it develops and approves: (1) Regulations on the Attestation and Qualification Commissions of prosecutors; (2) Code of ethics of prosecutors; (3) Regulations on the procedure for wearing and samples of uniforms and insignia of prosecutors; (4) Rules for the selection, training and qualification examination of candidates for the position of public prosecutor; (5) Regulations on evaluation of professional activity of public prosecutors, etc.

The Council of the Prosecutor General, in turn, creates *The Attestation and Qualification Commissions* for a one-year term. The Council of the Prosecutor General also determines the number and composition of their members. In addition, these commissions report on their activity to the Council of the Prosecutor General at least once a year (Art. 29^{1}; Art. 29^{2}). Today, each commission consists of 8 members, all of whom are prosecutors (prior to 2023, each commission had 10 members – all of whom were prosecutors).

The Attestation Commission of Prosecutors provides an opinion on the suitability for the position before the appointment or promotion of a prosecutor, submits a proposal to the Prosecutor General to apply disciplinary sanctions to the prosecutor if the Law determines its need, and exercises other powers. At the same time, its decisions and conclusions are of a recommendatory nature (Art. 29^{1}).

13 Law of the Republic of Latvia of 19 May 1994 'Prokuratūras likums' <https://likumi.lv/doc.php?id=57276> accessed 27 October 2023.

14 CCPE, *Compilation of Responses to the Questionnaire for the Preparation of the CCPE Opinion no 18 (2023) on the Councils of Prosecutors as Key Bodies of Prosecutorial Self-Governance* (CCPE Secretariat 2023) 101 <https://rm.coe.int/compilation-of-responses-for-opinion-no-18-2023-/1680aa9355> accessed 27 October 2023.

In turn, *the Qualification Commission of Prosecutors* evaluates and provides an opinion on the progress of the implementation of the internship program of the candidate for the position of prosecutor, on the conformity of the knowledge and professional skills of the candidate for the position of prosecutor or prosecutor to the position he holds, etc. (Art. 29[2]).

Issues of bringing the prosecutor to disciplinary responsibility are resolved within the framework of the "simplified" procedure in an order determined by the Prosecutor General (Art. 45).

Lithuania

In the Constitution of the Republic of Lithuania, the norms regarding the public prosecutor's office are contained in Art. 118 of Chapter IX. Court.[15] At the same time, the institution of self-governance of prosecutors is currently absent in the country as such. Although 'some elements of self-governance' are mentioned in the context of the management of the prosecutor's service in matters of selecting prosecutors, evaluating their work, and checking violations of the Code of Ethics. They are exercised by commissions created by the Prosecutor General, consisting of 7 members - 4 prosecutors and 3 public representatives.[16] The conclusions of such commissions are partially binding for the Prosecutor General, who cannot strengthen the decisions of the Commission for the evaluation of the work of prosecutors; he can appoint a person to the position of a prosecutor only from the list of candidates proposed by the relevant commission; The Prosecutor General may also not impose disciplinary sanctions on a prosecutor if the Prosecutor's Ethics Commission believes that the prosecutor has not committed a breach of the law, official misconduct or a violation of the Code of Ethics of Prosecutor.

According to Art. 10 of the Law on the Public Prosecutor's Office of Lithuania, commissions function in the prosecutor's system *for the recruitment of prosecutors* (for the selection of persons who claim to occupy the vacant position of the prosecutor, with the exception of the positions of the chief prosecutor and his deputy); *for the selection of chief prosecutors* (chief prosecutor and his deputy); *attestation of prosecutors* (for evaluation of the official activities of prosecutors, their qualification and suitability for work); *on the ethics of prosecutors* (for investigation of violations of legislation, official misconduct, actions that discredit the rank of the prosecutor, as well as other violations of the Code of Ethics of Prosecutor), and also *examination commissions* for candidates for positions (for evaluation of the professional preparation of candidates for the position of prosecutor).[17] All of them are formed for a period of three years. The Board of Prosecutors nominates two prosecutors;

15 Lietuvos Respublikos Konstitucija (1992) <https://www.lrs.lt/home/Konstitucija/Konstitucija.htm> accessed 27 October 2023.

16 CCPE (n 14) 109.

17 Law of the Republic of Lithuania no I-599 of 13 October 1994 'Lietuvos Respublikos prokuratūros įstatymas' <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.5956/asr> accessed 27 October 2023.

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the Prosecutor General appoints two prosecutors (one of such appointments is based on the proposal of the public prosecutor's trade union) to the composition of these commissions (except for the examination commission). The President of the Republic, the Speaker of the Parliament and the Prime Minister also nominate one prosecutor with an impeccable reputation based on the proposal of the public prosecutors' trade union. In turn, the Prosecutor General and the Board of Prosecutors appoint two prosecutors to the examination commission, and the President of the Republic, the Speaker of the Parliament and the Prime Minister nominate one scholar in the field of legal sciences with an impeccable reputation.

The Prosecutor General approves the composition of the commissions and the order of their activities.

According to Art. 7 of the Law, there is an advisory body under the General Prosecutor's Office - the Board of the Prosecutor's Office of the Republic of Lithuania, the composition and the order of activity of which are approved by the order of the Prosecutor General. The Prosecutor General is the head of the Board, and the members are the deputies of the Prosecutor General and the chief prosecutors of the districts.

In addition, the Public Prosecutor's Office of Lithuania has two trade unions that represent the interests of prosecutors, as well as the Labor Council, which actively defends the interests of prosecutors and tries to participate in the management of the Public Prosecutor's Office. Their representatives are members of the Board of the Prosecutor's Office of the Republic of Lithuania and the commissions mentioned above created by the Prosecutor General.[18]

Estonia

According to § 1 of the Law 'On the Public Prosecutor's Office', the public prosecutor's office in Estonia is subordinate to the Minister of Justice, i.e., belongs to the executive branch of government.[19] There is the General Assembly of Prosecutors (the General Meeting of Prosecutors) in the public prosecutor's office system. According to Art. 13 of the Law, the Prosecutor General convenes the General Assembly of Prosecutors and manages its work.

The General Assembly of Prosecutors is a meeting of all prosecutors that takes place at least once a year. It resolves the following issues: (1) election of two prosecutors of the district public prosecutor's office and one prosecutor of the State Public Prosecutor's Office as members of the Competition Commission of Prosecutors; (2) election of two prosecutors of the district public prosecutor's office and two prosecutors of the State Public Prosecutor's

18 CCPE (n 14) 109-10.

19 Law of the Republic of Estonia of 22 April 1998 'Prokuratuuriseadus' <https://www.riigiteataja.ee/akt/13153853?leiaKehtiv> accessed 27 October 2023.

Office as members of the Disciplinary Commission; (3) election of a prosecutor to the position of a member of the commission on professional suitability of the Bar of Estonia and his deputy; (4) approval of the procedure for holding the General Meeting of Prosecutors; (5) listening to the reports of the responsible minister and the Prosecutor General on the activity of the public prosecutor's office; (6) discussion and submission of proposals to resolve issues related to the activity of the public prosecutor's office.

The Competition Commission of Prosecutors evaluates candidates for the position of prosecutor if such a position is filled by open competition. This commission consists of the Prosecutor General, who is ex-officio the chairman of this commission, one prosecutor of the State Public Prosecutor's Office, two prosecutors of the district public prosecutor's office, one judge elected by the plenum of judges, one legal scholar elected by the dean of the Faculty of Law of the University of Tartu, and an official of the Ministry of Justice appointed by the minister. The term of office of a member of the Competition Commission of Prosecutors, with the exception of the Prosecutor General and an official of the Ministry of Justice, is three years (Art. 19; Art. 43). The Ministry of Justice establishes requirements for the organisation of this competition, as well as for persons applying for the position of prosecutor (Art. 44).

The Minister of Justice also determines the procedure for the work of *the Disciplinary Commission,* which considers cases of disciplinary misconduct of prosecutors (Art. 36). This commission consists of two prosecutors of the State Public Prosecutor's Office, two prosecutors of the district public prosecutor's office and one judge elected by the plenum of judges. The Disciplinary Commission is elected for a term of three years. Its chairman is elected from among the members of this commission.

Ukraine

Today in Ukraine, according to the Law operates:

(a) the *All-Ukrainian Conference of Prosecutors* is defined as 'the highest body of prosecutorial self-governance' (Art. 67). Convened by the Council of Prosecutors of Ukraine (hereinafter – CPU) once every two years. Its competence includes hearing the CPU report on the fulfilment of tasks of public prosecutorial self-governance bodies; electing members of the High Council of Justice and deciding on the termination of their powers; appointment members of the CPU and the Qualification and Disciplinary Commission of Prosecutors (hereinafter – QDCP); approval of the Code of Professional Ethics and Rules of Professional Conduct for Public Prosecutors and the regulations on the CPU; adoption of regulations on the procedure for the work of the QDCP; appeal to public authorities and their officials with proposals for resolving issues related to the activity of the public prosecutor's office; examination of other issues of public prosecutorial self-governance and exercise of other powers in accordance with the law.

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(b) *the CPU* is the highest body of public prosecutorial self-governance between the Conferences of Prosecutors. It not only organises the implementation of decisions of the Conference or resolves issues related to its convening and holding, but also its competence includes, in particular, bringing recommendations to the heads of relevant public prosecutor's offices for appointment of prosecutors to administrative positions; contribution to assurance of the independence of prosecutors and to increasing the state of organisational support for the activities of public prosecutor's offices; resolution of issues of legal and social protection of prosecutors and members of their families; consideration of appeals on threats to the independence of prosecutors and taking appropriate measures; making proposals to state authorities on resolving issues related to the activities of the public prosecutor's office; exercising control over the implementation of decisions of public prosecutorial self-governance bodies, etc.

(c) *a meeting of prosecutors* of the relevant public prosecutor's offices (the Prosecutor General's Office, regional public prosecutor's offices, and district public prosecutor's offices), which elects delegates to the Conference of Prosecutors. However, it should be noted that the legislator does not give them any other competence. However, this does not limit the capacity development of such meetings, taking into account, in particular, the provisions para. 8-9 of Guidelines on the Role of Prosecutors (1990)[20] and para. 6 of Recommendation (2000) 19 on the role of public prosecution in the criminal justice system.[21] They refer to the possibility of prosecutors participating in professional organisations to represent their interests, increase their professional training, protect their status, and also discuss legal issues.

(d) *the QDCP*, which keeps records of vacant and temporarily vacant positions of prosecutors; conducts a competition (selection) of candidates for the position of district prosecutor; conducts a competition for appointment to high-level public prosecutor's offices; considers issues about disciplinary responsibility of prosecutors; etc.

In general, public prosecutorial self-governance bodies in Ukraine solve tasks and exercise competence[22] that are characteristic of such bodies in other European countries (where they are established.[23]

20 'Guidelines on the Role of Prosecutors' (8th UN Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990) <https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors> accessed 27 October 2023.

21 Recommendation Committee of Ministers of the Council of Europe R (2000) 19 and Explanatory Memorandum of 6 October 2000 'The Role of Public Prosecution in the Criminal Justice System' <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804be55a> accessed 27 October 2023.

22 Oksana Khotynska-Nor, Nana Bakaianova, and Maryna Kravchenko, 'Prosecutor's Office of Ukraine Under Martial Law: Challenges, Trends, Statistical Data' (2023) 6(3) Access to Justice in Eastern Europe 40, doi:10.33327/AJEE-18-6.3-a000303.

23 CCPE (n 14) 235.

The conducted comparative analysis demonstrates that one or another organisational model of public prosecutorial self-governance, which was formed in each of the countries, is a product of various political and legal events within the national legal system. Although such countries may have a common historical past, in the future, the specifics of political, social, cultural and legal development will determine individual features for each of them.

In the context of compliance with the international standards mentioned at the beginning of this section, the existing de jure model of public prosecutorial self-governance in Ukraine appears to be more optimal because, taking into account the structure of its bodies and powers, it has a greater ability to minimise corporate influence by reducing the participation of the Prosecutor General in the processes of formation and activity of relevant bodies, as well as external political influence, for example, of the Minister of Justice as a representative of the executive power. Although its formation was not without its disadvantages, which were the object of attention at various levels.[24]

3 WAYS TO STRENGTHEN THE INSTITUTIONAL CAPACITY OF PROSECUTORIAL SELF-GOVERNANCE IN THE EXAMPLE OF UKRAINE

The experience of the formation of public prosecutorial self-governance, the ramifications of its model and the practice of the relevant bodies allow us to identify the following possible ways for strengthening their institutional capacity to ensure the fulfilment of their tasks:

1) change of corporate culture, the transformation of the consciousness of the professional prosecutorial community;
2) improving the legal regulation of public prosecutorial self-governance activity, in particular:

(a) of the formation of the relevant bodies' staff;
(b) of exercising their powers;
(c) of ensuring the enforcement of the prosecutorial self-governance bodies decisions.

1. For Ukraine and states that follow a similar course of development, this is especially important in view of the long historical traditions of building and activity of the public prosecutorial system on the principles of centralisation and unity of command. It is necessary to understand clearly the fact of changing the content and scope of traditional principles of the public prosecutor's office organisation and activity, including the principle of collegiality in resolving issues related to the status of prosecutors. This requires a certain

24 S Podkopaiev, 'The Main Areas of Improvement of the Legal Basis of the Organization and Activity of the Qualification and Disciplinary Commission of Public Prosecutors' (Actual Problems of Judicial Law: Conference, Kharkiv, 23 April 2018) 105; GRECO, *Fourth Evaluation Round Corruption prevention in respect of members of parliament, judges and prosecutors: Compliance Report Ukraine Greco RC4(2019)28* (GRECO Secretariat 2019) para 134 <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809d768c> accessed 27 October 2023.

period and contains difficulties, but it is compulsory in the context of the full formation of public prosecutorial self-governance bodies and the effective performance of their tasks.

2 (a). Formation of the relevant bodies' staff

The Law of Ukraine on the Public Prosecutor's Office provides that the composition of bodies of public prosecutorial self-governance includes representatives of the legal community, scholars or lawyers. In this sense, foreign experience testifies to different organisational models of prosecutorial self-governance. Despite the organisational peculiarities in different countries, representatives of civil society, scientific schools and lawyers are involved in their work to prevent these bodies from becoming "syndicates" on a professional basis.[25] The aim of such involvement is to strengthen public confidence in the judiciary system and the responsibility of the judiciary to society. It is generally believed that the inclusion of representatives of other legal professions provides better public recognition of the results of the activity of relevant bodies. This partly removes fears that experts protect their colleagues from the consequences of disciplinary misconduct.[26] It will also ensure constant social control over the organisation of staffing of the justice system. At the same time, foreign experience shows that a majority of prosecutors are in such bodies or consist exclusively of prosecutors.

And while the CPU includes the majority of prosecutors (11 out of 13), then in the QDCP – on the contrary, prosecutors constitute a minority in the total composition (5 out of 11).

GRECO experts (2017) expressed concern about the fact that '... current law does not ensure that prosecutors will have a majority of seats in the QDCP'. They underline that the situation in Ukraine differs from other GRECO states that have already formed bodies of similar competence. The experts proposed amendments 'to the provisions on the formation of the Qualification and Disciplinary Commission to ensure that the majority of seats are occupied by prosecutors elected by their colleagues'. This is considered to be a measure that will help it '... fully defend their legitimacy and credibility, as well as strengthen its role as a guarantor of the independence and autonomy of prosecutors'.[27] A similar provision is contained in para. 24 of Opinion No. 13 (2018) CCPE.[28] Therefore, the legislator should consider it in the context of further modernisation of public prosecutorial self-governance organisational forms.

25 Stefan and Peci (n 5) 10.

26 H Mitchell Caldwell, 'The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal' (2014) 63(1) Catholic University Law Review 100.

27 GRECO, *Fourth Evaluation Round Corruption prevention in respect of members of parliament, judges and prosecutors: Compliance Report Ukraine GrecoEval4Rep(2016)9* (GRECO Secretariat 2017) para 216 <https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-/1680737207> accessed 27 October 2023.

28 Opinion of the CCPE no 13 (2018) (n 3).

It is also necessary to revise the approach, according to which a prosecutor holding an administrative position cannot be a CPU or QDCP member. The desire to protect the relevant procedures from excessive administrative pressure from managers on other members (prosecutors), which could potentially be possible if they were appointed to these bodies, is understandable. Actually, the heads of the respective prosecutor's offices and their deputies, as heads of these bodies, have a certain authority in the system, in the prosecutorial community, which, in turn, has established historical traditions of centralised construction and hierarchical subordination. At the same time, we should understand that candidates for administrative positions in the public prosecutor's office have always been subject to increased requirements for professional qualities.

In this sense, the best solution to the issue may be to impose restrictions on the appointment of a prosecutor to the CPU or to the QDCP who does not hold any administrative position of high level (of First Deputy and Deputy Prosecutor General; head, first deputy and deputy head of regional or district public prosecutor's offices).

2 (b). Exercising the powers granted to the bodies of prosecutorial self-governance

Pondering the issue of the exercise of powers granted to the prosecutorial self-governance bodies inevitably leads to the question of the scope of their competence in the field of staffing and its correlation with the competence of other subjects. The specificity of the Ukrainian realities is that, in fact, today, the career advancement of prosecutors is carried out by:

a) the QDCP while conducting a competition for the transfer of a prosecutor to a position in a higher-level prosecutor's office;
b) the CPU while introducing recommendations to the Prosecutor General for the appointment of prosecutors to some administrative positions;
c) heads of prosecutor's offices of the appropriate level, who appoint prosecutors to other administrative positions without recommending the CPU.

Dispersion of personnel powers among various subjects makes the construction of the Ukrainian model of prosecutors' career advancement vulnerable, particularly in terms of clarity in the demarcation of their competence.

Given the need to ensure the unity of the status of prosecutors, there may be several options and possible ways to resolve this issue. Still, all of them will require institutional strengthening of the relevant bodies and legislative changes. In particular, (a) the establishment of a body in the justice system competent in matters of staffing of the prosecutor's office; (b) the CPU focuses on ensuring the independence of prosecutors, as well as improving the state of organisational support for the public prosecutors' offices activity. At the same time, issues of staffing, including in terms of making recommendations for the appointment and dismissal of prosecutors from administrative positions, consideration of appeals regarding improper performance by a prosecutor

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holding an administrative position, or official duties established for the corresponding administrative position, are transferred to the QDCP; (c) on the contrary, the transfer of powers from the QDCP to the CPU and, accordingly, the CPU should become the sole body responsible for staffing. In any case, given the need to strengthen the independence of prosecutors, the role of heads of prosecutor's offices at the appropriate level in personnel matters should be minimised.

2 (c). Of ensuring the enforcement of the prosecutorial self-governance bodies' decisions.

Ensuring the enforcement of decisions of public prosecutorial self-governance bodies is closely connected to the issue of their binding nature for various subjects, including prosecutors, other employees of the public prosecutor's office, as well as bodies of state power and local self-governance, and citizens. The issue of the effectiveness of the mechanism for ensuring the enforcement of the CPU decisions is open and requires separate consideration. Nevertheless, the very existence of such an institution as public prosecutorial self-governance and its activity is a significant step forward in ensuring the independence of prosecutors.

Today in Ukraine, the All-Ukrainian Conference of Prosecutors adopts decisions on matters within its competence binding for the CPU and all other prosecutors. At the same time, there is no similar norm for the CPU at the legislative level. Only in the Regulations on the Council of Prosecutors of Ukraine (2017) is it stipulated that the decisions of the CPU adopted on ensuring the independence of prosecutors, protection from unlawful influence, pressure, or interference in the exercise of the prosecutor's powers may be sent to the public prosecutor's office and are binding for consideration within its competence.[29] As we can see, the obligation is established only for consideration of decisions by the relevant prosecutors and only on specific issues of ensuring the independence of prosecutors. The obligation to consider such decisions by subjects outside the system other than prosecutors, as well as to consider requests, appeals, decisions on improving the state of organisational support for the activity of public prosecutor's offices, legal and social protection of prosecutors, appeals with proposals for solving problematic issues of the prosecutor's office activity to state authorities or local self-government bodies etc. remains out of regulation.

In this regard, the legislation must provide that state bodies, local self-government bodies, public organisations and officials should consider requests and decisions of the CPU within a month from the date of their receipt; as for the issues of ensuring the safety of prosecutors – within 10 days with taking measures to eliminate threats to the safety of prosecutors.

29 'Regulations on the Council of Prosecutors of Ukraine' (All-Ukrainian Conference of Prosecutors, 27 April 2017) (as amended of 28 August 2021) <https://rpu.gp.gov.ua/userfiles/file/rolojennja_pro_rpu_(1).docx> accessed 23 March 2023.

4 CONCLUSIONS

The set-up of prosecutorial self-governance in states is a significant step towards strengthening the independence of prosecutors. As the comparative analysis has shown, its Ukrainian model is quite progressive, as it has the potential to minimise both external political and internal systemic influence on personnel processes in the public prosecutor's office system and also contributes to the resolution of issues of financial, material, technical and other support of prosecutors. However, it is not without its disadvantages. Dispersion of personnel powers among different subjects makes the construction of the Ukrainian model of prosecutors' career advancement vulnerable, particularly in terms of clarity in the demarcation of their competence.

Further development of the prosecutorial self-governance should provide for strengthening its institutional capacity, taking into account the existence for a long time of conservative views on solving issues related to the status of prosecutors inside of the public prosecutor's office system, in the past self-governing forms of the organisation did not characterise this system. It can be carried out in particular by changing corporate culture, transforming the consciousness of the professional prosecutorial community, streamlining the procedure for personnel forming the relevant bodies, a clear delineation of their competence and sphere of responsibility, and ensuring the implementation of decisions. This is a necessary condition for developing the potential of the prosecutor's office, strengthening the real independence of prosecutors, and a condition for more effective functioning of the justice system in the country.

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AUTHORS INFORMATION

Oksana Khotynska-Nor*
Dr. Sc. (Law), Head of the Department, Law School, Taras Shevchenko National University of Kyiv, Ukraine
oksananor@knu.ua
https://orcid.org/0000-0002-4480-6677
Corresponding author, responsible for concept creation, text writing and data collection, as well as supervising the article.
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Disclaimer: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations.

Sergii Podkopaiev
Dr. Sc. (Law), Prof. of the Department of Law Enforcement and Anti-corruption Activities of the Educational and Scientific Institute of Law named after Prince Volodymyr the Great of the Interregional Academy of Personnel Management, Senior Researcher at the Academician Stashis Scientific Research Institute for the Study of Crime Problems National Academy of Legal Sciences of Ukraine, Ukraine
s.podkopaev@gmail.com
https://orcid.org/0000-0002-5281-3981
Co-author, responsible for conceptualization, conducting research and writing the article.
Competing interests: Any competing interests were disclosed.
Disclaimer: The author declares that his opinion and views expressed in his manuscript are free of any impact of any organizations, despite he serves as a Member of the Prosecutor General's Office he does not represent their view or opinions.

Hanna Ponomarova
Ph.D. (Law), Head of the Department of History of State and Law of Ukraine and Foreign Countries, Yaroslav Mudryi National Law University, Kharkiv, Ukraine
g.p.ponomarova@nlu.edu.ua
https://orcid.org/0000-0003-4940-1406
Co-author, responsible for project administration, methodology and writing the article.
Competing interests: Any competing interests were disclosed.
Disclaimer: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations.

Dmytro Lukianov
Dr. Sc. (Law), the Deputy Chairman of the High Council of Justice, Ukraine
lukianov1975@gmail.com
https://orcid.org/0000-0003-2540-5488
Co-author, responsible for formal analysis, critical revision of the manuscript, approval of the final version.
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RIGHTS AND PERMISSIONS

CASE NOTE

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Case Note

EVALUATING THE ADMINISTRATION OF JUSTICE AND ABUSE OF PROCESS: A CRITICAL ANALYSIS OF THE MARIANA JURISDICTION CHALLENGE [2022] AND THE EUROPEAN SYSTEM OF LAW FOR CIVIL AND COMMERCIAL MATTERS FOR A THIRD STATE

Pedro Domingos*

ABSTRACT

Background: *This research critically analyses the jurisdictional challenges and their implications for the proper administration of justice in the case of Mariana vs. BHP Group [2022] EWCA Civ 951. The legal route taken by the High Court of Appeal is examined, considering both the proceedings in the UK (pre-Brexit) and a third state (Brazil). This text examines the impact of the European legal framework on EU member states and evaluates the approach of UK towards Article 34 of the Brussels Regulation. The analysis examines whether pursuing damages based in civil or commercial liability suffered by victims domiciled in a Third State through European jurisdiction is appropriate.*

Methods: *The study employs a case law analysis, supported by doctrinal legal research methodology, to systematically examine the balance of the principle of forum non conveniens and the consistent application of the Brussels Regulation in the Mariana Case. This is a critical review of the UK High Court's decision to overturn Judge Turner's ruling. The review emphasizes the adherence to historical national precedents, European Union Law, and the European Court of Justice's previous rulings against the United Kingdom's strike-out legal technique.*

The article explores the complexities of administering justice, focusing on the interplay between case management discretion, the principle of proportionality, and the court's responsibility to ensure a fair trial. It analyses the impact of factors such as the court's structure, case complexity, and the time required for resolution within this framework, while also considering the court's duty to administer justice effectively. .

