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Iryna Izarova
ISSUE 3 OF 2023 AND THE JOURNAL'S POLICY ON NEUTRALITY AND NON-DISCRIMINATION IN EDITORIAL WORK

Judita Krasniqi, Labinot Hajdari, Alban Maliqi and Kimberly DeGroff Madsen
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ROUNDTABLE DISCUSSION ON UKRAINIAN RECONSTRUCTION AFTER THE WAR: KEY POLICY PAPER AND RECOMMENDATIONS

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Editor-in-Chief's Note

ISSUE 3 OF 2023 AND THE JOURNAL'S POLICY ON NEUTRALITY AND NON-DISCRIMINATION IN EDITORIAL WORK

In this issue of the Access to Justice in Eastern Europe journal, we collected articles from authors of various states – Romania, Moldova, Ukraine, Slovakia, Poland, and Saudi Arabia. We are particularly delighted to welcome contributions from authors from Kosovo, as their efforts to spread knowledge about their jurisdiction and share the results of their studies is warmly welcomed. This fact alone is another good reason for policymakers, legal practitioners, and researchers to read this issue.

As usual, I would like to provide a brief overview of some of the articles featured in this issue. However, before diving into the contents, as Editor-in-Chief, I would like to share some ideas and reflections with our audience and my colleagues and editors. I will discuss the Journal's commitment to neutrality and non-discrimination, especially in light of the challenges faced during wartime in Ukraine.

The editorial role is challenging and ever-evolving, requiring vigilant attention to ongoing developments. AI has emerged as a remarkable issue, exemplifying the need to be vigilant and ready to address all new challenges. At the same time, the most demanding matter Ukrainian journals have faced in the last months has been neutrality and non-discrimination toward authors, reviewers, editors and Board members from state aggressors.

International documents, such as the International Covenant on Civil and Political Rights[1], the Universal Declaration of Human Rights[2], and the European Convention on Human Rights[3], guarantee non-discrimination for all people and the right to freedom of expression. These rights encompass the freedom to hold opinions, receive and impart information and ideas without interference by public authority, and regardless of frontiers. However, it is essential to acknowledge that the exercise of these freedoms, since it carries duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties

1 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 25 July 2023.

2 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 25 July 2023.

3 Council of Europe, *European Convention of Human Rights: as amended by Protocols Nos 11, 14 and 15, supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECtHR 2014) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 25 July 2023.

as are prescribed by law and necessary for a democratic society, particularly in the interests of national security[4].

While the case law on this matter may not be so extensive, I find it necessary to highlight some key points through specific judgements.

In the case of Vereniging Weekblad Bluf! v. the Netherlands[5], a report was published, and the director of the internal security service was deemed to violate the Criminal Code. Consequently, the issue of the journal was withdrawn from circulation by order of the public prosecutor without the need for adversarial proceedings to prove that the information in question had to be kept secret. However, in his decision, the Court ruled that this measure was unnecessary in a democratic society and constituted a breach of Article 10 and the right to freedom of expression (Art. 10) (pp. 28-46).

In the case of Wille v. Liechtenstein[6], a newspaper published an article on the lecture given by the applicant, a Judge, mentioning, inter alia, his views on the competencies of the Constitutional Court. This article became the basis for the Prince of Liechtenstein to announce his intention not to reappoint the applicant to a public office. The Court found that this action by the Prince interfered with the applicant to exercise his freedom of expression. By criticising the contents of the applicant's speech and expressing the intention to sanction him for freely expressing his opinion, the Prince's announcement constituted a reprimand for the applicant's previous exercise of his right to freedom of expression. Moreover, it had a chilling effect on the applicants' future expression, as it was likely to discourage them from making statements of that kind in the future (p. 50).

I suppose the mentioned cases have a direct link to the behaviour of journals in two important aspects. Firstly, it reflects the role of decision-making in the editorial process, akin to a sovereign editor, such as the Prince, giving the right to proceed with further publication. Secondly, it highlights the importance of evaluating content without bias or background information about the authors.

Discrimination remains one of the worst aspects of human society. The very idea of treating people differently based on their colour, gender, or political views is ugly. In reality, there is no distinct white and black, even among natural colours, as artists have observed. Manipulating these differences or any other criteria only disregards the history and remarkable achievements of all individuals without exception. Nevertheless, despite decades of international acts to address non-discrimination, we still face many challenges.

As an Editor-in-Chief, I confront various forms of bias. The publication process is human-driven, making it susceptible to subjective opinions and views. Navigating through this wild forest of judgments and opinions can be exceedingly challenging. However, I firmly believe that maintaining a clear and transparent policy, supported by well-grounded arguments, can guide us to avoid confusion and difficulties.

Since the occupation of Ukrainian territory in 2014, we have come to realise that academic publishing is an integral part of our society's activities, and it is imperative to react and

4 Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A handbook for legal practitioners* (Council of Europe 2017) <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814> accessed 25 July 2023.

5 *Vereniging Weekblad Bluf! v the Netherlands* App no 16616/90 (ECtHR, 09 February 1995) <https://hudoc.echr.coe.int/eng?i=001-57915> accessed 25 July 2023.

6 *Wille v Liechtenstein* App no 28396/95 (ECtHR, 28 October 1999) <https://hudoc.echr.coe.int/?i=001-58338> accessed 25 July 2023.

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position ourselves on the right side of this ongoing war (In this case, we truly support our colleagues who signed this letter[7]).

By the laws of Ukraine, particularly in the media, including journals, the dissemination of information containing the following is prohibited: calls for violent change, the overthrow of the constitutional order, initiation or conduct of aggressive war or military conflict, violation of Ukraine's territorial integrity, the liquidation of Ukraine's independence, and information that justifies or propagates such actions; statements that incite hatred, hostility, or cruelty towards individuals or groups based on their ethnic or social origin, citizenship, nationality, race, religion and beliefs, age, gender, sexual orientation, gender identity, or disability; information that denies or justifies the criminal nature of the Communist totalitarian regime in Ukraine from 1917 to 1991, as well as the criminal nature of the national-socialist (Nazi) totalitarian regime, creating a positive image of persons who held leading positions in the Communist Party, other Union and autonomous Soviet republics (except for cases related to the development of Ukrainian science and culture), justifying the actions of Soviet state security; information that contains symbols of the Communist or national-socialist (Nazi) totalitarian regime, propaganda of the Russian totalitarian regime, armed aggression of the Russian Federation as a state-terrorist against Ukraine, as well as symbols of the military invasion by the Russian totalitarian regime.

Most importantly, this includes the prohibition of disseminating information that degrades or disrespects the state language, denies or calls into question the existence of the Ukrainian people (nation), Ukrainian statehood, and/or the Ukrainian language (Article 36 of the Law on Media, entered into force in March 2023)[8].

According to the law, the Russian Federation is recognised as a state-terrorist, with one of the political regime's objectives being the genocide of the Ukrainian people, physical extermination, mass killings of Ukrainian citizens, committing international crimes against the civilian population, using prohibited methods of war, destruction of civilian objects and critical infrastructure, artificially creating a humanitarian catastrophe in Ukraine or its specific regions, and its political regime being inherently Nazi in its essence, practice, and ideological following of the national-socialist (Nazi) totalitarian regime[9].

The law strictly prohibits the propagation of the Russian Nazi totalitarian regime and the armed aggression of the Russian Federation as a state terrorist against Ukraine. It also addresses the use of symbols related to the military invasion of the Russian Nazi totalitarian regime in Ukraine, stating that employing these symbols as specified in the law constitutes a distinct form of propaganda of the Russian Nazi totalitarian regime and the armed aggression of the Russian Federation as a state-terrorist against Ukraine (Part 3 of the Law).

The prohibition of using the specified symbols of the military invasion of the Russian Nazi totalitarian regime in Ukraine does not apply to cases where their use serves a legitimate purpose and is lawful, as long as it does not have signs of propaganda of the Russian Nazi totalitarian regime and the armed aggression of the Russian Federation as a state-terrorist against Ukraine. This exception includes situations in scientific activities, such as during

7 'An Open Letter from Scientists of Ukraine and Diaspora' (*National Research Foundation of Ukraine*, 13 February 2023) <https://nrfu.org.ua/en/news-en/an-open-letter-from-scientists-of-ukraine-and-diaspora> accessed 25 July 2023.

8 Law of Ukraine No 2849-IX of 13 December 2022 'On Media' (as amended of 02 July 2023) <https://zakon.rada.gov.ua/laws/show/2849-20> accessed 25 July 2023.

9 Law of Ukraine no 2265-IX of 22 May 2022 'On the Prohibition of Propaganda of the Russian Nazi Totalitarian Regime, Armed Aggression of the Russian Federation as a State-Terrorist against Ukraine, Symbols of the Military Invasion of the Russian Nazi Totalitarian Regime in Ukraine' (as amended of 31 March 2023) <https://zakon.rada.gov.ua/laws/show/2265-20> accessed 25 July 2023.

scientific research and dissemination of research results in a manner not prohibited by the legislation of Ukraine (paragraph 7).

In August 2022, a draft law of Ukraine titled 'On Amendments to Certain Laws of Ukraine Regarding the Prohibition of Using Information Sources from the Aggressor State or Occupying State in Educational Programs, Scientific, and Scientific-Technical Activities,' was registered as bill number 7633 on August 4 2022[10]. This bill has sparked serious discussions within academic circles.

Keeping this in mind, I am pleased to share our new approaches to the journal's policy on neutrality and non-discrimination in the editorial process, based mainly on the legal regulations, case law and ethical ideas of the role and meaning of scholarly publishing in an open society.

The journal maintains a neutral stance towards political controversies. It ensures that the editors do not express personal preferences or biases towards manuscripts or authors based on their country of origin, residence, or affiliation. Publication decisions are made independent of the manuscript's origin, including the authors' nationality, ethnicity, political beliefs, race, or religion. The journal's editorial board is not influenced by external factors such as government policies or institutional guidelines.

To promote depoliticisation in research, we advise authors to avoid making provocative remarks, controversial geopolitical claims, or using disputed map markings. In cases where this cannot be avoided, the journal reserves the right to label such content as controversial during or after publication, publish the editor's comments, or reject/retract articles.

However, the editors reserve the right to reject manuscripts without review under the following circumstances:

1. The author(s) are affiliated with an organisation or institution located in a country deemed an aggressor state or a state sponsor of terrorism.
2. The research is funded by an organisation or institution in a country deemed an aggressor state or a state sponsor of terrorism.
3. The manuscript contains calls for the violation of state order or the rule of law, human rights abuses, terrorism, or the dissemination of ideological or politicised ideas.
4. The research is based on conclusions or results obtained by authors affiliated with an organisation or institution in a country deemed an aggressor state or a state sponsor of terrorism without sufficient justification for their uniqueness, originality, and global scientific significance or their specific relevance to the research proposed for publication.
5. The study excessively focuses on conclusions or results of studies that contain or reflect the subjective assessments or opinions of the author(s) regarding Ukrainian statehood and/or independence, distort historical events, the Ukrainian language, or national identity.

The main aim is to identify and fight it greatly. Scientific research should be free of the influence of research institutions and state policies; however, we presume that authors can

10 Draft Law of Ukraine no 7633 of 04 August 2022 'On Amendments to Certain Laws of Ukraine Regarding the Prohibition of Using Information Sources from the Aggressor State or Occupying State in Educational Programs, Scientific, and Scientific-Technical Activities' <https://itd.rada.gov.ua/billInfo/Bills/Card/40164> accessed 25 July 2023.

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express their visions of the study, its objectives and results. In the case of a totalitarian state, aggressor states, journals, editors, and reviewers can not be obliged to take responsibility to conclude whether the particular study brings to the science free expression or is biased or bound by the leading affiliation institutions.

Open science is only truly possible when scholars have the freedom to openly express their opinions; otherwise, it carries more dangers than benefits.

In my opinion, a few articles in this issue deserve particular attention. Firstly – the writing of co-authors *Judita Krasniqi, Labinot Hajdari, Alban Maliqi and Kimberly DeGroff Madsen,* 'The Mirror Reflection of the Russian Invasion of Ukraine in the Western Balkans: Opening New Conflicts as a Distraction', in which the correlation between the increase in tensions between Russia and Ukraine and the rise of tensions in the Western Balkans was analysed. The article examines how Russia's aggression in Ukraine has increased pressure on Serbia, its closest ally, to fuel tensions in the region using hybrid war methods. These methods involve a combination of various war tactics integrated into different spheres, including political, religious, ideological, ethical, economic, and informational.

The research reveals that Russia's influence in the Western Balkans aims to destabilise the region by reigniting past conflicts or inciting new ones to divert international attention from the declining power of Ukraine. The article highlights the importance of accelerating NATO and EU integration for Western Balkan countries to counteract Russian influence and prevent future conflicts among Balkan states. The study concludes that Russian influence in the region is real and seeks to undermine the power and influence of the West and NATO in former Yugoslav states, using conflicts as a distraction from Ukraine's power decline.

Oksana Khotynska-Nor, Nana Bakaianova, and Maryna Kravchenko, in their article, examined the impact of martial law on the activity of the Prosecutor's Office in Ukraine following the full-scale invasion by the Russian Federation in February 2022. The study presents a systematic analysis of the Prosecutor's Office's performance indicators within the context of the events unfolding during the war, focusing on a period of over a year. The authors base their analysis on the performance indicators of four regional Prosecutor's Offices representing different regions of Ukraine. This approach allows for examining the correlation between the intensity of military aggression in specific regions and the effectiveness of the Prosecutor's Office's operation. The findings reveal that the territorial factor significantly influences the activity of the Prosecutor's Office during martial law.

Additionally, the full-scale war has resulted in polar phenomena among prosecutors, including intensifying their civil position against the aggressor. Moreover, professional and behavioural disruptions among prosecutors have been observed, which are subject to assessment by a disciplinary body, potentially leading to the finalisation of a prosecutor's career. This article is expected to provide valuable insights for anyone interested in the justice system, particularly the Prosecutor's Office, and its responses to the extraordinary conditions of war.

Notably, a group of Ukrainian scholars, *Oksana Kaplina, Anush Tumanyants, Iryna Krytska and Olena Verkhoglyad-Gerasymenko*, explored the use of artificial intelligence (AI) technologies in criminal proceedings. The rapid development of digital technologies has impacted various spheres of society, including the legal field. This study focuses on the application of AI systems in criminal justice, considering the potential challenges in upholding fundamental human rights and legal principles, and emphasises that using AI systems for auxiliary purposes poses minimal risks of interfering with human rights and freedoms. However, adopting AI in other areas may significantly infringe upon these rights and freedoms. Therefore, it is essential to control and verify the use of AI for such purposes, limiting its implementation to subsidiary roles and, in some instances, even prohibiting

it altogether. The study underlines the importance of safeguarding fundamental human rights and adhering to basic legal principles, such as the presumption of innocence, non-discrimination, and the right to privacy, when applying AI systems in the criminal justice system.

Hanna Ostapenko's article offers a comprehensive analysis of the implementation of the legal certainty principle and access to justice in Ukraine, particularly amidst the challenges posed by the ongoing war. According to the author's findings, legal certainty is an integral element of the rule of law, ensuring predictability and clarity in legal regulation and requiring proper enforcement of legal acts while prohibiting retroactivity. It contributes to stability in legal regulation and respects legitimate expectations. A key finding in this article is the reciprocal relationship between improving access to justice and legal certainty. When legal certainty is compromised due to legislative gaps or unclear norms, the right to access the court becomes essential for restoring the violated rights of claimants. The requirement of res judicata for legal certainty is also necessary for access to justice.

This issue presents a collection of intriguing articles and notes that will captivate those interested in access to justice issues in Eastern Europe.

As always, I am endlessly grateful to my dedicated team, and I pass our warm welcome to our new English editors, *Nicole Robinson and Julie Bold*. English language publications are paramount as they facilitate the global dissemination of knowledge, enabling researchers, professionals, and policymakers from diverse backgrounds to access and contribute to cutting-edge research and advancements across various fields. We are warmly grateful to our editors for their help.

We are proud to announce a Special Issue aimed at collecting articles related to the intersection of legal and economic issues. Understanding this intricate relationship is crucial as it provides insights into how effective legal systems can foster economic growth, social inclusion, and overall societal well-being, benefiting individuals, businesses, and communities alike.

Leading this special issue will be *Prof. Ganna Kharlamova* from Taras Shevchenko National University of Kyiv, Ukraine, *Prof. Alfredo Moscardini* from Northumbria University, UK, and *Dr. Eduard Stoica* from Lucian Blaga University of Sibiu, Faculty of Economic Sciences, Romania. Their expertise will be complemented by contributions from other esteemed scholars, making this Special Issue a significant contribution to understanding how legal frameworks impact economic performance and society as a whole.

Slava Ukraini!
Editor-in-Chief
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RESEARCH ARTICLE

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Research Article

THE MIRROR REFLECTION OF THE RUSSIAN INVASION OF UKRAINE IN THE WESTERN BALKANS: OPENING NEW CONFLICTS AS A DISTRACTION

Judita Krasniqi [1]***, Labinot Hajdari*** [2]***, Alban Maliqi*** [3] ***and Kimberly DeGroff Madsen*** [4]

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Keywords: Western Balkans, the war in Ukraine, Russia's influence, geopolitics, conflict, great powers

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ABSTRACT

Background: *The Western Balkan region has long struggled under extensive pressure and influence from Russia and the West. World developments have occasionally echoed tensions among nations in the region, including a prolonged EU and NATO membership process, which has increased the possibility of Russia's influence, especially after the aggression in Ukraine. This article analyses the increase in Russia – Ukraine tensions and its direct correlation with the increase of tensions in the Western Balkans through hybrid war methods understood through Zhyhlei and Syvak's definition: "a fragmentary and situational combination of different methods and theories of war, their integration into different spheres, especially political, religious, ideological, ethical, economic and informational."*[5] *The higher Russia's aggression in Ukraine, the higher the pressure on Serbia to fuel tensions in the Western Balkans. This pressure comes through direct threats, media propaganda, and influence on parallel structures and financial support for CSOs, through which Russia increases its influence in the Balkans through Serbia as its closest ally. This influence strategy is particularly important for Russia to undermine the power and influence of the West and NATO in former Yugoslav states, especially those with open conflicts which serve as a global distraction from a possible power decline in Ukraine.*

Methods: *Through discourse and thematic analysis, this article analyses local, regional, and international media, data, and publications of international organisations, press releases of international and regional institutions, conclusions of distinguished scientists and heads of state over the current situation in the Western Balkans, and interviews with representatives of CSOs and institutions in Kosovo. The influence of Russian aggression in Ukraine, with Russia's pressure to increase tensions in the Western Balkans, has been analysed in the framework of Western unipolar influence and Russia's attempts to return to multipolarity.*

Results and Conclusion: *Among others, it is concluded that Russian influence is present in the Western Balkans and seeks to destabilise the region by activating passive conflicts from the past or opening new conflicts to defer international attention from the power decline in Ukraine, which did not produce the results that Russia had expected. This is possible through Serbia, Russia's closest ally. The solution to prevent Russian influence and any future conflicts among Balkan states is to accelerate NATO and EU's integration of Western Balkan countries.*

1 INTRODUCTION

The U.S., EU, China, and Russia play an important role in balancing powers under the equilibrium principle in modern international relations. Throughout history, the Balkan region has been a center of attention for international actors, including empires and great powers, due to its geostrategic position and resources. As Pezarat Correira states it, the Balkan region "is pivotal between three continents, Europe, Asia and Africa (…) as a crossroad of cultures and, historically, of disputes between empires."[6] It is not surprising, then, that the region has become an arena of rivalry between Moscow, Brussels, and Washington as they seek influence over one another.