Results and conclusions: *The study's findings enhance comprehension of jurisdiction challenges in transnational litigations within the European Legal System and their implications for the proper administration of justice. The article recommends a balanced approach that upholds the substantial rights of claimants while aligning national practices with EU civil liability standards, promoting judicial harmony in transnational civil and commercial liability cases in the European Union.*

1 INTRODUCTION

The case study analyses the implications of the Court of Appeal's decision[1] that ruled against Mr. Justice Turner decision[2] in the matter of the Jurisdiction Challenge in *Municipio de Mariana and others v BHP Group*. The case involves a group of Brazilian claimants seeking damages for environmental pollution caused by a dam collapse in Brazil. The defendants, a UK based mining company and its Australian subsidiary, challenged the jurisdiction of the English court, arguing that similar claims were already pending in Brazil.

Initially, the court granted the defendants 'application to strike out the claim or stay it as an abuse of process. The main reason for the priori decision was the potential risk of irreconcilable judgments and cross-contamination arising from the parallel proceedings in Brazil, which would render the claim in England "irredeemably unmanageable".[3]

However, the Court of Appeal overturned this decision and rejected the defendants 'application. It held that for the abuse of process to be established, each individual claimant should be considered individually, and a finding of abuse of process does not automatically lead to striking out the claim. The court emphasized that litigants should not be deprived of their claims without a scrupulous examination of all circumstances.

This rejected approach by the Court of Appeal supported by the Civil Procedure Rule 52.30,[4] is a landmark case with significant implications for the doctrine of abuse of process and the extraterritorial reach of English courts. In this paper, we further consider the issue of abuse of process and the Brussels Regulation,[5] particularly the

1 *Municipio de Mariana and others v BHP Group (UK) Ltd (formerly BHP Group PLC) and BHP Group Ltd* [2022] EWCA Civ 951 (08 July 2022) <https://www.judiciary.uk/judgments/municipio-de-mariana-v-bhp-group> accessed 11 January 2024.

2 *Município de Mariana and others v BHP Group PLC (formerly BHP Billiton PLC) and BHP Group Ltd* [2020] EWHC 2930 (TCC) (09 November 2020) <http://www.bailii.org/ew/cases/EWHC/TCC/2020/2930.html> accessed 11 January 2024.

3 ibid, paras 104, 265.

4 UK Parliament, Civil Procedure Rules (1998) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules> accessed 11 January 2024.

5 Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L 351/1 <https://eur-lex.europa.eu/eli/reg/2012/1215/oj> accessed 11 January 2024.

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framework related to the jurisdiction from an EU member state to decide a claim with parallel implications in a third state.

Crucially, this claim was commenced in 2018, prior to the UK's exit from the European Union (BREXIT), which concluded in December 2020. As a result, all proceedings are being conducted under EU law, the European Court of Justice (ECJ) jurisprudences and UK case law.

The case involves a group of Brazilian claimants, who in 2022 numbered around two hundred thousand people, including 13 large companies, 25 municipalities, 15 churches and religious institutions and 5 public utilities, none of whom had received any monetary redress from any Brazilian decisions relating to compensation.[6]

They decided to bring a claim against a UK-based mining company, seeking damages for environmental pollution caused by a dam collapse in Brazil that affected the Doce River, a huge water body stretching more than 800 kilometers between the Brazilian states of Minas Gerais and Espírito Santo, a distance greater than that from Edinburgh to London.

The claim was proposed against BHP England and BHP Australia, which sit at the head of the BHP Group and indirectly control BHP Brazil as part of the BHP Group. They share 50% ownership of Samarco Mineração SA, a Brazilian company, in a joint venture agreement with Vale SA, the owner of the other 50%. They operate together as a single economic entity under a dual-listed company structure, with the boards of director comprising the same individuals, a unified senior executive management structure, and joint objectives. The mining companies challenged the jurisdiction of the English Court to hear the liability of the defendants, arguing that the plaintiffs had already brought similar claims in Brazil, in particularly the pending action known as the "155bn CPA".[7] Jurisdiction over BHP England is based on its domicile under Regulation (EU) No 1215/2012, and over BHP Australia on the fact that it conducts its business from offices in the United Kingdom, where the claim was processed.

At first instance in Liverpool, on 07 August 2019, the defendants applied to strike out the case on three grounds: "(1) BHP Australia applied to stay the claims against it under CPR 11(1) on the basis that Brazil was clearly and manifestly the more appropriate and available forum ("the *forum non conveniens* application"); (2) BHP England applied to stay the claim under Article 34 of the "Brussels Recast" on the basis that there were pending proceedings in Brazil which gave rise to a risk of irreconcilable judgments ("the Article 34 application"); (3) Notwithstanding these applications, both defendants applied to strike out or stay the claims under CPR 3.4(2)(b) as an abuse of process, alternatively to stay them on case management grounds pursuant to CPR 3.1(2)(f), in each case on the grounds that they are vexatious, wasteful and duplicative of the collective and individual proceedings and/or

6 *Município de Mariana v BHP Group (UK)* (n 1) paras 2, 42.

7 The English abbreviation for the existing Brazilian lawsuit named "Ação Civil Pública de 155 bilhões".

judgments in Brazil and/or the work of the Renova Foundation ["the Abuse Application" and " the Case Management stay application" respectively]".[8]

Mr. Justice Turner in Liverpool, granted the defendants' applications on 9 November 2020, recognizing that all the claims would be struck out or, in the alternative, stayed as an abuse of process on the basis of the proceedings in Brazil and the Renova initiatives. The argument presented was that it may be futile and wasteful for the administration of justice to entertain a claim in the United Kingdom where it cannot be predicted that more favorable remedy will be obtained there compared to the jurisdiction of Brazil.

Alternatively, the claims should be stayed against BHP England pending the conclusion of the 155bn CPA pursuant to article 34 of Brussels Recast, due to numerous issues and a risk of irreconcilable judgments between the Mariana Case and the action in Brazil. It was considered appropriate to stay the case until the conclusion of the 155bn CPA because both actions proceeding in parallel would have the risk of undermining the administration of justice.

There last assertion was that the claims against BHP Australia should involve arguments related to *forum non conveniens* grounds, even if the proceedings against BHP England were granted in the UK, because Brazil would still be the unique forum to trial claims against BHP Australia. It was argued that the claimants had not properly demonstrated the standard rule that the British forum had a better position to obtain substantial justice despite the Brazilian courts and Renova Claim resolution facility.

To counter this argument, the Court of Appeal considered that the first judge's position was incorrect for several reasons. In relation to this research, the focus is on the decision of appeal that considered both the proceedings as a Group Litigation Order (GLO) and the position of all the individual claimants to assess the preliminary abuse of process decision. The Court recognized that the argument of abuse of process affects a material right through a procedural challenge that results in a serious denial of access to justice. In such cases, a decision needs to be deeply considered, taking into account all the parties involved and proportional to the conflict. The court stated the following in its decision:

"Where multiple claims are brought by different claimants who do not stand in materially the same position, it is necessary to consider the question of abuse by reference to claims individually (or by relevant claimant category). Abusive factors applicable only to one claimant do not render another co-claimant's claim abusive. We treat it as axiomatic that a claim brought by one claimant, which is not itself abusive, cannot become abusive merely because other claimants have chosen to bring abusive claims. The claimants should be in no different position, so far as an abuse argument is concerned, from that if each had brought separate proceedings, whether or not other claimants also brought proceedings. An individual approach is required. The court must be satisfied in relation to every claim,

8 *Município de Mariana v BHP Group (UK)* (n 1) para7.

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having regard to any differences between claimants or categories of claimant, that it is abusive and a strike-out or stay appropriate. 177. A finding of abuse of process does not lead automatically to a striking out of the claim. The court then retains a discretion as to the appropriate response, which must always be proportionate (see for example Cable v Liverpool Victoria Insurance Co Ltd [2020] EWCA Civ 1015 at paras. [63] and [64]). 178. Finally, but importantly for present purposes, litigants should not be deprived of their claims without scrupulous examination of all the circumstances and unless the abuse has been sufficiently clearly established."[9]

Dr. Zuckerman opinion sheds light on the importance of the proportionate principle in case management. According to him, which "*a sound civil adjudication system must meet three basic requirements: it must return judgments that are well grounded in law and in fact; it must do so within a reasonable time; and, it must deliver all this by the use of proportionate public and litigant resources*".[10] This argument will be further elaborated in the subsequent pages, providing a more detailed analysis.

Having duly introduced the context of the facts and arguments related to the first decision, as well as the main debate that overruled it, let's explore the concept of abuse of process and the preliminary ruling about stay proceedings in cases pending in a Member State and a third State within the context of the European Union Law.

2 THE DOCTRINE OF ABUSE OF PROCESS

The concept of abuse of process is crucial to this essay as the defendants rely on Article 34 of Regulation (EU) No 1215/2012, which empowers the court of an EU member state to stay proceedings within their jurisdiction if it is necessary for the proper administration of justice to await the final judgment in a third state. This provision also grants the courts to continue their analysis, such as striking out the action, if it appears that a double judgment would result in irreconcilable outcomes.[11]

The Royal Courts of Justice in the UK, supported by the precedent set in possess inherent jurisdiction to stay proceedings where their continuation would constitute an abuse of process.[12] The underlying principle behind this concept is that any conduct undermining the administration of justice or damaging public confidence in the legal system may be deemed abusive.

9 ibid, paras 176-8.
10 Adrian Zuckerman, 'The Continuing Management Deficit in the Administration of Civil Justice' (2015) 34(1) Civil Justice Quarterly 1.
11 Regulation (EU) no 1215/2012 (n 5) art 34.
12 *Hunter v Chief Constable of the West Midlands Police & Ors* [1981] UKHL 13 (19 November 1981) <http://www.bailii.org/uk/cases/UKHL/1981/13.html> accessed 11 January 2024.

Prof. Rabeea Assy, in his exploration of the three senses of integrity in civil justice, defines abuse of process as the "basic idea [...] that the court may impose sanctions on parties who litigate in an improper or inappropriate manner".[13] In the aforementioned precedent, Lord Diplock invoked the Court's power:

"to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people".[14]

The discretion to determine whether conduct in the proceeding is abusive is vested in the judge, supported by the doctrine of inherent power which has "operated as a valuable weapon in the hands of the court to prevent the clogging or obstruction of the stream of justice".[15] Furthermore, since the implementation of the "CPR", this doctrine must align with the CPR rules, which are also invoked by the defendants in their jurisdiction challenge.

Prof. C. H. van Rhee, in his argument about the model of civil procedure rules in modern Europe, firmly believes that under the case management system, the court bears the primary responsibility of ensuring that the proceedings are proportionate. This entails considering the nature, importance and complexity of the concrete case, as well as the impact of the pending decision in relation to other cases on its docket, to ensure that justice can be administered both in the specific case and in all proceedings in a proportional manner.[16]

This question is addressed in Rule 5 of the Model European Rules of Civil Procedure from the European Law Institute & Unidroit (2021):

"In determining whether a process is proportionate the court must take account of the nature, importance and complexity of the particular case and of the need to give effect to its general management duty in all proceedings with due regard for the proper administration of justice."[17]

This framework underscores the significance of proportionality in the exercise of the courts' discretionary power, particularly when it comes to the power to strike out a claim involving

13 Rabeea Assy, 'Taking Seriously Affordability, Expedition, and Integrity in Adjudication' in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure, and Justice: Essays in honour of Adrian Zuckerman* (OUP 2020) 190, doi:10.1093/oso/9780198850410.003.0009.

14 *Hunter v Chief Constable of the West Midlands Police & Ors* (n 12).

15 Stuart Sime, 'Inherent Jurisdiction and the Limits of Civil Procedure' in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure, and Justice: Essays in honour of Adrian Zuckerman* (OUP 2020) 290, doi:10.1093/oso/9780198850410.003.0014.

16 CH van Rhee, 'Gerenciamento de Casos e Cooperação Na Europa: Uma Abordagem Moderna Sobre a Litigância Cível' (2022) 13(2) Civil Procedure Review 162.

17 European Law Institute and UNIDROIT, *ELI – UNIDROIT Model European Rules of Civil Procedure: From Transnational Principles to European Rules of Civil Procedure* (OUP 2021) 34, doi:10.1093/oso/9780198866589.001.0001.

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substantial rights of victims of European companies. Precedents related to these rights have significant implications for international commercial litigation, cross-border disputes, and the liability of multinational companies.

Notably, in a common law system, a decision on cross-border disputes, especially when it arises from the largest group litigation order in world history, establishes a strong precedent for future similar cases and becomes a turning point in how companies operate in international market. Therefore, if a controversial decision is made without due consideration or contradicts the traditional position of the Court, the resulting precedent could undermine moral coherence and public confidence in the legal system, potentially favoring large companies disproportionately.

Dr. Zuckerman emphasizes the importance of a civil adjudication system that meets three fundamental requirements, similar to those expected of any other public service. First, "it must return judgments that are well grounded in law and in fact; [Secondly] it must do so within a reasonable time; and, [Lastly] it must deliver all this by the use of proportionate public and litigant resources" striking a "balance [between] the competing demands of correct judgements, timely judgements, and resource constraints".[18]

Conversely, if the Court were to exercise its inherent power to reconcile extraterritorial legal system with the rules of its own country and the EU legal system, acknowledging that companies operating in international markets must take measures to comply with the European legal system beyond their border to protect the environment and the people affected by their action, It would send a strong message to society that its legal system is robust enough to enforce compliance with rules even when companies operate abroad.

The three requirements aforementioned reflect the need for an efficient and fair civil adjudication system, where the proper administration of justice relies on delivering well-reasoned judgements, respecting reasonable timeframes, and managing resources effectively. The forthcoming pages of his research will delve deeper into the implications of these requirements within the context of the Mariana vs. BHP Group case and its jurisdictional challenges.

Considering the far-reaching consequences, the strike-out application must be approached with proportionally and caution, as it involves principle of access to justice, a fundamental right of the European Union, based on article 47 Charter of Fundamental Rights[19] and on article 6 European Convention on Human Rights,[20] which guarantee a fair trial for everyone

18 Zuckerman (n 10) 1.

19 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 <http://data.europa.eu/eli/treaty/char_2012/oj> accessed 11 January 2024.

20 Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ETS 5 <https://rm.coe.int/1680063765> accessed 11 January 2024.

from a member. In the UK, this principle is connected to the principle of natural justice and the right to a day on court.[21]

It is important to note that this plea (strike out application) is not limited to pending actions but can also be made prior to the initiation of a claim. In the UK legal system, such a request falls under the category of an anti-suit injunction, which is also covered by the European Union law. Prof. Remedio Marques points out that these pleas involve "Applications for declarations of condemnation for failing to initiate or continue interim proceedings […][and] imply that their substantiation allows the issuance of decisions in which a court orders a party subject to the jurisdiction of that judicial body not to initiate or continue certain requests [author translation]".[22]

He argues that, despite the controversial nature of this remedy, it offers the advantage of reducing costs and fees associated with abusive litigation and preventing irreconcilable decision between different jurisdictions.[23] Referring to Donohue v. Armco Inc. et al., (2001) 294 N.R. 356 (HL) 64, § 24, he draws attention to the standard of inherent power exercised by the UK courts, which includes granting a stay of proceedings, restraining the prosecution of proceedings in a non-contractual forum abroad, or issuing any other appropriate procedural order in the circumstances when a claim falls within the agreement made in another forum.[24]

Thus, the inherent power exercised with proportionality in conflicts involving the fundamental right of access to justice is often governed by "Rules of international courtesy (*courtoisie internationale*) guided by a principle of reciprocity and combined with specific considerations regarding *forum non conveniens* [author translation]" when striking out a case. In conclusion, he argues that the British courts typically rely on the argument of sufficient interest[25] to justify their decisions, taking into account the overall effects of these actions.[26]

21 *Ridge (AP) v Baldwin and Others* [1963] UKHL J0314-1 (14 March 1963) <https://vlex.co.uk/vid/ridge-p-v-baldwin-793177273 > accessed 11 January 2024.

22 JP Remédio Marques, 'Tutela Cautelar e Inibitória no Quadro da Propriedade Intelectual - Alguns casos difíceis em matéria de providências cautelares e a adequada tutela de requerentes e requeridos', Coimbra, Gestlegal, 2023.

23 ibid 110.

24 *Donohue v Armco Inc and Others* [2001] UKHL 64 (13 December 2001) <https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd011213/dono-1.htm> accessed 11 January 2024.

25 *Airbus Industrie GIE v Patel and Others* [1998] UKHL 12 (2 April 1998) <https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd980402/patel01.htm> accessed 11 January 2024.

26 Remédio Marques (n 22) 112.

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3 THE IMPLICATIONS OF ABUSE OF PROCESS ON MARIANA CASE

In light of the aforementioned legal framework, it is crucial to how the High Court's approach was influenced by these implications. The court carefully analyzed the main arguments and precedents presented by Mr. Justice Turner, who considered the case an abuse of process. These precedents included Hunter v Chief Constable of the West Midlands Police [1981] UKHL 13, [1982] AC 529 ("Hunter"); Her Majesty's Attorney General v Barker [2000] EWHC 453 (Admin), [2000] 1 FLR 759 ("Barker"); Johnson v Gore Wood & Co [2000] UKHL 65, [2002] 2 AC 1 ("Johnson") (citing Henderson v Henderson [1843] 3 Hare 100 ("Henderson")); Dexter Ltd v Vlieland-Boddy [2003] EWCA Civ 14 ("Dexter"); and AB v John Wyeth & Brother (no 4) [1994] PIQR 109 ("Wyeth").

Moreover, Mr. Justice Turner asserted that his decision regarding the abuse of process was a matter of case management discretion and that "[…] the factors relevant to the exercise of his discretion in relation to a case management stay did not differ materially from those relevant to the strike out application".[27] However, the High Court held a contrary view, stating that "The Judge's finding that the claims amounted to an abuse of process was not the exercise of a discretion. Rather it was an assessment in respect of which there could only be one correct answer (as to whether there was or was not an abuse of process)."[28]

In cases where a court decision is not made under the inherent power to manage a case through the CPR (Civil Procedure Rules), the decision is considered an attempt to find the correct answer within a larger context and involving multiple factor "[but] the question [on the Mariana case appeal] […] is whether or not the Judge reached the right answer (see Aldi Stores Ltd v WSP Group plc [2007] EWCA Civ 1260, [2008] 1 WLR 748 at para. [16])". In such instances, "[…] an appellate court will be reluctant to interfere with the decision of a judge where the decision rests upon balancing a large number of factors". If so, "The court can interfere if it considers the decision to be wrong by reason of some identifiable flaw in the treatment of the questio n to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the conclusion (see for example Re Sprintroom [2019] EWCA Civ 932, [2019] BCC 1031 at para. [76])."[29]

According to Prof. Zucherman, "To enforce rights judgements [the court opinion] need not only be correct in law and in fact but must also be effective as remedies for wrongs". For a remedy to be truly effective, it needs to be administered in a timely manner when it can still make meaningful difference.[30] Therefore, if a strike-out decision is made prematurely without considering the proportionality principle, it raises questions about

27 *Município de Mariana v BHP Group (UK)* (n 1) para 8.
28 ibid, para 143.
29 ibid.
30 Zuckerman (n 10) 1.

the Court of Appeal's responsibility to oversee the "exercise of case management discretion by the trial courts".[31] The analysis of such decision becomes crucial to ensure that they are made in a secure and consistent manner across the board according to the rule of law and the principle of fairness.

As a matter of principle, in analyzing Judge Turner's decision, the High Court approached the claim as a group order litigation (GLO), which involves multiple claims, brought by different claimants who are not in materially the same position. In such cases, the court must consider the question of abuse in relation to the entire class of claimants and each of their individual claims. Failing to do so would result in a general strike-out decision that does not adequately consider whether should be applied to all claimants. Thus, hypothetically, an abusive factor applicable only to one claimant would not render another co-claimant's claim abusive.[32]

The High Court firmly stated that it is "axiomatic that a claim brought by one claimant, which is not itself abusive, cannot become abusive merely because other claimants have chosen to bring abusive claims. The claimants should be in no different position, so far as an abuse argument is concerned, from that if each had brought separate proceedings, whether or not other claimants also brought proceedings". Thus, in collective cases, an individual approach is required to strike out a large number of claimants. In cases involving GLO or multiple claims a "court must be satisfied in relation to every claim, having regard to any differences between claimants or categories of claimant, that it is abusive and a strike-out or stay appropriate."[33]

Consequently, a strike-out decision must always be proportionate not only to the court's docket but also with the limitations on the substantive rights of the claimants (see for example *Cable v Liverpool Victoria Insurance Co Ltd*).[34]

In a previous case mentioned, the court made it a clear that "Having established that there was an abuse of process, the second step for the court is the usual balancing exercise, in order to identify the proportionate sanction. Striking out the claim is an available option, but as we have seen, it is not the only, or even the primary solution".[35]

This *ratio deciendi* requires the court to consider what a proportionate decision entails, ensuring careful consideration of all circumstances and avoiding the deprivation of a claimant's right to bring an apparently valid claim before the court, particularly when doubts exist regarding one or more claimants. In such cases, the Court must be taken into

31 ibid 3.

32 *Município de Mariana v BHP Group (UK)* (n 1) paras 176-8.

33 ibid, para 176.

34 *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015 (31 July 2020) <https://www.judiciary.uk/judgments/cable-v-liverpool-victoria-insurance/> accessed 11 January 2024.

35 ibid, para 73.

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account where a litigant should not be deprived without careful consideration of all the circumstances and where abuse is not clearly established.[36]

In order to follow this statutory route, a strike out order should only be made at first instance where, in the opinion of the court, it is clear and obvious that a proceeding is so abusive and wasteful that it would not serve the ends of justice, and for that reason the court should exercise its discretion, but proportionately. Otherwise, it would be contrary to all the principles of justice, and in particular to the claim of correctness on which all modern legal systems are based, to prevent a claimant from bringing an apparently proper claim to court, especially when there remains a residual doubt about one or more claimants.[37] To repair an erroneous argument, the High Court did so, overturning the first decision and concluding that:

"[…] the Judge's decision to strike out, alternatively stay, the proceedings for abuse of process was flawed in a number of respects and wrong. In particular: (1) the fact that a claim properly advanced is said to be "unmanageable" does not as such make it an abuse; (2) in any event, the Judge's conclusion that the proceedings were "irredeemably unmanageable" is not sustainable; (3) the Judge was wrong to rely on forum non conveniens factors as part of his analysis on abuse of process; (4) whilst a properly arguable claim may in principle be abusive if it is (clearly and obviously) pointless and wasteful, the Judge's error in relation to the manageability of the litigation infected his conclusion on whether that was the case here; his reasoning that there was nothing to be gained by the claimants in the English courts was premised fundamentally on his (unjustified) view that their claims here were unmanageable; (5) the Judge failed properly to analyse the position of the 58, and the consequences of their position for other claimants; he treated the claimants as a single indivisible group against whom the application must succeed or fail altogether, rather than treating the application as constituting an application against each claimant, with the position of each claimant or group of claimants being considered individually."[38]

Furthermore, the High Court's decision seems to take into consideration the legal framework established by the European Court of Human Rights (ECtHR) regarding to interim measures, specifically strike-out decisions, within the UK. A significant case in this context Osman v UK, where the ECtHR found the UK to be in violation of Article 6 of the European Convention on Human Rights.[39] Subsequently, in another case, the

36 *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685, [2015] 1 WLR 4535, para 24; *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, para 22D; *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004, para 48.

37 Cristina Lafont, 'Correctness and Legitimacy in the Discourse Theory of Law' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 291, doi:10.1093/acprof:oso/9780199582068.003.0013.

38 *Município de Mariana v BHP Group (UK)* (n 1) para 179.

39 *Osman v the United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) <https://hudoc.echr.coe.int/fre?i=001-58257> accessed 11 January 2024.

ECtHR accepted the UK's system of strike-out decisions, but only if the UK court provided in these applications an effective remedy for harm suffered by the claimant. Additionally, the ECtHR emphasizes that a court in a Member State must carefully consider all relevant differences in facts, circumstances and inequalities that impact claimants before deciding to strike out.[40]

To conclude, "Justice can be delivered only according to rules, for without rules there is no justice and no law".[41] From our perspective, this landmark decision, when examined from a technical standpoint, not only aligns with the long historical line of precedents in the UK courts but also aligns with European legislation. This compatibility extends not only to the Brussels Regulation, which will be scrutinized in the next topic, but also to the procedural standards outlined in modern European rules, as previously mentioned in the research's preceding topic regarding Rule 5 of the Model European Rules of Civil Procedure of the European Law Institute and UNIDROIT.

4 THE ARTICLE 34 OF REGULATION (EU) NO 1215/2012 – BRUSSELS REGULATION AND THE FORUM JURISDICTION

Once a summary of the Mariana case, its legal route, and the general approach of the High Court have been provided, its crucial to conclude this case study by examining the Court's stance on the jurisdictional challenge in relation to Article 34 of the Brussels Regulation and its implications for a pending civil or commercial case in a third state.[42] Article 34 governs how a European Court of Justice deals with civil actions when an application to strike out or stay claims is based on a pending case in a third state, and when the risk of irreconcilable judgments may affect the proper administration of justice.