The Balkans have been particularly important to Russia. In addition to geopolitical factors, Russia is tied to the region through economic interests as well as historical ties with Christian

5 Iryna Zhyhlei, Segiy Legenchyk and Olena Syvak, 'Hybrid War as a form of Modern International Conflicts and its Influence on Accounting Development' (2020) 11 (1) Przegląd Wschodnioeuropejski 194, doi: 10.31648/pw.5980.

6 Pedro de Pezarat Correia, *Manual de Geopolítica e Geoestratégia, vol 2 Análise Geoestratégica do Mundo em Conflito* (Almedina 2010).

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Orthodox countries in the region.[7] The Balkan states are also at the center of Russia's foreign policy as it seeks to return to multipolarity in world affairs to oppose the Western unipolar influence, according to Stanislav Secrieru.[8] Vadim Kononenko highlights multipolarity from the war in Bosnia & Herzegovina in 1994 and the war in Kosovo in 1999 as a

> "rhetorical tool of Russian diplomacy with which, in the absence of more persuasive instruments, Russia has tried to overcome a striking and painful decline of its role and status in the international system since the end of the Cold War."[9]

As a result, any attempts to guide Balkan countries into Western institutions receive consistent pushback from Russia, including through the use of separatist and nationalist groups that Russia supports. Of particular importance is the hindrance to NATO and EU enlargement efforts, which Russia considers a threat to its interests. The unresolved conflicts in Bosnia & Herzegovina and between Kosovo and Serbia are used as leverage to maintain Russian influence in the region.[10] Meanwhile, as Samokhalov analyses,

> "Russia is more concerned about being recognized recognised among great powers than it is concerned about failing states in the Balkans."[11]

The Kosovo period, specifically, opened the opportunity for Russia to position against the West. Putin used the Kosovo conflict to flip the West's narrative, allowing intervention in Kosovo to justify his campaign into Chechnya, propelling him from Prime Minister to President. Russia argued that NATO's use of force to resolve ethnic conflict in the former Yugoslavia allowed Russia to do the same in Chechnya. While the West rejected the narrative, Russia pushed the point by modelling information briefings on NATO.[12] NATO's use of force in Kosovo further shaped Russian foreign policy, as evidenced in the National Security Concept approved in December 1999, which cited NATO's use of force outside its zone of responsibility without UN sanction as a threat to Russia's national security.[13] Kosovo re-emerged as a major issue in Russia's foreign policy toward the Balkans when Kosovo declared independence in 2008. At that point, Russia said it would support Serbia's reaction and even help its interests in Kosovo.[14] Putin would later cite the "Kosovo precedent" to justify their annexation of Crimea from Ukraine.[15]

After the Kosovo war, Russia maintained the importance of the Balkans as a regional priority. While Russia went on to cultivate ties with the other states of the former Yugoslavia, Serbia remained its closest ally due to anti-NATO sentiments.[16]

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7 Dimitar Bechev, 'Russia's Strategic Interests and Tools of Influence in the Western Balkans' (*Atlantic Council*, 20 December 2019) <https://www.atlanticcouncil.org/blogs/new-atlanticist/russia-strategic-interests-and-tools-of-influence-in-the-western-balkans> accessed 10 June 2023.

8 Stanislav Secrieru, 'Russia in the Western Balkans: Tactical Wins, Strategic Setbacks' (*European Union Institute for Security Studies*, 2 July 2019) <https://www.iss.europa.eu/content/russia-western-balkans#_make_the_balkans_multipolar_again> accessed 10 June 2023.

9 Vadim Kononenko, From Yugoslavia to Iraq: Russia's Foreign Policy and the Effects of Multipolarity (UPI Working Papers 42, UPI; FIIA 2003) 36.

10 Paul Stronski and Annie Himes, 'Russia's Game in the Balkans' (*Carnegie Endowment for International Peace*, 06 February 2019) <https://carnegieendowment.org/2019/02/06/russia-s-game-in-balkans-pub-78235> accessed 10 June 2023.

11 Vsevolod Samokhalov, 'Russia in the Balkans: Great Power Politics and Local Response' (2019) 21 (2) Insight Turkey 192, doi: 10.25253/99.2019212.12.

12 James Headley, Russia and the Balkans: *Foreign Policy from Yeltsin to Putin* (Hurst & Co 2008).

13 ibid.

14 Samuel Ramani, 'Why Serbia is Strengthening its Alliance with Russia' (*HuffPost News*, 15 February 2016) <https://www.huffpost.com/entry/why-russia-is-tightening_b_9218306> accessed 10 June 2023.

15 V Putin, 'Address by the President of the Russian Federation' (*President of Russia*, 18 March 2014) <http://en.kremlin.ru/events/president/news/20603> accessed 10 June 2023.

16 Headley (n 12).

The start of the war in Ukraine in February 2022[17] was a clear statement from Moscow against NATO and EU enlargement, as they are perceived a threat to Russia's national security and global political interests.[18] Russian political influence in the Balkans is clearly seen by Western countries. They view Russia as having a direct path through its economic cooperation with Serbia and through financial support for different political parties and civil society organizations, mainly in Serbia and Republica Srbska in Bosnia and Herzegovina.[19] The expansion of Western influence has been opposed by Russia's destabilising actions meant to undermine the West's state-building efforts in the Western Balkans. This has happened despite the investment of the EU and the U.S. through NATO membership of some Balkan countries,[20] their EU integration process,[21] as well as the economic interconnection between the Balkans and the Western world.

This article explores the increase of influence and pressure in the Western Balkans that parallels the intensity of the war in Ukraine. This largely takes place through Serbia, Russia's closest ally, demonstrated through economic and military cooperation between the two countries and through the social and historical connection that Russia and Serbia share. To analyse the present rhetoric, major articles from local, regional, and international media have been analysed, as well as press releases from global leaders and international representative missions to Kosovo. These are supplemented with interviews conducted with the Deputy Minister of Defence of Kosovo, Mr. Shemsi Syla, with Xhemajl Rexha – Chairman of the Board of the Association of Journalists of Kosovo (AGK), and Mentor Vrajolli – the Executive Director of Kosovar Centre for Security Studies (KCSS) to include different perspectives on the situation.

This article shows that open conflict between Kosovo and Serbia, Bosnia and Herzegovina, and other multi-ethnic states in the Western Balkans have been targets of Russia's destabilising intentions. Russia aims to reinstate new conflicts so that the world can ultimately shift its focus from the war in Ukraine since the conflict did not achieve the victory that Moscow had planned.

2 WHY ARE THE WESTERN BALKANS A SOLID GROUND FOR RUSSIAN POLITICAL INFLUENCE?

The vulnerability of the Balkans towards external influences originates in the ties and relations from the past, including inter-ethnic conflicts, cultural and religious proximities, and lack of cooperation between countries in the region in economic, political, or socio-cultural spheres.[22] The struggle with significant problems, such as high-level corruption,

17 Brad Fisher, 'Russia's Invasion of Ukraine and the Doctrine of Malign Ilegal Operations' (2022) 5 (4-2 spec) Access to Justice in Eastern Europe 25, doi: 10.33327/AJEE-18-5.4-a000456.

18 Aditi Sangal and others, 'Russia's war in Ukraine' (*CNN*, 24 June 2022) <https://edition.cnn.com/europe/live-news/russia-ukraine-war-news-06-24-22/index.html> accessed 10 June 2023.

19 'Ndikimi rus në Ballkanin Perëndimor / Raporti: Rusia financon në mënyrë të paligjshme partitë e djathta politike dhe grupet e djathta ekstreme' (*Top Channel*, 15 March 2023) <https://top-channel.tv/2023/03/15/ndikimi-rus-ne-ballkanin-p1eren11dimor-raporti-rusia-financon-ne-menyre-te-paligjshme-partite-e-djathta-politike-dhe-grupet-e-djathta-ekstreme> accessed 10 June 2023.

20 'Enlargement and Article 10' (*NATO*, 12 April 2023) <https://www.nato.int/cps/en/natolive/topics_49212.htm> accessed 10 June 2023.

21 EU-Western Balkans Summit Declaration 10229/03 (Presse 163) (Thessaloniki, 21 June 2003) <https://ec.europa.eu/commission/presscorner/detail/en/PRES_03_163> accessed 10 June 2023.

22 Noela Mahmutaj, 'Russian Government Policy in the Western Balkans' in Anja Mihr, Paolo Sorbello and Brigitte Weiffen (eds), *Securitization and Democracy in Eurasia: Transformation and Development in the OSCE Region* (Springer 2023) ch 8, 125, doi: 10.1007/978-3-031-16659-4_8.

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organised crime, high migration rates, and other phenomena, creates ground for instability and various types of crises.[23] All of these elements open the door to the possibility of increased external influence, including Russian influence with its large potential.

Russian influence in the Balkans has been present during different intervals over history. This is particularly true given its emotional and historical connection with Serbia, further enhanced with military, political, and economic cooperation over the years.[24] Stronski and Himes write that:

> "For Russia, the Balkans have important historical, cultural, and religious ties—common ties that are actively spread, and sometimes exaggerated by, the efforts of Russian public diplomacy and media narratives."[25]

These narratives were spread among other countries in the Western Balkans through Russian media and news agencies, such as Sputnik and RT, but also through other means of propaganda. The ethnic composition of the Western Balkan states that emerged from the former Yugoslavia comprises another convenient element for Russian influence, especially through Serb communities, both in the states themselves and wherever they reside in the Balkans.

The dependency on Russian gas and oil further increases the Western Balkans' economic vulnerability and the possibility for the region to fall under Russia's political influence. Serbia has relied on convenient low prices for Russian gas, and the main Serbian oil producer, "NIS," is owned by Russian company, Gazprom Neft.[26] The dual alignment of Serbia is visible in its deep economic cooperation with Russia. In 2022, Serbia signed a three-year gas supply contract with Russia,[27] however, the strong foundation of this cooperation was set between former Serbian President Tomislav Nikolic and Vladimir Putin in 2013 through "The Strategic Partnership Declaration."[28] Another deal that was planned to be implemented was to build the South Stream gas pipeline, which would have increased Russian influence in the region. This deal would have utilised Serbia as a route to transport Russian gas to other parts of Europe. However, it was abandoned in 2014 due to pressure from the EU.[29]

In recent times, Serbia's alignment alongside Russia has been most visible through Serbia's neutrality towards Russian aggression in Ukraine, its disobedience towards the EU and U.S. requests regarding Russian sanctions, and Serbia's obligations towards the UN Charter. Although Serbia is financially dominated by Russia through financial support of far-right political parties and groups, CSOs, and media,[30] while staying loyal to its political actions, Serbia also receives financial support from the EU and Western countries. Between 2000

23 Labinot Hajdari and Judita Krasniqi, 'The Economic Dimension of Migration: Kosovo from 2015 to 2020' (2021) 8 (1) Humanities and Social Sciences Communications 273, doi: 10.1057/s41599-021-00923-6.

24 Ernest A Reid, 'Third Rome or Potemkin village: Analyzing the Extent of Russia's Power in Serbia, 2012–2019' (2021) 49 (4) Nationalities Papers 728, doi: 10.1017/nps.2020.62.

25 Stronski and Himes (n 10).

26 Milica Stojanovic, 'Serbia Mulls "Taking Over" Mainly Russian-owned Oil Company' (*BalkanInsight*, 14 July 2022) <https://balkaninsight.com/2022/07/14/serbia-mulls-taking-over-mainly-russian-owned-oil-company> accessed 10 June 2023.

27 "Serbia's Vucic Says he Agreed a Three-Year Gas Supply Contract with Putin' (*Reuters*, 29 May 2022) <https://www.reuters.com/world/europe/serbias-vucic-says-agreed-3-year-gas-supply-contract-with-putin-2022-05-29> accessed 10 June 2023.

28 Declaration on Strategic Partnership between the Russian Federation and the Republic of Serbia (24 May 2013) <http://kremlin.ru/supplement/1461> accessed 10 June 2023.

29 Andrew Rettman, 'EU Puts Pressure on Serbia to Stop South Stream Gas Pipeline' (*EUObserver*, 7 October 2014) <https://euobserver.com/green-economy/125924> accessed 10 June 2023.

30 Ndikimi rus në Ballkanin Perëndimor (n 19).

and 2022, the EU supported Serbia's field of transport with over 420 million EUR in grants.[31] Additionally, the EU is the largest donor in the energy sector, with over 830 million EUR given in financial support.[32] According to data from the Delegation of the European Union, the EU invested about 2.8 billion EUR in grants, and another 6.5 billion EUR in soft finance, during the period between 2007 and 2020.[33]

In 2023, while Serbia continues to support Russia's policies and actions, the EU is financing the railway, Corridor X section, through EIB Global with a value of 1.1 billion EUR. According to the European Investment Bank (EID), the EU investment grants are the largest for a single project in Serbia thus far, with a 1.1 billion EUR EIB loan and another loan of 550 million EUR from the European Bank for Reconstruction and Development (EBRD).[34] According to the National Bank of Serbia, foreign direct investments were made as follows: the EU accounted for 19.2 billion EUR, 3.2 billion EUR from China, and only 2.4 billion EUR from Russia.[35] Nevertheless, support from the EU has not influenced Serbia's foreign policy orientation. Serbia did not enforce sanctions against Russia for its aggression in Ukraine; this political support mirrored social support for Russia as exhibited by the broader population in the form of pro-Russia/anti-NATO marches.[36] In a time when the West seeks to isolate Russia over the escalating war in Ukraine, foreign ministers of both Russia and Serbia signed an agreement on September 22, 2022, for the coordination of foreign policies of both countries.[37]

Nevertheless, Serbia as a state is not the only option for Russian influence in the Balkans. Loyal leaders oriented toward Russia, such as Bosnian Serb leader, Milorad Dodik, continue to be offered political, military, and financial support for efforts regarding the territorial division of Bosnia & Herzegovina.[38] The leadership of Republika Srpska, an entity within Bosnia and Herzegovina with a predominantly Serbian population, has expressed support for Russia's position on Ukraine and has opposed Western sanctions against Russia.[39]

Unfortunately, Russia takes destabilising actions against Balkan countries that have aligned towards Western policies, particularly to undermine the West's state-building efforts in the region. The Kremlin has been accused of using various means to undermine

31 'Railways Development Required Increased Awareness of Traffic Participants' (*EU in Serbia*, 30 January 2023) <https://europa.rs/railways-development-required-increased-awareness-of-traffic-participants/?lang=en> accessed 10 June 2023.

32 'EU boosts Green Agenda in Serbia' (*EU in Serbia*, 17 December 2022) <https://europa.rs/eu-boosts-green-agenda-in-serbia/?lang=en> accessed 10 June 2023.

33 Mateja Agatonović, 'How much money Serbia receives from the EU and how much it risks to lose?' (*European Western Balkans*, 14 December 2022). <https://europeanwesternbalkans.com/2022/12/14/how-much-money-serbia-receives-from-the-eu-an-how-much-it-risks-to-lose> accessed 10 June 2023.

34 'Serbia: Team Europe – EU, EIB and EBRD announce financial package to improve the Belgrade-Niš railway' (*European Investment Bank*, 28 February 2023) <https://www.eib.org/en/press/all/2023-080-team-europe-eu-eib-and-ebrd-announce-financial-package-to-improve-the-belgrade-nis-railway> accessed 10 June 2023.

35 Snezana Rakic, 'China the Biggest Foreign Investor in Serbia this Year' (*Serbian Monitor*, 24 October 2022) <https://www.serbianmonitor.com/en/china-the-biggest-foreign-investor-in-serbia-this-year> accessed 10 June 2023.

36 'Pro-Russia Serbs protest in Belgrade to support Russia and against NATO' (*Reuters*, 16 April 2022) <https://www.reuters.com/world/europe/pro-russia-serbs-protest-belgrade-support-russia-against-nato-2022-04-16> accessed 10 June 2023.

37 'EU Candidate Serbia and Russia Sign Foreign Policy Agreement' (*Associated Press*, 24 September 2022) <https://apnews.com/article/russia-ukraine-united-nations-general-assembly-foreign-policy-moscow-serbia-c63b0ca1271dd5b2ee3008bdcbb7de23> accessed 10 June 2023.

38 Hamza Karcic, 'Putin's Most Loyal Balkan Client' (*Foreign Policy*, 7 October 2022) <https://foreignpolicy.com/2022/10/07/bosnia-elections-milorad-dodik-putin-russia> accessed 10 June 2023.

39 'Bosnian Serb Entity Parliament Rejects Sanctions Against Russia' (*N1*, 6 June 2022) <https://n1info.ba/english/news/bosnian-serb-entity-parliament-rejects-sanctions-against-russia> accessed 10 June 2023.

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Montenegro's sovereignty and territorial integrity, including through disinformation campaigns, propaganda, and support for opposition groups. In 2016, a Russian-led network of military intelligence organised a coup attempt in Montenegro, obstructed elections, and facilitated an assassination plot against former Prime Minister, Milo Djukanovic, as a result of Montenegro's decision to start the process of integration into NATO.[40] Moscow has also sought to maintain its influence in Montenegro through economic ties. Russia is a major investor in Montenegro's tourism industry and invests in many infrastructure projects, including a highway and power plant.[41]

Additionally, Russia has been accused of using its influence to undermine Kosovo's sovereignty and territorial integrity.[42] Russia has been a strong supporter of Serbia's position in Kosovo and has opposed Kosovo since it declared independence from Serbia in 2008. In 2021, Kosovo's government expelled two Russian diplomats due to Moscow's destabilising activities in Kosovo.[43] Moscow has supported Belgrade's efforts to block Kosovo's membership in international organisations, such as the United Nations and Interpol,[44] which remains a concern for Kosovo and the international community, particularly as Kosovo seeks to strengthen its position on the global stage and gain recognition as an independent state.

In North Macedonia, interethnic tensions were fueled with false narratives and confirmed attempts to obstruct the Prespa Agreement between Greece and the Former Yugoslav Republic of Macedonia to resolve the long-standing name dispute between the two countries, while continually hindering North Macedonia's path towards EU and NATO integration. In Albania, Russian Foreign Minister Lavrov has propagated false narratives, implying that Albania has territorial appetites toward its neighbors, intending to exacerbate interethnic tensions.[45] Finally, Russia has thoroughly blocked any substantive progress in resolving Kosovo and Serbia disputes, supporting Serbia's position and blocking the recognition of the independence of Kosovo.[46]

Russia's opposition towards Western influence in former Yugoslav states is a long-standing position, particularly against NATO and EU integration, seen over the last two decades. Integration of Western Balkan countries into NATO[47] and EU[48] is seen as an attempt by the EU and U.S to limit Russia's influence. The war in Ukraine was a clear signal for the EU and U.S. that their focus on the Western Balkans is far from finished, and their attempts to integrate the region need to be accelerated, as it may be the only opportunity to limit Russian influence in the region. This alarm was raised in an interview with the State Department Office of the Spokesperson for the Voice of America:

40 'Russian Nationalists' Behind Montenegro PM Assassination Plot' (*BBC News*, 6 November 2016) <https://www.bbc.com/news/world-europe-37890683> accessed 10 June 2023.

41 Maxim Samorukov, 'Surviving the War: Russia-Western Balkan Ties After the Invasion of Ukraine' (*Carnegie Endowment for International Peace*, 25 April 2023) <https://carnegieendowment.org/politika/89600> accessed 10 June 2023.

42 'Joint statement of the heads of institutions of the Republic of Kosovo following the military aggression and invasion of Ukraine by the Russian Federation' (*President of the Republic of Kosovo*, 24 february 2022) <https://president-ksgov.net/en/joint-statement-of-the-heads-of-institutions-of-the-republic-of-kosovo-following-the-military-aggression-and-invasion-of-ukraine-by-the-russian-federation> accessed 10 June 2023.

43 'Kosovo Expels two Russian Diplomats' (*Radio Free Europe/Radio Liberty*, 22 October 2021) <https://www.rferl.org/a/kosovo-expels-russian-diplomats/31524923.html> accessed 10 June 2023.

44 'Kosovo Fails For Third Time To Win Interpol Membership' (*Radio Free Europe/Radio Liberty*, 20 November 2018) <https://www.rferl.org/a/kosovo-fails-for-third-time-to-win-interpol-membership/ 29610709.html> accessed 10 June 2023.

45 'Russia warns Albania, Kosovo against creating "Greater Albania"' *Tirana Times* (Tirana, 12 October 2020) <https://www.tiranatimes.com/?p=147396> accessed 10 June 2023.

46 Samokhvalov (n 11).

47 Enlargement and Article 10 (n 20).

48 EU-Western Balkans Summit Declaration 10229/03 (n 21).

> "Russia's war has clarified how urgent our work is to assist all the countries of the Western Balkans to fully advance democratic reforms and achieve their aspirations of integration into European and Euro-Atlantic institutions."[49]

Adoption of the European Union path, and reforms from the Western Balkan states, are crucial for eligibility, and according to the European Commission's enlargement strategic document, they consider the European Integration of the Western Balkans a geostrategic investment,[50] aiming at the integration of Serbia and Montenegro by 2025 as the preferred scenario.[51]

While Albania, North Macedonia, and Montenegro have already become NATO members, Serbia, Kosovo (through the Serbian community, particularly in the north), and Bosnia & Herzegovina are still vulnerable to Russian influence, particularly since the start of Russian aggression in Ukraine. According to Larsen, although NATO could expand its enlargement after North Macedonia's membership occurred, "Russia has effectively encouraged Serbia and Bosnia & Herzegovina not to pursue similar ambitions."[52]

Accordingly, the EU and U.S. have since intensified their pressure on Kosovo and Serbia to abandon tensions and concentrate on dialogue, which developed rapidly in the past months through frequent visits from EU and U.S. special delegates. As a result, on the 27th of February, 2023, Kosovo and Serbia reached an agreement to implement a European Union-led agreement to normalise relations, known as "the agreement on the path to normalization between Kosovo and Serbia,"[53] regarded as the fundamental action to restrain Russia's functional impact and control in the Balkans.

Despite efforts by the EU and the U.S. to come to an agreement, tensions remain. Serbs living in northern municipalities have quite different experiences in Kosovo than those in other areas. Those residing in the north are more resistant to Kosovo authority and maintaining ties to Serbia, while those in the south have integrated into the state in a broader extent. This was seen in a recent rule change regarding license plates. The approximately 50,000 Serbs in Northern Kosovo have largely kept Serbian plates, while the nearly 50,000 Serbs in the rest of Kosovo generally use Kosovo plates.[54] Protests in the streets and the resignation of 576 Serb officers, ten prosecutors, a government minister, and ten members of parliament followed the dismissal of a Serb police officer in North Mitrovica after he refused to change to a Kosovo plate.[55] This also led to the collective resignation of Kosovo Serb mayors in the north. Talks between Serbia and Kosovo have been set back by concerns over the resulting

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49 Dino Jahic, 'Russia's War on Ukraine Endangers Stability in Western Balkans, US Officials Say' (*Voice of America*, 27 February 2023) <https://www.voanews.com/a/russia-s-war-on-ukraine-endangers-stability-in-the-western-balkans/6981840.html> accessed 10 June 2023.

50 A Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans COM(2018) 65 final (Strasbourg, 6 February 2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0065> accessed 10 June 2023.

51 Florian Bieber and Nikolaos Tzifakis, *The Western Balkans as a Geopolitical Chessboard? Myths, Realities and Policy Options* (Policy Brief, BiEPAG June 2019) <https://ssrn.com/abstract=3406295> accessed 10 June 2023.

52 Henrik Larsen, 'The Western Balkans between the EU, NATO, Russia and China' (2020) 263 CSS Analyses in Security Policy 1, doi: 10.3929/ethz-b-000412853.

53 'Belgrade-Pristina Dialogue: EU Proposal – Agreement on the path to normalisation between Kosovo and Serbia' (*European Union External Action*, 27 February 2023) <https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-eu-proposal-agreement-path-normalisation-between-kosovo-and-serbia_en> accessed 10 June 2023.

54 'Serb Policemen Quit Jobs in Anti-Kosovo Protest' (*Reuters*, 6 November 2022) <https://www.reuters.com/world/europe/serb-policemen-quit-jobs-anti-kosovo-protest-2022-11-06> accessed 10 June 2023.

55 Samuel Petrequin, 'EU Fails to Defuse Tense Situation between Serbia and Kosovo' (*Associated Press*, 21 November 2022) <https://apnews.com/article/europe-serbia-kosovo-brussels-european-union-4830a2e1bdbaf5b32b0254b2de619fb9> accessed 10 June 2023.

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mayoral elections in the north, which were disputed and boycotted by ethnic Serbs. Prishtina directed the new ethnic Albanian-elected mayors to take their posts, which were met with protest. When Serbs attempted to block the mayors from entering municipal buildings, Kosovo Police fired tear gas to disperse the crowd.[56] The U.S. Ambassador to Kosovo, Jeff Hovenier,[57] and the U.S. Secretary of State, Antony Blinken, condemned the actions taken by the Kosovo government on Twitter, accusing them of escalating tensions, calling on Prime Minister Kurti to "immediately halt these violent measures and refocus on the EU-facilitated dialogue."[58]

Ambassador Hovenier also condemned the violent protestors when ethnic Serbs attacked the NATO Mission in Kosovo Force (KFOR),[59] leading to dozens of international peacekeepers from KFOR becoming injured. According to the Kosovo Prime Minister, these protests were fueled by Serbia and Russia altogether, "who paid 'ultra-nationalist' and 'right-wing' protesters who admire the despotic President Putin," since Kosovo is a NATO intervention success story, continuing to bother Serbia and Russia.[60] In response to the violence and injury of international soldiers, NATO Secretary-General, Jens Stoltenberg, condemned the violence and warned that "NATO troops would take all necessary actions to maintain a safe and secure environment for all citisens in Kosovo."[61] As a result, NATO will send 700 more troops to northern Kosovo to help quell violent protests after clashes.[62]

3 RUSSIAN INFLUENCE IN SERBIA AND ITS REFLECTED SCENARIOS IN KOSOVO

For many decades, Serbian politics have straddled the fence between Brussels and Moscow. On the one hand, strengthening the partnership with the EU through the accession process, while on the other hand, maintaining the strong relationship with the Kremlin. However, this was only possible until the Russian invasion of Ukraine, which forced democratic countries to choose a side; this situation once again revealed the deep connection between Belgrade and Moscow. Serbia's refusal to pose sanctions against Russia, and its lack of condemnation of Russia's aggression in Ukraine, represented yet another show of the strong connections between the two states and the level of Belgrade's loyalty towards Moscow. Serbia continues to justify its neutral political position, further refusing to impose sanctions on the Kremlin.[63] At the societal level, polls show that 51% of Serbia's citizens believe that Russia is their closest

56 'Kryetarët hynë në komunat në veri, Serbia ngre gatishmërinë luftarake' (*Radio Evropa* e Lirë, 26 May 2023) <https://www.evropaelire.org/a/sirena-ne-veri-/32429113.html> accessed 10 June 2023.

57 Xhorxhina Bami and Sasa Dragojlo, 'US Blames Kosovo for Violence in North as Disputed Mayors Enter Offices' (*BalkanInsight*, 26 May 2023) <https://balkaninsight.com/2023/05/26/us-blames-kosovo-for-violence-in-north-as-disputed-mayors-enter-offices> accessed 10 June 2023.

58 'Secretary Antony Blinken' (*Twitter*, 26 May 2023) <https://twitter.com/SecBlinken/status/1662140360821227520> accessed 10 June 2023.

59 Jessie Gretener and others, 'Dozens of NATO peacekeepers injured during clashes in northern Kosovo' (*CNN*, 30 May 2023) <https://edition.cnn.com/2023/05/29/europe/northern-kosovo-nato-serbian-clashes-intl/index.html> accessed 10 June 2023.

60 Isa Soares and Christian Edwards, 'Kosovo prime minister says he will not surrender country to Serbian "fascist militia" after clashes in north' (*CNN*, 31 May 2023) <https://edition.cnn.com/2023/05/31/europe/albin-kurti-kosovo-serbia-interview-intl/index.html?fbclid=IwAR0-WxWoya_sKteJqwP0pKdzsxM01kxsdRoJNLAksp4YRFLEf3VeiIkm-1M > accessed 10 June 2023.

61 Zenel Zhinipotoku and Llazar Semini, 'NATO to send 700 more troops to Kosovo to help quell violent protests' (*Associated Press*, 30 May 2023) <https://apnews.com/article/kosovo-ethnic-serbs-kfor-clashes-western-powers-0cb33f5396d3f16eb4a6325c61802f04> accessed 10 June 2023.

62 ibid.

63 Serbian President Rejects Calls for Sanctions Against Russia' (*Associated Press*, 4 January 2023) <https://apnews.com/article/russia-ukraine-politics-europe-serbia-european-union-6deaa57230993b02e7a67f57693bf7f2> accessed 10 June 2023.

ally. Results of the 2022 WBSB survey in Serbia show that the EU is considered to be the third ally (18%) after China with 19%.[64] Another survey conducted by the Institute for European Affairs and "NinaMedia" in March 2022 showed that 76% of the respondents considered Russia as a friend of Serbia, while only 13% supported the EU's decision to impose sanctions against Russia.[65]

The invasion of Ukraine has also increased concern among EU policymakers that Moscow will use these ties with Serbia to extend their influence in the Western Balkans, which can produce instability in the region, particularly in the northern part of Kosovo as the weakest point of relations between Serbia and Kosovo.[66] Seeing the rise of tension between the two states, Kosovo leadership has accused the Serbian government that it is serving as a tool for Russia's influence in the region. Kosovo's Prime Minister, Albin Kurti, declared that "it is in the interest of the Russian Federation to have new battlegrounds because they do not want to go back to peace,"[67] while Kosovo's president raised the concern that Moscow is using Belgrade to endanger democratic values and "by destabilising the Western Balkans, will seek to destabilise the whole of Europe."[68]

In the roundtable organised by the Kosovar Centre for Security Studies (KCSS) in April 2023, the President of Kosovo, Vjosa Osmani, said that:

> "Serbia, as a Russian satellite in the Western Balkans, continues to be a serious and main threat towards national security in Kosovo. The Republic of Serbia uses all its hybrid methods against the Republic of Kosovo in a synchronised manner. In the international relations field, it operates against statehood and the integration of the Republic of Kosovo's international institutions. Meanwhile, inside the territory of Kosovo, it exploits the criminal structures in the north of Kosovo, also becoming the main obstacle for the integration of the Kosovo Serbs in north Kosovo through pressure, fear, blackmailing, and violence."[69]

According to First Deputy Minister of Defense of Kosovo, Shemsi Syla:

> "Russia influences all the parallel structures that are under Belgrade's orders, which by default are under Russia's influence as well."[70]

According to President Osmani, NATO is the key factor to preserve regional peace and stability.[71] As Michael Handel argues, small states must depend on their allies and the

64 Vuk Vuksanovic, Luka Steric and Maja Bjelos, Public Perception of Serbian Foreign Policy in the Midst of the War in Ukraine: *WBSB Survey in Serbia, Country Report 2022* (QKSS 2022) 3.

65 Michael Minev Dimitrov, 'Analysis of Strategic stakeholders in the Western Balkans' (2022) 40 (4) Security and Defence Quarterly 29, doi: 10.35467/sdq/154884.

66 Engjellushe Morina, 'The politics of dialogue: How the EU can change the conversation in Kosovo and Serbia' (*European Council on Foreing Relations*, 15 March 2023) <https://ecfr.eu/publication/the-politics-of-dialogue-how-the-eu-can-change-the-conversation-in-kosovo-and-serbia> accessed 10 June 2023.

67 Patrick Wintour and Julian Borger, 'Russia may pressure Serbia to undermine western Balkans, leaders warn' (*The Guardian*, 11 March 2022) <https://www.theguardian.com/world/2022/mar/11/russia-may-pressure-serbia-to-undermine-western-balkans-leaders-warn> accessed 10 June 2023.

68 ibid.

69 'Osmani: Serbia vazhdon të mbetet kërcënimi më serioz i sigurisë së Kosovës' (*Kosovapress*, 18 April 2023) <https://kosovapress.com/osmani-serbia-vazhdon-te-mbetet-kercenimi-me-serioz-i-sigurise-se-kosoves> accessed 10 June 2023.

70 Interview with Mr. Shemsi Syla, First Deputy Minister, Ministry of Defense of the Republic of Kosovo, 18.04.2023, (conducted by authors for the purpose of this article).

71 Mersiha Gadzo, 'Kosovo, Bosnia call for NATO membership as war rages in Ukraine' (*Al Jazeera*, 5 April 2022) <https://www.aljazeera.com/news/2022/4/5/nato-membership-indispensable-for-kosovo-bosnia-leaders> accessed 10 June 2023.

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support that comes from international interactions with other states.[72] This brings us to the concluding point, that the best way for small states to preserve their security is by creating alliances with larger and powerful states and by becoming part of international organisations and multilateral forums as they cannot protect themselves through dependence on only their military power. According to the Deputy Minister of Defense of Kosovo, even in the cases of possible threats that can arise due to global risks in the security field created after Russia's aggression in Ukraine,

> "Kosovo is in full coordination with its strategic Western allies and KFOR. Together with them, Kosovo is prepared for these risks."[73]

Moreover, the Russian invasion of Ukraine is a warning that the capacity and military power of a state continues to play a crucial role in the security of states. Thus, small states, or states with weak military power, will always either be or feel threatened by bigger and more powerful states, regardless of international law and other international mechanisms. Although Kosovo has increased budgetary investments in military purchases, according to Kosovo's Deputy Minister of Defense, "for 95% increase of investments,"[74] Kosovo (as a small state) is not strong enough to face threats without the support of its allies. For this reason, membership in international organisations and the formation of alliances with other states is a strategic advantage, providing a guarantee for the safety of a weak state. One of the examples of strategic decisions on foreign policy and behaviour in the international arena is the situation in which global sanctions were imposed against Russia as a response to its military invasion of Ukraine.

According to Orhan Dragas, Director of the International Security Institute in Serbia,

> "Since it invaded Ukraine, Russian pressures on Serbia have been exposed, and they aim to open a new crisis to which the West would be much more committed and thus reduce its involvement in supporting Ukraine. For Russia, it would be ideal if this new Balkan crisis would be armed and bloody, and Kosovo is the ideal place for such a thing."[75]

Preserving peace and stability in the Balkans is far more important and difficult since Russian aggression in Ukraine has taken the form of Russian hybrid methods of war. Aggression in Ukraine pressures Serbia to increase the tensions in the north of Kosovo. Propaganda is one of the tools that "Russia, in cooperation with Serbia and Serbs of the north, are interested to maintain the tensions between the two countries,"[76] according to Xhemajl Rexha, President of the Board of Association of Journalists of Kosovo, who stated that Kosovo has countered this propaganda attempt through the contribution of Ukrainian journalists in Kosovo in the form of the "Journalists in Residence – Kosovo Program," offering credible and verifiable information to the Kosovar opinion regarding the unprovoked Russian invasion.

> "Ukrainian journalists in Kosovo have continually given their contribution to report the truth of Ukraine and Kosovo. Continuing their work in the media in Kyiv and cooperation with media in Kosovo, the refuged journalists through the program "Journalists in

72 Michael Handel, *Weak States in the International System* (Frank Cass 1981).

73 Interview with Mr. Shemsi Syla, First Deputy Minister, Ministry of Defense of the Republic of Kosovo, 18.04.2023.

74 ibid.