The arguments presented in the pleadings revolve around whether a European jurisdiction is the appropriate solution for seeking damages based on civil or commercial liability. The Regulation allows the court of a Member State to stay the proceedings and await the judgment in a third State, or to dismiss the proceedings if it does not believe that a third state is handling the case properly and if a future decision could be enforced in its jurisdiction even as a foreign judgment.

In considering the defendants' application and Mr Justice Turner's approach, the High Court stated:

"Under Brussels Recast the courts of a member state have no power to decline jurisdiction over a defendant domiciled and sued in that member state by reference to foreign

40 *Z and Others v United Kingdom* App no 29392/95 (ECtHR, 10 May 2001) <https://hudoc.echr.coe.int/?i=001-59455> accessed 11 January 2024.

41 Zuckerman (n 10) 3.

42 Regulation (EU) no 1215/2012 (n 5) art 34.

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proceedings, save in the limited circumstances of lis pendens identified in Section 9. Article 34 permits a stay of proceedings in favour of specific related pending proceedings in a non-member state in order to avoid the risk of irreconcilable judgments, in circumstances circumscribed by the conditions it imposes. Where those conditions are not fulfilled, article 4 must be given effect to. To strike out a claim against an English-domiciled defendant as abusive on the ground that the existence of parallel proceedings in a third state would give rise to a risk of irreconcilable judgments infringes the obligation of effectiveness in relation to article 4 and undermines the limited derogation from article 4 for which article 34 provides."[43]

The aforementioned Article 4, which grants jurisdiction to a court of a Member State when a domiciled party is involved, is a rule that has a broad interpretation. According to the High Court, the correct interpretation for Article 34 not only allows the option to strike out pending actions in a third but also requires the dourt to determine how to properly manage the case brought before its jurisdiction first.

However, the Court did not follow Mr Ju Turner's argument, especially because the *forum non conveniens* approach in the UK has been subject to disruptive changes due to a decision by the European Court (Case C-281/02) not to maintain any exceptions when a Member State applies the Brussels Regulation, even if a common law member has a different approach, in order to ensure a uniform application of the rules of jurisdiction in the European Community.[44]

Relying on the precedent of *MAD Atelier International BV v Manès* [2020] EWHC 1014 (Comm), [2020] QB 971, the High Court concludes that the court's power to stay cannot be used in a manner inconsistent with the Judgments Regulation. This is supported by the argument in *Skype Technologies SA v Joltid Ltd* [2011] I.L.Pr. 8, para 22 (Lewison J), that "A defendant should not be permitted under the guise of case management, [to] achieve by the back door a result against wich the ECJ has locked the front door."[45]

The structure and organization of a court, its output, the perceptions of judges, personal approaches to adjudication, different levels or dimensions of litigation in different courts, or even the risk of a long period of time before a decision is reached in a complex dispute brought before its jurisdiction, should not be the sole arguments considered by a court faced with the enforcement of a regulation accepted by a Member State in order to ensure the proper administration of justice. These factor could be not only a matter of judicial

43 *Município de Mariana v BHP Group (UK)* (n 1) para 198.

44 Case C-281/02 *Andrew Owusu v NB Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* [2005] ECR I-01383 (1 March 2005) <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-281/02> accessed 11 January 2024.

45 *Município de Mariana v BHP Group (UK)* (n 1) para 203.

discretion but also the result of a balance between the power to manage the case and the substantial rights of the parties.[46]

In fact, Mr Justice Turner's argument that the proceedings would be abusive as pointless and wasteful considered grounds that the claimants could obtain full redress in Brazil (which was not clear at the judge's preliminary level), but also because the proceedings could make the case in the UK court unmanageable[47] due to the complexity of the litigation and the hundreds of issues involved.

However, effective case management should not entail deciding not to manage the facts due to their complexity. If the court lacks the resources and highly trained, experienced staff to exercise its inherent power, proactive case management may face difficulties in resolving a case. These considerations should be addressed through administrative implications rather than arguments that affect the substantial rights brought before the court to be decided.[48]

Otherwise, while "the management of a given case must be tailored to the needs of the particular dispute", At the same time, it must still align with the general standards to ensure consistency in the treatment of similar cases in accordance with the overriding objective and general standards.[49] If the court take a different legal route, the decision should be overruled as a claim correctness.[50]

In fact, the proper administration of justice opposes the restrictive use of administrative powers, imposing consequences that are not related to the merits but restrict the rights of the parties involved. The proposal for a trinational European Rules of Civil Procedure, empathizes this assumption on its preamble, in Rule 5 (2) and 11, recommending that the court, in determining whether a process is proportionate, must take into account the nature, importance and complexity of the particular case. It should consider the consequences of managing a case as part of its duty to ensure proper administration of justice. Before striking out a case, the court order should provide a fair opportunity to present the full framework of the legal case before making a decision.[51]

Consequently, the principle of proportionality serves as hermeneutic approach to give effect to the proper administration of justice conferring management powers restrictively and balancing this principle with the facts presented in the case.

46 Sharyn Roach Anleu and Kathy Mack, 'Trial Courts and Adjudication' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 547, doi:10.1093/oxfordhb/9780199542475.013.0024.

47 *Município de Mariana v BHP Group (UK)* (n 1) para 208.

48 Robert Turner, '"Actively": The Word That Changed the Civil Courts' in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009) 86, doi:10.1093/acprof:oso/9780199576883.003.0005.

49 Zuckerman (n 10) 2-3.

50 Lafont (n 37).

51 European Law Institute and UNIDROIT (n 17) 34-40.

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To illustrate, the Brussels Regulation in recitals (23) and (24) of Articles 33 and 34,[52] confirms the principle of proportionality by explaining that the legislator's intentions with the Regulation was to establish a common basis for jurisdiction in civil and commercial matters. It aims to provide a flexible mechanism for the courts of Member States to apply the regulation, taking into account the enforceability of a judgment in a third State and its impact on the proper administration of justice. This includes considering all the circumstances and the connection between the facts and the parties involved in the proceedings in the Member State.

It also involves assessing whether a judgment in a third State can be expected within a reasonable time, in accordance with the principle of a fair trial (Article 6 of the European Convention on Human Rights), the balance between private and public interest, and the finality of justice.

As a result, the concept of reasonable time entails a prompt rendition of justice and should be considered in procedural rules and court orders as a reasonable claim of correctness (ELI/Unidroit Principle 7). If a third State fails to resolve a dispute in accordance with these standards, Article 4 c/c 34 of the Brussels Regulation should be applied, provided that there is no doubt that the defendant is domiciled in a Member State, as is the case in the particular study.

5 CONCLUSION

The recent verdict of the High Court concerning the applicability of abuse of process in Mariana vs. BHP England and others raises important considerations. While the court relied on established precedents, the unique circumstances of the group members and the concurrent Brazilian proceedings, which have their distinct scope and involved parties, may have warranted a more nuanced examination before a strike-out decision was made. The use of *forum non conveniens* in this case required a delicate balance between the complexities of cross-border litigation and the fundamental principles of justice.

It could be argued that exercising the inherent power at an early stage, resulting in the case being struck out as unmanageable, may have prevented a thorough assessment of the prospects of a fair trial in the UK. This is especially true when compared to the unique nature of Brazilian collective proceedings. The intersection of the principles of reasonable time, as enshrined in Article 6 of the European Convention on Human Rights, with the defendant's right to a fair trial requires scrutiny.

Concerning Articles 4 and 34 of the Brussels Regulation, it is crucial to have clarity on jurisdiction, particularly given the company's domicile in Europe, including England pre-Brexit. However, this recognition should not prevent the plaintiffs from pursuing

52 Regulation (EU) no 1215/2012 (n 5).

enforceable claims within the UK jurisdiction. The issue of whether BHP Australia or any other foreign joint venture company can be subject to legal proceedings in English courts requires evaluation based on established principles, as articulated by Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd*.[53]

The High Court's decision to overturn the first judgment reflects a commitment to align with historical UK precedents and the broader contours of European Union law, including the Brussels Regulation. The UK's legal conformity with prevailing European norms in civil and commercial liability matters is reaffirmed by the consideration in the UK legal system of relevant rulings from the European Court of Justice, highlighting the alignment with EU standards.

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53 *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10 (19 November 1986) <https://www.bailii.org/uk/cases/UKHL/1986/10.html> accessed 11 January 2024.

AUTHORS INFORMATION

Pedro Domingos
Cand. of Sc. (Social Challenges, Uncertainty and Law), Faculty of Law, University of Coimbra, Coimbra, Portugal
pedro@andradedomingosadvocacia.com
https://orcid.org/0000-0003-3543-5322
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RIGHTS AND PERMISSIONS

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Case Note

RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO

Din Shahiqi*, Zanita Fetahu and Reshat Fetahu

ABSTRACT

Background: *To respect international cooperation, human rights and legal certainty, it is possible to recognise the legal effects of foreign judicial decisions in another state, provided that the procedure for recognising a foreign judicial decision takes place and that such court decision fulfils the requirements set by local legislation.*

Recognition, as a concept, entails acknowledging the rights and obligations established in the originating jurisdictions and accepting juridical consequences. Enforcement, on the other hand, means fulfilling the obligation, allowing the creditor to realise his/her right and to ensure that the debtor has obligations and obeys the decisions that have already been made.

International collaboration should facilitate the codification of Kosovo's legal framework on private international law, allowing for the recognition and enforcement of foreign decisions to be less complicated, more extensive, and more easily applicable.

In comparison to prior solutions, the new law makes significant adjustments. Previous norms are being abandoned in favour of open links and jurisdictional criteria. Some prior solutions are preserved and, if necessary, changed and improved.

Methods: *The doctrinal approach involves the systematic identification, collection, and application of legal literature within the domain, encompassing statutes, texts, articles, and scholarly research by both local and international authorities. Additionally, the method involves a meticulous analysis of judicial practices, evaluating the practical implementation of legal standards and their judicial interpretations. Through examining legislation, our approach not only identifies legal issues but also furnishes a scholarly interpretation of the laws governing the field of study and its related institutions.*

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Results and conclusions: *Kosovo, as a relatively new state, has established a legislative framework through which it attempts to address problems and the path that must be taken in the implementation of foreign judgments. In general, the goal of having a democratic and well-developed society also means respecting the rights and decisions of foreign citizens, the rights that originate from the judicial decisions of international courts and the internationally accepted conventions. The harmonisation of the legislation and its compliance with ECHR conventions creates real opportunities for Kosovo to be ranked among the countries that respect these decisions.*
The legal system of Kosovo, as well as decisions made by the Constitutional Court, have produced results that can be used to influence future cases. The codification of private international law in Kosovo means that numerous circumstances will now have a legal basis for implementing foreign decisions.

1 INTRODUCTION

As a country with aspirations to join the European Union and other international organisations, Kosovo faces a variety of problems in all aspects of its daily existence. In private international law, a significant hurdle lies in the recognition of foreign decisions, a complicated process establishing legal conditions for enforcing decisions from other countries within the Republic of Kosovo.

Discussion of such a topic allows for the possibility of throwing light on the legislative framework and court decisions that determine the recognition and execution of these decisions. Recognising foreign decisions is an endeavour to respect international law while facilitating and establishing efficient justice in situations involving a foreign element.

The increasing intensity of the present relationship between international private law and domestic law is subject to a serious discussion about the best way in which Kosovo's domestic legal system could face the problems posed by the recognition and enforcement of foreign court decisions. The analysis of the legal aspect of this process is of great importance, as it provides an opportunity for legal certainty, facilitates various civil relations with foreign elements, and creates prerequisites for justice for decisions that different courts have decided.

To understand better recognition and enforcement of foreign decisions, we will try to analyse the following:

1. How are these issues addressed in private international law?
2. The special cases involving rulings from the Constitutional Court of Kosovo and their implications regarding compliance with the European Convention for Human Rights and Kosovo national law.

2 RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS ACCORDING TO PRIVATE INTERNATIONAL LAW: LITERATURE REVIEW

Private international law is governed by laws unique to each modern legal system, just like any other area of domestic law. Strong global efforts have been underway in recent years to harmonise the various conflicts of law systems.[1] A young democracy like the Republic of Kosovo is working nonstop to align and codify its laws to comply with international law.

With trade development, communication, and the opening of state borders, we are witnessing the enormous growth of international cooperation at the national and global levels. Private international law is a branch of law that will develop even more in the future since its implementation represents one of the basic conditions of the international economy and the unstoppable process of international cooperation.

Private international law, as a branch of the law of the legal system of a concrete state, represents the totality of legal norms regulating legal-private relations where a foreign legal-private element appears or is present.[2]

Legal norms belonging to the branch of private international law, as a neuralgic or problematic issue, have the determination of the competent law, namely the avoidance of the possible conflict of jurisdiction. In addition to the conflict of laws and jurisdiction, recognition of foreign decisions and their enforcement represent three main parts of private international law.[3]

Private international law does not impose the general obligation to recognise foreign court decisions, meaning that decisions made in one country do not automatically hold force in another. This is often unsatisfactory and insufficient. In general, there is a public interest in avoiding the expense of retrial, while states are interested in being promoters of interstate transactions. Generally speaking, states often have grounds to deny the legal effects of foreign judicial decisions and to consider these decisions equal to the judicial decisions of their courts. Foreign procedures are seen as deficient, and the results of the judicial process are deemed questionable. The interest of protecting state sovereignty imposes certain requirements or preconditions that the foreign judicial decisions must fulfil for such decisions to have effects even outside the country in which they were adopted.[4]

1 Abla J Mayss, *Principles of Conflict of Laws* (3rd edn, Cavendish 1999) <http://ci.nii.ac.jp/ncid/BA39903985> accessed 10 January 2024.

2 Asllan Bilalli dhe Hajredin Kuçi, *E Drejta Ndërkombëtare Private: (Pjesa e Përgijthshme)* (Universiteti i Prishtinës Fakulteti juridik 2012).

3 Tibor Varadi, Bernadet Bordaš i Gašo Knežević, *Međunarodno Privatno Pravo* (5 izd, Forum 2001).

4 Michael Douglas, 'Recognition and Enforcement of Foreign Judgments' (CLE presentation, Perth, 2 May 2018) doi:10.13140/RG.2.2.29522.66248.

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Three possible effects or consequences of foreign court decisions should be distinguished. Firstly, the foreign court decision creates dispositive or mandatory effects since approving the judgment creates, modifies or even abolishes legal or status obligations. Secondly, the foreign court decision creates a number of procedural effects, starting from the impact of the principle Res Judicata, Ne bis in Idem, as well as enforcement ones. Thirdly, the foreign court decision creates factual effects since the final court decision can be used as a fact in another eventual court proceeding.[5]

It is necessary to emphasise that this matter is widely regulated in normative acts within the framework of the European Union ("EU"). The unhindered circulation of decisions in civil and commercial matters can also be called the heart of jurisdictional cooperation within the EU. EU law broadly regulates this matter in normative acts. These normative acts have legal force within the EU and express a tendency to automatically recognise foreign judicial decisions within the member states.[6] Previously, this matter was regulated by the Brussels Convention on Jurisdiction, Recognition and Enforcement of Judicial Decisions in Civil and Commercial Matters from 1968.[7]

International legal cooperation in civil matters represents a topic of special importance for Kosovar jurisprudence, especially at the time when Kosovo has begun process of approximation and accession to various institutions and mechanisms of the EU, as is the case with the Agreement of Stabilization Association, the process of accession to the Apostils Convention, the process of membership or observer status in the "Hague Conference on Private International Law" for cases of legal cooperation in the civil field.[8]

In relation to the enforcement of the foreign court decision, the recognition of the latter is a preliminary matter, and it is very important to know where to begin and all disputes.[9] That is the fundamental idea behind the notion of a judgment's finality. Until the foreign court decision is enforced, it cannot come without prior recognition. Only in cases where an international agreement has been concluded between the states in which the acceptance of court decisions of the parties to the agreement is included can the enforcement of foreign court decisions be considered without going through the procedure of recognition of that decision.[10]

5 ibid.

6 Hrvoje Sikirić, 'Priznanje sudskih odluka prema Uredbi Vijeća (EZ) br 44/2001 od 22 prosinca 2000 O sudskoj nadležnosti i priznanju i ovrsi odluka u građanskim i trgovačkim predmetima' (2012) 62(1-2) Zbornik Pravnog fakulteta u Zagrebu 289 <http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=137035> accessed 10 January 2024.

7 Brussels Convention on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (1968) <http://data.europa.eu/eli/convention/1972/454/oj> accessed 10 January 2024.

8 Valon Totaj dhe Lumni Sallauka, 'Bashkëpunimi Juridik Ndërkombëtar në Çështjet Civile' (2016) 2 Opinio Juris 59 <http://jus.igjk.rks-gov.net/745/> accessed 10 January 2024.

9 R Lea Brilmayer and other, *Conflict of Laws: Cases and Materials* (Aspen Casebook, Wolters Kluwer 2019).

10 Andrew Dickinson and other, *The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process: Report for England and Wales* (British institute of International and Comparative Law 2008, February 20) <https://ssrn.com/abstract=1537154> accessed 10 January 2024.

3 RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS FROM THE PERSPECTIVE OF THE CONSTITUTIONAL COURT OF KOSOVO

The Constitution of the Republic of Kosovo obliges the implementation of signed international agreements, which guarantee protection, freedoms, and rights considered fundamental for human beings. [11] Moreover, these agreements have priority in case of collision with the acts approved in the Republic of Kosovo. Priority is given to human rights guaranteed and harmonised with the decisions of the European Convention on Human Rights (ECHR).

In its practice, the Constitutional Court has dealt with decisions from foreign courts, focusing on the main principles that emerge from the ECHR, namely Article 6, which covers the "Right to a fair trial."[12]

It must be noted that the European Convention on Human Rights is the first comprehensive convention for protecting human rights to come out of the post-Second World War legal system. ECHR has withstood the test of time and continues to be the gold standard for the global protection of human rights. It is a one-of-a-kind document that has significantly impacted the idea and practice of defending fundamental rights throughout Europe. Initially, the Convention provided for fifteen fundamental rights explained in its first section entitled "Rights and Freedoms".[13]

The right to a fair trial, enshrined in Article 6 of the Convention, is crucial, recognising that everyone who faces justice deserves such a right. Article 6 has played a pivotal role in shaping democratic societies and fostering the rule of law. Its practical significance is evident as many court decisions are grounded in its principles. While the first paragraph of Article 6 pertains to civil trials, it is crucial to underscore the importance of Articles 2 and 3 in criminal trials. The scope of the Article includes all civil rights and obligations that apply to relations between natural persons.

A more debatable issue is whether the enforcement procedure, particularly the exequatur procedure, should be in accordance with Article 6 of the ECHR. Article 6 applies from the moment the court proceedings begin. Yet, the wording of this provision does not distinctly indicate whether it also extends to procedural steps undertaken subsequent to the rendering of a judgment.

11 Constitution of Republic of Kosovo (2008) <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 10 January 2024.

12 Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols no 11 and no 14) [1950] ETS 5 <https://rm.coe.int/1680063765> accessed 10 January 2024.

13 Maria Louiza Deftou, *Exporting the European Convention on Human Rights* (Modern Studies in European Law, Bloomsbury Pub 2022).

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3.1. Recognition and enforcement of foreign divorce decisions according to the Constitutional Court of Kosovo's practice (KI73/18)

Concerning the recognition of a foreign court decision, the expressed position of the Constitutional Court of Kosovo in the case KI73/18, dated 1 November 2019, is of particular importance.[14] The case relates to the divorce between a citizen of Kosovo and a citizen of Albania and how the court recognised and enforced a decision from a foreign court. The Kosovo citizen, in the capacity of the applicant, claimed that the challenged decision on recognition of a foreign court decision violated his constitutional rights and freedoms, such as equality before the law and the concept of the right to a fair trial guaranteed by the Constitution of Kosovo and Article 6 of the ECHR. Although the Constitutional Court declared the referral inadmissible, its significance lies in the analysis of the application of the abovementioned Article, precisely, the first paragraph of the ECHR, then regarding the notion of dispute and the notion of rights and civil liabilities.

In its decision, the Constitutional Court of Kosovo expressed that, according to the ECtHR's case law, the application of the abovementioned Article in the civil domain (rights and obligations) implies the cumulative presence of the following conditions: a) there must be a dispute over any *right* or *obligation* that must be based on domestic law[15] and b) the right or obligation must be of a *civil* nature.[16]

The Constitutional Court found that under the practice of the ECtHR, the expression of dispute concerning civil rights and obligations encompasses all procedures, the outcome of which is decisive for private rights and obligations. The result is decisive even if the procedure concerns the dispute between individuals and public authorities acting independently, regardless of whether, according to the domestic law system of the respondent State, it falls under private or public law or is of a mixed character.[17]

In terms of the concept of dispute, the Constitutional Court of Kosovo believes that "dispute" refers to a judicial procedure in which the regular court examines and decides on disputes arising from personal and family relations, work relations (with the employer),

14 Case KI73/18 *Constitutional review of Decision CML no 36/2018 of the Supreme Court of 10 April 2018 in conjunction with Decision CN no 89/2015 of the Basic Court in Mitrovica of 14 August 2015* (Constitutional Court of the Republic of Kosovo, 1 November 2019) <https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-aktvendimit-te-gjykates-supreme-cml-nr-36-2018-te-10-prillit-2018-ne-lidhje-me-aktvendimin-e-gjykates-themelore-ne-mitrovice-cn-nr-89-2015-te-14-gushtit-2015/> accessed 10 January 2024.

15 *Benthem v the Netherlands* App no 8848/80 (ECtHR, 23 October 1985) paras 32-6 <https://hudoc.echr.coe.int/tkp197/view.asp?i=001-57436> accessed 10 January 2024; *Roche v the United Kingdom* App no 32555/96 (ECtHR, 19 October 2005) paras 116-26 <https://hudoc.echr.coe.int/?i=001-70662> accessed 10 January 2024.

16 *Ringeisen v Austria (Merits)* App no 2614/65 (ECtHR, 16 July 1971) para 94 <https://hudoc.echr.coe.int/eng?i=001-57565> accessed 10 January 2024.

17 ibid, para 56.

property relations, and other civil-legal relations of physical and legal entities. As a result, a judicial proceeding in the nature of a dispute must meet certain characteristics, including the action of three subjects: the claimant, the respondent and the court.[18]

The Constitutional Court, in the above-mentioned decision, specifically in paragraphs 56 and 57, referred to several other decisions of the ECHR, in which it defined the notion and nature of the dispute, namely what a judicial procedure must be to fulfil that criterion. The court underscored the ECHR's position in the case of *Ringeisen v. Austria* on 16 July 1971. In this decision, the ECHR delineated that "the phrase "contestation against" (des) droits et oblige de caractere civil" (contests regarding civil rights and obligations) includes all procedures whose outcome is decisive for (those) rights and obligations. Moreover, according to the Constitutional Court, the result of the procedure must be directly decisive for such a right. To support this assertion, the court referred to the ECHR Judgment *Le Compte, Van Lauven and De Meiere v. Belgium*.[19]

While addressing the notion of "civil rights and obligations", the Constitutional Court commences by explaining the notion of "civil rights". This notion concerns protecting all individual rights under applicable national law. On the other hand, the notion of "civil rights" extends considerably beyond civil cases in the narrow sense. The Constitutional Court referred to the ECtHR Judgment *Ringeisen v. Austria*, wherein it was established that any procedure whose outcome is "decisive for the determination of a civil right" must be harmonised with the requirements of the above-mentioned Article 6 of the ECHR.[20]

In paragraph 81 of the aforementioned Judgment, the Court expressed the position that Article 6 of the ECHR applies regardless of the status of the parties, as well as irrespective of the nature of the legislation which regulates how the dispute will be categorised; what is important is the character of the right in question, as well as whether the outcome of the procedure would directly affect the rights and obligations within the framework of private law.[21]

Further, the Court considers that according to the ECHR, there must be a "contest" regarding the content of "civil rights and obligations", at least in the broad sense of the term. It is emphasised that Article 6 of the ECHR, in principle, would generally not apply to cases with a purely administrative and procedural character in which there are no substantial actions for factual or legal issues.[22]

18 Case KI73/18 (n 14) para 55.

19 *Ringeisen v Austria* (n 16) para 94; *Le Compte, Van Leuven and De Meyere v Belgium* App nos 6878/75, 7238/75 (ECtHR, 23 June 1981) para 47 <https://hudoc.echr.coe.int/?i=001-57522> accessed 10 January 2024.

20 Case KI73/18 (n 14) para 80; *Ringeisen v Austria* (n 16).

21 *Baraona v Portugal* App no 10092/82 (ECtHR, 8 July 1987) paras 38-44 <https://hudoc.echr.coe.int/?i=001-57428> accessed 10 January 2024.