75 Orhan Dragaš, 'Russia needs a militarised Serbia: Interview for Oslobođenje' (*Orhan Dragaš*, 27 January 2023) <https://orhandragas.com/en/2023/01/27/interview-by-dr-orhan-dragas-for-oslobodenje> accessed 10 June 2023.

76 Interview with Xhemajl Rexha – President of the Board of Association of Journalists of Kosovo, 04.04.2023.

> Residence – Kosovo" have offered credible and verifiable information to the Kosovar opinion regarding the unprovoked Russian invasion, resisting the Russian propaganda."[77]

In addition to media, civil society organisations are another vulnerable aspect to Russian influence according to Mentor Vrajolli, Executive Director of the Kosovo Center for Security Studies, who believes that the possibility of Serbia inciting an armed conflict in Kosovo is limited because of international military presence and Serbia's inability to challenge NATO and KFOR's mandate in Kosovo.[78] According to Vrajolli, CSOs, particularly in the north of Kosovo, who struggle for financial stability are quite vulnerable to Russian influence. The NGOs who work to attract funds and have no criteria regarding funding are vulnerable and can install destabilising exponents operated, financed, and directed by Belgrade.[79]

According to Daniel Server,

> "Russian military aggression in Ukraine has a counterpart in the Balkans where the aggression is via hybrid warfare directed from Serbia, mainly against Kosovo, Bosnia and Herzegovina, Montenegro, and Macedonia."[80]

He further emphasises that:

> "If Russia succeeds in gaining territory in Ukraine, we should expect a far more aggressive effort in the Balkans. If Russia fails in Ukraine, it will fail as well in the Balkans."[81]

In the case of the Western Balkans, Euro-Atlantic integration is the only way to guarantee peace and prosperity. Similarly, if any of the Balkan states remain outside the EU and NATO, it would cause instability and threaten the prosperity interests of the EU and the long-term security of NATO. Kosovo leadership has raised the flag to the international community regarding Serbia's coordinated actions with Russia to shift NATO and the international community's focus from the war in Ukraine through criminal groups in northern Kosovo, which intend to destabilise the country. In February 2023, Kosovo's President, in an interview for the Telegraph, claimed that "mercenaries from Russia's notorious Wagner Group are working with Serbian paramilitaries to smuggle weapons and unmarked military uniforms into Kosovo."[82] As the fears about the Wagner Group's presence in the region remain, in March 2023, Kosovo designated the group as a significant transnational criminal organization.[83] Moreover, Serbia has also used its state-direct channels to threaten Kosovo's peace. The direct threats from Serbia towards Kosovo reached a peak as the Serbian army was put on a heightened state of alert over tensions with Kosovo multiple times in recent years.[84] The similarity of threatening rhetoric between Serbia and Russia is reflected particularly in the declarations of Serbian Member of the Parliament (MP), Vladimir Dukanovic, that

77 ibid.

78 Interview with Mentor Vrajolli – Executive Director of Kosovo Center for Security Studies (KCSS) 24.03.2023;

79 ibid.

80 Daniel Serwer, 'The Easy Way Out Leads to Failure' (*Peacefare.net*, 9 March 2023) <https://www.peacefare.net/2023/03/09/the-easy-way-out-leads-to-failure> accessed 10 June 2023.

81 Ibid.

82 Nick Squires, 'Wagner mercenaries helping Serbia prepare potential attack on our nation, Kosovan president warns' (*The Telegraph*, 11 February 2023) <https://www.telegraph.co.uk/world-news/2023/02/11/wagner-mercenaries-helping-serbia-prepare-potential-attack-nation> accessed 10 June 2023.

83 'Kosova zbaton sanksionet e SHBA-së ndaj Wagner-it' (*Radio Evropa e Lirë*, 22 March 2023) <https://www.evropaelire.org/a/kosova-sanksione-grupi-wagner-/32329308.html> accessed 10 June 2023.

84 'Serbia puts troops on high alert as tensions with Kosovo rise' (*The Guardian*, 27 December 2022) <https://www.theguardian.com/world/2022/dec/27/serbia-puts-troops-on-high-alert-as-tensions-with-kosovo-rise> accessed 10 June 2023.

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"Belgrade may be forced to start the denazification of the Balkans," a phrase used by Russia to justify the Ukranian invasion.[85]

4 CONCLUSIONS

The Western Balkans remains an area of interest for international actors as they seek influence over one another. As mentioned previously in this article, the Western Balkan states are also at the center of Russia's foreign policy as it seeks to return to multipolarity in world affairs, opposing the Western unipolar influence as a tool of its diplomacy in the absence of other plausible instruments to overcome the downfall of its status and position in the international system since the Cold War. Russia has continued to use the region to push against Western influence, simultaneously using NATO's actions in the region to justify its military campaigns and to criticise Western intervention. Additionally, Russia's policy towards the Balkans, and in particular Serbia, reflects both Serbia's willingness to negotiate with Russia as well as Russia's interests in destabilising relationships with the West.

The Western Balkans are particularly vulnerable to external influence due to past ethnic conflicts, organised crime, corruption, and the need for economic cooperation. The violent history in former Yugoslavia has limited trust and cooperation, making these states a suitable environment for information disorder and propaganda, which have been used by Russia constantly in past decades. In particular, the unresolved conflict between Kosovo and Serbia has been a convenient ground for Russia due to its close ties and cooperation with Serbia.

Kosovo has become a desirable distraction from difficulties resulting from the war in Ukraine. Tensions that could be sparked in the region may further Russia's desire to deflect international attention from a war that is not as successful as it anticipated. Meanwhile, the war in Ukraine revealed once again to the U.S., NATO, and the EU the Western Balkans' level of fragility and how urgent the integration of these states is to protect them from Russian influence and the possible scenarios trying to destabilise the region. This importance is recognised also by the European Commission's enlargement strategic document, which considers the integration of the Western Balkans from a geostrategic perspective. Meanwhile, through institutional and social support in Serbia, Russia has continued to maintain its interests in the region through financial support of pro-Russian political parties and civil society organisations in Serbia and other Balkan states, allowing Russia to increase its influence. While Kosovo has countered Russian propaganda concerning the war in Ukraine through the contribution of Ukrainian journalists, our findings show that Kosovo Civil Society organisations in the northern part of Kosovo are quite vulnerable to Russian influence due to their financial instability.

The war in Ukraine has had a mirroring effect in the Western Balkans. Russia, as the sole aggressor in Ukraine, has sought to destabilise the Balkans by activating passive conflicts, especially in Kosovo, aiming to shift the global attention from its possible power decline in Ukraine. Although, as previously mentioned in this article, Kosovo and the Western Balkans are considered a distraction from Russia's weakening and downfall position in Ukraine, Daniel Server considers that the increase of Russia's progress in Ukraine will increase its destabilising actions in the Western Balkans. Nevertheless, the recent tensions in Kosovo have testified once again to the necessity of a strong and coordinated policy from NATO and the West towards the Western Balkans. EU and NATO memberships are the best solutions

85 'Serbian ruling party MP: Serbia might have to begin denazification of Balkans' (*N1*, 31 July 2022) <https://n1info.ba/english/news/serbian-ruling-party-mp-serbia-might-have-to-begin-denazification-of-balkans> accessed 10 June 2023.

to decrease and prevent Russian influence and provide direct interference in the Balkans, to further prevent any future conflict among Balkan states.

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Research Article

THE ROLE OF LEGAL CERTAINTY PRINCIPLE IN PROVISION OF ACCESS TO JUSTICE IN UKRAINE IN WARTIME

Hanna Ostapenko[1]

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Summary: 1. Introduction. – 2. Access to justice and access to court: challenges caused by war. – 3. Approaches to the principle of legal certainty. – 4. Views of Ukrainian scholars on the principle of legal certainty. – 5. Coordination of legal certainty and access to justice. – *5.1 Access to justice as an element of the rule of law along with legal certainty. – 5.2 Access to justice as a way of ensuring legal certainty. – 5.3 Access to justice and the influence of legal certainty requirements.* – 6. Conclusion.

Keywords: legal certainty, rule of law, access to justice, access to court, legitimate expectations.

ABSTRACT

Background: *The paper offers the analysis of implementation of legal certainty principle and access to justice in Ukraine. Both are regarded in connection to the rule of law principle;*

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their coordination is shown in cases when the application of rule of law is required to patch the holes of imperfect judicial system facing the challenges of the ongoing war.

Methods: *The methods of legal reasoning and analysis are used to present the main approaches to legal certainty principle as well as to the access to justice. Additionally, with the help of comparative method their meaning and influence on the legal practice are established. The method of analogy is used to predict the possible solutions in order to improve access to justice in Ukraine.*

Results and Conclusions: *Legal certainty is an element of the rule of law, it provides predictability in legal regulation, the clarity of legal norms, and demands the propriate way of legal acts enforcement as well as prohibits retroactivity. It challenges respect to the legitimate expectations and provides stability in legal regulation. The improvement in the application of the right to access to justice is beneficial for the legal certainty and vice versa. When legal certainty is violated due to the gap in legislation, unclarity of legal norms or controversy of legislative provisions and violated rights of the claimant could be restored, if the right of access to court is fully guaranteed. It is stated that res judicata, a requirement for legal certainty is a demand that is also common to access to justice.*

1 INTRODUCTION

Nowadays, legal principles and concepts have got not only particularly legal but also some social and philosophical sense. Being established mostly after wars or as a result of fighting for the rights of the social group, evaluated within years of application, these concepts turned into values the democratic society acknowledges. Access to justice has been contingent historically upon gender, race, disability, class and sexual identity[2] and still has an impact of inequity caused by delays in court procedures, significant costs and ineffectiveness[3]. This affects as well the rule of law, especially during the war, when inequity of social groups is evident due to their location, income, physical disability and implementation of the legal principles that requires additional efforts from the government.

The principle of legal certainty is under the pressure too. The common reasons for this are the necessity to set out legal acts in short terms as well as a problem of making it available to all the citizens, who sometimes do not have even access to media and public information, makes requirement of legal certainty sometimes frustrating. It is evident, that stability and reliability produced by legal regulation are harmed, so in these circumstances the attention should be paid to proper precision and clarity of legal provisions, stability of legal regulation to raise the confidence in the law within the society and to support the economic and entrepreneurial planning with respect to legitimate expectations.

Being proclaimed and recognized, the legal principles need to be practically applied which requires from each country their own legal framework, administration in the practical sphere, especially by the authorities. One of the rights that are in danger during the period of war in Ukraine now is the right to access to court, that forms the part of the broader concept of access to justice. Due to the occupation of some territories and inability to administer justice there, the Supreme Court changed the jurisdiction of almost 100 courts[4]. Although the application can be made to the court electronically, the delays in

2 C Backhouse 'What Is Access to Justice?' (2005) J Bass, WA Bogart and F H Zemans, eds. Access to Justice for a New Century: The Way Forward Toronto: Law Society of Upper Canada (2005) 113-146, 126

3 MS Galanter, K Jayanth, 'Bread for the Poor: Access to Justice and the Rights of the Needy in India' (2004) 55 Hastings Law Journal 789

4 AY Gerich 'Access to administrative justice in the times of war' (2022) 5 Electronical scientific edition 'Analitical comparative jurisprudence' 227-232, 229

trials are strengthened by the raise of the cases on the adjacent territories. Parties of the trial, in case of being called for military service, can not participate, as the result the delays can be significant.

Legal certainty requires in these circumstances norms to be clearly set out on how to observe the rights equally to those, to those having diverse needs. Amendments introduced to separate acts enacted for the period of war, that are applied together with a legal act on one hand, made judicial system function despite the threats, but on the other hand, it caused some controversies, unclarity and could be harmful for legitimate expectations. Evidently, these acts were set out during a short period of time and the practice of their application in regard to the basic rights and principles will be a question to examine further. The Act of the Council of The Judges of Ukraine set out the regulations on judgment during the war several times, that are applied by the courts together with the procedural codes and other legislation[5].

Obviously, the wartime creates more threats to the legal order than peaceful times do, so the challenges for the judicial system are multiplied and vary from the danger to the judge`s life and safety to the problems with informing parties about the hearing and relying on the evidence that are hard to get direct access to.

Despite a significant difference of elements which forms the right to access to justice and access to court, the requirements of international and European law oblige the states to guarantee the access to justice in any circumstances. And the rule of law and legal certainty requires remain unchangeable, even though during the war their fulfilment needs more efforts.

The adoption of democratic principles and their connection with the Ukrainian legal reality is an extremely difficult task. The concept of the access to justice was formed in the 1970s; the legal certainty principle was recognized earlier, while Ukraine was still under the rule of Soviet regulatory regime with a normativistic approach to understanding the legal phenomena. That prevented Ukrainian society to fully understand the democratic concepts straight away, as their significant meaning was hidden in a rather "condensed" formulation. Therefore, the reception of these complex and broad principles is not a complete process in Ukraine, because their understanding requires not only an analysis of the normative legal act, in which the name of the principle is noted, but also an understanding of the value that constitutes the essence of legal regulation, as well as contributes to the establishment of justice. It is important in this process to understand the origin of the principle, its functional role and place among the other principles of law.

As noted by M. V. Tertishnik,

> "with the implementation of the civilizational choice the idea of the rule of law, the system of ideological ideas related to the principles of law is at the stage of development, incorporating the legal positions defined in international legal acts and decisions of the European Court of Human Rights, as well as embodying the ideas of natural law and current ideological ideas of legal science."[6]

The attempt to finding the hidden meaning of these concepts through the analysis of the term itself did not justify itself. As a result, the understanding of the content of these concepts

5 The Act of the Council of The Judges of Ukraine №23 05.08.2022 https://zakon.rada.gov.ua/rada/show/v0023414-22#Text; The Act of the Council of The Judges of Ukraine №10 14.03.2022 https://zakon.rada.gov.ua/rada/show/v0010414-22#n3; Recommendations of the Head of the Supreme Court of Ukraine № 6/0/9-22 13.03.2022

6 MV Tertishnik 'Principles of law and strategy and tactics of judicial and legal reform' (2016) 6 Pravo y suspilstvo 20-26, 21

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continues to be discussed in scientific circles for years. Decisive for understanding of these concepts was the practice of the ECHR, which began to be applied in resolving court cases in Ukraine, where such principles were given a deep and comprehensive explanation.

2 ACCESS TO JUSTICE AND ACCESS TO COURT: CHALLEHGES CAUSED BY WAR

Being in the weak position compared to the authority powers that sets out and exercises legal acts, a person has an access to justice to counterbalance and to getting protection against the violation of their his rights. Simply the proclamation of this right is not enough to achieve such a balance, as due to the diversity caused by economy, territorial and educational criteria people have different needs to fulfil this right. The ancestors of the access to justice underlined its "effectiveness" as a main criterion and the right to access to justice "the most basic human right of a system which purports to guarantee legal rights"[7]. Effectiveness shows how successfully the state acts to provide a way to overlap the existing barriers formed by social inequity to bring the dispute to the court. As pointed out, the access to justice that is commonly regarded similarly to access to court has been determined as having broader meaning[8]. Evidently, the democratic standards that are accepted by different countries equally, form the need to guarantee the access to justice despite social and economic difficulties that distinguish them.

According to the number of applications to the ECHR[9] Ukraine was not successful in achieving a good level of this effectiveness, obviously, in the times of war the diversity and challenges to get equal access to justice increased. The huge number of damages that occurred during the past year of war form an intense pressure on the judicial system and on government to find the effective mechanism to cope with it. Legal aid, costs to cover the expertise of the damages and to assist the trial procedure could be a challenge for many of those who lost their property and were injured. Deoccupied territories suffer from the lack of military servants to make records of violation. Even though the access to justice is recognized and the access to court proclaimed, it is still a challenge to get the renewal of rights in court. The terms of the consideration of cases, effectiveness of the court decisions and their execution, primary legal aid and court fees are the most vulnerable components among those the access to justice in a war-time encloses.

The standards in a democratic state governed by the rule of law put forward the same requirements for compliance with the right of access to justice and link it with other legal rights and principles, one of them – the legal certainty principle will be the subject of consideration in the article. When the cases of ECHR are analyzed there usually appear more than one principle violated in addition to the access to justice, so we will concentrate on the practice when access to justice and legal certainty are put together and will find out what are the frequent circumstances when both of them are violated and will propose solutions on how to avoid this in future.

7 M Cappelletti, B Garth, N Trocker 'Access to justice: Comparative General Report The Rabel Journal of Comparative and International Private Law' (1976) 40. Jahrg., H. 3/4, Der Schutz Des Schwacheren in Recht 669-717, 672-673

8 E Hurter 'Access to justice: to dream an impossible dream' (2011) 44 3 The Comparative and International Law Journal of South Africa 408-427, 408

9 A Kovalchuk, Yu Kotsubinska'Access to justice: modern problems an perspectives' (2020)< http://ispp.org.ua/wp-content/uploads/2021/02/kr-stil_theses_2020_12_10.pdf#page=72 >accessed 01 March 2023

3 APPROACHES TO THE PRINCIPLE OF LEGAL CERTAINTY

The theory of legal certainty is controversial. On one hand, we regard law as a certain established rule from the very beginning of its history. Even in ancient times the legal rules were set out in a clear way and were made available to the public in advance to understand and execute. These simple rules were not enough to achieve the goals of rule of law, so a wider concept of legal certainty including respect to legitimate expectations, prohibition of the retroactivity, res judicata were included.

Today the concept of legal certainty includes two blocks of criteria 1) the rules set out by the state should be clear, precise and predictable, foreseeable, uncontroversial, when applied; 2) it is an umbrella for legitimate expectations, vested rights and non-retroactivity[10]. The other approach to dividing the demands of legal certainty into groups is do distinguish its formal and substantive aspect. Formal approach requires clarity, stability of legal norms, predictability of its implementation, so that the result of applying the norm will be foreseeable and the person can predict the outcome of her legal actions with the desired certainty. Substantive legal certainty requires that judicial decisions and legal rules form the predictability and are accepted by the community[11]. The criteria of the substantive approach are mentioned as res judicata, respect to legitimate expectations and stability of legal regulations.

Legal certainty refers to both, law itself and judicial decisions, that are made on case-by-case method applying the law to a particular situation. The idea in the society of how law is executed in practice is formed by its application by authorities and judges, that becomes a litmus test for the person to what the consequences of their actions in the same circumstances would be. This formed the practice when legal certainty was derived from the judgements of Ukrainian and internationally recognized courts. In procedural doctrine the legal certainty principle is regarded from the procedural perspective, that limits its scope.