22 Case KI73/18 (n 14) para 82; *Le Compte, Van Leuven and De Meyere v Belgium* (n 19) para 41.

The Constitutional Court further emphasises that the ECHRt, in its many years of practice, concluded that Article 6 of the ECHR can be applied to the procedures initiated by the claimants, in which it is claimed that there was an omission or (negligence) of the courts when they decided for his "civil rights" in the judicial procedure that has the nature of a "contest", even in cases where the nature of rights has already been decided. In certain situations, the local court must determine whether the judicial processes have complied with the standards of Article 6 of the ECHR. The court also considers that when there is a serious and authentic dispute concerning the legality of this intervention related to the existence or the level and the extent of the civil rights disputed, Article 6 Paragraph 1 of the European Convention on Human Rights authorises an individual to have this matter determined under domestic law or by a domestic court.[23]

3.2. Scope of application of Article 6 of the ECHR according to Constitutional Court case (KI122/17), in the preliminary proceedings concerning the application for recognition and enforcement of foreign arbitration decision

With regard to the recognition of foreign court decisions in the practice of the Constitutional Court of Kosovo, the Judgment of the Constitutional Court of Kosovo dated 30 April 2018, in case no. KI122/17 is considered of particular importance.[24]

The applicant, a private company from the Czech Republic, entered into a commercial contractual agreement with a private company seated in Kosovo in 2020. The abovementioned contracting parties agreed that any dispute between them that arose and was unresolved within 30 days could be submitted to the Court of Arbitration at the Czech Chamber of Commerce. In accordance with contractual rules on disputes, the Applicant filed a lawsuit against the company from Kosovo before the Arbitration Court on 12 June 2012, and the Court ruled in favour on 30 January 2013.[25] Subsequently, on 18 June 2014, the Applicant filed a referral for recognition of the arbitration above award from the Basic Court in Prishtina, which recognised the award and declared it an enforceable document in Kosovo. The Court of Appeals of Kosovo upheld the decision, recognising the arbitral

23 *Sporrong and Lönnroth v Sweden* App nos 7151/75, 7152/75 (ECtHR, 23 September 1982) para 81 <https://hudoc.echr.coe.int/?i=001-57580> accessed 10 January 2024; *Tre Traktörer Aktiebolag v Sweden* App no 10873/84 (ECtHR, 7 July 1989) para 40 <https://hudoc.echr.coe.int/?i=001-57586> accessed 10 January 2024.

24 Case KI122/17 *Constitutional review of Decision Ae no 185/2017 of the Court of Appeals of 11 August 2017, and Decision IV EK C no 273/2016 of the Basic Court in Prishtina of 14 June 2017* (Constitutional Court of the Republic of Kosovo, 30 April 2018) <https://gjk-ks.org/en/decision/vleresim-kushtetutshmerise-se-aktvendimit-ae-nr-185-2017-te-gjykates-se-apelit-te-11-gushtit-2017-dhe-aktvendimit-iv-ek-c-nr-273-2016-te-gjykates-themelore-ne-prishtine-te-14-qershorit-20/> accessed 10 January 2024.

25 ibid, paras 16-8.

award as a final and enforceable decision on 20 March 2015. In response, the Applicant submitted a proposal for enforcement of a certified arbitral award on 26 March 2015, and finally, on 1 March 2016, the enforcement order issued by the Private Enforcement Agent became final and enforceable.[26]

On 21 March 2015, following recognition of the arbitration award, the private company's shareholders from Kosovo voluntarily dissolved their company. In response to this action, on 30 May 2016, the Applicant, by means of a new lawsuit, requested the Basic Court of Prishtina to annul the decision on voluntary dissolution and claimed compensation for material damage. As of now, the court has not ruled on the Applicant's claim to annul the decision on voluntary dissolution. All proceedings in regular courts until the aforementioned judgment of the Constitutional Court of Kosovo are related to the security measure.[27]

In the abovementioned judgment, the Constitutional Court of Kosovo emphasises that pre-trial procedures, such as those relating to imposition of injunction - usually are not considered to establish civil rights and, therefore, do not fall within the scope of such protection.[28] However, in different cases, ECtHR applied Article 6 of ECHR in pre-trial proceedings when it was considered that security measures were crucial to the Applicant's civil rights. Constitutional Court has referred to ECtHR cases: *Aerts v. Belgium, application no. 25357/94, Judgment of 30 July 1998; Boca v. Belgium, application no. 50615/99, Judgment of 15 November 2012*.[29]

According to the Constitutional Court of Kosovo, in 2009, the ECtHR knowingly changed its previous position on pre-trial proceedings by stating in response to whether there is a need for case law.[30]

Constitutional Court concluded that the content of the right in question, in proceedings, is related to the annulment of the decision on voluntary dissolution, which is a civil right under applicable legislation in Kosovo. The security measure aimed to secure the applicant's main claim, which the latter found necessary to enforce the final arbitral award. To that end, the Constitutional Court notes that implementing a final arbitral award depends inherently on the results of the request for an injunction in the contentious procedure. In this case, the security measure procedures fulfil the criteria for implementing Article 31 of the Constitution of Kosovo under Article 6 of the ECHR.[31]

26 ibid, paras 19-23.
27 ibid, paras 33-7.
28 ibid, para 126.
29 ibid, para 127.
30 ibid, para 128.
31 ibid, paras 132-7.

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The Constitutional Court's decision stands out for the first time because it has interpreted Article 31, Right to Fair and Impartial Trial, in the preliminary proceedings based on the ECtHR's previous practice.

Constitutional Court of Kosovo, in its Judgment No. KI122/17 has set implementation standards in Kosovo with regard to requirements of Article 6 of the ECHR in civil cases in so-called "preliminary proceedings", such as those relating to issuance of an interim measure or injunction relief. Referring to the position of the ECHR, the court finds that not all temporary measures determine rights, and not all cases result in obligations, and the implementation of Article 6 in relation to preliminary procedures also depends on certain conditions and criteria.

The right that people seek must be civil, both in the main trial and in proceedings concerning security measures. Secondly, ECtHR emphasises that the nature of the temporary measure must be examined, considering that whenever such a measure is considered to effectively determine civil rights and obligations, Article 6 will be implementable.[32]

This case best established the basic rights principles for a fair trial. With its decision, the court has made it hard to escape legal obligations, creating a critical practice. There can be many cases in the arbitration court in Kosovo, and since we may face such a situation in the future, it is good that there is now a ruling on similar matters.

3.3. The Kosovo Constitutional Court's perspective on the recognition of contracts certified by foreign courts (KI161/11)

In another case involving a foreign element, a review was conducted over a property issue in one of Kosovo's cities. The party requested that the District Court in Prizeren recognise the contract of sale for an apartment. This contract was proven before the first municipal court in Belgrade, Republic of Serbia, on 25 June 1999, while Kosovo was at war and NATO's intervention had just finished.[33]

The Court in Prizeren rejected the party's request. Similarly, the Court of Appeal dismissed the request for the same legal basis, citing the contract's certification by the Court in Belgrade as insufficient to qualify as a foreign decision. They specified in their legal opinion that:

> " ... requirements for recognising the apartment purchase contract as a decision of foreign court are not met, because such contract cannot be considered as a court decision nor as a court settlement as the petitioner claims in the appeal."[34]

32 ibid, paras 128-31.

33 Case KI161/11 *Constitutional review of the Resolution of Supreme Court of Kosovo Ac.br.2/2011 of 10 June 2011* (Constitutional Court of the Republic of Kosovo, 25 April 2012) <https://gjk-ks.org/en/decision/constitutional-review-of-the-resolution-of-supreme-court-of-kosovo-ac-br-22011-of-10-june-2011/> accessed 10 January 2024.

34 ibid, para 10.

After the review by the regular courts, the interested parties addressed the Constitutional Court; the legal basis used by the party was that this case is similar to divorce cases, which the Court in Kosovo had its practice, where it had recognised them.

To decide the case, the Constitutional Court first determined whether the administrative requirements for presenting the request to this Court were met, assuming there were no obstructions. The Court then informed the party that the Constitutional Court does not function as a Court of Appeal that re-judges cases but rather examines if there was a violation of the Constitution during the trial.

Consequently, the Court determined that the party exhausted all legal options in regular courts and found no violation of any part of the Constitution, thus declaring the party's request inadmissible.

Upon analysing the case, it is evident that the Constitutional Court made the correct decision as the parties had exhausted all their legal options before the regular courts. Moreover, property issues cannot be equated to matters arising from civil partnerships such as marriage. Therefore, we assert that the complainant's desire to compare is not justified by law, given the circumstances of the case. In the aforementioned example, the Lex Rei Sitaes could have been invoked to advise the party that since the object was located in the Republic of Kosovo, the contract would need to be confirmed by the courts of the country where the asset was situated.

4 GENERAL ANALYSIS

To address this situation clearly and adequately, it is crucial that the Constitutional Court of Kosovo's decisions regarding the issue of accepting foreign court decisions establish certain standards that serve regular courts during decision-making in future cases.

However, it should be noted that the case studies from the judicial practice of the Constitutional Court of Kosovo are cases that were decided before the entry into force of the Law on Private International Law in Kosovo (Law no. 08/L-028) which was adopted after a long series of years, in August 2022.[35]

On the one hand, the new law serves as a guideline for the bodies that apply it, referring to supranational sources in force in Kosovo. On the other hand, the new law adopts rules adopted exclusively for the needs of the Kosovo legal order.

The laws adopt a rule regarding the recognition and execution of foreign decisions, declaring the application of European and international sources. Article 1 of the Law

35 Law of the Republic of Kosovo no 08/L-028 of 4 August 2022 'On Private International Law' [2022] Official Gazette of the Republic of Kosovo 30/21.

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enumerates European regulations and multilateral international agreements that govern the recognition of foreign court decisions.

The provisions of the new Kosovo law on private international law embody contemporary trends in the recognition and implementation of the decisions of foreign courts regarding international jurisdiction and the recognition and enforcement of foreign judgments.

The essential concept by which the aforementioned law determines the recognition of foreign decisions is *a foreign judgment shall mean any decision rendered by a court of a foreign state.*[36]

Kosovo has attempted to modernise its law by being flexible and granting favourable conditions to parties in the event of a request for recognition of foreign decisions. If specific requirements are met, all principles for the recognition of foreign decisions can be acknowledged in the Republic of Kosovo.

For a foreign decision to carry legal weight, it must officially be recognised by the Republic of Kosovo.[37] Article 159 poses a challenge due to the notion of reciprocity, which, in normal circumstances, creates equal standards for recognising foreign citizens' rights in the same way that domestic citizens' rights are governed. Given Kosovo's history and the difficult relations with its neighbours, we believe it is poorly stated and serves as a mini-obstacle in the law. The aforementioned law lacks direct clarifications on how the principle of reciprocity should be applied, being limited to two short articles. However, what is important and related to this principle is Article 165, which imposes constraints in circumstances where the foreign decision cannot be accepted. The essential concept is that it should not be contrary and violate public order.

In light of what we have mentioned, the case KI25/20 should also be examined, in which the court was already confronted with a decision made in another country, and the Court of Appeal of Kosovo was referred to on the principle of reciprocity.[38] The case included a building project in Montenegro, where one of the parties involved filed a complaint for debt compensation, which this court partially approved, and later, it was also partially supported by the High Court in Podgorica. The claimant then went to the Basic Court in Pristina to recognise the foreign decision, which was rejected in the first instance. He then went to the Court of Appeal, where the reasoning given in this court was very important, referring to the principle of reciprocity and stating that Kosovo and Montenegro do not have any reciprocity agreement in recognising foreign decisions. Following this decision, the party approached the Constitutional Court, but the procedural aspect was not respected because

36 ibid, art 157.

37 ibid, art 158.

38 Case 25/20 *Constitutional review of Decision Rev no 367/2019 of the Supreme Court of Kosovo of 10 December 2019* (Constitutional Court of the Republic of Kosovo, 16 November 2020) <https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-aktvendimit-te-gjykates-supreme-te-kosoves-rev-nr-367-2019-te-10-dhjetorit-2019/> accessed 10 January 2024.

the party did not meet the appropriate deadline of four months to file a complaint within the Constitutional Court, causing the Court to reject as inadmissible the request due to failure to appear on time.

What is more essential is that certain examples, however few, have established a procedure that can be used in the future. The instances discussed in the article lay the way for examining how the practice of accepting foreign rulings evolved in a new country such as Kosovo based on Constitutional Court decisions.

5 CONCLUSIONS

The recognition of foreign judicial decisions through the Constitutional Court in Kosovo has become a practice, with several decisions made by this Court. For the instances relating to Article 31 of the Constitution of Kosovo and Article 6 of the ECHR, which concerns the right to a fair and impartial trial, it is evident that the Court has established a judicial practice, showing that all the assessed cases had the legal basis of the aforementioned provisions.

What is essential is that Kosovo has approved the law on private international law, simplifying interactions involving foreign elements. This law has made it easier to recognise foreign decisions, contributing to the ongoing development of the legal framework. The harmonisation of the legislation and its compliance with the conventions gives genuine prospects for Kosovo to be ranked among the countries that respect these decisions.

Furthermore, certain examples, albeit limited, have established a procedural framework for future use. The instances discussed in the article examined how accepting foreign rulings evolved in a newly established country like Kosovo based on Constitutional Court decisions.

In general, the goal of having a democratic and well-developed society also means respecting the rights and decisions of foreign citizens, the rights that originate from the judicial decisions of international courts and the internationally accepted conventions. Harmonising the legislation and its compliance with the conventions creates real opportunities for Kosovo to be ranked among the countries that respect these decisions.

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AUTHORS INFORMATION

Din Shahiqi*
Dr.Sc. (Law), Alumni, Faculty of Law, South East European University, Tetovo, North Macedonia
dinn.sh@hotmail.com
https://orcid.org/0000-0002-6152-601X
Corresponding author, responsible for research methodology, data collection, writing, and supervising.

Zanita Fetahu
LL.M (Master) in Civil and Property Law, Alumni, Faculty of Law, University "Hasan Prishtina", Prishtina, Republic of Kosovo
zanitafetahu1@hotmail.com
https://orcid.org/0009-0007-9855-7008
Co-author, responsible for conceptualization, writing, and data collection.

Reshat Fetahu
LL.M (Master) in International Law, Alumni, Faculty of Law, University "Hasan Prishtina", Prishtina, Republic of Kosovo
fetahureshat@gmail.com
https://orcid.org/0009-0008-5206-7799
Co-author, responsible for writing and data collection.

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RIGHTS AND PERMISSIONS

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Note

CONFERENCE DISCUSSION "BEYOND CONFLICT, UKRAINE'S JOURNEY TO RECOVERY REFORM AND POST-WAR RECONSTRUCTION"

Silviu Nate*, Andriy Stavytskyy, Răzvan Șerbu and Eduard Stoica

ABSTRACT

Background: *The paper investigates the results and conclusions of the conference held on 29 November 2023 within the framework of the research project. The conference extensively discussed the current problems facing Ukraine amidst an aggressive ongoing war. Considerable attention was paid to the country's post-war recovery, necessitating significant reforms in various sectors of the national economy. Participants underscored the need for these reforms to be integrated rather than isolated initiatives, serving as a comprehensive solution for Ukraine's achievement of the SDGs and fulfilling the criteria for joining the EU and NATO. The paper delves into the main challenges for implementing such reforms, their main elements, and their relationship, all of which were discussed during the conference. Particular attention was paid to achieving and maintaining the country's macroeconomic stability during military operations and identifying the main programs essential for revitalising Ukraine's economy. Furthermore, the paper presents successful cases of reform implementation at the micro level in state institutions.*

Results and Conclusions: *Following the conference, a program document on the directions for the restoration and development in Ukraine was drafted. It pointed out the critical need for unity between European countries and the USA in supporting Ukraine and providing timely aid. In Ukraine, achieving unity between the government and business regarding the de-shadowing of the economy, reform of the tax system, customs service, and administration of basic taxes and fees emerged as an issue. This should create prerequisites for the inflow of investments into the Ukrainian economy, ultimately reducing the gap with European countries.*

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1 INTRODUCTION AND PROJECT BACKGROUND

The Romanian-Ukrainian research project "A modern science-based concept for Ukraine to ensure the sustainable development, recovery & reconstruction: cost assessment, model, and policy framework" was launched in 2023 to analyse new geopolitical challenges for achieving the goals of sustainable development of Ukraine in the post-war period. Conducting such an analysis should contribute to developing the concept of sustainable development and post-war renovation until 2030 under the global consequences of war.

The conference held in November 2023 was part of research aimed at providing a better understanding of how to develop a blueprint for security, resilience and development in Ukraine and the Black Sea region. A bilateral Romanian-Ukrainian team of six scholars from the Luciano Blaga University of Sibiu and the Taras Shevchenko National University of Kyiv focused on designing a roadmap for stabilising the region, fostering economic interconnection and facilitating Ukraine's integration into the democratic core of Europe. The research is directed to practical means and policy recommendations. Therefore, a combination of academic approaches and database research combined with policy design will generate academic papers, books, and policy papers.

The conference was addressed to investigate two main questions. How can we effectively address the new geopolitical challenges and achieve sustainable development goals in Ukraine and the region during the post-war period? How can regional actors enhance their joint profiles with the support of the EU, NATO and Western partners to strengthen regional security and stability? Ukraine's success and post-war reconstruction are a matter of interest for the broader region and its long-term stability.

2 KEY SPEECHES AND INSIGHTS FROM THE SPEAKERS

V. Cojocaru, Director for Eastern Europe and Central Asia and representative of the Ministry of Foreign Affairs in Romania, underlined that the diplomatic dialogue between Romania and Ukraine is strong, dynamic and constant. Romania will continue to support the legitimate fight for Ukrainian independence, territory integrity and sovereignty. This commitment involves continuing to invest in Ukrainian infrastructure to increase transit capacity and provide a lift for Ukrainian exports. The reconstruction process will be directly interlinked with reform. These reforms will play an essential role in ensuring the long-term economic development of Ukraine and create a democratic, stable, safe and inclusive Ukraine. Moreover, the EU accession process will undoubtedly be transformative.

HE Ihor Prokopchuk, Ambassador Extraordinary and Plenipotentiary of Ukraine in Romania, admitted that the key objective for Ukraine is to win the war unleashed by Russia. This war of aggression is not only an existential threat to Ukraine; Europe is at a critical point. The result of this war will define the security order that will govern this continent through the century. It is, therefore, crucial for all to stand firmly with Ukraine and provide

the necessary assistance until the full victory over the aggressor. The victory would be a restoration of the sovereign and territorial integrity of Ukraine within its internationally recognised borders of 1991, which includes the autonomous republic of Crimea and the city of Sevastopol, compensation of the losses, and bringing the perpetrators to justice. It is essential to maintain international solidarity regarding all forms of assistance to Ukraine, including military, economic, financial, and humanitarian. One of the important tracks for cooperation is Romania's participation in the rebuilding and recovery of Ukraine. A bilateral partnership will facilitate Ukrainian and Romanian partnership on rebuilding Ukraine to increase the transit of products of Ukraine in origin. There is mutual interest in doing more in energy security and cooperation in digitalisation and cyber security. Post-war reconstruction and resilience building will become the key driving forces for strong partnerships between Romania and Ukraine.

Dmytro Natalukha, Member of Parliament of Ukraine and Chairman of the Economic Affairs Committee of the Verkhovna Rada, Ukraine, outlined that Ukraine has all the opportunities to implement and support logistics routes between the EU, Turkey, the Caucasus and Central Asia. It has a huge potential for freight transportation by rail, sea, and roads, which makes these routes extremely competitive. Ukraine has significant natural resources, such as agriculture and energy, which can stimulate economic growth, and it is ready to attract investment and operate in competitive markets. Without Ukrainian grain and other components, ensuring food safety worldwide is impossible. Significant volumes of energy resources, in particular, uranium and shale gas, and large and reliable gas storage make Ukraine attractive for the energy hub of Europe. Ukraine has significant natural resources for green energy production, including solar, wind and biomass. This provides opportunities for developing sustainable energy and reducing dependence on hydrocarbons.

Dr. Sergiy Nikolaychuk, Deputy Head of the National Bank of Ukraine, stressed the significance of Ukraine's victory and the subsequent strengthening of its economy and resilience as a very important challenge. This resilience is of joint interest to Ukraine and the EU, including, of course, Romania, and will considerably mitigate security risks for Europe. The fundamental prerequisites for sustainable economic growth are economic and financial stability. The NBU's commitment to maintaining price and financial stability under any conditions was a clear statement from the recently updated NBU strategy.

Under the full-scale war, the policy toolkit has had to adapt substantially and implement stabilisation policy measures. Despite the progress since the beginning of the war, today, Ukraine has embarked on a full-fledged program with the IMF, which is unprecedented and helps to navigate the economy and financial sector amidst extreme uncertainty. Notably, this program stipulates the absence of direct financing of the budget. All these efforts have led to a notable reduction in inflation to 5.3%, very close to the medium-term target of 5%, instilling optimism about achieving a control level of inflation close to the target in the medium term despite various adversities.

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The domestic financial sector has to play a pivotal role in Ukraine's reconstruction and economic recovery, facilitating Ukraine's access to the EU common market in its interventions with other key sectors. To ensure successful reconstruction, Ukrainian authorities must prioritise different aspects in different stages. During the current stage, the critical role belongs to the state and official financing partners to make this stage work effectively. The key element nowadays belongs to the National Reconstruction Agency. According to the transfer and EU standards, this is relevant for all reparation, implementation, control, and reporting for projects with budgetary and donor funds.

There is a strong potential to boost the effectiveness of many state-owned enterprises and banks alongside expediting infrastructure and formulating comprehensive strategies for their subsequent privatisation. Transitioning to the next phase, the focus should move to public-private partnership instruments to overcome the initial resistance; the target programs from foreign governments, government agencies, and IFIs via subsidising the board risk insurance, co-investment, and guarantees are crucial. Ukraine must also improve infrastructure for public-private partnerships, concessions, and state-enabled investments.

Kateryna Ivanchenko, Head of CID, Ukraine, focused on the key goal of supporting and strengthening the capacity of local authorities, businesses and civil society to adapt to new challenges and make effective data-driven decision-making. She presented a Special bank of 80 proposed solutions for local self-government bodies for joint evaluation and selection of the best in providing services. Such solutions include data-driven decision tools, more than 100 in democracy and government services to make evidence-based decisions.

Dr. Habil, Prof. Andriy Dligach, Taras Shevchenko National University of Kyiv, Ukrainian entrepreneur, scientist, and civic activist. Founder of the Advanter Group of companies and the international business community Board and co-founder of the Center for Economic Recovery Ukraine, discussed efforts to strengthen Europe, enhance Ukraine's resilience, and foster its integration into the European Union.

Emphasising the multifaceted nature of the conflict with Russia, he highlighted Ukraine's role as a frontier between the Western world and regions marked by conflict and resource competition. He stressed the need for total modernisation in Ukraine's economy, state, and society beyond mere recovery. Economic freedom was identified as crucial for future growth, with a vision to double Ukraine's economy and achieve a scale similar to Turkey or Poland within 8 to 10 years.

The proposed formula for modernisation involved inclusive collaboration between the government, business, and civil society, focusing on anti-corruption initiatives. He estimated that Ukraine would need approximately $700 billion over the next decades, based on an analysis of over 40 countries worldwide that underwent similar challenges like war. He asserted that a significant portion of this $700 billion would come from FDI foreign direct investments. In this case, accordingly, he stressed the need to develop Ukraine's

financial infrastructure both domestically and internationally, with the European investment bank identified as the biggest investor in Ukraine.

Addressing concerns about Ukrainian corruption, Dr Dligach attributed it to systemic economic issues rather than merely institutional shortcomings. He concluded by asserting that a strong Ukraine contributes to a strong European Union, positioning the country as a potential significant partner for the EU's future.

Mr. Stefan Schleuning, Head of Cooperation of the EU Delegation to Ukraine, delivered a speech on the challenges and progress in Ukraine's recovery, reform, and reconstruction efforts. Notable points include the recent recommendation for accession negotiations with Ukraine in the EU enlargement report, highlighting impressive reform progress despite ongoing war and the pandemic. The speaker emphasised the need for visible results and quick impact in various sectors, citing an example of school repairs in Chernigiv. Cooperation with international partners, capacity building, and the proposed four-year Ukraine facility were discussed as key elements of EU support, focusing on financial assistance, technical support, and coordination efforts. The speaker concluded by addressing the importance of donor collaboration and expressing readiness for questions or comments.

Dr. Pinter addressed challenges faced by Ukrainian publishers by fostering global collaborations, particularly in the realm of textbooks, scientific, and general publishing sectors, offering various support mechanisms.

Dr. Humenna discussed the importance of SDGs in Ukraine's recovery agenda. Survey findings highlight the war's significant impact on Ukraine's future development, with key sectors such as agriculture, IT, and construction expected to drive the economy. Challenges like corruption and human capital retention need to be addressed for successful SDG implementation.

Dr. Colibășanu examined the complex challenges of rebuilding Ukraine post-war, emphasising geopolitical and geoeconomic perspectives. Key priorities include infrastructure reconstruction, energy security, and societal reconstruction to enhance competitiveness and resilience against external influences.

Prof. Stavytskyy proposed a comprehensive modernisation plan for Ukraine post-war, emphasising EU alignment, green economy transition, and societal reforms. Key steps include stimulating SMEs, reforming education, and enhancing infrastructure to position Ukraine as a major player in Eastern Europe.

Mrs. Leca outlined Ukraine's potential contribution to Europe's green transition, emphasising its natural resources and expertise in energy sectors. For successful green recovery, policies promoting good governance, transparency, and local empowerment are recommended.

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Dr. Nazarov presented survey findings indicating low trust in institutions and challenges in synchronising perceptions of conflict readiness. Efforts to rebuild trust, enhance communication, and promote collaboration between sectors are crucial for strengthening national resilience amidst external pressures and destabilising trends.

Prof. Izarova highlighted Russia's illegal invasion of Ukraine and emphasised the need for fair compensation procedures. **Mr. Chernohorenko** discussed implementing European Court of Human Rights (ECHR) judgments, crucial for Ukraine's recovery and EU accession. **Prof. Maydannyk** explored legal challenges in compensating damages caused by Russian aggression and advocated a shift to a reparation tort model.

Michael Khoo shared insights from the KleptoCapture Task Force, detailing efforts to enforce economic countermeasures against Russia and seize assets. **Jared Kimball** discussed trust in Ukraine's judiciary and efforts to seize Russian assets for reconstruction.

James Carafano emphasised the need to integrate Ukraine into the broader Eurasian community, viewing reconstruction as pivotal for Europe's future. He outlined strategies to leverage regional infrastructure, particularly focusing on the Black Sea's significance for maritime safety and trade. Carafano advocated for Ukraine's role in connecting Europe with the Middle Corridor, fostering economic integration despite ongoing conflicts.

Gabriela Ciot and Liviu Serban discussed the European Union's (EU) enlargement methodology and expectations for candidate countries like Ukraine. Highlighting The discussions emphasised the need for unified international legal acts to navigate challenges effectively and achieve justice.

The need for fundamental reforms in areas such as the rule of law and economic development stressed the importance of credible progress and political leadership in the accession process.

Silviu Paicu addressed the reform of Ukraine's intelligence system, advocating for democratic oversight to build public trust. He proposed models from countries like Norway and Belgium to enhance parliamentary oversight and ensure independent scrutiny of security agencies, fostering transparency and accountability.

Vira Konstantinova discussed Ukraine's aspiration to join NATO, noting increased public support for membership as a long-term security guarantee. Despite challenges such as Russian propaganda and political changes within NATO, she emphasised Ukraine's strategic importance in deterring Russian aggression and protecting European security.

Vasyl Yurchshyn highlighted the importance of international assistance for Ukraine's security and reconstruction efforts. He emphasised the role of military-industrial cooperation in strengthening Ukraine's defence capabilities and contributing to regional security, urging global partners to support Ukraine's defence industry.

Alla Kozhyna discussed the significance of digital transformation in shaping urban resilience, sustainability, and recovery. Emphasising global urbanisation and digitalisation trends, she underscored the importance of digital solutions in addressing contemporary challenges and fostering economic and social development in urban areas. The presentation highlighted the potential of digital technologies to enhance urban strategies and improve residents' quality of life.

Victoria Vdovychenko focused on the resilience of Ukrainian cities and communities in achieving sustainable development goals. She highlighted the positive outcomes of decentralisation initiatives and Ukrainian cities' environmental priorities. Vdovychenko emphasised the importance of collaboration with European partners and advocated for a comprehensive strategy that includes community resilience and sustainable development goals.

Alina O'Connor discussed the transformative role of education in Ukraine's reconstruction efforts. She emphasised the importance of investing in education and skill development, particularly targeting adult learners and public service leadership skills. O'Connor proposed collaborative initiatives with Ukrainian universities to expand educational access and address local needs effectively.

Professor Silviu Nate elaborated on the efforts to convey the Ukrainian perspective on victory to European partners. He emphasised the importance of countering potential Russian propaganda and aligning terminology and ideas with Ukrainian experts and society representatives. Nate underscored the importance of incorporating sustainability into Ukraine's reconstruction efforts for a resilient future.

3 CONCLUSIONS AND POLICY PAPER

In conclusion, participants highlighted the main challenges that need to be solved in the near future:

1. Further unified support of Ukraine by EU countries, the USA and other allies demands an uninterrupted supply of both weapons and financial resources. The countries of Eastern Europe and the Black Sea region should play a key role in providing transit corridors, promoting the recovery of the Ukrainian economy, and investing in infrastructure recovery, which will ensure the stability of the entire region.
2. The strategic importance of incorporating sustainability and resilience-building strategies into Ukraine's post-war reconstruction efforts requires uniform EU approaches to reforming the Ukrainian economy.
3. The development of joint strategies to counter potential Russian propaganda and align European perceptions. It is imperative for both EU countries and the USA to maintain a unified position regarding the terms, sources of funding, and reform

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tasks. Otherwise, all such reforms will be nullified by counter-propaganda of the Russian Federation. Also, the unification of cyber security with the EU and the US is becoming an important challenge, especially in the world of smart things.

4. The development of unified international legal acts to navigate challenges effectively and achieve justice, especially in the matter of paying reparations to Ukraine and punishing war criminals.
5. Ukraine will require huge investments to restore war-affected regions, which should be rebuilt according to SDG principles. This approach will not only expedite Ukraine's progress but also bring it closer to EU standards.

ANNEX

BEYOND CONFLICT, UKRAINE'S JOURNEY TO RECOVERY REFORM AND POST-WAR RECONSTRUCTION

Policy Paper

Coordinator: Silviu Nate
Research Team: Andriy Stavytskyy, Ganna Kharlamova, Răzvan Şerbu, Iryna Izarova and Eduard Stoica

The policy paper is a result of the conference entitled "Beyond Conflict: Ukraine's Journey to Recovery, Reform and Post-War Reconstruction", organised on 29 November 2023 under the auspices of the research grant entitled "A Modern Science-Based Concept for Ukraine to Ensure Sustainable Development, Recovery and Reconstruction: Cost Assessment, Model and Policy Framework", funded by the Hasso Plattner Foundation and the Knowledge Transfer Centre of the Lucian Blaga University of Sibiu, Romania.[1]

The war in Ukraine has caused severe humanitarian and economic consequences. It has created a new geopolitical environment that demands continual support for Ukraine and sustainable goals for the post-war period.

A better reference to the conflict is the "Russian-European War", which not only highlights Ukraine's essential role in European civilisation but also Russia has declared war on the entire continent, thereby challenging European security architecture. Consequently, the Western Coalition must support the victory of Ukraine and reject the Russian abuse of European civilisations.

Economic and Infrastructure Perspective for the Post-war Renovation of Ukraine

Revitalisation relies on effective fiscal policies and attracting investment to support enterprises and generate employment by:

- ⇒ *Mitigating the cost-of-living crisis exacerbated by supply shocks.*
- ⇒ *Addressing long-term unemployment from demobilisation.*
- ⇒ *Capitalising on energy self-sufficiency and export potential.*
- ⇒ *Enhancing competitiveness and productivity of state-owned enterprises.*
- ⇒ *Improving infrastructure to enable growth.*
- ⇒ *Implementing anti-corruption measures.*
- ⇒ *Streamlining regulations and financing access.*

1 'Collaborative research project Ukraine-Romania (financed by Hasso Plattner funds): A Modern Science-Based Concept for Ukraine to Ensure the Sustainable Development, Recovery and Reconstruction: Cost Assessment, Model and Policy Framework' (*Lucian Blaga University of Sibiu*, 2023) <https://grants.ulbsibiu.ro/roukr> accessed 10 February 2024.

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The prices of goods supplied by Russia and Ukraine, including oil, wheat, fertilisers, and various metals, have risen sharply. This has exacerbated poverty and food insecurity, adding to increasing inflationary pressures. Policymakers must address the issue to mitigate its impact on people and the economy.

After the war, Ukraine is expected to experience a significant increase in unemployment rates and bankruptcies among firms and enterprises.[2] This is due to the return to civilian life of over a million military personnel. In 2021, there were 1,956,248 registered entities of economic activity in Ukraine, with 1,585,414 being persons-enterprises. However, as of January 1, 2023, this number decreased to 1,464,953, representing a decrease of 25.2%.

To help businesses affected by war, **a state program is needed to support small and medium-sized enterprises**. Ukraine must recover and grow to match neighbouring countries. **The nation has great potential to become an important energy player in Europe due to its abundant uranium and shale gas resources and vast and dependable gas storage facilities.** Additionally, it is a country that is rich in natural resources that can be used to produce green energy, such as solar, wind, and biomass. This presents a unique opportunity to develop sustainable energy and decrease reliance on non-renewable energy sources.

Ukraine has a unique program with the IMF that helps manage the economy and financial sector during uncertainty without directly financing the budget. Inflation has fallen to 5.3%, close to the 5% target. Despite the adverse effects, the National Bank of Ukraine hopes to achieve the target.

The National Reconstruction Agency is crucial for all reparation, implementation, control, and reporting stages for projects with budgetary and donor funds. **Ukraine needs to enhance the effectiveness of state-owned enterprises and banks, create infrastructure, and develop strategies for efficient privatisation.** In the transition stage, public-private partnership instruments can help overcome initial resistance, and they should target programs from foreign governments and agencies via subsidising insurance, co-investment, and guarantees.

A proposed plan for modernising Ukraine involves collaborative efforts between the government, businesses, and civil society, focusing on implementing anti-corruption initiatives. The analysis estimates that Ukraine will require around $700 billion over the next decade for this effort. It is realistic based on a study of over 40 countries receiving aid and international assistance following similar situations. However, most of this funding will likely come from foreign direct investments (FDI). To attract FDI, Ukraine must improve

2 'Job Search: How the Labour Market in Ukraine has Changed During the War and what Will Happen Afterwards' (*Visit Ukraine*, 19 May 2023) <https://visitukraine.today/blog/1872/job-search-how-the-labour-market-in-ukraine-has-changed-during-the-war-and-what-will-happen-afterwards> accessed 10 February 2024.

its financial infrastructure both within the country and outside of it. The European Investment Bank is a significant potential investor in Ukraine.[3]

In 2024, Ukraine will join SEPA, the European payment system in euros, marking a significant milestone in its journey towards European integration. This development stands as a key indicator within Ukrainian's plan with the European Union.

Recommendations

- ⇒ *Expand social safety net eligibility using World Bank aid to protect vulnerable groups.*
- ⇒ *Develop robust retraining programs preparing veterans for civilian roles in priority sectors.*
- ⇒ *Incentivise renewables integration, achieving 2030 climate targets, and cleaning energy exports.*
- ⇒ *Strategically privatise non-core SOEs while enforcing corporate governance reforms.*
- ⇒ *Establish a reconstruction agency with the mandate to consolidate infrastructure modernisation.*
- ⇒ *Launch comprehensive anti-corruption campaigns.*
- ⇒ *Provide a transparent and simple tax system to attract FDI.*
- ⇒ *Partner with EIB, EBRD, etc., on priority infrastructure and enterprise financing.*
- ⇒ *Impose procurement transparency auditing processes to ensure responsible expenditure.*
- ⇒ *Acknowledge the necessity and justification of expenses for implementing monetary policy through the absorption of liquidity (interest expenses on deposit certificates of the NBU) to maintain macroeconomic stability in Ukraine.*
- ⇒ *Detail the development and step-by-step realisation of the National Revenue Strategy, the Ukrainian Plan within the framework of the Ukrainian Facility from the EU, encompassing a large matrix of reforms that amalgamates plans, strategies, programs and memoranda.*

Geoeconomic Challenges and Opportunities

Key Issues

- ⇒ *Leveraging potential as trade routes crossroads between EU and Central Asia.*
- ⇒ *Reconstructing agriculture export capacity through modernised port infrastructure.*
- ⇒ *Building cyber and energy resilience to support the economy under conflict conditions.*
- ⇒ *Attracting investment via compliance with EU regulations and standards.*
- ⇒ *Overcoming Russia's efforts to cut off Black Sea access is critical for trade.*
- ⇒ *Advancing EU Middle Corridor east-west connectivity goals.*

3 World Bank, Government of Ukraine, European Union and United Nations, *Ukraine: Rapid Damage and Needs Assessment, February 2022 – February 2023* (World Bank Group 2023) <http://documents.worldbank.org/curated/en/099184503212328877/P1801740d1177f03c0ab180057556615497> accessed 10 February 2024.

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Ukraine's role as a frontier between the Western world and regions marked by conflict and resource competition highlights the multifaceted nature of the conflict with Russia. Ukraine is strategically located at the crossroads of transport routes, providing ample opportunities for foreign trade and investment. **The country has the potential to establish and maintain logistics routes between the EU, Turkey, the Caucasus, and Central Asia.** With its vast transportation infrastructure, Ukraine can efficiently transport goods by rail, sea, and road, making these routes highly competitive.

The top priorities for reconstruction are the port infrastructure for agriculture and trade, followed by energy for sustaining the economy under war conditions. The IT sector is foundational but has yet to be an immediate top priority.

The second tier involves **modernising agriculture**, meeting European standards, and navigating the global food supply chain.

The third top tier focuses on Ukraine's posture in the ongoing deglobalisation phenomenon, emphasising **societal reconstruction** to build competitiveness and resilience against external influences.

The key to Ukraine's successful reconstruction lies in aligning its social infrastructure with EU conditionalities and Western investments. This pivotal factor can ensure that the country meets global standards and attracts more foreign investments in the long run.

Black Sea port infrastructure is vital for Ukraine's reconstruction and countering Russia's goal of cutting off Ukraine's access to the Black Sea. Ukraine is critical in establishing a European front line connecting the North Sea to the Black Sea.

Due to increased interest from Germany and France in Central Asia, the European vision of the Middle Corridor will likely progress faster than the Chinese-led "One Belt One Road" project. China's internal focus on socioeconomic issues and complex relationships with the US and Russia may hinder the momentum of the "One Belt One Road" project.

Ukraine's reconstruction is crucial for Europe's future interconnection of North-South infrastructure, with significant economic and geopolitical consequences.

The precondition of East-West interconnection is the guarantee of free navigation in the Black Sea. This goal can ultimately be the result of a type of thinking based on Europe's direct interdependence with Central Asia and the West's interest in integrating the Black Sea region into a winning strategic equation; however, materialising these ambitions requires a shift toward a Cold War mentality. This is essential to prevent Russia from unilaterally reshaping the geopolitical landscape, stretching its influence as far as Poland and Romania, potentially generating additional fronts for the US and weakening its presence in the Pacific.

Ukraine and Europe demand the development of joint systems of protection against cyber threats from the Russian Federation and China, which requires adopting joint political

decisions. These decisions should lead to increased use of digital security products across the European continent.

It is imperative to prioritise establishing a safe and secure maritime area for civilian traffic in the Black Sea. It will significantly impact trade, reconstruction, and development in the region. Furthermore, integrating the Caucasus and Central Asia into a larger economy through the Middle Corridor promoted by Western countries is necessary. The Middle Corridor could engage India, Japan, South Korea, and Western Europe through resilient transportation to the Black Sea.

The networks present a significant opportunity for the Mediterranean region, with potential partners in northwest and eastern Africa. The level of connectivity between them will not only determine Eurasia's economic future but also its history. Hence, **Ukraine could play a crucial role as a catalyst for linking Africa with Northern Europe, underscoring the justification for** investing in reconstructing Ukraine and Europe's infrastructure.

The United States will support and contribute to Ukraine's reconstruction while taking a new approach to geopolitics and interconnectedness in Eurasia.

Recommendations

- ⇒ *Provide sufficient powerful air defence systems to protect Ukrainian ports and infrastructure in the long run.*
- ⇒ *Invest in cyberinfrastructure and energy grid hardening to enable industrial production under duress.*
- ⇒ *Accelerate transportation system upgrades, closing capability gaps inhibiting Middle Corridor success.*
- ⇒ *Explore joint development initiatives with Black Sea littoral states to counter Russian dominance.*
- ⇒ *Promote the Black Sea's hub potential connecting Africa, Europe, and Central Asia.*
- ⇒ *Develop supplementary logistics infrastructure to shift more cargo off railways.*

Unlocking Ukraine's potential requires securing territorial integrity and freedom of navigation while building regional partnerships. With reconstruction supporting competitiveness, Ukraine can anchor new geoeconomic linkages.

Romania's Role in Supporting Ukraine

Key issues

- ⇒ *Supporting Ukraine's fight against the existential Russian threat.*
- ⇒ *Countering Russia's global supply chain and migration disruption efforts and protecting European political resilience.*
- ⇒ *Enabling Ukraine's agricultural exports through Danube ports.*
- ⇒ *Managing pressure on domestic infrastructure from transhipments.*
- ⇒ *Advancing mutual interests in energy security and digitalisation.*

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Romania and Ukraine possess ample opportunities to collaborate across various sectors, including transport infrastructure and economy. Romania is committed to supporting Ukraine's fight for independence, territorial integrity, and sovereignty by investing in infrastructure and boosting exports. Romania also supports President V. Zelensky's peace formula and plans to facilitate the reconstruction of Ukraine, which involves international organisations and companies.

The Russian aggression poses an existential threat not only to Ukraine but also to Europe as a whole. It is, therefore, crucial for all stakeholders to stand firmly with Ukraine and provide the necessary assistance until the aggressor is entirely defeated. Russia, either directly or through proxies, seeks to provoke tensions in various regions to disrupt supply chains and hijack Western priorities for supporting Ukraine.

The blockade of grain exports from Ukraine has exacerbated a food security crisis, particularly in the Middle East and Africa, increasing the risk of famine. The Russian Federation's actions, including bombing loading and export facilities on the Danube, is putting significant pressure on affected states in Africa. These actions have become levers for generating overlapping crises, evident in military crises and coups d'état in countries like Sudan and Niger. The resulting armed conflicts and famine fuel forced migration in Africa, which is a phenomenon that is putting pressure on Europe. Furthermore, some nationalist and far-right parties backed by Moscow are gaining adherents amid anti-immigration rhetoric in a crucial election year.

In 2023, Romania facilitated the transit of 70% of all grain produced by Ukraine for export. By maintaining the flow of grain exports, Romania not only alleviates Russia's pressure on African states and implicitly on Europe but also supports Ukraine's economy. However, this effort puts additional pressure on the national infrastructure, underscoring the need for **investment in intermodal stations on the Danube**.

Ukraine and Romania play vital roles in maintaining global food security, developing the Danube Port clusters and projects in the triangle of Ukraine, Romania, and the Republic of Moldova, improving railroad and port infrastructure, and jointly coordinating border checkpoint controls. There is a mutual interest in furthering cooperation in energy security, digitalisation, and cyber security.

Recommendations

- ⇒ Boost investment in intermodal stations and logistics infrastructure to sustain high volumes of Ukrainian grain exports.
- ⇒ Explore the funding for modernising the Danube and Black Sea ports via EU assistance programs to reinforce food and raw materials transport capacity.
- ⇒ Advance renewable energy partnerships, cyber collaboration, and digital connectivity to reduce dependence on Russia.
- ⇒ Leverage bilateral chamber of commerce to promote trade and cross-border infrastructure growth.
- ⇒ Commission feasibility study on regional rail enhancements to shift more grain and goods transport off-roads.

The Path to the EU Integration

The EU discussed crucial support elements for Ukraine, including a four-year facility for financial assistance, technical support, and coordination efforts.

Despite immediate concerns in areas such as housing, agriculture, and energy, it is essential to address these issues to ensure a resilient and geopolitically independent future for Ukraine.

Key issues

- ⇒ *Ukraine has pursued full EU membership and a resilient future.*
- ⇒ *Pre-accession conditionalities require significant governance and economic reforms.*
- ⇒ *Leveraging Ukraine's renewable energy potential is imperative for continuing alignment with the EU Green Deal.*
- ⇒ *Ukraine might fill EU supply chain gaps as a manufacturing player.*
- ⇒ *Implementing recovery supporting decentralisation is crucial.*

To support Ukraine, the European Commission should progressively consider granting specific privileges before the country officially joins the EU. These could include giving Ukraine access to the single market and helping it become eligible for EU funds. These actions would speed up Ukraine's integration and post-war recovery and strengthen its partnership with the European Union.

The principles of the enlargement methodology refer to more **credibility in delivering fundamental reforms**, **stronger political leadership** and more political commitment, **dynamic process** by integration of the 35 chapters of the Acquis Communautaire into six thematic policy clusters, and **predictability**, negative and positive conditioning – annual verification of progress or stagnation.

According to the Copenhagen criteria (1993), candidate states must achieve synergy between economic criteria, democratic institutions' functioning, and public administration reforms in the accession negotiation process.

The EU Commission's 2023 Enlargement Package[4] highlights several challenges for EU enlargement policy in the context of the war in Ukraine:

- ⇒ Increasing security and defence capabilities
- ⇒ Reconstructing Ukraine
- ⇒ Accelerating the energy transition and independence from Russian gas
- ⇒ Refugees and humanitarian action
- ⇒ EU enlargement

4 'Commission adopts 2023 Enlargement package, recommends to open negotiations with Ukraine and Moldova, to grant candidate status to Georgia and to open accession negotiations with BiH, once the necessary degree of compliance is achieved: Press Release' (*European Commission*, 8 November 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5633> accessed 10 February 2024.

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Before the Russian invasion, Ukraine progressed in aligning with the European Union's Green Deal policies for climate and energy transition. However, the war disrupted these efforts.

Ukraine's key advantages include its proximity to the EU, abundant renewable energy resources, and a developed nuclear sector for green hydrogen production. Its strong metallurgical sector and low labour costs also position it to fill the EU's processing gap for the EU as it diversifies from China.

To achieve the vision, Ukraine must act decisively, implement the National Recovery Plan and Lugano Declaration and prioritise good governance, transparency, and accountability.

Decentralising participation in Ukraine's green recovery is recommended. Ukraine is not just a recipient but also an active contributor to Europe's sustainable future.

Recommendations

- ⇒ *Adopt EU enlargement methodology emphasising reforms, leadership, and process predictability.*
- ⇒ *Prioritise public administration reform to meet EU economic, democratic, and functional benchmarks.*
- ⇒ *Develop post-war renewable energy infrastructure facilitating future hydrogen exports.*
- ⇒ *Tap Ukraine's solar, wind, and hydropower potential to support the European energy transition.*
- ⇒ *Provide incentives for metallurgical and technology firms to engage in onshore production for EU markets.*
- ⇒ *Empower local governance and encourage public participation in supporting recovery from the war.*
- ⇒ *Increase accountability around spending and progress milestones regarding Lugano commitments.*
- ⇒ *Join EU regional initiatives on digital, transport, and environmental priorities.*
- ⇒ *Proactively communicate Ukraine's vision as a fully integrated, value-adding EU member state.*

Ukraine's Effort Towards Transatlantic Membership

A strong Ukraine will directly diminish the threat Russia could pose to Eastern European nations and will indirectly bolster the global security order. The Ukrainian society is more united and provides broad support for NATO membership, understanding that NATO is a long-term guarantee for Ukraine's security and sovereignty.

Key issues

- ⇒ *Ukraine's commitment to NATO membership requires boosting defences to meet NATO standards.*
- ⇒ *Reconstructing Ukraine necessitates reforms for democratic oversight of security and intelligence.*

⇒ *Ukraine's defence industry and military capability can be leveraged to strengthen NATO.*
⇒ *Consensus is needed among NATO members to welcome Ukraine.*
⇒ *Interim defence assistance must bridge gaps posed by prolonged NATO accession.*

On 29 November 2023, Mr Kuleba announced in Brussels that Ukraine had adopted the Annual National Program for Defence and Security Sector Reforms.[5]

The reconstruction of Ukraine also requires reform of the intelligence system and oversight of the security sector in line with democratic governance. The Security Service of Ukraine has multiple roles, an overly extensive task with multiple branches without a very logical connection, and is eight times larger than MI5.

There must be a distinction between control and oversight in the intelligence community. Ukraine can consider adopting models used by countries like Norway, Belgium, and the Netherlands, where committees of experts appointed by parliament oversee the security sector.

Civil society was crucial in setting up independent authorities to investigate corruption. A model with a central role in civil society participation would increase confidence in the intelligence sector and result in successful reform.

Ukraine in NATO represents a valuable investment in strategic determination and deterrence:

⇒ Ukraine is already part of deterrence on NATO's eastern flank.
⇒ Ukraine's armed forces are among the most capable combat forces in Europe.
⇒ Ukraine has a unique experience in defending itself against conventional Russian troops.
⇒ Ukraine has practical experience in combating Russian propaganda and information warfare.
⇒ Ukraine's integration into NATO will protect investments in infrastructure and the country's reconstruction.

It is unlikely that there will be a swift consensus for Ukraine to become a member of NATO, especially during times of war. Additionally, even if Ukraine were to integrate into the EU, it may still require the desired defence guarantees. In such circumstances, coalition assistance, infrastructure investments, and defence sector development are crucial factors that can contribute to Ukraine's victory. It enhances Ukraine's industrial defence capability, producing military goods that can be sold on foreign markets. Being one of the most profitable sectors, independent military industry or cooperation-based production aims to defend and strengthen the eastern flank.

5 Sergiy Sydorenko, 'Road to NATO without Hungary's Veto: Ukraine's Reform Plan Agreed with Alliance' (*European Pravda*, 29 November 2023) <https://www.eurointegration.com.ua/eng/articles/2023/11/29/7174539> accessed 10 February 2024.

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Russia's invasion of Ukraine threatens European security. Supporting Ukraine's self-defence and eventual victory is imperative to protect Eastern European nations and the global security order. A united, NATO-aligned Ukraine with reformed and modernised defence and intelligence sectors will be pivotal.