Legal certainty is frequently shown as a procedural principle, the prominent position of this principle is pointed out for the international civil procedure[12], in regard of uniformity of decisions[13] , newly discovered circumstances[14] Therefore the legal certainty principle is of high importance for the procedural law, we can not deny its global impact and limit the use of this principle just to the procedural aspect. Even though it is applied for the procedural purposes it has a strong connection with the substantive law. " In case of litigation the substantive law can only be realised and concretised by the judgement, which is the result of civil proceedings"[15].

The key idea of legal certainty is predictability based on the legal provisions, that is achieved by the demands to the quality of legal acts on one hand and the consistency of executing legal acts by authorities and their application by the court on the other. The way the legal provision is interpreted in the society together with the judgments and practice forms the

10 J van Meerbeeck 'The Principle of legal certainty in the Case Law of the European Court of Justice: from Certainty to Trust' (2016) 2 European Law Review 274-288, 280

11 E Paunio, 'Beyond Predictability – reflections on Legal Certainty and the Discourse Theory of Law in the Eu Legal Order' (2009) 11 (10) German Law Journal 1469-1493 1471

12 G Biagioni, 'Jurisdiction in Matters of Parental Responsibility Between Legal Certainty and Children`s Fundamental Rights' (2019) 4 (1) 285-295 <https://www.europeanpapers.eu/es/europeanforum/jurisdiction-parental-responsibility-between-legal-certainty-and-childrens-rights>

13 C Gabarini Lages, LA Chamon Junior, 'On legal certainty and uniformity decisions in the new civil procedure code in the light of Brazilian constitutional process model' (2017) 7 Braz. J. PP 286

14 H Urazova, V Yanishen, L Baranova, 'Who is the owner? Newly discovered circumstances and the principle of legal certainty in a single case study' (2022 February) Access to Justice in Eastern Europe 193- 202

15 WJ Habscheid 'The fundamental principles of the law of civil procedure' (1984) 17(1) The Comparative and International Law Journal of South Africa 1-31, 8

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stability for both a single person and an authority. Furthermore, the latter presupposes the application of a rather unique interpretation in terms of qualifying the action as legal or illegal one. If the person is removed from the application process, and their position and understanding of legal provisions is meaningless, the power not only to execute but to interpret the rule will remain the privilege of the authority. The legitimate expectations that are formed as a result of legal practise should be respected. The obligation not to break the constancy in applying legal norms in the similar circumstances forms the measures for the authorities, especially in the cases they obtain a discretion. Benefits of the predictability formed on the basis of legal certainty in a better investment environment and reliability, as a person or entity could act and make business with less risk and expected results. "Legal certainty should operate mainly for the benefit of the individual and not for the powers"[16] which shows its direct link to the rule of law principle.

4 VIEWS OF UKRAINIAN SCHOLARS ON THE PRINCIPLE OF LEGAL CERTAINTY

The legal certainty principle appeared in Ukrainian legal doctrine as a part of researches of rule of law and implementation of democratic standards into Ukrainian legislation. S. Pogrebnyak points out that

> "under the rule of law, legal norms and their sources (regulatory acts, etc.) must comply with the principle of legal certainty. This principle, sometimes is referred to as "legal security", or legal stability (Rechtssicherheit in German) is a broad concept based on predictability."[17]

Although it is hard to reach an absolute certainty, due to a number of circumstances, the clarity can be achieved for a particular situation with the judicial practice[18]. Clarity refers not only to a particular legal provision or article, it is the quality of the regulation itself – absence of controversial positions, gaps in legal regulation, uncertain and doubtful meaning of the words incorporated in law. Frequent changes to the regulation can cause uncertainty in their application for a long-termed contracts. The low level of clarity results in the situation when a person acting bona fide can not clearly understand how to act and what decisions comply with legal provisions. So, access to justice and the possibility of bringing the case to the court could obtain legal certainty in such circumstances.

Although the legal certainty principle is not enshrined in the Constituent treaties, it is recognized as one of the general principles of European law. The same approach is shown by Ukrainian researchers – despite the fact that legal certainty is not directly formulated, it is widely applied by the courts in Ukraine that had inherited the standards of the ECHR.

Ukrainian legal positions on legal certainty can be divided into two groups. The first one demonstrates a general approach, regarding legal certainty as a theoretical principle in connection and coordination with other principles that together have an aim to achieve high democratic standards and provide the rule of law. The second one is presented by branch law studies regarding how legal certainty is applied within a particular legal sphere. The second approach is usually narrow, as the scope of these studies is much more limited and precise, so it covers just some aspects of legal certainty. That can cause a

16 J van Meerbeeck 'The Principle of legal certainty in the Case Law of the European Court of Justice: from Certainty to Trust' (2016) 2 European Law Review 274-288, 276

17 S Pogrebnyak `The principle of legal certainty as a general principle of law' (2010) Lviv Galitsky drukar p 490-491

18 MI Kozyubra 'The rule of law and Ukraine' (2012) 1-2 Pravo Ukrainy 49

confusion for the reader to equalize legal certainty to one of several aspects of it. To avoid this misunderstanding it is recommended to provide a meaning of the principle of legal certainty together with its components and to underline that just some of them are regarded in particular. For example, *res judicata* is a key element of legal certainty that is of special importance for the civil process, but it is mentioned together with other elements – clarity of legal norms, accessibility of court decisions, stability of legal acts, consistency of legal provisions, legitimate expectations, principle of *nullum crimen sine lege* , *nullum poena sine lege and res judicata.*[19]

5 COORDINATION OF LEGAL CERTAINTY AND ACCESS TO JUSTICE

It would be necessary to mention that both of the concepts do not have a fixed meaning, as they embody a status to achieve and a number of elements to use for this purpose. The choice of which element to use depends on the obstacles that prevent from establishing access to justice and legal certainty. Sometimes they can work together to get the necessary result and it will be shown how this coordination takes place and how it can be beneficial in achieving the purposes of both principles.

Access to justice is mentioned in its procedural (more narrow) and substantive (broader) ways. The procedural aspect requires the existence of the procedural means for securing vested rights which are commonly embodied in the right to access to court and bringing the dispute to it. Substantive justice requires direct and indirect acts to be made, the first one refers to individuals, the second one – to the system itself. This means that substantive access to justice for an individual can appear in access to court, seeking the outcome that results in judicial procedure – to protect their rights. In this aspect access to justice is connected with the fair trial and access to court and judicial protection. The substantive justice in its indirect meaning requires actions to improve access to justice by setting out new legislation, improving the procedure, overlapping the difficulties existing for the system, for example attempts to shorten the duration of the process[20].

Regarding the components of access to justice M. Savchyn determines the following: access to legal aid and reasonable court fees, pre-trial procedures and mediation, the duration of the trial, appeal of the court decisions, effectiveness of execution of the court decisions. To show the connection of access to justice with legal certainty the scholar underlines that application of the res judicata is derived from the legitimacy of public powers and legal certainty.[21]

Occasionally, the principles of access to justice and legal certainty are regarded together in the court decisions of ECHR. In the case *Kunert v. Poland* both principles access to court (right to appeal which is the component of the access to justice) and the principle of legal certainty are applied. The applicant faced difficulties in proper filling the appeal application because at this time he was imprisoned and could not get the copy of his primary demands. To his mind, that prevented him from appealing the court decision which violated his right to fair trial, to access to court; in addition to it, he was not given legal aid on that stage of the trial to formulate his appeal application. Although, the court ruled in favour of Poland it was mentioned that "the rules governing the formal steps are to be taken and the time-

19 T Tzuvina, 'Res judicata principle for the civil procedure'(2019) 1 Pidpriyemniztvo, gospodarstvo y parvo38-44, 38

20 JH Gerards, LR Glas, 'Access to justice in the European Convention on Human Rights System' (2017) 35(1) Netherlands Quarterly of human Rights 11-30 14

21 M Savchyn 'Dirrect effect of the Constitution of Ukraine in the focus of access to justice and judicial control on execution of court decisions' (2022) Naukoviy Visvyk Uzgorodskogo Nazionalnogo Universitetu (Pravo) 146-155 148

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limits are to be complied with in lodging an appeal or an application for judicial review are aimed at ensuring the proper administration of justice and compliance, in particular, with the principle of legal certainty”[22].

The other case, we found reasonable to mention, is the case of *Kurochenko and Zolotuchin v. Ukraine.* The applicants were previously sentenced to punishment but all the materials of the trial appeared to be left on the occupied territories, that prevented the appeal court from possibility of hearing the case due to the absence of the necessary documents. Although ECHR refused to recognize violation of the Article 5, it recognized that the efforts of the state to fulfil the requirements of the Article 6 were not enough. The uncertainty referred to the legal status of the applicant as he remained accused, in the absence of the clear instructions to the court and prosecutor’s office on how to act in the case of the occupation and loss of documents that followed. Due to these circumstances of the case, the terms of the duration of the trial were violated significantly.

These examples show the access to justice in procedural and substantive aspects. The procedural part is evident, and means the necessary and adequate actions to provide the right to bring the dispute to court, the right to legal aid and reasonable terms of the duration of the trial. However, the last example shows that in the times of war with the number of court buildings burned and destroyed and with the occupied territories that caused the absence of normal legal cooperation for the purposes of judicial procedures, Ukraine will continue to face the similar problems in access to justice as it has been shown in the last case. Even though the courts are relocated and functioning and the direct access to court is guaranteed, the absence of the access to evidence, the inability to conduct the expertise of the evidence remained on the occupied territory, inability to inform interested parties of the trial due to their location on the occupied territory will cause difficulties for both legal certainty and access to justice. Consequently, there is a need to focus on their interaction, which is represented by the following levels:

– access to justice is seen as an element of the rule of law together with legal certainty;

– access to justice as a way of ensuring legal certainty;

– access to justice and the influence of legal certainty requirements.

5.1 Access to justice as an element of the rule of law along with legal certainty

The rule of law is a broad concept, the content of which is usually revealed through a set of elements, according to R. Leal-Arcas they are the following: access to justice and judicial review; legal certainty; proportionality; equality and non-discrimination; and transparency[23].

As constituent elements, they are mutually consistent and interact, ensuring the operation of the rule of law. Thus, they are united by a single goal and their application is carried out with this goal in mind. As the author further states, the application of the above principles enables fair and just societies, irrespective of their history or background. These principles are universal and therefore valid for any society at any given time[24]. References to these values can be seen in judicial practice, given this understanding of the purpose of application, and should be applied overcoming excessive rigidity and formalism.

22 *Kunert v. Poland* App no 8981/14 (ECtHR, 04 July 2019) < https://hudoc.echr.coe.int/eng?i=001-192076 >

23 R Leal-Arcas, ‘Essential Elements of the Rule of Law Concept in the EU’ (2014) <http://ssrn.com/abstract=2483749 > 1-2

24 Ibid 5

The rule of law in relations between a citizen and the state means that the state influences the freedom of a citizen through legal mechanisms, and citizens are given the opportunity to legally protect themselves from illegal interference and violation of their rights by other persons. The right to access to justice and legal certainty provide citizens with such mechanisms.

Access to justice is mentioned as an element of the rule of law by the Council of Europe in the legal doctrine in Ukraine. The Ukrainian authors that support this idea are mentioning that 1) access to justice is not equal to access to court as an element of the right to fair trial (R. Moskal)[25] and that execution of court decisions and *res judicata* are mentioned as elements of the access to justice ; 2) access to justice in its broad idea is the possibility to avoid the violation of vested rights and an effective mechanism against violation (Yu. Sverba)[26] 3) access to justice should, according to the rule of law principle, be presented with independent courts, that have the powers in administrative procedures (S. Golovatyi)[27].

The comparison in the meanings of legal certainty and the access to justice shows several similarities. Firstly, both of them include r*es judicata* as their element and requires the actual execution of the court decision as the required ending of the trial that serves the implementation of legal certainty and access to justice. Secondly, they both take into account the temporary factor and set the rule of the court decision to be announced within the time limits established in procedural code. Thirdly, when access to justice and legal certainty are provided to a high level standard, they achieve predictability that forms a favourable climate for economic growth and stability.

The war raises new challenges for implementing both of these elements of the rule of law. The frequency of legal changes increased, that results in less stability and predictability that could be achieved in normal circumstances. The status of the occupied territories causes uncertainty first of all in regard to the temporal factor, as it is uncertain whether the full access to this territories will be obtained back. The massive violation of human rights requires from the state accurate and adequate system of access to justice for those who are in the vulnerable position in getting legal aid, renewing the lost documents and mostly to exercising the judicial decisions made in favour of victims. These are a serious challenges for rule of law in Ukraine, particularly to the principles of legal certainty and access to justice.

5.2 Access to justice as a way of ensuring legal certainty

Being widely recognized, legal certainty is not easy to be achieved and a minor level of uncertainty is always present in the legal regulation. Obviously, there is a lack of certainty when referring to some new spheres of legal regulation such as technology development, biomedicine and artificial intelligence, because there is no clear understanding on how the law should regulate those issues. The other example of uncertainty is the frequent legal changes in Ukraine caused by war. This additional temporal legislation is applied together with all the existing legal provisions and due to its high level of changeability it is relatively uncertain and sometimes controversial. The durable period of occupation caused another problem for legal certainty, the legal status sometimes is hard to prove in the court. Applying for the compensation for damage afflicted to the real property, one neither has evidence to

25 R Moskal, 'Requirements of the Rule of Law concerning Access to Justice' (2020) 2 (115) Naukovij Vysnik Nacionalnoi Akademii Vnutrisnih Sprav 36-49, 43

26 Yu Sverba, 'Access to Justice as an Element of Rule of Law' (2019) 10 Almanach Prava 236-240, 239

27 S Golovatyi, 'The Rule of Law, how it is interpreted by Venecian Commition' (2011) 10 Pravo Ukraini 154-184, 177

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prove the factual condition of the property, nor can estimate and calculate the losses; there is uncertainty concerning the way one can get the compensation from the defendant and prove who has caused the losses. In other words, there is a lack of certainty in how to file such applications, thus the number of the cases is expected to be extremely large.

Legal certainty, among other elements, contains requirements for limiting the discretionary powers of officials of a public authority, taking into account the prevention of arbitrariness and discrimination or inequality in ensuring the rights of some citizens before others, as well as considering the inadmissibility of refusing to ensure recognized rights and freedoms of citizens. However, the existence of discretionary powers always carries the risk of violation by state authorities of the rights and freedoms of citizens, if such a fact occurs, the only legitimate way of protection is through the court hearing.

Discretionary powers are the tribute to flexibility of law and require legal certainty and proportionality in order to obtain it. None of those, nor the discretionary powers, neither the rights of people are executed without the established measures. The role of legal certainty principle here is prominent. Discretionary powers give the authority a choice, sometimes mutually exclusive, on how to execute legal provisions in particular individual situation. The authority powers usually include mutually exclusive options. For example, the custom officer has a possibility to allow the load to go through customs or to suspend customs clearance of goods; the tax agent has the powers to check the tax payments and to issue a tax penalty decision; applying for the permission for visa one could be given a visa or refused in obtaining it by the decision of the same authority. Another frequent example that causes disputes is accrual of the pension which is seen to be among the most numerous disputes brought before the administrative court in Ukraine.

Legitimate expectations:

> 'requires not only congruence between law and its application (whereby the authorities must not "ignore" the law) but also that the authorities consider the individuals' expectations formed on the basis of the apparent law, at least when the latter is attributable to the public authorities. It is important to underline that "taking into account" does not automatically mean concretizing these expectations, since other legitimate interests may be at stake and may prevail'[28].

For the abovementioned disputes to be solved an access to justice should be guaranteed as court remains the final authority ready to restore the violated rights. The respect to legitimate expectations touches upon access to justice mostly in the substantive meaning. By forming consistent judicial practice through access to justice legal certainty could be obtained.

The other example of establishing the rule of law when there is lack of certainty is shown by T. Furley[29]. She argues that a huge number of legal norms on housing law remains unchanged for thirty years already. It is easy to agree with the author that these norms are in opposition to legal certainty, as the principles incorporated in legal regulation have changed significantly. Furthermore, legislation in Ukraine on house violation, freedom of assembly, housing law suffers from outdated norms. This causes damages to access to justice and legal certainty, until the new legislation is set out, only the court is entitled to solve the dispute applying the internationally recognized principles. So, obtaining legal certainty requires access to justice.

28 J van Meerbeeck, 'The Principle of legal certainty in the Case Law of the European Court of Justice: from Certainty to Trust' (2016) 2 European Law Review 274-288, 287

29 T Fuley, 'Application of the Outdated Legislation by the Courts as a Prevention for Access to Justice' (2021) 2 Pidriyemnitstvo, Gospodarstvo y Parvo 185-193

5.3 Access to justice and the influence of legal certainty requirements

Access to justice is a positive procedural right, that gives a person an opportunity to bring the dispute to the court and to get an effective protection. It's the obligation of the state to provide this procedure and make it available. Being of a high importance in connection to the establishment of rule of law, this right is the base for protection of all the other rights and freedoms that could be somehow violated.[30] Obviously, access to justice meets numerous challenges to achieve its aims that are diverse and vary within the states. Although the acceptance of the democratic standards necessitate the mitigating of these challenges. Legal certainty, as a principle that together with access to justice contributes to the establishment of rule of law, could be beneficial in overlapping the threats to access to justice.

Difficulties occurred in Ukraine recently that were mentioned above require application of legal certainty.

1) the democratic institutions together with the governmental legal aid can improve the situation with legal assistant to those that are in need. The procedures of declaration of the death, recognition of the person being constantly absent, the official establishment of the act of loss of the property, inheritance cases usually require a set of the standard documentation. The support of non-governmental organizations in coping with the huge number of similar cases could be significant and important to unburden the police. The cooperation in this sphere should be set out in order to achieve efficiency.

2) the authorities and courts should meet the terms of the trial procedure in any case. As J. Van Meerbeeck noted,

> 'it is interesting to observe the strong relationship between time and legal certainty. Time is indeed at the heart of most requirements of legal certainty (predictability, non-retroactivity, transitional measures, and so on)'[31].

The rule of law requires restoration regardless of when the offense was committed, but it should be taken into account that over time, the restoration of the violated right can have a negative impact on bona fide participants in legal relations, so the time factor is used as a certain limit, the passage of which closes the possibility of reviewing the decision. This also applies to the statute of limitations and the terms of review of court decisions. In cases where the review of a decision is significantly removed in time from the moment of occurrence of a dispute or a court decision of the first instance, it is not an easy task for legal certainty to weigh between the need to restore the violated right and taking into account the impact of such a decision on other interested parties, primarily bona fide participants. Legal certainty in this case provides the efficiency for access to justice.