Recommendations

- ⇒ *Help Ukraine implement its Annual National Defence and Security Reform program, focusing on modernising NATO interoperability, maritime security, and air defence.*
- ⇒ *Restructure intelligence services on Western models, prioritising efficiency and accountability.*
- ⇒ *Invest in Ukraine's defence industry and joint production initiatives to provide NATO-grade equipment. Help set up export controls and protocols to enable Ukraine's participation in multinational defence projects.*
- ⇒ *Expand Ukraine's existing coordination role in NATO's eastern flank defence planning. Foster inclusion of Ukrainian officers in NATO training programs.*
- ⇒ *Develop a roadmap to guide Ukraine's potential NATO accession process. Concurrently, structure a NATO-affiliated security pact to meet Ukraine's nearer-term defence needs.*

Bolstering Ukraine's military and social will diminish future Russian threats. With strategic assistance, Ukraine's victory can anchor enduring European security.

Recovery and Rebuilding Challenges

Key Challenges

- ⇒ *Brain drain and loss of human/social capital.*
- ⇒ *Prevalence of corruption hindering growth.*
- ⇒ *Modernising critical infrastructure.*
- ⇒ *Shaping a strategic vision aligned with EU/SDGs.*
- ⇒ *Building climate resilience and energy security.*
- ⇒ *Fostering entrepreneurship and small business.*
- ⇒ *Restoring economic equality and opportunity.*

A recent survey conducted among students and teachers throughout Ukraine has revealed some significant findings[6]. Notably, 93% of the respondents believed that a full-scale war would profoundly impact Ukraine's future development. The top three economic activities expected to drive Ukraine's economy in the next five years are agriculture and IT, each with 74% support, followed by construction at 60%.

6 USAID, Pact and Razumkov Centre, *Ukraine: From War to Peace and Recovery: Analytical Assessments, September 2023* (Razumkov Centre 2023) <https://razumkov.org.ua/vydannia/shchorichni-analitychni-pidsumky-i-prohnozy> accessed 10 February 2024.

Almost 80% of those surveyed believe that Ukraine will take three or more years to recover from the current destruction of its industrial and social infrastructure. The survey highlighted corruption as the biggest threat to recovery, along with challenges such as immigration, destruction of territory, and mining.

Industrial production in **Ukraine faces challenges related to retaining qualified human capital** and high energy costs. Culture is essential to sustainable development, yet **digitalisation and education need more support**.

Nevertheless, Ukraine still has a qualified workforce that can contribute to the rapid recovery of the economy, specifically in labour specialities in demand for infrastructure restoration and city reconstruction.

Private entrepreneurship plays a vital role in achieving global sustainability. However, **Ukraine faces challenges such as corruption, a shadow economy, loss of human and social capital, and military concerns to achieve SDGs and sustainable development.**

Education and science through civil society engagement are pivotal in addressing these challenges. It is crucial that Europe support and mobilise these sectors to create a long-term sustainable projection for Ukraine. A Western fifteen-year Marshall Plan for education is essential to support human capital development in Ukraine.

Rebuilding Ukraine post-war requires modernisation and foreign financing, with investments contingent on security amidst geopolitical uncertainties. Achieving sustainable development involves harmonising EU legislation, transitioning to a green, digital, and inclusive economy, and aligning with the Sustainable Development Goals.

The proposed steps for Ukraine's recovery include **creating a program encouraging small and medium-sized businesses, addressing unemployment, rehabilitating war-affected individuals, reforming the education system, and restoring critical infrastructure focusing on smart development. Energy security is also a priority, aiming for climate neutrality, reduced coal usage, and integration with EU markets. To address economic inequality and stimulate growth, tax reforms, a new European-style railway development, and a balanced economic and tax policy are recommended.**

A research project conducted in collaboration with international partners aims to support the higher education system in the context of climate change mitigation. The project involves partnering with universities from Slovakia, Spain, Romania, and Ukraine. They use the "one-click LCA" application to calculate carbon footprints and assess the lifecycle impacts of building products and organisations. The study reveals that Ukraine has a low level of popularity regarding energy certification for buildings, with only 25 large structures certified using programs like LEED and BREEAM. The research team recognises the significance of energy optimisation, especially in the context of climate change mitigation.

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During the pre-war era, media content focused 87% on reporting environmental disasters, crimes, abnormal weather, and international news, with only 13% promoting active decision-making.

The research unequivocally demonstrates the media's significant role in shaping public perception of environmental issues. To improve this perception, it is imperative to increase the representation of Ukrainian scientists and foster a more comprehensive understanding of environmental threats.

The potential for Ukraine to emerge as a new European economic centre, particularly in production, logistics, and energy, depends on a proactive policy and the victory of the Western bloc in the war.

Recovery Recommendations

- ⇒ *Incentivise workforce retention programs in key sectors like IT and engineering.*
- ⇒ *Launch comprehensive anti-corruption initiatives across public and private sectors.*
- ⇒ *Develop a 15-year Marshall Plan with the EU supporting education and human capital.*
- ⇒ *Create a post-war rebuilding roadmap focused on ESG factors and SDG alignment.*
- ⇒ *Prioritise climate-resilient and digitally enabled infrastructure rehabilitation.*
- ⇒ *Offer a simplified tax system to destroy the shadow economy and accelerate SMB growth and job creation.*
- ⇒ *Reform social security net and skills retraining programs targeting vulnerable groups.*
- ⇒ *Tap media and civil society networks to promote sustainability awareness.*
- ⇒ *Explore public-private partnerships to spur ethical investment in regional development.*

The "Resilience through Intersectional Cooperation" project promotes collaboration and mutual trust between Ukraine's state, military, and civil sectors.[7] The goal is to enhance national resilience by emphasising the importance of communication and cooperation among these sectors.

Two worrying trends have been observed recently. Firstly, much pressure is being placed on Ukraine to compromise with Russia, which could have severe consequences and potentially lead to societal destabilisation. Secondly, there have been calls for early elections, which is a challenging prospect given the uncertainties surrounding the organisation of such elections. These trends are cause for concern and must be monitored closely.

Political Challenges

- ⇒ *It is vital to communicate the importance of Euro-Atlantic integration to American partners while confidently navigating discussions with Democrats and Republicans.*

7 'Mykola Nazarov: "The authorities should emphasize the regional aspect of national security" ' (*Research Centre for Regional Security, Sumy State University*, 21 April 2021) <https://rcrs.sumdu.edu.ua/all-news/373-2021-04-21-20-00-38.html> accessed 10 February 2024.

The relevance of this agenda to the upcoming US elections in 2024 cannot be overstated, and it is imperative to align with both parties in Congress and the Senate.

⇒ *The Black Sea's security is paramount and critical to NATO. We must stress the urgency of attaining integration across seas, which is imperative for maintaining regional stability and security.*

⇒ *It is imperative to ensure that European partners have no doubts about Ukraine's success, particularly in the lead-up to elections that may significantly influence perceptions across the European continent.*

⇒ *The incorporation of sustainability in the reconstruction of Ukraine is strategically important. This approach lays the foundation for a resilient future, aligning with global efforts to address environmental challenges and contribute to well-being.*

The UN-Habitat World Cities Report 2022 reveals that the world is becoming more urbanised, with the global population expected to grow in urban areas by 2050. [8] The European context emphasises the urgent need for viable models of urban development. These models should be able to navigate numerous challenges, such as pandemics like COVID-19, climate crises, geopolitical conflicts, and socioeconomic disparities. In this context, the digital transformation of cities appears as a decisive strategy that offers pathways to sustainability and security.

Digital technologies and public goods can enhance urban strategies to improve urban living. However, questions remain about their appropriate use to increase urban resilience and sustainability, including citizen participation, socioeconomic opportunities, and accessible infrastructure.

Digital transformation significantly impacts various fields, including promoting inclusion and equity, contributing to the local economy, and fostering decentralisation and social capital in communities. By creating platform services for citizen access and encouraging democracy and openness. Transform urban living globally, focusing on rebuilding conflict-affected cities.

The decentralisation initiative launched in 2015 has enabled small villages, communities, and cities to become resilient and digitally advanced.

Education is critical to transforming society. Western universities are committed to helping Ukraine's reconstruction by investing in education and skill development programs for both traditional and adult learners. The focus goes beyond academic pursuits to encompass the cultivation of public service leadership skills for a comprehensive societal improvement approach.

8 United Nations Human Settlements Programme, *Envisaging the Future of Cities: World Cities Report 2022* (UN-Habitat 2022) <https://unhabitat.org/wcr> accessed 10 February 2024.

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Efforts are underway to expand educational access and develop human capital in Ukraine, laying the groundwork for long-term prosperity through collaboration with local universities.

Constraint on Russian Assets for Ukraine's Recovery: Legal Perspectives

As Ukraine valiantly resists Russia's unlawful invasion, the global community has a moral obligation to assist Ukraine in its reconstruction and ensure justice for the affected people. According to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005, Ukraine is obliged to provide victims with effective remedies, namely equal access to effective judicial protection, as well as to other legal remedies, including access to administrative bodies and other mechanisms, conditions, and procedures in accordance with national legislation.

The experience of other countries clearly demonstrates the importance and urgency of providing a comprehensive approach to the settlement of the issue of compensation for the losses of the civilian population in war conditions, not limited to the introduction of separate procedures for the compensation of costs for the losses of this or that property.

One of the major contributions of the international community to the implementation of this obligation is to provide funding for the realisation of this duty. Due to this, extensive measures are being taken to freeze Russian assets, with over $300 billion currently immobilised. However, there are still legal uncertainties regarding the control and use of these sovereign assets.

In this case, it is important to establish a fair, transparent, and understandable procedure for compensating the losses suffered by Ukrainian citizens and businesses due to the war and occupation by troops, as well as to find funding for realising this compensation.

Key issues

- ⇒ *Frozen Russian assets deemed sovereign property are protected under state immunity.*
- ⇒ *Ukraine must overcome domestic judicial challenges impeding recovery and effective compensation for damages.*
- ⇒ *Innovative legal pathways are needed to access frozen assets compared with existing examples.*
- ⇒ *Multilateral consensus is required on ethical guiding principles.*
- ⇒ *Strategic coordination is necessary for asset redistribution.*

We have to confirm that internally, Ukraine faces three main challenges in its justice sector, which may be considered obstacles to the realisation of effective compensation for war damages: non-enforcement of domestic judgments, lack of judicial independence, and excessive court proceedings. However, despite these obstacles, the country has made significant progress in implementing reforms, and in Ukraine, internal constraints on Russian assets have been intensively developed.

Three different seizure or confiscation mechanisms in Ukraine are available for war damages compensation: through the particular law that enabled the seizure of two Russian banks, and these seized assets were used to compensate for damaged property through the e-recovery program; the mechanisms under the law of sanctions, requiring court decisions to seize the property of individuals meeting the criteria under the law of sanctions, and a novel mechanism specifically for commercial banks linked to sanctioned individuals. Underlining the importance of existing mechanisms, the main compensation procedure must be an umbrella procedure, within which the restoration of property and non-property rights violated during the war and occupation will be carried out. At the same time, the application for compensation for the loss of any objects of civil rights provided for by the current legislation must be guaranteed and not a list defined by law or in another order.

The limitation or selective approach to determining the objects of compensation or expenses subject to reimbursement violates basic human rights. The compensation mechanism should provide a simplified and transparent version of the procedure for restoring the rights to housing, resuming work, and everything that ensures the possibility of a person's normal life. At the same time, there should remain a real prospect of applying for the restoration of rights that have been violated in the person's opinion, in particular, copyrights or any others that cannot be classified as top priorities.

How do we use external funding to compensate for war damages?

To effectively tap seized resources while upholding the rule of law, a strategic realignment of national legal frameworks and the unification of international provisions are needed. Complexities arise mainly when frozen assets are considered sovereign property protected under state immunity precedents. Nonetheless, innovative legal pathways likely exist and may be developed in the near future.

The legal complexities surrounding utilising these assets for Ukraine's benefit emphasise the need to distinguish between private and sovereign assets. In the case of private assets, the US experience plays a pivotal role and may be used as an option.

The US's experience shows that almost 60 individuals and companies have faced charges resulting in arrests, extraditions, guilty pleas, and convictions. The KleptoCapture Task Force has seized, restrained, or limited over $500 million in assets, with ongoing forfeiture proceedings against substantial properties. $5.4 million belonging to a sanctioned oligarch was forfeited and transferred to the State Department, supporting Ukraine's veteran recovery efforts—the main ways for the assets to be made with funds obtained through criminal and civil forfeiture.

National regulations depend on policymakers and allow the updating of existing approaches to the constraints manner. Therefore, the first issue is the national legal framework for using the assets and implementing the compensation mechanisms. **The constrained assets should be collected by the national authority and allocated equitably, addressing not**

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only Ukrainian recovery efforts but also encompassing victim compensation, national development, and mitigating the aftermath of the conflict inside this state.

The development of clear provisions for property liability and the need for a new understanding of the legal basis for compensation give a clearer and more transparent basis for compensation of damages. A shift from restitution to a reparation tort model entails advocating for guiding principles on the tort of armed aggression. Key concepts like countermeasures, property constraints, and conditions of the tort must be incorporated. It is necessary to define countermeasures for asset recovery, joint liability, and the legal effect of due care in the context of armed aggression.

Unified international provisions are needed to address the manifest injustice and legal uncertainty arising from the conflict. The existing compensation mechanisms, for instance, through the European Court of Human Rights, hold the potential to secure Ukraine's recovery. Potential judgments against Russia in inter-State cases lodged by Ukraine, particularly those that address systemic human rights violations committed by Russia during the war in Ukraine, hold promise for securing justice and reparations.

However, implementing ECHR judgments to Ukraine's recovery plan addresses issues such as non-enforcement of court decisions and other violations of the Convention on Human Rights. Through implementing ECHR judgments against Russia in interstate applications, innovative solutions like linking them to a special fund for compensation are suggested.

Unified approach mechanisms must be defined for seized asset management and victim compensation. For example, G7 nations could spearhead an international working group to define such mechanisms. The frameworks drafted should balance sustainable development priorities, ease of implementation, and justice imperatives such as the rule of law.

Designating Russian oligarch resources for Ukraine's rebuilding also warrants consideration, given precedence. To circumvent roadblocks, initiating an initial pilot program focused on lower-risk asset categories could help establish feasibility and build momentum. In tandem, repurposing the US' proposed REPO Act to spur near-term reconstruction financing could aid Ukraine's urgent needs.

While asset seizures represent a meaningful economic problem for Russia, realising their full potential to serve Ukraine requires surmounting complex legal and political obstacles. Success demands strategic collaboration by coalition nations to pioneer innovative yet actionable solutions. Financial sanctions and export controls impede Russia's ability to continue its aggressive actions. The long-term prize is structuring sustainable outcomes centred on human dignity and the rule of law.

For example, G7 nations could spearhead an international working group to define unified mechanisms for seized asset management and victim compensation.

AUTHORS INFORMATION

Silviu Nate*
PhD (Military Sciences and Intelligence), Associate Professor of Security Studies, the Faculty of Social Sciences and Humanities, Lucian Blaga University of Sibiu, director of the Global Studies Center (GSC), Romania
silviu.nate@ulbsibiu.ro

Andriy Stavytskyy
Dr. Sc. (Economic), Professor of Economic Cybernetics, Faculty of Economics, Taras Shevchenko National University of Kyiv, Ukraine
a.stavytskyy@gmail.com
https://orcid.org/0000-0002-5645-6758

Răzvan Șerbu
Dr. Sc. (Economic), Professor of Economics, Faculty of Economic Sciences, Lucian Blaga University of Sibiu, Romania
razvan.serbu@ulbsibiu.ro
https://orcid.org/0000-0003-1099-1330

Eduard Alexandru Stoica
Dr. Sc. (Economic), Associate Professor of Business Informatics, Faculty of Economic Sciences, Lucian Blaga University of Sibiu, Romania
eduard.stoica@ulbsibiu.ro
https://orcid.org/0000-0002-0693-8433

CO-AUTHORSHIP CONTRIBUTIONS

Conceptualization Silviu Nate, Andriy Stavytskyy
Data curation Răzvan Șerbu
Formal Analysis Andriy Stavytskyy, Eduard Alexandru Stoica
Funding acquisition Silviu Nate
Investigation Andriy Stavytskyy
Methodology Andriy Stavytskyy
Project administration Silviu Nate
Supervision Andriy Stavytskyy
Writing – original draft Andriy Stavytskyy, Răzvan Șerbu, Eduard Alexandru Stoica
Writing – review & editing Silviu Nate, Andriy Stavytskyy, Răzvan Șerbu, Eduard Alexandru Stoica

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RIGHTS AND PERMISSIONS

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ІНСТРУМЕНТИ ВИЯВЛЕННЯ ПРАВДИ В ПОСТКОМУНІСТИЧНІЙ АЛБАНІЇ: НЕДОВИКОНАННЯ ПРИЙНЯТИХ ЗОБОВ'ЯЗАНЬ У СФЕРІ ПЕРЕХІДНОЇ СПРАВЕДЛИВОСТІ ПІД ЧАС РОЗСЛІДУВАННЯ ЗЛОЧИНІВ КОМУНІСТИЧНОГО РЕЖИМУ ТА ДОЛІ ЗНИКЛИХ ОСІБ

Бледар Абдурахмані* та Тідіта Абдурахмані

АНОТАЦІЯ

Вступ. Упродовж 45 років диктатури в Албанії багато людей були несправедливо звинувачені, засуджені, ув'язнені, заслані або переслідувалися за "злочини" політичного характеру (згідно з комуністичним законодавством), зі значними порушеннями основних прав людини. Упродовж 30 років демократичного розвитку було застосовано багато правових заходів для врегулювання проблем гіркої спадщини минулого, зокрема і злочинів комуністичного періоду.

Методи. Пропоноване дослідження надає нормативну оцінку стану права на правду в міжнародному праві. Увагу зосереджено на найважливіших обов'язках держави для забезпечення цього права, зокрема і таких, як переслідування серйозних порушень основних прав і проблема зниклих осіб. У роботі використано якісний аналіз моделі албанського законодавства, що спрямований на розкриття правди щодо порушень, які сталися в часи комуністичного режиму, серед яких кримінальне переслідування та судові процеси, а також проблема зниклих осіб.

Дослідження проведено на основі методології, що аналізує чотири змінні в кожній із цих політик, зокрема:

- політики, що сприяє виявленню;
- правові й емпіричні виклики;
- конституційна та законодавча база цих заходів;
- отримані результати на практиці.

Результати та висновки. Заходи, ужиті впродовж років демократичного розвитку в Албанії для розслідування значних порушень основних прав, скоєних колишніми комуністичними посадовими особами, не сприяли досягненню цілей перехідної справедливості. Злочинці, із колишніх комуністичних посадових осіб у часи комуністичного режиму в Албанії, так і не були покарані, а правда про минулі жахи, навіть і використовуючи кримінальне законодавство в Албанії, так і не була розкрита.

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Упродовж останніх років, незважаючи на зміну траєкторії у розв'язанні питання про рештки 6000 зниклих осіб з комуністичного періоду, албанське суспільство так і не отримало конкретних відповідей. Правда про долю зниклих людей залишилася похованою, що перетворило її на серйозну проблему в контексті гарантування прав людини. Ігнорування місцеперебування та долі зниклих осіб в Албанії зумовлює ситуацію порушення права на життя, що неврегульована і дотепер.

***Ключові слова**: правосуддя перехідного періоду, право на правду, комуністичні злочини, зниклі безвісти.*

СУДОВА ІНТЕРПРЕТАЦІЯ ЯК НЕОФІЦІЙНІ КОНСТИТУЦІЙНІ ЗМІНИ: ПИТАННЯ ЛЕГІТИМНОСТІ У КОНТЕКСТІ ДОКТРИНИ КОНСТИТУЦІОНАЛЬНОЇ ВЛАДИ

Григорій Берченко*

АНОТАЦІЯ

Вступ. Стабільність вважають традиційною правовою цінністю, особливо в контексті стабільності конституції. Акцент на стабільності випливає з потреби захисту тексту конституції від частих і необґрунтованих змін. Однак стабільність має поєднуватися з динамікою. Це завдання покладене, передусім, на судову владу через конституційну інтерпретацію. Зокрема, ідеї судового створення правил і поняття живої/невидимої конституції є лише деякими виявами такого явища, як неофіційні зміни до конституції. Проте потенційні ризики, що виникають унаслідок судового втручання, та питання легітимності, пов'язані з такими неофіційними змінами, потребують уваги фахівців. Який взаємозв'язок неофіційних конституційних змін через інтерпретацію із традиційною доктриною суверенної конституючої влади? Який має бути ліміт інтерпретації конституції, щоб таку інтерпретацію не визнали зловживанням? Ці й інші питання є основним об'єктом дослідження у пропонованій статті.

Методи. Для дослідження основних підходів до неофіційних змін до конституції були використані такі методи:

- системно-структурний – для характеристики концепції живої та невидимої конституції, різновидів неофіційних конституційних змін та встановлення взаємозв'язку між цими концепціями;
- логіко-правовий – дав змогу виявити зміст позицій учених щодо потенційного порушення меж інтерпретації конституції судами, а також аргументи за та проти легітимності судової інтерпретації, оцінку неофіційних змін у конституції з позиції сучасних поглядів на доктрину конституючої влади;
- порівняльний – для вивчення досвіду іноземних країн у визначенні обов'язкової інтерпретації.

Результати та висновки. У дослідженні проаналізовано нинішній стан концепції неофіційних змін до конституції через судову інтерпретацію, її зв'язок з доктриною конституюючої влади, а також питання легітимності такої інтерпретації та її меж. Головним висновком є те, що судова діяльність гарантує захист матеріальної конституції, принципів і прав людини. Іншими словами, судова влада не дозволяє суверенним рішенням, ухваленим демократично (народом), порушувати права людини. Отже, текст конституції інтерпретується відповідно до індивідуальних прав. Питання про роль судової влади, можливість неофіційних змін до конституції та саме судове законотворення можуть слугувати індикатором для відрізнення авторитарних/тоталітарних країн від демократичних.

***Ключові слова**: судова влада, Конституційний Суд, тлумачення, легітимність, зміни до конституції, права людини, демократія, постсуверенна теорія, матеріальна конституція, «жива» конституція, «невидима» конституція, установча влада.*

СПРАВЕДЛИВІСТЬ У СПРАВАХ ЩОДО ПРАВ ВЛАСНОСТІ В КОСОВО: ПІСЛЯВОЄННИЙ ДОСВІД КРАЇНИ

Ардрит Гаши*

АНОТАЦІЯ

Вступ. У сфері відносин власності, а точніше, порушення прав власності та пошуку адекватної справедливості, ситуацію в Косово можна розглядати як один із найунікальніших випадків. Його унікальність не випливає з одиночної обставини, закону або періоду, а зі складної взаємодії подій, законів та історичних періодів. Основні цілі пропонованої статті обертаються навколо врегулювання спорів щодо власності, які виникли внаслідок етнічних конфліктів, дискримінаційних законів і воєнних обставин. Дослідження ґрунтується на двох фундаментальних гіпотезах. По-перше, автори прагнуть дослідити спори щодо прав власності, які виникли через ці конфлікти, дискримінаційні закони та війну, особливо націлені на певні сегменти населення. По-друге, розглянути стратегії для уникнення подібних наслідків у майбутньому та відшкодування завданих матеріальних збитків. Контекст, що спостерігається, також важливий через активну участь і вплив міжнародної адміністрації. У цьому сенсі справа Косова може служити типовим прикладом, як теоретично, так і практично, для інших суспільств і країн, що стикаються з подібними викликами. Досвід позитивних аспектів справи Косова має бути враховано, уникаючи повторення численних помилок, щоб запобігти цим країнам відчувати подібні наслідки.

Методи. Основні джерела, використані для розроблення цієї статті, охоплюють наукові праці, такі як підручники та наукові статті, законодавчі акти, включно з міжнародними конвенціями та судовою практикою. Пропонована стаття має унікальний характер з огляду на проблеми, які в ній розв'язуються. Вона також спирається на широкий спектр досліджень і звітів від поважних міжнародних організацій, що систематично вивчають ситуацію як неупереджені спостерігачі.

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Автори дотримуються певної методології, причому історичний метод є невід'ємним у питаннях, що стосуються власності. Через цей метод розкривається еволюція власності, ідеї, громадська свідомість, політичні та соціальні рухи, що вплинули на закон, і підходи міжнародних місій, які сприяли формуванню характерного законодавства в Косово, відомого як Постанова УНМІК.

У межах дослідження використано метод порівняльного аналізу. Щоб надати читачам чіткий огляд подій і відповідних механізмів утілення, пов'язаних з правами власності, також застосовано описовий метод.

Результати та висновки. У статті розкрито три основні типи спорів стосовно прав власності, що виникають унаслідок унікальних обставин, які характеризують Косово:

- вимоги до власності, що виникають з "репресивних заходів" (1990–1998);
- вимоги до власності, що виникають після війни (з 27 лютого 1998 р. по 20 червня 1999 р.);
- вимоги до власності, спричинені системою суспільної власності (після 1945 р.) – унаслідок її приватизації після 1999 р.

Для кожного із цих порушень прав власності досліджено їхні причини, обставини й основні цілі. Також обговорюються підходи до врегулювання цих спорів. Хоча вважається, що врегулювання спорів щодо вимог до власності, які виникають після війни (із 27 лютого 1998 р. по 20 червня 1999 р.), задовільне, цього не можна стверджувати стосовно двох інших категорій спорів. У цих випадках сучасне законодавство залишається зазвичай мовчазним. Тому, хоча пропонована стаття містить у своїй назві слово "справедливість", усе ж маємо констатувати, що стикаємося з переважанням "несправедливостей" у справах щодо прав власності. Проте автори висловлюють ідеї та пропозиції стосовно того, як сучасне законодавство може врегулювати ці категорії порушень прав власності.

***Ключові слова**: Косово; справедливість; власність; право власності; майнові позови.*

ПОДВІЙНІ САНКЦІЇ ЗА ЗЛОЧИНИ НА ҐРУНТІ НЕНАВИСТІ ТА МОВИ ВОРОЖНЕЧІ ЯК ЧАСТИНИ ЕКСТРЕМІЗМУ У СЛОВАЦЬКІЙ РЕСПУБЛІЦІ: КОНЦЕПТУАЛЬНІ, ЗАКОНОДАВЧІ ТА ПРАКТИЧНІ ПИТАННЯ

Сергій Ромжа, Сімона Ференчікова та Лібор Клімек*

АНОТАЦІЯ

Передумови дослідження: Екстремізм є транскордонною соціальною проблемою, що не має загальноприйнятого визначення. Власне кажучи, так звані злочини на ґрунті ненависті є особливими видами кримінальних правопорушень, що охоплюють усі види екстремізму. Можна навіть говорити про їхній концептуальний збіг. Особливу категорію злочинів на ґрунті ненависті формують так звані словесні напади, відомі як

мова ворожнечі, які вважаються зловживанням свободою вираження поглядів як з міжнародного погляду, так і в судовій практиці Європейського суду з прав людини. Унаслідок такого сприйняття береться до уваги їхнє кримінальне покарання. Відповідно до принципу субсидіарності кримінально-правових репресій можливим є й інший спосіб санкціонування злочинів на ґрунті ненависті та мови ворожнечі, а саме – адміністративно-правовий. Існування «множинних правових норм» щодо екстремізму як делікту зумовило формування подвійної системи санкцій за екстремізм. Це призводить до проблем їхнього застосування в юридичній практиці, наприклад, з огляду на нечітке розуміння правопорушень з кримінальної та адміністративної позицій або навіть через слабку можливість розслідування таких діянь державною владою. Головна мета публікації – вказати на подвійне правове регулювання (кримінальне та адміністративне) санкцій за екстремізм, зокрема його особливої категорії – злочинів на ґрунті ненависті та мови ворожнечі.

Крім того, метою статті є оцінка незрозумілих проблем у правовому розумінні **зазначених** санкцій та виявлення конкретних проблем їхнього застосування, спричинених подвійною системою (кримінальною й адміністративною). Особлива увага зосереджена на санкціях, які застосовують як у кримінально-правовій, так і в адміністративно-правовій сферах. У підсумку, авторами вносяться пропозиції щодо розв'язання зазначених проблем.

Методи. Першоджерелами, що використовуються для розроблення статті, є наукові джерела (книги, дослідження, наукові праці тощо), законодавчі документи (національне та міжнародне законодавство) та судова практика (національних судів Словаччини, Європейського суду з прав людини та Суду Правосуддя Європейського Союзу). Автори застосовують традиційні методи юридичного наукового дослідження – загальнонаукові та спеціальні методи юридичної науки.

Загальнонаукові методи, використані в роботі, є переважно логічними, а саме: метод аналізу, синтезу, метод аналогії й описовий. Ознайомлення читача із сучасним правовим регулюванням екстремізму відбулося за допомогою описового методу. Використано також метод аналізу відповідних правових положень і судової практики. У роботі був застосований і метод синтезу. До спеціальних методів юридичної науки, що використовуються тут, переважно належать методи, що входять до групи інтерпретативних методів, а саме: телеологічний, систематичний і порівняльний. Телеологічний метод був використаний для пояснення призначення законодавчих актів. З допомогою систематичного методу здійснено класифікацію відповідного чинного законодавства. Порівняльний метод використано для вивчення взаємозв'язку між законодавчими перспективами – кримінальною та адміністративною.

Результати та висновки. Що стосується правопорушень екстремізму, скоєних у Словацькій Республіці, то в конкретних випадках рішення про те, чи є вчинене правопорушення кримінальним або адміністративним, залежить від ставлення до особи, яка його вчинила. У Словацькій Республіці законодавчі поправки спрямовані на боротьбу зі злочинами екстремізму, але вони не були внесені як остаточні. Передбачено нове правове регулювання адміністративних правопорушень екстремізму в частині їхнього визначення. Також очікується нова санкційна політика щодо екстремізму, адміністративних правопорушень з боку неповнолітніх правопорушників. Крім того,

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застосування пробації в разі правопорушень, учинених неповнолітніми правопорушниками у сфері екстремізму, є рекомендованим і бажаним. Це підкреслить важливість відновного правосуддя, включно з його посиленням. Пробація надала б змогу суду, санкціонуючи екстремізм у сфері кримінального права, створити так звану індивідуальну санкцію, яка б посилила індивідуалізацію санкції, освітню мету санкції та досягнення як мети санкції, так і мети Кримінального кодексу, що полягає в захисті суспільства від кримінальних правопорушень та їхніх виконавців. Навіть Конституційний суд Словацької Республіки частково розглянув модифікацію елементів кримінальних злочинів екстремізму.

Ключові слова: *екстремізм, злочини на ґрунті ненависті, мова ворожнечі, відповідальність, санкції.*

НАВІГАЦІЯ ПРАВОВИХ МЕЖ: ПОДОЛАННЯ ВИКЛИКІВ У РЕГУЛЮВАННІ ЦИФРОВОЇ ЕКОНОМІКИ

Лірідон Даліпі та Агім Зузаку*

АНОТАЦІЯ

Вступ. Інтеграція цифрових технологій у різні аспекти суспільства породила цифрову економіку, що видозмінює економічний ландшафт. Країни Західних Балкан стикаються з викликами цифрової трансформації, що потребує ефективних регуляторних рамок. Визнання й усунення регуляторних прогалин є важливим для створення безпечного й інноваційного цифрового середовища. Пропоноване дослідження розглядає регуляторні виклики у цифровій економіці Західних Балкан, зосереджуючись на партнерствах державного та приватного секторів (PPP) у кібербезпеці. Увага авторів також спрямована на визначення прогалин у правовому регулюванні, на поліпшення розуміння динаміки PPP у протидії кіберзагрозам й надання оцінки потенційного впливу Директиви європейського цифрового ринку та Директиви про цифрові послуги на регуляторну сферу Західних Балкан.

Методи. У дослідженні використано якісний підхід, проаналізовано правові та політичні рамки шести країн Західних Балкан. Дані зібрані за допомогою глибокого аналізу законів, стратегій і планів дій у сфері кібербезпеки, з особливим акцентом на положеннях, що стосуються PPP. Порівняльний аналіз застосовується для виявлення закономірностей і варіацій між країнами, а також урахування потенційного впливу Директиви європейського цифрового ринку та Директиви про цифрові послуги.

Результати та висновки. Проведений аналіз виявив загальний виклик – відсутність конкретних регуляцій для цифрової економіки, що створює правовий вакуум. Існують різні рівні інтеграції PPP у Західних Балканах. Вагомі висновки містять етичні розгляди, виклики, пов'язані з конфіденційністю даних, і необхідність ефективних регуляцій у сфері конкуренції. Аналіз Директиви європейського цифрового ринку та Директиви про цифрові послуги виокремлює потенційні можливості та виклики гармонізації. Як

підсумок, у дослідженні підкреслюється необхідність комплексної регуляторної реформи на Західних Балканах для усунення викликів цифрової економіки. У роботі висловлено підтримку розробленню спеціальних законів, що регулюють цифрові платформи, посиленню PPP для підвищенню кібербезпеки та внесенню етичних розглядів у правові рамки. Отримані результати пропонують цінні висновки для політиків і зацікавлених сторін, підкреслюючи необхідність адаптивних і перспективних регуляторних підходів у постійно змінному цифровому ландшафті, потенційний вплив ініціатив ЄС, таких як Закон про цифровий ринок і Закон про цифрові послуги.

***Ключові слова**: цифрова економіка, правова база, кібербезпека, державно-приватне партнерство, Західні Балкани.*

КРИМІНАЛЬНА КОНФРОНТАЦІЯ ЗА ЗЛОЧИНИ ДИСКРИМІНАЦІЇ ТА МОВИ НЕНАВИСТІ: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ

Мохаммад Амін Алькрішех, Саїф Обаїд Аль-Катбі та Хавлах М. Аль-Тхайнег*

АНОТАЦІЯ

Вступ. Злочин поширення риторики ненависті вважають одним із найвизначніших злочинів у цій сфері, особливо зважаючи на стрімкі технологічні досягнення, що спостерігаються глобально і сприяють його вияву в усіх суспільствах. З огляду на його серйозність, цей злочин загрожує стабільності та безпеці людства. З метою сприяння культурі глобальної толерантності та протидії різним виявам дискримінації та расизму, еміратський законодавець визначив кримінальний захист для осіб проти дискримінації та ненависті за етнічною, расовою та релігійною ознаками. Цей правовий захист викладено у Федеральному законі № 34 від 2023 р. "Про боротьбу з дискримінацією, ненавистю та екстремізмом". Крім того, Федеральний указ-закон № 34 від 2021 р., що стосується боротьби із чутками та кіберзлочинами, зміцнює правову базу, спрямовану на боротьбу з поширенням таких злочинів через цифрові канали. Зазначене доповнення підкреслює всебічний підхід ОАЕ до боротьби з мовою ненависті та дискримінацією, визнаючи еволюційний характер цих злочинів у дедалі більш взаємозалежному світі.

Методи. Дослідження спрямоване на дослідження ефективності законодавства ОАЕ у боротьбі зі злочинами дискримінації та мовою ненависті через багатоаспектний підхід, що містить порівняльну складову. По-перше, проведено комплексний огляд літератури, наявних правових текстів і наукових статей, щоб зрозуміти ширший правовий контекст й історичні перспективи цих злочинів. Огляд виходить за межі еміратських правових джерел й охоплює міжнародні правові стандарти та порівняльний правовий аналіз, що дає нам змогу контекстуалізувати правову базу ОАЕ у глобальній перспективі.

Результати та висновки. У дослідженні подано докладний огляд складнощів і викликів у розслідуванні злочинів поширення та просування дискримінації й ненависті в межах правового положення ОАЕ. З'ясовано, що розслідування зазначених злочинів є вкрай

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складним, оскільки вони вимагають наявності конкретного наміру провокувати насильство та дискримінацію. Аналіз виявив прогалину в сучасному правовому підході, особливо у розслідуванні повного спектру злочинів ненависті та відтінків кримінального наміру.

З урахуванням цих висновків, автори запропонували кілька критичних поправок до законодавства ОАЕ, що бореться з дискримінацією та мовою ненависті. Серед них удосконалення визначень та обсягу дискримінації у ст. 1, внесення "мотиву ненависті" як ключового елементу у ст. 4, перегляд ст. 10 із фокусом на загальний кримінальний намір і підвищення покарань у ст. 16 у разі залучення зарубіжної фінансової підтримки. Зазначені рекомендації спрямовані на зміцнення правової бази, зробивши її комплекснішою та ефективнішою в боротьбі з дискримінацією та мовою ненависті, тим самим забезпечуючи соціальну безпеку та права людини.

Це дослідження зробить значний внесок у розуміння злочинів ненависті та дискримінації в ОАЕ і пропонує практичні рішення для правової реформи. Воно підкреслює потребу в постійному оцінюванні й адаптації законів для ефективного усунення суспільних викликів, що постійно змінюються.

***Ключові слова**: дискримінація, мова ворожнечі, соціальний мир, кримінальне протистояння, Федеральний закон про боротьбу з дискримінацією, ненавистю та екстремізмом, ОАЕ.*

ВИКЛИКИ ІНВЕСТИЦІЙНОГО АРБІТРАЖУ: УСПІХ ЧИ ПОРАЗКА? КОМПАРАТИВНИЙ АНАЛІЗ ІНВЕСТИЦІЙНОГО АРБІТРАЖУ В ПІВНІЧНІЙ МАКЕДОНІЇ ТА КОСОВО

Нжоме́за Зе́йнуллаху та Башкім Нуре́діні*

АНОТАЦІЯ

Вступ. У сучасному бізнесовому та технологічному середовищі підприємства дедалі більше схиляються до пошуку альтернативних методів урегулювання спорів, аніж покладаються виключно на традиційні судові процедури. Підприємства також дедалі більше усвідомлюють значення розв'язання конфліктів за допомогою альтернативних засобів й ухвалюють активні заходи для уникнення судових суперечок. Протягом останніх десятиліть інвестиційний арбітраж набув широкого визнання і почав переважати у розв'язанні спорів, що стосуються міжнародних інвесторів у країнах Західних Балкан. Деякі країни демонструють прихильне ставлення до застосування арбітражу як механізму врегулювання спорів, ухвалюючи законодавство, що надає інвесторам право ініціювати арбітражні процедури проти держави в разі невдачі.

Мета наукового дослідження буде досягнута шляхом аналізу законодавчого положення у справі інвестиційного арбітражу, а також потоку іноземних інвестицій, та не обмежується обробленням конкретних випадків арбітражних суперечок.

Через цей підхід ми відповімо на центральне питання про те, наскільки арбітраж, як альтернативний механізм урегулювання спорів, є стимулюючим фактором для приваблення іноземних прямих інвестицій, або ж багатонаціональні компанії використовують лише законодавчі та стимулюючою перевагою, що пропонує Республіка Косово та Північна Македонія.

Методи. Статтю було розроблено на основі сучасного методологічного каркасу. У загальному методологічному каркасі наукових досліджень логічні методи відіграють важливу роль у науковому опрацюванні даних дослідження, формулюванні висновків і встановленні фактів, через які науково досягається правдивість тези роботи. У контексті пропонованої статті варто виокремити метод аналізу, за допомогою якого проаналізовано вплив арбітражу як альтернативного механізму врегулювання спорів на потік інвестицій.

Додатково використані методи абстракції та конкретизації. Абстракція є основою аналізу, що іноді передбачає відокремлення частин від загальної теми. Крім того, порівняльний метод підкреслив різноманітні нормативні рішення в національному законодавстві та міжнародних правових джерелах.

Результати та висновки. Авторами запропоновано розглянути ефективність чинних положень та визначити, чи потрібні коригування й альтернативні підходи для максимізації переваг зовнішніх інвестицій, водночас мінімізуючи потенційні ризики та невизначеності, пов'язані з процесами врегулювання спорів.

***Ключові слова**: інвестиції, спір, арбітраж, ЮНСІТРАЛ, Північна Македонія, Косово.*

ВИЧЕРПАННЯ ПРАВ НА ТОВАРНИЙ ЗНАК У КАЗАХСТАНІ В КОНТЕКСТІ РЕГІОНАЛЬНОГО ВИЧЕРПАННЯ ПРАВ У ЄВРАЗІЙСЬКОМУ ЕКОНОМІЧНОМУ СОЮЗІ

Жанат Нурмагамбетов* та Аманжол Нурмагамбетов

АНОТАЦІЯ

Вступ. У пропонованій статті досліджено режим вичерпання прав на товарні знаки для Казахстану в контексті високого рівня імпорту товарів і вільної торгівлі в Євразійському економічному союзі (ЄАЄС). Проаналізовано інтереси споживачів, проблеми бізнесу і право інтелектуальної власності (ПІВ) у зв'язку з режимом вичерпання прав на товарні знаки. Розглянуто використання товарних знаків у Казахстані, заборона такого використання власниками товарних знаків й обмеження права власника товарного знаку на заборону такого використання. Хоча національне та регіональне законодавство вводять режим регіонального вичерпання прав на товарні знаки у країні, усе ж їхні правові конструкції містять прогалини та взаємовиключні положення, що створюють невизначеність для власників товарних знаків і судів, тим самим сприяючи порушенню у вигляді паралельного імпорту.

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Методи. Для досягнення цілей статті автори застосували комплекс методів, що складається з аналізу контенту та кейс-стаді. Було проаналізовано, зокрема, національне та регіональне законодавство, яке застосовують у Казахстані, та досліджено чинну судову практику, що виявляє певні проблеми з вичерпанням прав на товарні знаки. Крім того, стаття містить порівняльний аналіз законодавства Великої Британії, Європейського Союзу й обраних країн Східної Європи.

Результати та висновки. У статті подано огляд уже реалізованого режиму вичерпання прав на товарні знаки в Казахстані та його застосування в ЄАЄС і досліджено проблеми, створені невизначеністю щодо того, які права вичерпуються. Зроблено висновок, що Казахстан дотримується режиму регіонального вичерпання прав на товарні знаки. Водночас місцеве та регіональне законодавство суперечать одне одному, коли регулюються питання національної ідентифікації товарного знаку. З національною реєстрацією товарного знаку режим вичерпання стає національним. На відміну від цього, у випадку міжнародної реєстрації торгової марки, за наявності кількох умов, принцип вичерпання є регіональним.

***Ключові слова**: товарний знак, порушення, вичерпання прав на товарний знак, паралельний імпорт, Казахстан, Євразійський економічний союз.*

БАНКІВСЬКІ, ЕКОНОМІЧНІ ТА ПРАВОВІ ДЕТЕРМІНАНТИ ПРИБУТКОВОСТІ В РЕСПУБЛІЦІ ПІВНІЧНА МАКЕДОНІЯ

Арбеніта Косумі*, Луфті Жарку

АНОТАЦІЯ

Вступ. Прибутковість банків – це не лише фінансовий показник; це відображення здоров'я та життєздатності банківського сектора й економіки загалом. Прибуткові банки допомагають забезпечити фінансову стабільність шляхом збільшення стійкості, сприяючи формуванню капіталу та посередництву, просуваючи інновації та пристосованість і впливаючи на довіру та віру. Отже, прибутковість має вирішальне значення в банківському секторі, оскільки вона безпосередньо впливає на тих, хто ухвалює рішення, регуляторів та управління банків. З огляду на це пропоноване дослідження оцінюватиме вплив конкретних банківських та економічно-правових визначників на рентабельність активів у Республіці Північна Македонія.

Методи. У дослідженні, що охоплює щоквартальні дані з 2007 по 2022 рік, використано методику векторної моделі помилок корекції (VECM). Для проведення емпіричного аналізу, необхідного для ідентифікації й оцінювання факторів прибутковості банків, кількісні дані були зібрані переважно з Національного банку Республіки Північна

Македонія, Міжнародного валютного фонду та Світового банку. Рентабельність активів автори використовували як залежну змінну. Фактори поділено на дві групи:

- перша охоплює банківські (контрольовані) фактори, такі як розмір сектора, кредитний ризик, адекватність капіталу, ліквідність, диверсифікація доходів, ефективність операцій і проблемні кредити;
- до другої групи входять макроекономічні (неконтрольовані) фактори, такі як економічне зростання, інфляція та відсоткові ставки.

Результати та висновки. Результати дослідження показують, що розмір банківського сектора, кредитний ризик, ліквідність, диверсифікація доходів і проблемні кредити мають значущий, але негативний вплив. Однак адекватність капіталу, ефективність операцій, ВВП та відсоткова ставка здійснюють важливий позитивний вплив. Отже, на основі емпіричного аналізу зроблено висновок, що для підвищення прибутковості банківської системи Північної Македонії слід надавати перевагу управлінню активами, як показнику розміру, підвищувати співвідношення диверсифікації доходів, зменшувати кредитний ризик і проблемні кредити та підтримувати оптимальне співвідношення ліквідності. Крім того, існують чіткі докази того, що банки другого рівня мають виходити за межі національних кордонів. Ефективніше управління портфелем кредитів, вища технологічність з обробленням баз даних і поліпшення комунікацій можуть поліпшити здатність упоратися з наступною кризою. Крім того, банки мають збільшити невідсоткові доходи, використовуючи їх як засіб ризику в банківській сфері та розподіляючи їх серед багатьох прибуткових підприємств, що сприяє підвищенню прибутковості. Зазначені висновки надають важливі відомості для керівників банків і регуляторів, які зацікавлені у зростанні прибутковості та стабільності банків.

***Ключові слова**: прибутковість банку, ROA, VECM, внутрішні фактори, макроекономічні та правові фактори.*

СЛІПА ВІРНІСТЬ, ЕКСТРАТЕРИТОРІАЛЬНІ РОЗБІЖНОСТІ ТА КРИТИЧНА БЕЗПЕКА: КРИТИЧНИЙ АНАЛІЗ РІШЕННЯ ЄВРОПЕЙСЬКОГО СУДУ ЩОДО ПРОДУКЦІЇ ІЗ ЗАХІДНОЇ САХАРИ

Мохамед Ель-Хаді Ель Макнузі* і Мамун Алаоуї Ісмаілі

АНОТАЦІЯ

Вступ. Суд Європейського Союзу нещодавно скасував Рішення Ради (ЄС) № 2019/217, що дало змогу укласти угоду – у формі обміну листами – між Європейським Союзом і Королівством Марокко. Зазначений документ спочатку розширив покриття пільгового торговельного режиму між сторонами на товари, що походять із Західної Сахари та підпадають під контроль марокканських митних органів. Рішення Суду ЄС викликало скасування цих торговельних пільг і на практиці встановило фактичне ембарго ЄС на регіон. У статті критично обговорюється рішення Суду ЄС із правових і політичних

позицій. З юридичного погляду рішення Суду ЄС не враховує поняття суверенітету, яке застосовується до Західної Сахари згідно з ісламським правом, що призвело б до визнання його стійкої «вірності» Марокко. Ба більше, те саме рішення є прикладом екстратериторіального застосування законодавства ЄС і порушує принцип неподільності угод. У політичному сенсі рішення Суду ЄС, визнаючи можливість дії на підставі присутності лише незаконних збройних формувань, надало терористичним групам і повстанським міліціям – у контексті глибокої нестабільності в регіоні Сахелю – підстави застосуванню стратегії шантажу щодо регіональних урядів.

Методи. У пропонованому критичному огляді використано описовий підхід для надання уявлення, аналізу, інтерпретації та критики рішення Суду ЄС 2021 р., що відмовляє в пільговому торговельному режимі продуктам з регіону Західної Сахари, навіть коли вони перебувають під контролем марокканських митних органів, тоді як продукція з Марокко продовжує отримувати таке оброблення.

Результати та висновки. Суд Європейського Союзу частково користувався концепціями міжнародного права, оскільки він не врахував концепцію суверенітету в ісламському світі, що пов'язана із плем'ям, вірністю та лояльністю. Крім того, розширення застосування європейського права до третьої держави, що уклала кілька угод з Європейським Союзом, має бути позбавлене будь-якого політичного виміру, який може сформуватися під впливом регіональних конфліктів і міжнародних балансів. Виконання зазначеного рішення еквівалентне економічному ембарго на регіон Західної Сахари, що неминуче вплине на ситуацію з безпеки в ньому і збільшить тут вплив терористичних груп.

***Ключові слова**: Суд Правосуддя ЄС, Західна Сахара, Марокко, суверенітет, ісламське право, екстериторіальність.*

РОЗВИТОК НОТАРІАТУ ЯК ВІЛЬНОЇ ЮРИДИЧНОЇ ПРОФЕСІЇ В КОСОВО

Бедрі Бахтірі та Гані Асьяні*

АНОТАЦІЯ

Вступ. У пропонованій статті проаналізовано роль нотаріусів – осіб, уповноважених державою на складання, урочисте оформлення та легалізацію цивільних юридичних документів, – які здійснюють свою діяльність у Косово. Сьогодні нотаріальні послуги надають кваліфіковані юристи, які відповідають встановленим державою критеріям, та складають професійний іспит для практики як незалежні фахівці. Світовий досвід показує, що нотаріуси сприяють розвантаженню й ефективності судів та адміністративних органів, тим самим прискорюючи правові процеси та забезпечуючи права й інтереси фізичних і юридичних осіб. Нотаріат є публічною службою, яку здійснюють уповноважені особи, ліцензовані державою для виконання запитів юридичних і фізичних осіб шляхом підготовки нотаріальних документів. У Республіці Косово нотаріуси також зареєстровані як індивідуальні підприємці у Відомстві реєстрації бізнесу. Під час підготовки цих дій від нотаріусів очікують високої особистої та

професійної доброчесності, що безпосередньо впливає на виконання запитів громадян з високою ефективністю та професіоналізмом. У термінах організації та функціонування нотаріат є дуже складним в очах громадян та самій системі правосуддя. Для збільшення довіри Косовська нотаріальна палата визначила розвиток нотаріату як постійний процес модернізації та гармонізації нотаріальних послуг зі зростаючими потребами юридичних і фізичних осіб, які отримують такі послуги. Це стратегічне спрямування забезпечує ефективний захист правових інтересів і сприяє правовій упевненості.