3) international cooperation in prosecution of the guilty should be improved. Legal certainty is required for the authorities who will be executing the court decision on how to act if the accused and his assets are situated on the territory of the country aggressor. This situation is easy to foresee and the regulations and algorithm of the acts of the authorities should be given in order to meet the criteria of proper performance of the duty of the state. Clear and understandable regulations should be set out.

30 T Tzuvina Principle of rule of law in civil judicial procedure: practical and theoretical research (2010) Kharkiv 254, 47

31 J van Meerbeeck, 'The Principle of legal certainty in the Case Law of the European Court of Justice: from Certainty to Trust' (2016) 2 European Law Review 274-288, 287

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4) predictability in how to act at the situation of absence of documents of the court hearings to guarantee the fair trial should be established. By analyzing the number of cases that already took place and displayed this problem, the government should provide organizational and legal procedures to avoid the damages this absence can cause. Both – the citizens and the authorities should be given strict and direct instructions what could be done to fulfil access to justice requirements.

6 CONCLUSIONS

The evolution of access to justice has passed three waves – the first one aimed to protect the poor people and make the access to justice available to them; the second – aimed to protect the collective rights of consumers and in the sphere of ecology; the third one – aimed to make the procedure of the trial faster and to give alternative ways of solving the disputes. There are reasonable expectations that in Ukraine the fourth way is ready to emerge. It will be concentrated on solving the problems of people that unexpectedly and suddenly appeared to be in the difficult situation due to the complete loss of their property and death of many of their relatives (sometimes hole families) with irreversibly destroyed documents that leave a vide number of evidence to protect their rights in the court. The judicial authorities together with the prosecutor office have no direct access to the occupied territories and are unable to restore the documentation themselves. The absence of the accused and inability of the occupied state to execute the court decision would be a tough problem for Ukraine to provide the access to justice and guarantee the rule of law. Taking into account legal certainty regulations, it would be easier to overlap the difficulties. In this regard, some of the recommendations are given.

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Research Article

PROSECUTOR'S OFFICE OF UKRAINE UNDER MARTIAL LAW: CHALLENGES, TRENDS, STATISTICAL DATA

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Keywords: Prosecutor's Office, prosecutor, functions of the Prosecutor's Office, war, Prosecutor's Office in wartime, justice, Ukraine

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ABSTRACT

Background: *Introduction of martial law on the territory of Ukraine on 24 February 2022, due to the full-scale invasion of the russian federation*[4]*, led to a shift in the emphasis in activity of all public authorities and institutions. They promptly adapted to the challenges brought by the war to ensure continuous functioning of the institutions of key importance for the state. Such include the institution of justice; the Prosecutor's Office is an integral element of its implementation. During the war, Ukraine gained new experience in the matters of its organization and functional development. It is expected to be useful to anyone interested in the justice system, particularly the Prosecutor's Office, and for the study of its responses to the extraordinary conditions of the war.*

The publication is the result of a systematic analysis of the indicators of the Prosecutor's Office of Ukraine activity within the context of the events caused by the war's development, which has been taking place for more than one year. This time span allows the authors to draw certain conclusions and highlight trends.

The performance indicators of four regional Prosecutor's Offices, representing the north, south, east, and west of Ukraine, are taken as a basis. This approach is driven by different degrees of military aggression intensity in relation to the various regions, allowing tracing of the relevant correlation between the "territorial factor" and effectiveness of the Prosecutor's Office's operation.

The study is based on statistical indicators and reports of the Office of the Prosecutor General, data from Kyiv, Odesa, Lviv, and Kharkiv's regional Prosecutor's Offices, as well as materials from the Qualification and Disciplinary Commission on Public Prosecutors.

Methods: *The authors used systematic, statistical, historical, and comparative methods, as well as the method of selective analysis and synthesis of information, ensuring the objectivity and complexity of the study. Actual statistical and empirical data are used for proper argumentation of the conclusions.*

Results and Conclusions*: It was concluded that the activity of the Prosecutor's Office in Ukraine under martial law is largely determined by the territorial factor. At the same time, the full-scale war became a catalyst for polar phenomena among prosecutors: intensification of the civil position in opposition to the aggressor, professional, and behavioural destructions, which are assessed by a disciplinary body to finalize the prosecutor's career.*

1 INTRODUCTION

Introduction of martial law on Ukraine's territory on 24 February 2022, due to the full-scale invasion of the Russian Federation, affected the functioning of all institutions of state power without exception, including the field of justice. Its continuous functioning is a prerequisite for statehood and national security. This naturally led to a shift in the emphasis in scientific research, focusing on the problems that ensure the right to a fair trial. This emphasis that a person's right to a fair trial is inviolable, even in conditions of martial law[5], led to emergence of studies which focus on a few problems, including organizing the work of courts in wartime[6],

4 Editorial note: Authors retain the right to title the state aggressor with lowercase letters. We recognize and respect the autonomy of authors in expressing their perspectives and preferences regarding the use of capitalization.

5 O Uhrynovska, A Vitskar 'Administration of Justice during Military Aggression against Ukraine: The "Judicial Front" 2022 3 (15) *Access to Justice in Eastern Europe*. 1-10.

6 O Khotynska-Nor, A Potapenko, 'Courts of Ukraine in Wartime: Issues of Sustainable Functioning' 2022 31 *Revista Jurídica Portucalense*, 218–240.

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advocacy's functioning[7],[8] judgments' enforcement[9], and other related aspects. In this sense, the Prosecutor's Office, as an integral element of justice administration, was undeservedly neglected. The study of the specificity of the Prosecutor's Office's work under martial law is isolated and eclectic in nature.

For a long time in Ukraine, the Prosecutor's Office was the object of discussions focused on the following issues: (a) its place in the system of public authorities[10], (b) the list of functions[11], (c) the system of Prosecutor's Offices[12], (d) requirements for the Prosecutor General[13]. However, the war created some adjustments. Like other state and public institutions, the entire prosecution system adapted to modern challenges associated with security problems, power outages, lack of mobile communication and Internet connection. The problems listed apply to Prosecutor's Offices on all levels: the Office of the Prosecutor General, Regional Prosecutor's Offices, district Prosecutor's Offices, and the Specialized Anti-Corruption Prosecutor's Office.

Our study is based on the activity indicators of Kyiv, Odesa, Lviv, and Kharkiv Regional Prosecutor's Offices, representing the northern, southern, western, and eastern regions of Ukraine, respectively. Considering the course of the war, different intensities of military aggression in various territories[14], the regional (territorial) factor has a significant impact on the effectiveness of performance of the Prosecutor's Office functions and specifies them. Therefore, such a sample will ensure the representativeness of the study's results.

We hope that these findings will be useful for everyone interested in the justice system's functioning problems, in particular, the Prosecutor's Office. After all, the Prosecutor's Office of Ukraine is now gaining a unique experience of operating under the conditions of a full-scale war, which European countries do not have. Taking into account the global threats posed by the Russian Federation to the civilized world, study of the Prosecutor's Office's response to the extraordinary conditions of war will enable us to avoid destruction in the system of judicial protection of individual rights and freedoms in the future.

7 O Khotynska-Nor, N Bakaianova, 'Transformation of Bar in Wartime in Ukraine: on the Way to Sustainable Development of Justice (On the Example of Odesa Region)' 2022 3(15) *Access to Justice in Eastern Europe* 146-154.

8 T Vilchyk, 'Advocacy of Ukraine in the period of martial law and restoration after the war: problems of legal regulation of the organization and activities' 2022 32 *Revista Jurídica Portucalense*, 254–273.

9 Yu Prytyka, I Izarova, L Maliarchuk, O Terekh 'Legal Challenges for Ukraine under Martial Law: Protection of Civil, Property and Labour Rights, Right to a Fair Trial, and Enforcement of Decisions' 2022 3(15) *Access to Justice in Eastern Europe* 219-238.

10 In Ukraine, four main approaches to the place of the prosecutor's office in the system of public authorities have been formed: 1) affiliation of the prosecutor's office to the executive branch of government; 2) affiliation of the prosecutor's office to the legislative branch of government; 3) affiliation of the prosecutor's office to the judicial branch of government; 4) allocation of a separate, fourth "control and supervisory" branch of government. For now, this discussion continues.

11 In 2014, the transport and environmental protection prosecutor's offices were liquidated; the system of prosecutor's offices has been changed; in 2019, military prosecutor's offices were abolished.

12 The prosecutor's office was deprived of the functions of monitoring compliance with the laws by officials and citizens, conducting pre-trial investigations (i.e., the function of "general supervision"); the function of "maintenance of state prosecution" was transformed into "maintenance of public prosecution" and the prosecutor's office lost the opportunity to represent the interests of citizens in court.

13 In 2014, the law did not envisage the requirements for the Prosecutor General for obtaining a higher legal education.

14 The intensity of military aggression on the entire territory of Ukraine is clearly expressed in the direction of decrease from the eastern to the western region and from the northern to the southern region, which is explained by the borders with Russia.

The study is based on the systematic, statistical, historical, and comparative methods, as well as the method of selective analysis and synthesis of information, ensuring objectivity and complexity of the study. The authors used actual statistical and empirical data, particularly the materials of disciplinary practice, to properly argue their conclusions.

2 ACTIVITY OF PROSECUTOR'S OFFICE UNDER MARTIAL LAW

2.1 Procedural Field

At the beginning of a full-scale war, decisive action was expected from the Office of the Prosecutor General. Thus, on 24 February 2022, the Office began procedural management in the criminal proceedings, initiated by the Main Investigative Department of the Security Service of Ukraine, due to the invasion of the Armed Forces of the Russian Federation into the territories of northern, eastern, and southern regions of Ukraine, and air and artillery strikes made on Ukraine's military facilities and units[15]. In addition, the Office determined that all Prosecutor's Office's forces and resources should be directed to maintaining law and order on the territory of the state, recording, and documenting the crimes of the aggressor[16].

At the same time, the Prosecutor's Office had to ensure continuity of the functions assigned to it by the Constitution of Ukraine: maintenance of public prosecution in court; arrangement and procedural management of pre-trial investigation; settlement of other issues during criminal proceedings in accordance with the law; supervision of undercover and other investigative and search actions of law enforcement agencies; representation of the state's interests in court in exceptional cases, and in accordance with the procedure specified by the law[17].

The constitutional level of the specified functions requires attention on the issue of their implementation in the conditions of martial law. This will make it possible to show the impact of the war on the Prosecutor's Office and clarify the specificity of its wartime activity. To do this, we will apply generalization of statistical indicators of accounting for criminal offences and use the indicators for January 2023, provided by the Prosecutor's Offices of Ukraine's relevant regions for comparison.

Thus, according to the data of Kyiv Regional Prosecutor's Office, in January 2023, a total of 3,239 criminal offences were recorded (860 offences of which individuals were served with a notice of suspicion for committing, and 269 offences were the object of the proceedings forwarded to court)[18].

During the same period, Odesa Regional Prosecutor's Office recorded 2,126 criminal offences (458 offences of which individuals were served with a notice of suspicion for committing, and 188 offences were the object of the proceedings forwarded to court)[19].

15 Invasion of the Armed Forces of the Russian Federation - criminal proceedings have been initiated <https://gp.gov.ua/ua/posts/vtorgnennya-zs-rf-rozpocato-kriminalni-provadzennya> accessed 23 February 2023.

16 We do not betray our oaths, keep a cool head, protect Ukraine and its laws <https://gp.gov.ua/ua/posts/ne-zradzujemo-prisyazi-zberigajemo-xolodnii-rozum-zaxishhajemo-ukrayinu-i-yiyi-zakoni> accessed 23 February 2023.

17 Constitution of Ukraine, 28 August, 1996 <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 23 February 2023.

18 Unified report on criminal offences for January 2023. Kyiv Region Prosecutor's Office. <https://kobl.gp.gov.ua/ua/documents.html?dir_id=115438&libid=100130> accessed 23 February 2023.

19 Unified report on criminal offences for January 2023. Odesa Region Prosecutor's Office. <https://od.gp.gov.ua/ua/documents.html?dir_id=115449&libid=> accessed 23 February 2023.

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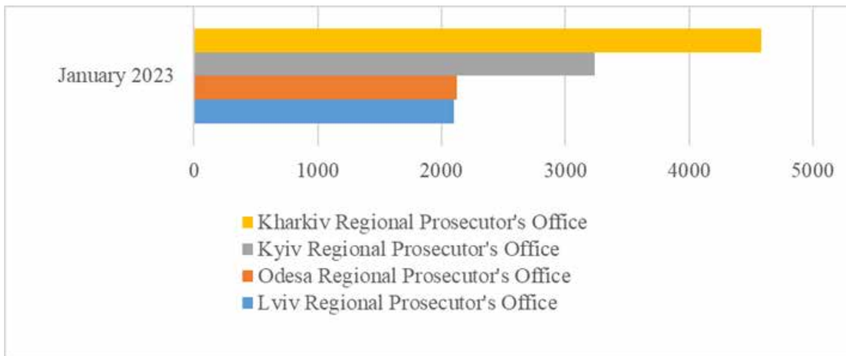
The data of Lviv Regional Prosecutor's Office include 2,102 criminal offences (1,021 offences of which individuals were served with a notice of suspicion for committing, and 441 offences were the object of the proceedings forwarded to court)[20].

Kharkiv Regional Prosecutor's Office, in turn, showed the following indicators: 4,579 criminal offences (1,256 offences of which individuals were served with a notice of suspicion for committing, and 303 offences were the object of the proceedings forwarded to court)[21] (Table 1).

Table 1



As may be seen, closer proximity to the front lines (Kharkiv Regional Prosecutor's Office) increases the criminogenic nature of the region's situation, which may be reflected in the quantitative indicators of the committed offences.

Statistical indicators of the criminal offences related to war crimes require special attention.

A) Offences against foundations of national security:

Kyiv Regional Prosecutor's Office recorded 14 offences (1 offence of which an individual was served with a notice of suspicion for committing, and 0 offences were the object of the proceedings forwarded to court);

Odesa Regional Prosecutor's Office recorded 20 offences (2 offences of which individuals were served with a notice of suspicion for committing, and 1 offence was the object of the proceedings forwarded to court);

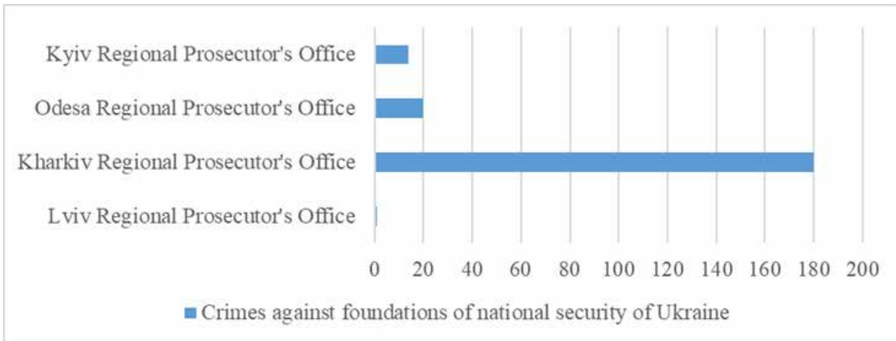
Lviv Regional Prosecutor's Office recorded 1 offence (0 offences of which individuals were served with a notice of suspicion for committing, and 0 offences were the object of the proceedings forwarded to court);

Kharkiv Regional Prosecutor's Office recorded 180 offences (6 offences of which individuals were served with a notice of suspicion for committing, and 0 offences were the object of the proceedings forwarded to court) (Table 2).

20 Unified report on criminal offences for January 2023. Lviv Region Prosecutor's Office. <https://lviv.gp.gov.ua/ua/lvdoc.html?_m=publications&_t=rec&id=327715> accessed 23 February 2023.

21 Unified report on criminal offences for January 2023. Kharkiv Region Prosecutor's Office. <https://khar.gp.gov.ua/ua/documents.html?dir_id=115343&libid= > accessed 23 February 2023.

Table 2



Therefore, we may once again assert that intensification of military operations affects the increase in the number of offences, which is especially noticeable in the comparative analysis of the indicators of criminal offences related to war crimes as recorded by Lviv Regional Prosecutor's Office and Kharkiv Regional Prosecutor's Office (1:180).

B) *Criminal offences in the field of protection of state secrets, inviolability of state borders, ensuring conscription and mobilization:*

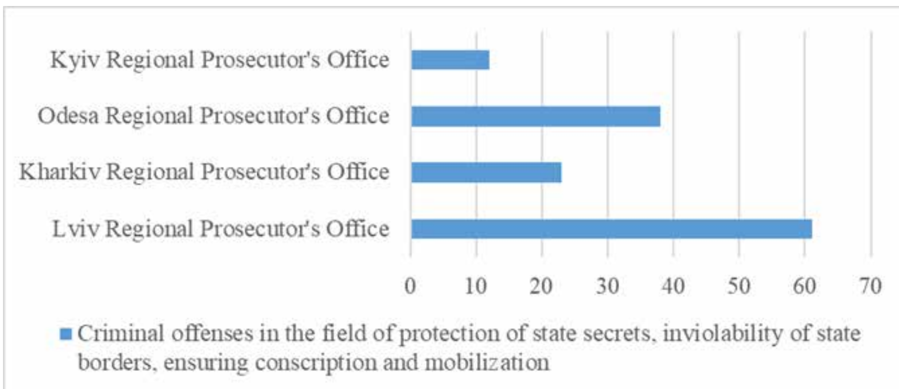
Kyiv Regional Prosecutor's Office recorded 12 offences (0 offences of which individuals were served with a notice of suspicion for committing, and 0 offences were the object of the proceedings forwarded to court);

Odesa Regional Prosecutor's Office recorded 38 offences (4 offences of which individuals were served with a notice of suspicion for committing, and 1 offence was the object of the proceedings forwarded to court);

Lviv Regional Prosecutor's Office recorded 61 offences (41 offences of which individuals were served with a notice of suspicion for committing, and 9 offences were the object of the proceedings forwarded to court);

Kharkiv Regional Prosecutor's Office recorded 23 offences (4 offences of which individuals were served with a notice of suspicion for committing, and 0 offences were the object of the proceedings forwarded to court) (Table 3).

Table 3



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This graphic representation of the criminal offences seen in the fields of protection of state secrets, inviolability of state borders, ensuring conscription, and mobilization shows that Odesa Regional Prosecutor's Office and Lviv Regional Prosecutor's Office had the greatest workload. In our opinion, a similar situation is due to the proximity of the territories of these two regions to the Republic of Poland and the Republic of Moldova, respectively, which are most often chosen for attempts to illegally cross the border by individuals subject to mobilization. For example, in September 2022, the prosecutors of Odesa Regional Prosecutor's Office submitted an indictment against four members of a transnational organized group to the court upon illegal transportation of people across Ukraine's state border (Part 3 of Article 332 of the Criminal Code of Ukraine). It was established that a citizen of Moldova in the territory of the Pridnestrovian Moldavian Republic transported willing men of draft age to Moldova for a reward of 3-4 thousand US dollars, together with accomplices[22]. Such cases have become systematic during the period of the war.

C) *Criminal offences against peace, security of mankind, and international legal order:*

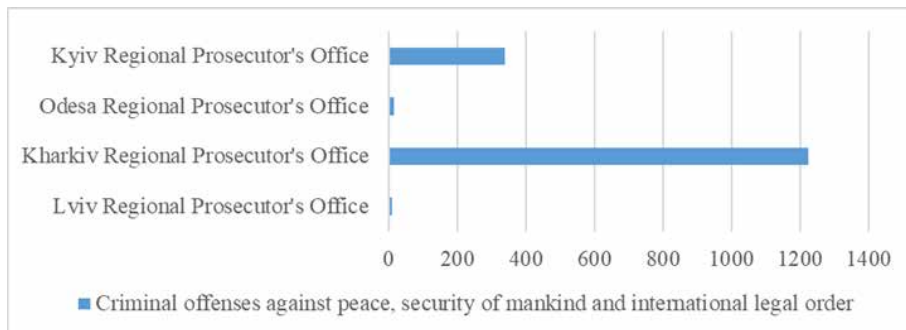
Kyiv Regional Prosecutor's Office recorded 340 offences (2 offences of which individuals were served with a notice of suspicion for committing, and 0 offences were the object of the proceedings forwarded to court);

Odesa Regional Prosecutor's Office recorded 17 (4 offences of which individuals were served with a notice of suspicion for committing, and 4 offences were the object of the proceedings forwarded to court);

Lviv Regional Prosecutor's Office recorded 9 (3 offences of which individuals were served with a notice of suspicion for committing, and 0 offences were the object of the proceedings forwarded to court);

Kharkiv Regional Prosecutor's Office recorded 1,222 (31 offences of which individuals were served with a notice of suspicion for committing, and 0 offences were the object of the proceedings forwarded to court) (Table 4).

Table 4



As may be seen, Kharkiv Regional Prosecutor's Office and Kyiv Regional Prosecutor's Office had more cases associated with the offences against foundations of national security and criminal offences against peace, security of mankind, and international

22 Unified report on criminal offences for January 2023. Kharkiv Region Prosecutor's Office. <https://khar.gp.gov.ua/ua/documents.html?dir_id=115343&libid= > accessed 23 February 2023.

legal order. This seems logical due to the proximity of Kharkiv's region to the line of hostilities and the aggressor country, combined with military events in the Kyiv region in the spring of 2022[23].

The trend of increase in the number of the abovementioned criminal offences over the years is also quite interesting to analyse in the study.

To demonstrate this, we would like to refer to the indicators of Odesa Regional Prosecutor's Office for 2022 and 2021. This region is "averaged" in terms of military aggression intensity against certain territories and the scale of the damage caused as a result.

Thus, in 2022, Odesa Regional Prosecutor's Office recorded the following criminal offences:

against foundations of the national security of Ukraine – 281 (95 offences of which individuals were served with a notice of suspicion for committing, and 83 offences were the object of the proceedings forwarded to court);

in the field of protection of state secrets, inviolability of state borders, ensuring conscription, and mobilization – 242 (104 offences of which individuals were served with a notice of suspicion for committing, and 79 offences were the object of the proceedings forwarded to court);

against peace, security of mankind, and international legal order – 170 (70 offences of which individuals were served with a notice of suspicion for committing, and 68 offences were the object of the proceedings forwarded to court)[24].

These indicators significantly exceed the indicators for 2021 (Table 5), namely:

criminal offences against foundations of the national security of Ukraine – 13 cases (5 offences of which individuals were served with a notice of suspicion for committing, and 5 offences were the object of the proceedings forwarded to court);

criminal offences in the field of protection of state secrets, inviolability of state borders, ensuring conscription, and mobilization – 54 cases (18 offences of which individuals were served with a notice of suspicion for committing, and 17 offences were the object of the proceedings forwarded to court);

crimes against peace, security of mankind, and international legal order – 2 cases (2 offences of which individuals were served with a notice of suspicion for committing, and 2 offences were the object of the proceedings forwarded to court)[25].

23 The tragedy of entire cities and towns of Kyiv region (Bucha, Borodianka and others) gained international publicity.

24 About registered criminal offences and the results of their pre-trial investigation <https://od.gp.gov.ua/ua/ documents.html#> accessed 23 February 2023.

25 About registered criminal offences and the results of their pre-trial investigation <https://od.gp.gov.ua/ua/ documents.html#> accessed 23 February 2023.

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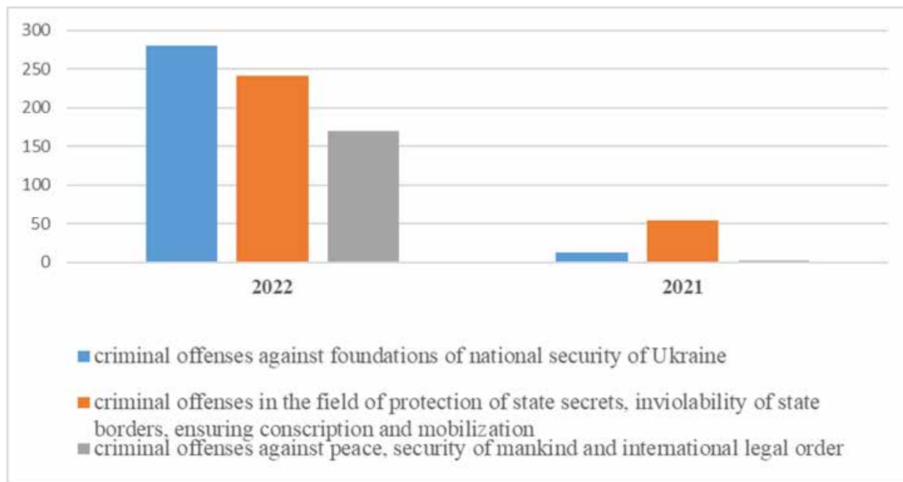
Table 5



We would like to note that the indicators for other criminal offences are more stable. For example, criminal offences against property in the Odesa region in 2022 made up 8,003 cases, and 7,144 cases in 2021; criminal offences against production safety in 2022 made up 33 cases, and 22 cases in 2021.

2.2 Cooperation Field

To implement its functions, the Prosecutor's Office of Ukraine is carrying out international cooperation on an ongoing basis. In light of the European integration processes, direction towards the membership of Ukraine in the European Union, interaction with international and European institutions acquires special importance. Our state is trying to account for the recommendations of European partners when reforming, not only the prosecutorial system, other law enforcement agencies, or the judicial system, but also non-legal fields.

Thus, the war crimes' special resource, implemented by the Office of the Prosecutor General together with Ukrainian and international partners for documenting war crimes and crimes against humanity committed by the Russian army in Ukraine, is innovative and was created due to the war. All documented evidence will be used to prosecute those involved in the crimes under Ukrainian law, as well as at the International Criminal Court in The Hague and the Special Tribunal, once established.

This resource allows submission of not only text information, but also photo and video materials. The following facts are considered: injury or death of civilians due to the use of physical violence by the occupier; deprivation of the civilian population's liberty by the occupier; violence against medical personnel, damage to medical transport, hospitals, and equipment; refusal or deprivation of medical care access; violence against the clergy, damage or destruction of religious buildings (temples, mosques, synagogues, etc.)[26].

26 The Office of the Prosecutor General of Ukraine calls to collect and document the facts of russia's war crimes against the civilian population <https://2022.uba.ua/news/ofis-generalnogo-prokurora-ukrayiny-zaklykaye-zbyraty-ta-dokumentuvaty-fakty-voyennyh-zlochyniv-rosiyi-proty-czyvilnogo-naselennya/> accessed 23 February 2023.

In addition, the Office of the Prosecutor General and the International Bar Association have entered a Memorandum of Understanding on cooperation to ensure prosecution of war crimes and other international crimes, including the crimes of aggression, genocide, and crimes of conflict-related sexual violence. The fields of cooperation in accordance with the Memorandum are as follows: 1) access and use of photo and video files as potential evidence of international crimes committed in Ukraine collected through the mobile application, eyeWitness to Atrocities; 2) establishment of a Special Tribunal on the crime of aggression to prosecute the senior political and military leadership of the Russian Federation; 3) assistance to the Interagency Working Group of Ukraine on Asset Freezing, coordinating the search, arrest, and confiscation of the assets of individuals, directly or indirectly, involved in Russia's aggression against Ukraine, etc.[27]

At the regional level, the interaction of Odesa Regional Prosecutor's Office and the United Nations Human Rights Monitoring Mission may be cited as an example. Thus, during a joint meeting of Odesa Regional Prosecutor's Office and the Head of the United Nations Human Rights Monitoring Mission's leadership in Ukraine's Odesa, Mykolaiv, and Kherson regions, the parties discussed how to ensure responsibility for war crimes and crimes committed as an armed attack of the Russian Federation on Ukraine[28]. Additionally discussed during the meeting was the arrangement of work on identifying, recording, and preserving evidence of the Russian Federation's military aggression against Ukraine and its breach of the regulations of international humanitarian law[29].

3 CIVIC POSITION AND DESTRUCTIONS AS RESPONSE OF PROSECUTOR'S OFFICE TO WAR

3.1 Support of the defence capability of the state

The full-scale war united Ukrainian society with the key goal to help the country resist the aggressor. Like other representatives of the justice system (judges, attorneys), prosecutors actively participated in the initiatives targeted at strengthening the state's defence capabilities. One of the most effective ways to achieve this goal was financially supporting the Armed Forces of Ukraine (hereinafter referred to as the "Armed Forces").

Donation by prosecutors to the state's defence field manifested in various forms. By analogy with judges, it is carried out at the official (by delivering relevant judgments) and private levels, and the financial assistance provided to the Armed Forces is both direct and indirect in nature[30]. However, it also has its own specificity associated with the procedural tools available to the prosecutor.

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27 The Office of the Prosecutor General and the IBA announced signing of the Memorandum of Understanding <https://www.gp.gov.ua/ua/posts/ofis-generalnogo-prokurora-ta-iba-zayavili-pro-pidpisannya-memorandumu-pro-vzajemorozuminnya> accessed 23 February 2023.

28 The UN Human Rights Monitoring Mission in Ukraine began its work in March 2014. The mission carries out monitoring, publishes reports and advocates on the human rights situation in the country in order to promote access to justice and bring perpetrators to justice. In the context of the russian federation's invasion in Ukraine, the Mission focused on monitoring how the invasion affected the human rights situation in Ukraine. In connection with hostilities, the Mission moved part of its offices and now operates in Uzhhorod, Kyiv, Odesa, Dnipro and other cities.

29 A meeting with representatives of the UN Human Rights Monitoring Mission was held at the Prosecutor's Office <https://od.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=313390> accessed 23 February 2023.

30 O Khotynska-Nor, A Potapenko, 'Courts of Ukraine in Wartime: Issues of Sustainable Functioning' 2022 31 *Revista Jurídica Portucalense*, 218–240.

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Thus, according to the Office of the Prosecutor General, 4.898 billion hryvnias of funds and valuables were transferred for the needs of the Armed Forces to defeat the aggressor, as well as 880 vehicles and 13 thousand tons of fuel[31].

Unfortunately, there is no generalized information on the scope of assistance given by the Prosecutor's Offices with regional criteria. It remains as a one-off. Thus, from the beginning of the war until the beginning of June 2022, the prosecutors of Kharkiv Regional Prosecutor's Office ensured transfer of the funds to the Armed Forces' account[32] in the amount of about UAH 3.3 million, deposited in the form of bail in criminal proceedings; as of 21 April 2022, the prosecutors of Lviv region transferred more than 4.5 million hryvnias and 42 vehicles[33].

Regarding individual cases of assistance, at the request of the prosecutors from the Office of the Prosecutor General, goods for military purposes (helmets, body armour, thermal imaging cameras, quadcopters) for the total amount of about 5 million UAH were transferred for the needs of the Armed Forces. The goods were seized during a pre-trial investigation on suspicion of a group of individuals evading customs payments when the goods were imported under the guise of humanitarian aid during martial law, and their subsequent legalisation on the territory of Ukraine (Part 3 of Article 212, Part 3 of Article 209 of the Criminal Code of Ukraine)[34].

In turn, at the request of the prosecutors in Odesa Regional Prosecutor's Office, more than 600 spare parts and units of military aviation equipment, for the sum amount of more than 4 million hryvnias, were transferred for the needs of the Armed Forces. This equipment was seized and arrested during the pre-trial investigation of the criminal proceedings upon encroachment on the territorial integrity and inviolability of Ukraine[35].

Thus, for the support of the defence capability of the state, the Prosecutor's Office uses the range of possibilities envisaged by the legislation within the framework of criminal proceedings.

3.2 Destructions

It should be recognized that, in addition to manifestations of national consciousness and active civic position in confrontation with the aggressor in the justice system, particularly in the Prosecutor's Office, the war resulted in a number of destruction occurrences. This refers to the collaboration, treason, and violation of the prosecutor's oath. All these are associated with the human factor.

Prosecutors, like judges, represent state power in society and are involved in the process of justice execution. This imposes obligations and restrictions on them, which they must

31 Official website of the Office of the Prosecutor General <https://www.gp.gov.ua/> accessed 23 February 2023.

32 Support of the Ukrainian army: Kharkiv prosecutors ensured transfer of seized funds as part of criminal proceedings for the needs of the Armed Forces <https://khar.gp.gov.ua/ua/news.html? _m=publications&_c=view&_t=rec&id=314277> accessed 13 February 2023.

33 The Prosecutor's Office of Lviv Region handed over 42 vehicles for the needs of the Armed Forces of Ukraine <https://tvoemisto.tv/news/prokuratura_lvivshchyny_peredala_na_potreby_zsu_42_avtomobili_131155.htm> accessed 23 February 2023.

34 Military goods for the amount of UAH 5 million were transferred to the needs of the Armed Forces <https://www.facebook.com/pgo.gov.ua/posts/446013574228148/?paipv=0&eav=AfYISIBsNfozpyctXJUIP4w8gsz-rHpakSKmF3kXXSDuKr6gtC1DvOIKcZHiW2aU3JE&_rdr> accessed 23 February 2023.

35 In Odesa, the prosecutor's office seized equipment for military aviation from a private enterprise and handed it over to the Armed Forces of Ukraine <https://yug.today/na-odeshchyni-prokuratura-vyluchyla-u-pryvatnoho-pidpryiemstva-obladnannia-dlia-viyskovoi-aviatsiynoi-tekhniky-ta-peredala-yoho-zsu/> accessed 23 February 2023.

observe, even during martial law. However, like all humans, they act according to instinct (especially the instinct of self-preservation), emotions (fear, hatred, anger, etc.), personal views, and beliefs.

Our analysis of the materials of the disciplinary practice to bring prosecutors to responsibility[36] during the period from 24 February 2022 to 24 February 2023 shows that:

- 41% of decisions to dismiss prosecutors from their positions (13 decisions out of 32) are justified by the circumstances caused by the war, including:
- 8% of decisions are justified by circumstances such as providing assistance to the occupiers in carrying out subversive activities against Ukraine;
- 77% of decisions are justified by circumstances such as staying in the occupied territory or refusal to move to the territory controlled by the Ukrainian authorities;
- 15% of decisions are justified by circumstances such as going abroad or to a region of Ukraine other than the place of work to ensure personal safety and safety of their family members.

In some cases, depending on the specific circumstances, less stringent types of disciplinary sanctions were applied in relation to the prosecutors who went abroad (or stayed there until 24 February 2022 and did not return) due to their personal safety and safety of their family members, particularly seen as a reprimand.

As part of the decisions on dismissal from the positions, an assessment was made of the actions of the prosecutors, which became the subject of criminal proceedings under the Articles of the Criminal Code of Ukraine "Treason," and "Collaborative Activity."

It is important that assessment of the circumstances caused by the war in the analysed decisions gave impetus to develop the standards of prosecutorial activity. As an example, it is necessary to cite the position formulated in one of the decisions of the Qualification and Disciplinary Commission on Public Prosecutors: "Complying with the requirements to prevent illegal non-official relations and prohibition of the actions that may cast doubt on the objectivity, impartiality and independence of the prosecutor, on the integrity and incorruptibility of the bodies of the Prosecutor's Office, and even in favour of the enemy in wartime conditions, is obvious and mandatory, and violation of such requirements cannot be justified by any circumstances. Such behaviour undermines the authority of the prosecutor, Prosecutor's Office, and the state as a whole, because prosecutors represent the state when exercising their powers. Such actions in wartime in favour of the occupier may result in growing dissatisfaction of the society with the actions of the authorities, provoking social conflicts. Committed specified disciplinary offences by the prosecutor are incompatible with further holding by this prosecutor of any position in the Prosecutor's Office and cannot result in imposition of a less stringent penalty than dismissal from the position in the Prosecutor's Office"[37].

Therefore, the analysed cases are professional and behavioural destructions which are assessed by a disciplinary body to finalize the prosecutor's career.

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36 The decision to impose disciplinary sanctions on prosecutors, published on the official website of the Qualification and Disciplinary Commission on Public Prosecutors was analysed. <https://kdkp.gov.ua/decision> accessed 23 February 2023.

37 On imposition of disciplinary sanctions with regard to the Head of Mykolaiv District Prosecutor's Office of Mykolaiv Region H.Yu. Herman: Decision of the Qualification and Disciplinary Commission on Public Prosecutors No.61дп-22. 25.05.2022 <https://kdkp.gov.ua/decision/2022/05/25/2243> accessed 23 February 2023.