Методи. У дослідженні використано якісний метод, який широко застосовують у соціальних науках; поєднано огляд літератури й аналіз разом із нормативним, порівняльним та історичним методами. Проаналізовано правове ставлення, яке нотаріальна система Косово отримала від законодавства й академічної літератури, а також розкрито переваги й недоліки цієї системи. Зазначений підхід, який порівнює нотаріальну систему із системою, що використовувалася судами країни до 2011 р., допомагає визначити ціль, значення та статус сучасної нотаріальної системи в Косово.

З використанням методу порівняння розкрито спільні та відмінні елементи нотаріальної системи в Косово, а також напрями її розвитку відповідно до міжнародних стандартів, надаючи чіткий огляд її місця, ролі та значення в системі країни. На основі правового аналізу висвітлено зміни у внутрішніх правових відносинах, які раніше належали до відповідальності адміністративних органів і судів, а тепер – до компетенції нотаріусів.

Результати та висновки. Сучасна нормативна база надає якісну основу для інформації про роботу нотаріусів та Косовської нотаріальної палати. Однак ще більший внесок необхідно зробити для кращого інформування громадян про функціонування системи нотаріату, що є ключовим для зміцнення довіри громадськості до зазначеного інституту.

***Ключові слова**: нотаріат, державні послуги, власність, нормативні акти, нотаріальна палата.*

ДОГОВОРИ, ЩО ВИНИКАЮТЬ ЗА ФАКТОМ, ЯК ФОРМА ВИЯВЛЕННЯ ВОЛІ

Віктор Савченко* та Роман Майданик

АНОТАЦІЯ

Вступ. Договори, що виникають за фактом, є частиною цивільних правових відносин з давніх часів. Пропоноване дослідження має на меті перевірити гіпотезу, що договори, які виникають за фактом, є способом виявлення волі. Також проаналізовано сучасні доктринальні підходи до розуміння та визначення договорів, що виникають за фактом. Це дає змогу створити єдине й усталене знання про договори, що виникають за фактом, з позиції права. З допомогою аналізу досліджено проблеми виявлення волі в договорах, що виникають за фактом. Крім того, аналіз підтверджує, що укладання договорів, які виникають за фактом, базується на свободі волі, вираження якої є основою всіх цивільно-правових відносин.

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Методи. У дослідженні було застосовано діалектичний метод для аналізу міжнародного та національного законодавства. Порівняльний правовий метод допоміг визначити схожі й відмінні характеристики на основі емпіричного дослідження правових норм і доктрини загального та континентального права. Генезис договорів було продемонстровано за допомогою історичного методу. Суперечності визначали й уточнювали за посередництвом формальних і логічних методів. Крім того, догматичний метод дав змогу сформулювати нові правові позиції та концепції. Усі зазначені методи використовувалися авторами взаємозалежно.

Результати та висновки. Дослідження пояснює походження та ідеї договорів, що виникають за фактом, коріння яких відстежуємо в римському праві. «Contractus innominate» значно вплинув на їхній розвиток, поряд із синалагматичною угодою, принципом «non concedit venire contra factum proprium» та «protestatio facto contraria non-valet». Договори, що виникають за фактом, тісно пов'язані з естопелем та концепцією стипуляції. Урешті, договори, що виникають за фактом, фахівці удосконалили до їхнього сучасного стану, і тепер вони мають свій аналог у континентальному праві.

У центрі договорів, що виникають за фактом, є обов'язкові дії, які служать способом прийняття пропозиції, визначення форми договору та виявлення волі. Обов'язкові дії характеризуються динамічною поведінкою у вигляді однозначних дій, спрямованих на бажання укласти угоду. Однак відсутність прямого нормативного визначення обов'язкових дій призводить до правових проблем у їхньому застосуванні.

***Ключові слова**: конклюдентний договір, волевиявлення, договори, цивільне право, автономія волі, свобода волі, конклюдентні дії.*

КАРАЛЬНА ВЛАДА НЕЗАЛЕЖНИХ АДМІНІСТРАТИВНИХ ОРГАНІВ В АСПЕКТІ ФІНАНСОВИХ І ПОДАТКОВИХ ПОРУШЕНЬ (КОМПАРАТИВНЕ ДОСЛІДЖЕННЯ)

Гехад Мохамед Абдель Азіз та Алаа Абуахмед*

АНОТАЦІЯ

Вступ. У Франції деяким незалежним адміністративним органам надано повноваження з питань покарання за порушення встановлених нормативних правил. У зв'язку із цим неодноразово порушувалося питання накопичення штрафів щодо санкцій, накладених незалежними адміністративними органами, і покарань кримінального судочинства. Певна дія, наприклад, може бути криміналізована згідно із Кримінальним кодексом, що потребує покарання у вигляді ув'язнення або штрафу, а також її можна вважати лише порушенням за фінансовими та грошовими законами, що призводить до накладання певного фінансового штрафу.

Це породжує питання: "Чи порушує накладання як кримінальних, так й адміністративних санкцій за фінансові та податкові злочини принцип "ne bis in idem?". Конституційна рада

Франції широко розглянула зазначене питання. Наслідком цього стала заборона накопичення кримінальних покарань й адміністративних санкцій покарального характеру у разі виконання певних умов. Ці умови не застосовували до податкових суперечок, що призвело до накопичення штрафів у цій конкретній сфері. Однак накопичення штрафів було заборонено і визнано неприпустимим на фінансових ринках. Отже, може виникнути важливе питання: "Чому Конституційна рада ухвалила два різні підходи в цих двох схожих сферах?".

Методи. Для досягнення дослідницьких цілей у пропонованому дослідженні використано комбінацію порівняльних, історичних й аналітичних методів. Шляхом розкриття правової природи незалежних адміністративних органів у роботі здійснено всебічний аналіз відповідних правових текстів, включно з конституційними положеннями, законодавством і судовими рішеннями, для аналізу принципу "ne bis in idem" у Франції. Було використано метод порівняльного аналізу для розгляду рішень Конституційної ради і Касаційного суду Франції та європейських судових органів.

Результати та висновки. У різних юрисдикціях, зокрема й у Франції та ЄС, визнають принцип накопичення кримінальних покарань й адміністративних санкцій, але виникають відмінності у його застосуванні. Підходи різних юрисдикцій варіюються, деякі суворо забороняють накопичення, тоді як інші дозволяють гнучкість на основі таких чинників, як характер правопорушення та суспільні інтереси. Конституційна рада Франції встановлює стандарти, дозволяючи подвійні покарання в питаннях оподаткування, але не у фінансовій сфері. Рішення Конституційної ради та Касаційного суду Франції надають уявлення про застосування принципу, розкриваючи складнощі у збалансованому забезпеченні регулювання та прав особи.

***Ключові слова**: незалежні адміністративні органи, адміністративні санкції, каральна природа, кримінальні санкції, Ne bis in idem, права людини*

КРИМІНАЛЬНИЙ ЗАХИСТ ПРАВА НА ЗОБРАЖЕННЯ В ЦИФРОВУ ЕПОХУ ВІДПОВІДНО ДО ЗАКОНОДАВСТВА ОАЕ ТА ФРАНЦІЇ

Абдулазіз Альхассан*, Хамуд Таннар, Раед С. А. Факір, Алаелдін Мансур Магхайрех і Хабіс Мшур Аль-Фавара

АНОТАЦІЯ

Передумови дослідження: Право на зображення вважають одним із найважливіших особистих прав, пов'язаних з особою, просто тому, що зображення дійсно дає можливість упізнати свого власника серед однолітків, отже – є життєво важливим елементом приватного життя людини. Відповідно, правовий захист права на зображення є вкрай необхідним як на цивільному, так і на кримінальному рівнях. Безсумнівно, таку вимогу можна віднести до помітних розробок у сфері інформаційних технологій, а те, що виробляється цифровими пристроями і використовується людьми не за призначенням, призвело до стрімкого поширення зображень у віртуальному просторі, де будь-які

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індивіди стали об'єктом порушення їхнього приватного життя. З огляду на ці правові порушення як еміратські, так і французькі законодавці ухвалили правові положення, що забезпечать повний і змістовний кримінальний захист права на зображення, підтверджуючи криміналізацію всіх форм посягання на це право, а також визначаючи контроль і покарання, які правоохоронці мають застосовувати проти цих нападів.

Методи. Щоб ґрунтовно розглянути проблему дослідження та її наслідки, ми використаємо описовий, аналітичний і порівняльний методи. Підхід, побудований у такий спосіб, має на меті скрупульозно дослідити кожен аспект предмета дослідження, хоча й лаконічно, та інтегрувати юриспруденційні принципи із сучасними судовими прецедентами.

Результати та висновки. Результати сучасних досліджень свідчать, що порівняльне законодавство не має чіткого визначення щодо порушення права на зображення, тому залишає його тлумачення на розсуд судової практики та судової влади. В еміратському та французькому законодавствах зазначене правопорушення чітко не окреслене, а, радше, охоплюється нормативними актами, що захищають приватне життя. Право на зображення не є абсолютним, за винятком випадків, що дають змогу фотографувати в суспільних інтересах. Захист зображень вважається необхідним у контексті прав приватного життя. Тоді як законодавство ОАЕ зобов'язує використовувати пристрої для фіксування таких порушень, французьке законодавство пропонує гнучкість, дозволяючи різні способи вчинення таких дій. Обидві правові системи передбачають, що дія має відбуватися у приватному, несанкціонованому контексті, і забороняє змінювати фотографії без згоди осіб, що фігурують на них. На відміну від законодавства ОАЕ, французьке законодавство передбачає покарання за поширення зображень відверто сексуального характеру. Урешті, посягання на право на зображення класифікують як умисне правопорушення в обох правових системах.

Ключові слова: *право на зображення, приватне життя, нормальна людина, кримінальний захист, вияви насильства, приватні та публічні місця, інформаційні технології, електронні злочини, законодавство ОАЕ, законодавство Франції.*

СИСТЕМА УПРАВЛІННЯ ВІДХОДАМИ В УКРАЇНІ: ПРАВОВИЙ КОНТЕКСТ І SWOT-АНАЛІЗ

Євгенія Носова*, Олена Яфінович, Наталія Мєдведькова, Віталіна Делас, Наталія Плєшакова

АНОТАЦІЯ

Вступ. Управління відходами привертає увагу як українських, так і зарубіжних науковців. Поки вітчизняні дослідники вивчали управління відходами й акцентували увагу на можливостях спалювання відходів з метою економічного та екологічного захисту, зарубіжні вчені зосереджували свою увагу на вивченні екологічного впливу електронних пристроїв. Аналізуючи складні питання, пов'язані із соціально-екологічними системами, зарубіжні вчені досліджували підходи до управління відходами електроніки (EWM), щоб

забезпечити екологічну стійкість і підвищити загальну свідомість щодо EWM. Цей порівняльний аналіз розкриває наукову прогалину, що породжує необхідність вивчення сучасного стану системи управління електронними відходами (EWMS) в Україні для визначення напрямків її вдосконалення.

Методи. Для досягнення поставлених цілей у пропонованій роботі використано різноманітні наукові та спеціалізовані методи. Структурно-функціональний метод застосовано для врахування інтересів зацікавлених сторін та рівня їхнього впливу в системі управління відходами шляхом поділу їх на чотири групи. Виконано SWOT-аналіз для визначення можливостей, загроз, недоліків і переваг системи управління відходами. Використано метод порівняння для апроксимації законодавчого середовища України в системі управління відходами та порівняння його із правовими діями Європейського Союзу.

Результати та висновки. Досліджено інтереси зацікавлених сторін і рівень їхнього впливу на систему управління відходами, розділивши їх на чотири категорії:

- інформуватися (масмедіа);
- добровільно консультуватися (Кабінет Міністрів України, різні міністерства та державні організації України);
- задовольнити (Президент України та Верховна Рада України);
- інформуватися + двостороннє спілкування (міжнародні організації, неприбуткові та громадські організації, активісти й екологічні організації).

SWOT-аналіз виявив переваги, недоліки, можливості та загрози системи управління електронними відходами. Урахування цих факторів сприятиме розвитку системи управління електронними відходами в Україні та надасть уявлення про проблеми, що перешкоджають її розвитку.

***Ключові слова**: електронні відходи, система управління електронними відходами, охорона навколишнього середовища, зацікавлені сторони, SWOT аналіз, директиви ЄС, правова база.*

СПРАВА СКРИПКИ ЯК ЕПІТОМЕЯ ЕФЕКТИВНОСТІ КОНСТИТУЦІЙНИХ СКАРГ В УКРАЇНІ

Дмитро Терлецький* та Родіон Негара

АНОТАЦІЯ

Вступ. У пропонованій статті детально розглянуто ефективність конституційних скарг в Україні, використовуючи справу Скрипки як ключовий ілюстраційний приклад. Шляхом усебічного аналізу автори розкрили фактичні обставини, національні законодавчі рамки, що регулюють спірні правові питання, та судові прецеденти, які стосуються справи Скрипки. Суть авторської позиції полягає в первинній ролі конституційної скарги в захисті порушених конституційних прав особи, одночасно сприяючи зміцненню конституційного ладу держави.

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Методи. Для всебічного розуміння предмета дослідження автори провели глибокий огляд відповідних судових рішень, детально аналізуючи правові аргументи, що представлені суддями. Крім того, розглянуто позиції кваліфікованих учених для виявлення та розуміння поточних експертних оцінок і пропозицій.

Результати та висновки. Шляхом глибокого аналізу судової практики у статті визначено три домінантні погляди щодо впливу рішень, які випливають з розгляду конституційних скарг у Конституційному Суді України, на перегляд остаточних судових рішень у конкретних справах:

- Рішення Конституційного Суду України не можуть впливати на спірні правові відносини, оскільки ці відносини існували до ухвалення зазначених рішень Конституційним Судом України.
- Перегляд у виняткових обставинах застосовують лише до рішень, де претензії були повністю або частково задоволені (тобто підлягають виконанню), але ще не були виконані.
- Рішення Конституційного Суду України зазвичай значущі як рішення загального характеру, що встановлюють юридичні висновки для врегулювання майбутніх справ.

Ключові слова: *конституційна скарга, засіб правового захисту, судова практика, виняткові обставини.*

МОДЕЛЬ ПРОКУРОРСЬКОГО САМОУПРАВЛІННЯ В УКРАЇНІ ТА БАЛТІЙСЬКИХ КРАЇНАХ: КОМПАРАТИВНИЙ АСПЕКТ

Оксана Хотинська-Нор*, Сергій Подкопаєв, Ганна Пономарьова та Дмитро Лук'янов

АНОТАЦІЯ

Вступ. Нове законодавство в Україні внесло значні зміни у функціонування прокуратури, створивши органи прокурорського самоврядування. Їхнє впровадження обумовлене зміною конституційного статусу прокуратури та потребою зміцнення незалежності прокурорів за мінімізації зовнішнього політичного та внутрішнього системного впливу на їхню роботу. Такі реформи відповідають пан'європейській тенденції, що сформувалася завдяки модернізації підходів до сприйняття ролі прокуратури. Незалежність судової влади й ефективність здійснення правосуддя залежать від самостійної діяльності такого органу, як прокуратура. Це вимагає формування та розвитку принципу політичної нейтральності, що має бути основою організації та діяльності прокуратури в державі, яка керується правовими принципами.

Орієнтація на міжнародні стандарти та найкращі практики дає змогу гіпотезувати про прогресивність української моделі прокурорського самоврядування. Зазначену гіпотезу можна перевірити шляхом порівняльного аналізу з іншими країнами. Ми

обрали для порівняння балтійські країни, оскільки вони пов'язані з Україною спільним минулим у складі Радянського Союзу, проте швидше визначились із європейським напрямом свого розвитку.

У статті наведено огляд моделей прокурорського самоврядування в Латвії, Литві, Естонії та Україні, виокремлено структуру та компетенцію їхніх органів. На основі порівняльного аналізу на прикладі України дослідники визначили основні напрями зміцнення інституційної потужності органів прокурорського самоврядування.

Методи. У науковій роботі автори використовували кілька спеціальних юридичних методів, які дали їм змогу реалізувати як збирання, так й узагальнення фактичних даних, а також здійснити багаторівневий порівняльний аналіз обраних об'єктів вивчення на відповідному рівні. Дослідження ґрунтувалося, зокрема, на формально-правових, логіко-правових, історико-правових та порівняльно-правових методах наукового пізнання.

Висновки та результати. Було зроблено висновок, що впровадження прокурорського самоврядування у державах є необхідним кроком у напрямі зміцнення незалежності прокурорів як складової ефективного правосуддя. Це дає змогу мінімізувати зовнішній політичний і внутрішній системний вплив на кадрові процеси у системі прокуратури, сприяє забезпеченню її політичної нейтральності, а також урегульовує питання фінансового, матеріального, технічного й іншого забезпечення прокурорів. У цьому контексті українська модель прокурорського самоврядування є досить прогресивною, хоча і містить певні недоліки. Розподіл кадрових повноважень між різними суб'єктами, наприклад, робить прокурорів вразливими у професійному зростанні, зокрема певні проблеми полягають й у відсутності чіткості у визначенні їхніх компетенції. Це акцентується на подальшому розвитку прокурорського самоврядування, зміцненні його інституційних можливостей.

***Ключові слова**: прокуратура, прокурорське самоврядування, незалежність прокуратури, політична нейтральність прокуратури.*

ОЦІНКА ЗДІЙСНЕННЯ ПРАВОСУДДЯ ТА ЗЛОВЖИВАННЯ ПРОЦЕСУАЛЬНИМИ ПРАВАМИ: КРИТИЧНИЙ АНАЛІЗ СПРАВИ MARCIANA JURISDICTION CHALLENGE [2022] ТА ЄВРОПЕЙСЬКОЇ СИСТЕМИ ПРАВА У ЦИВІЛЬНИХ І КОМЕРЦІЙНИХ СПРАВАХ ДЛЯ ТРЕТЬОЇ ДЕРЖАВИ

Педро Домінгос*

АНОТАЦІЯ

Вступ. У дослідженні критично проаналізовано юрисдикційні виклики та їхні наслідки для належного адміністрування правосуддя у справі Mariana проти групи BHP [2022] EWCA Civ 951. Розглянуто правовий шлях, обраний Вищим апеляційним судом, з

урахуванням процесу в Сполученому Королівстві (до Brexit) та третьої держави (Бразилії). Зазначений текст аналізує вплив європейської правової системи на держави – члени ЄС й оцінює підхід Великої Британії до ст. 34 Брюссельського регламенту. В дослідженні аналізується, чи здійснюється відповідне відшкодування збитків на підставі цивільної або комерційної відповідальності, понесених постраждалими, що мешкають у третій державі, через європейську юрисдикцію.

Методи. Автором використано аналіз судової практики, підтриманий методологією доктринальних юридичних досліджень, щоб систематично відстежити баланс принципу форуму невиправної помилки та послідовного застосування Брюссельського регламенту у справі Mariana.

Результати та висновки. У дослідженні подано критичний огляд рішення Вищого суду Великої Британії про скасування рішення судді Тернера, що підкреслив відповідність історичних національних прецедентів, законодавства Європейського Союзу та попередніх рішень Європейського суду з прав людини щодо застосування Великою Британією методу відмови від позову. Розкрито складнощі адміністрування правосуддя, зосереджуючись на взаємодії між основними рішеннями у справі, принципом пропорційності та відповідальністю суду за забезпечення справедливого судового розгляду. Також проаналізовано вплив таких факторів, як структура суду, складність справи та час, необхідний для врегулювання спору в межах цього методу, а також ураховано обов'язок суду ефективно адмініструвати правосуддя.

Висновки дослідження сприяють кращому розумінню юрисдикційних викликів у транснаціональних судових суперечках у межах Європейської юридичної системи та їхніх наслідків для належного адміністрування правосуддя. Автор рекомендує збалансований підхід, що забезпечує відповідні права вимагачів, а також узгоджує національні практики з європейськими стандартами цивільної відповідальності, сприяючи судовій гармонії у транснаціональних цивільних і комерційних справах у Європейському Союзі.

***Ключові слова**: справа Маріанна, оскарження юрисдикції, зловживання процесуальним правом, Європейський Союз, регламент Брюссель I.*

ВИЗНАННЯ ТА ВИКОНАННЯ ВИНЯТКОВИХ СУДОВИХ РІШЕНЬ У СУДОВІЙ ПРАКТИЦІ КОНСТИТУЦІЙНОГО СУДУ РЕСПУБЛІКИ КОСОВО

Дін Шахікі*, Заніта Фетаху та Решат Фетаху

АНОТАЦІЯ

Вступ. З метою поваги до міжнародної співпраці, прав людини та юридичної впевненості, можливо визнавати правові наслідки іноземних судових рішень в іншій державі, за умови, що процедура визнання іноземного судового рішення відбувається і що таке судове рішення відповідає вимогам, встановленим місцевим законодавством.

Визнання, як концепція, передбачає визнання прав та обов'язків, встановлених у початкових юрисдикціях, та прийняття юридичних наслідків. Виконання, з іншого боку, означає виконання обов'язку, що дає змогу кредитору реалізувати своє право та забезпечити те, що боржник має обов'язки та дотримується рішень, які вже були ухвалені.

Міжнародна співпраця має сприяти кодифікації правової системи Косова у сфері приватного міжнародного права, що дасть змогу здійснювати визнання та виконання іноземних рішень менш складним, більш розлогим та легшим у застосовуванні.

Порівняно з попередніми рішеннями, новий закон уносить значні зміни. Попередні норми скасовано на користь відкритих зв'язків і юрисдикційних критеріїв. Деякі попередні рішення збережено і, за необхідності, змінено й удосконалено.

Методи. Доктринний підхід передбачає систематичне ідентифікування, збір та застосування юридичної літератури у галузі, охоплюючи закони, тексти, статті та наукові дослідження як місцевих, так і міжнародних авторитетів. Крім того, метод передбачає досконалий аналіз судової практики, оцінку практичної реалізації юридичних стандартів і їхніх судових тлумачень. Шляхом аналізу законодавства наш підхід не лише визначає юридичні питання, але й надає наукову інтерпретацію законів, що регулюють сферу дослідження та її пов'язаних інститутів.

Результати та висновки. Косово, як відносно нова держава, сформувало законодавчу основу, через яку країна намагається розв'язувати проблеми та визначити шлях, який необхідно пройти у виконанні рішень іноземних судів. Загалом, мета мати демократичне та добре розвинене суспільство також означає повагу до прав і рішень іноземних громадян, прав, що випливають із судових рішень міжнародних судів і міжнародно визнаних конвенцій. Гармонізація законодавства та його відповідність конвенціям ЄСПЛ створює реальні можливості для того, щоб Косово визнали країни, які поважають зазначені рішення. Правова система Косово, а також рішення, ухвалені Конституційним Судом, продукують результати, що можуть бути використані для впливу на майбутні справи. Кодифікація приватного міжнародного права в Косово означає, що тепер численні обставини матимуть юридичну основу для виконання рішень іноземних судів.

***Ключові слова**: Іноземні судові рішення, визнання та виконання рішень іноземних судів, Європейські конвенції, Конституційний суд Косова.*

РЕЗУЛЬТАТИ КОНФЕРЕНЦІЇ "ЗА МЕЖАМИ КОНФЛІКТУ: ШЛЯХ УКРАЇНИ ДО ВІДНОВЛЕННЯ, РЕФОРМИ І ПІСЛЯВОЄННА РЕКОНСТРУКЦІЯ"

Сільвіу Нате*, Андрій Ставицький, Рэзван Шербу та Едуард Стоіка

АНОТАЦІЯ

Вступ. У роботі розглянуто результати та висновки конференції, що відбулася 29 листопада 2023 р. в межах дослідницького проєкту. На конференції широко обговорювали поточні проблеми, що стоять перед Україною в умовах агресивної війни, що триває й досі. Значну

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увагу було приділено післявоєнному відновленню країни, що потребує суттєвих реформ у різних секторах національної економіки. Учасники наголосили на необхідності інтеграції цих реформ, а не ізольованих ініціатив, що слугуватимуть комплексним рішенням для досягнення Україною Цілей сталого розвитку та виконання критеріїв для вступу до ЄС і НАТО. У дослідженні детально розглянуто основні виклики для впровадження таких реформ, їхні основні елементи та взаємозв'язок. Усі виокремлені питання набули широкого обговорення в ході конференції. Особливу увагу було приділено досягненню та збереженню макроекономічної стабільності країни під час військових операцій та ідентифікації основних програм, необхідних для оживлення економіки України. Крім того, у роботі презентовано успішні випадки впровадження реформ на мікрорівні в державних установах.

Результати та висновки. За результатами конференції було розроблено програмний документ щодо напрямів відновлення та розвитку в Україні. Він вказував на критичну необхідність єдності між країнами Європи та США у підтримці України та наданні своєчасної допомоги. В Україні досягнення єдності між урядом і бізнесом у питаннях дезавуалювання економіки, реформування податкової системи, митної служби й адміністрування основних податків і зборів набуло особливої актуальності. Це має створити передумови для припливу інвестицій в економіку України та, у підсумку, зменшити розрив із країнами Європи.

Ключові слова: *відбудова, війна, інвестиції, геополітика, цілі сталого розвитку, Україна.*

For further information, please contact
Access to Justice in Eastern Europe, Mazepy Ivana str., 10, Kyiv, 01010, Ukraine.
Email: info@ajee-journal.com. Tel: +38 (044) 205 33 65. Fax: +38 (044) 205 33 65.

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