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4 PROSPECTS FOR PROSECUTOR'S OFFICE UNDER MARTIAL LAW

The conditions of martial law outlined new prospects for development of the prosecutorial system. First, the full-scale war exacerbated discussion of the expediency of returning the military Prosecutor's Office as a part of the prosecutorial system[38].

The above resulted in development of the legislative initiatives to staff separate Prosecutor's Offices with servicemen of the Armed Forces of Ukraine. According to the authors, this will ensure effective organisation and procedural management over investigation and disclosure of war crimes, contribute to maintenance of military discipline, combat, and mobilization readiness of the Armed Forces of Ukraine and other Ukrainian military units at a level that guarantees an adequate response to threats to territorial integrity and inviolability, defence capability, national security and defence, and protection of military personnels' rights and legitimate interests[39].

Such an idea is interesting for discussion because, in the modern world, there is no single model of functioning military Prosecutor's Offices (for example, in the Czech Republic, they are created only in emergency situations)[40]. Considering the key role of the Armed Forces in today's conditions with the increase of military personnel through mobilization, the proposed idea of staffing the Prosecutor's Offices with servicemen from the Armed Forces of Ukraine, at first glance, may be considered acceptable for Ukraine. However, in our opinion, based on the requirements for prosecutors envisaged by the legislation of Ukraine, it is the military Prosecutor's Offices that should be staffed, not vice versa.

In addition, the idea of assigning some of the investigating judge's powers to the prosecutors, if the former does not have the objective ability to perform them, was formalized.

The above shows that the conditions of martial law require a prompt response to the situation and wartime needs of all state power subjects without exception, particularly parliament, which must ensure an adequate modern regulatory framework for the Prosecutor's Office's functioning. The effective performance of its functions by the Prosecutor's Office depends on it.

5 CONCLUSIONS

In summary, it may be confidently noted that influence of martial law on the activity of the Prosecutor's Office of Ukraine is observed in all fields and directions of its work.

Our selective analysis of the Prosecutor's Offices' performance indicators by regional criteria showed the following results: 1. Prosecutor's Offices continue to fulfil their constitutional duties in coordination with other law enforcement agencies and military administrations; 2. The activity of Prosecutor's Offices during the period of martial law is largely determined by the territorial factor; 2.1. The proximity of a certain region (oblast) to the front line or

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38 The military prosecutor's office system existed in Ukraine until 2012, and its jurisdiction extended to the crimes committed by the representatives of the defence sector. In 2014, with the beginning of the armed conflict, the state resumed the activity of military prosecutors and extended their jurisdiction also to the crimes classified as "violations of the laws and customs of war".
In 2019, the military prosecutor's offices were liquidated again, but the question of their next return became relevant with the beginning of the full-scale invasion of the russian federation into the territory of Ukraine.

39 Explanatory note to the Draft Law of Ukraine on Amendments to Certain Legislative Acts on Improving the Activity of Prosecutor's Offices in the Conditions of Armed Aggression against Ukraine <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1221948> accessed 23 February 2023.

40 M Vashakmadze, (2018) Understanding Military Justice: A Practice Note. Geneva. <https://www.dcaf.ch/sites/default/files/publications/documents/Military-Justice_Prictice-Note_eng.pdf>

the border with the aggressor country increases the criminogenic nature of the situation in that region, as displayed on quantitative indicators of the committed offences; 2.2. Criminal offences in the fields of protection of state secrets, inviolability of state borders, ensuring conscription, and mobilization are most common in the regions that are often chosen by the persons subject to mobilization for attempts to illegally cross the border (Lviv region, Odesa region); 2.3. The military operations' activity is directly reflected in the change in the types of recorded criminal offences, especially noticeable in the comparative analysis of indicators of criminal offences associated with war crimes; 2.4. Incidents of procedural management over the cases associated with the offences against foundations of national security and criminal offences against peace, security of mankind, and international legal order, are significantly increasing in the regions close to the line of hostilities.

As a response to the war, the following trends became pronounced in the activity of the Prosecutor's Office of Ukraine: 1. The impact of digitization on the activity of the Prosecutor's Office expanded the scope of its penetration. If previously, digitalization was manifested mainly in presence of the websites used to cover news of the Prosecutor's Office's activity, now the platforms for interaction with the public are being created, thus contributing to effectiveness of the Prosecutor's Office; 2. Strengthening of international cooperation, determined by the European integration processes and support of our country by European partners under difficult conditions of martial law.

The full-scale war catalysed development of polar phenomena among prosecutors: 1) enhancing the civil position in opposing the invader; and 2) professional and behavioural destructions, of which a disciplinary body evaluates and finalizes the prosecutor's career. The decisions of this body contribute to development of the prosecutorial activity standards in wartime conditions.

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Research Article

MORE EDUCATION OF JUVENILE OFFENDERS IN SENTENCES OF IMPRISONMENT: A REFORM AND JUSTIFICATION APPROACH AS A CONSEQUENCE OF NIKLAS LUHMANN'S SYSTEMS THEORY

Wolfgang Storck [1]

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Summary: 1. Introduction. – 2. Criticism Of Determinate Sentencing And The Non-Definition Of Education And Resocialisation In German Juvenile Criminal Law. – 3. The Indeterminate Sentence As A Solution Approach. – 4. Systems Theory And Individualisation Thesis Of Societies In The Legal Sphere, According To Luhmann, As A Theoretical Justification For The Reintroduction Of Indeterminate Sentencing. – 5. Discussion. – 6. Conclusions.

Keywords: juvenile criminal law; indeterminate sentencing; determinate sentencing; criminal justice reform; Luhmann's systems theory

ABSTRACT

Background: In order to *meet the demands of contemporary society, German juvenile criminal law needs a necessary reform. Consequently, this article proposes the reintroduction of indeterminate sentencing as an instrument for an overall social benefit to this need for reform and to counter the existing determinate sentencing system in place today . This specific*

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sentencing system is understood to be the current guideline and norm currently implemented. According to Luhmann's systems theory, this contradicts the diversity of societies and the unique individuality of each member within them. In this perspective, individuals have the right to assert their rights and define their norms as long as they do not break the law or commit a criminal offence.

Methods: *The discussion surrounding indeterminate sentencing reached its conclusion in the late 1990 s, so a lack of scientific research exists. However, considering the societal transformation and development of the younger generation, the reintroduction of indeterminate sentencing seems opportune. Niklas Luhmann's flexible systems theory from the 1980 s is well suited to support this reintroduction. Based on a relevant literature review and the development of tightening in German juvenile law, this article adopts an analytical approach supported by social, legal and political research. It provides a framework elucidating the reasons and the appropriate form for reintroduc ing indeterminate sentencing as a useful method to increase resocialis ation among the youth . This framework includes practical approaches such as combining education, professional training and social education, all aimed at implementing a rehabilitative approach within the juvenile justice system, similar to the original law that was abandoned.*

Results and Conclusions: *If this occurs, the indeterminate sentence allows for a more individualised approach, establishing an individual-oriented minimum sentence while maintaining a maximum duration. Thus, it aligns with Luhmann's flexible systems theory approach and proves relevant to the current circumstances of the youth generation. Such an approach offers greater benefits by emphasising the integration of education within the prison sentence for resocialisation, surpassing the capabilities of the current determinate sentencing in juvenile criminal law .*

The actual recidivism rates average between 25% and 30% depending on the sentence. With an education-focused approach adjusted to the juvenile offender , coupled with a realistic future-oriented education system in and after the sentence, the process of resocialis ation stands a better chance of success . Although the research on this topic is in its early stages, this approach serves as an initial step towards instigating the necessary reform within juvenile law.

1 INTRODUCTION

The recognition that young people are the future and are still in a developmental phase [2] has led to the thought that juvenile offenders must be treated differently from adults, and offences must also be sanctioned in a differentiated manner. For this reason, a separate juvenile criminal law was developed in Germany to function as a so-called 'educational criminal law,'[3] with the primary aim of punishment being education and the subsequent resocialisation of juvenile offenders.

In order to achieve this goal, there is – in addition to outpatient measures – also the possibility of imposing prison sentences as an 'ultima ratio'.

In the case of imposing a custodial sentence, there were two forms of juvenile sentences in Germany until 1990: the determinate sentence according to Section 18 and the indeterminate

2 Bernd Dollinger, 'Professional Action in the Context of Juvenile Criminal Law: Conceptual Provisions and Empirical Evidence' (2012) 95 (1) Journal of Criminology and Penal Reform 6, doi: 10.1515/mks-2012-950101.

3 Axel Montenbruck, *German Criminal Theory I – IV: Textbook in four pts* (4th edn, Free University of Berlin 2020) 31.

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sentence according to Section 19 JGG (Jugendgerichtsgesetz (German)/Youth Court Act (English)).[4] According to the law, an indeterminate sentence was intended for cases in which the duration required for successful resocialisation (achievement of the purpose of the sentence) could not be precisely determined. When sentencing, a minimum and maximum sentence was given, ranging from no less than half a year to a maximum of two years.

In 1990, the indeterminate sentence was abolished by the legislature on the grounds that it would take better account of the educational principles in juvenile criminal law.[5]

The present article exclusively deals with cases involving the imposition of a prison sentence and explores whether indeterminate sentencing could facilitate appropriate sentencing and provide enhanced opportunities for resocialisation.

Sentencing in trials is still a much-discussed topic today. One of the key challenges is the lack of decisive, valid instruments to ensure that the verdict does full justice to the nature of the offence, the surrounding circumstances, and the personal characteristics of the offender. The primary concern here is the predictability of an offender's resocialisation . It can never be clearly determined when and how resocialisation is really completed. Dahle formulated this in 2010:

> *What is required is an idiographic methodology (or at least the inclusion of such a methodology) that can analyse the dynamics of the offence realised in the concrete event and its background and to identify the factors responsible for this. In contrast, one searches in vain for further specifications regarding the content or methodology of prognosis assessments in the legal texts. The case law has not formulated any very far-reaching content or methodological requirements either. It is, therefore, not surprising that binding methodological standards for criminal prognosis assessments are not in sight for the time being.*[6]

If one must assume that the successful resocialisation of offenders cannot be predicted reliably by the majority, then no sentence could be determined with the particular conviction. In such a case, one could argue that to compensate for this uncertainty, even more drastic measures would need to be implemented in the penal system. Montenbruck makes it clear here:

'With the punishment, the state 'protects the right to freedom by violating the right to freedom', without really knowing whether this offender will ever commit a crime again'. Especially since anyone who assumes freedom of can hardly make this prognosis convincingly. It would then be consistent to develop a law of correction and security in the sense of para. 61 ff. StGB (Strafgesetzbuch (German)/Criminal Code (English)[7] and not to provide for a criminal law of guilt.[8]

However, since society generally acknowledges the need for punishment when laws are broken, imprisonment is often considered the ultima ratio if a threat from an offender

4 Youth Courts Act 'Jugendgerichtsgesetz (JGG)' (as amended of 25 June 2021) <https://www.gesetze-im-internet.de/englisch_jgg> accessed 10 March 2023.

5 Helmut Baier, 'Juvenile Sentencing' in K Laubenthal, H Baier and N Nestler (eds), *Juvenile Criminal Law* (3rd edn, Springer 2015) 338.

6 Klaus-Peter Dahle, *Psychological Criminal Prognosis: Towards an integrative methodology for assessing the probability of recidivism in prisoners* (Studies and Materials for Criminal penitentiary 23, 2nd edn, Centaurus 2010) V-VI, doi: 10.1007/978-3-86226-449-0.

7 German Criminal Code 'Strafgesetzbuch (StGB)' (as amended of 22 November 2021) <https://www.gesetze-im-internet.de/englisch_stgb> accessed 10 March 2023.
This includes preventive detention, compulsory admission to a psychiatric institution, etc. with revocation upon absolute proof of resocialisation.

8 Montenbruck (n 3) 249.

cannot be averted in any other way. However, it is important to recognise that imprisonment ultimately does not integrate the offender into society but excludes him or her from it.

As a consequence, this approach proves to be too harsh in the context of juvenile criminal law since it is based on the fundamental belief that young individuals can still be educated. Thus, in the case of non-prognostic ability, the introduction of an indeterminate sentence from 6 months to 2 years would be a flexible instrument that, on the one hand, retains the punitive nature of the sentence , on the other hand, considers positive changes in the offender's behaviour. Additionally, it would allow for the full duration of the sentence to be served in situations where the need for continued punishment is warranted.

In connection with certain sentences, problem situations arise that can hinder the resocialisation of the offender. Determining the length of a sentence is thus difficult; while serving a sentence, significant negative psychological characteristics can become apparent in the offender, making resocialisation impossible and resulting in criminal behaviour or completed disengagement from society. Dollinger, among others, confirms this:

In view of the openness and plasticity of juvenile development, professional decisions even face the problem that – especially through 'harsh' measures – this development can be interfered with in a way that counters intentionally set negative tendencies in motion and promotes deviant careers. [...] Professionalism in the context of juvenile criminal law is therefore confronted with the fact that decisions must be made about facts that cannot be decided since sufficient bases for the decisions are usually not available. Those who have to make decisions find themselves confronted with principled, unsolvable dilemmas since they have to integrate contradictory requirements without ultimate certainties.[9]

In particular, the orientation of the negative forecast is linked to decision-making patterns that are used as predictors in judgements. Frommel argues:

However, since the negative predictors of an unregulated lifestyle, which are still propagated today, play a considerable role in negative prognoses, a class-specific selection from police registration to imprisonment is pre-programmed.[10]

This implies that subliminal stereotypes are formed in sentencing decisions that contradict reality. Based on this, the sentencing in such cases deviates from the principle of individualised consideration and instead gives rise to the generalised negative factors that influence the sentencing.

'Diversion largely follows administrative rationality (facilitation of work for the public prosecutor's office). Stratification discrimination does not take place directly but at most indirectly via decision-related criteria such as offence severity, criminal record, and provability. Not poor people, but a small group of poor criminals or criminals who are poor are increasingly negatively evaluated after previous formal labelling'.[11]

Diversity, however, determines society more today than was the case before the millennium. This shift can be attributed to the pervasive influence of globalisation across all areas of life and the widespread access to digital technology, which has transformed the information landscape for individuals. As a result, not only have societies become increasingly differentiated in their tendencies towards individualisation, but emancipations are also taking place that are based on a new body of knowledge. This realignment has encompassed

9 Dollinger (n 2) 6.

10 Monika Frommel, 'Feminist Criminology' in K Liebl (ed), *Criminology in the 21st Century* (VS Verlag für Sozialwissenschaften 2007) 109.

11 ibid 112.

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norms, values, democracy, and social and group-specific actions and behaviours. Therefore, it is necessary to acknowledge and take these tendencies and lines of development into account within the realm of criminal law.

This appears to be particularly important in juvenile criminal law regarding the deprivation of liberty since, here, the effects of punishment can have a more substantial impact on the developmental trajectory of young individuals and their social groups . Imposing punishment solely for punishment's sake does little to prevent recidivism. What is needed is a more individual-oriented approach to punishment that combines punitive measures with simultaneous developmental opportunities for resocialisation. Within this context, it is also necessary to integrate education and training as integral components of the resocialisation process, thus establishing them as permanent instruments of education. This would entail creating structured educational programs to be built up within the juvenile system, thereby sharpening a clearer definition and understanding of the role of education in juvenile criminal law.

2 CRITICISM OF DETERMINATE SENTENCING AND THE NON-DEFINITION OF EDUCATION AND RESOCIALISATION IN GERMAN JUVENILE CRIMINAL LAW

Since the reform of the penal code in 1976, Germany has had a uniform penal system law in which resocialisation was set as the primary goal (Section 2 (1) StVollzG (Strafvollzugsgesetz (German)/(Penitentiary Act (English)).[12] The wording here is:

> In the execution of the custodial sentence, the prisoner should become capable of leading a life without criminal offences in the future in a socially responsible manner[13]

However, the term resocialisation is not subject to a clear definition by law and can only be derived from the wording of the StVollzG:

> [...] the sum of all efforts in the penal system for the purpose of enabling the prisoner to lead a life without criminal offences in the future in a socially responsible manner.[14]

The principle of resocialisation is different in juvenile penal law, which, in addition to personal efforts, places greater emphasis on the influence of education . However, here, too, there is a lack of a uniform, federal definition or implementation of what precisely constitutes "education"[15]. In 2019, Swoboda raised concerns about the absence of a legal definition of upbringing within case law.[16]

Dollinger sums up in this context that a clear definition with a targeted action plan would be necessary.

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12 Thomas Vormbaum, *Introduction to Modern Criminal Law History* (2nd edn, Springer 2011) 254, doi: 10.1007/978-3-642-16788-1.

13 Act on the Execution of Prison Sentences and Measures of Reform and Prevention Involving Deprivation of Liberty (Prison Act) 'Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung (StVollzG)' (as amended of 5 October 2021) <https://www.gesetze-im-internet.de/englisch_stvollzg/index.html> accessed 10 March 2023.

14 Klaus Laubenthal, *Penitentiary* (5th edn, Springer 2008) 97.

15 Florian Knauer, 'Current developments in Land legislation on youth detention' in DVJJ (ed), *Herein-, Heraus-, Heran- Let young people grow: Documentation of the 30th Youth Court Day, Berlin, 14-17 September 2017* (Forum Verlag Godesberg 2019) 206.

16 Sabine Swoboda, 'Critical Developments in Juvenile Criminal Law Since 2013: Lecture script at the NRW Youth Court Day Münster, 19 September 2019' (2020) 132 (4) Journal for the Entire Criminal Law Science 826, doi: 10.1515/zstw-2020-0031.

Education as a concept itself lacks clear structure, necessitating a closer look at the actors involved to understand the consequences of educational demands.[17]

In German legal policy, juvenile criminal law serves as educational criminal law that aims to prevent the reoccurrence of offences and focuses on education in its legal consequences. Within this context, punitive punishment in the form of arrest and imprisonment is considered a last resort (ultima ratio) (cf. in terms of content para. 2, section 1 JGG; version 1990). Through a clear diversion[18] of circumstances, backgrounds, and offender profiles, punishments in the form of arrest or detention can be avoided, and solutions can be found through youth welfare or other organisations. In this way, previous convictions can be avoided, and stigmatisation prevented. However, in cases where measures to avoid imprisonment have proven unsuccessful for juvenile offenders and their delinquent behaviour persists, a custodial sentence becomes the necessary course of action.

However, this system is reinforced by the negative effects of determinate sentences. As fixed-term sentences, they not only produce negative behavioural consequences during the implementation of punishment but also fall short in terms of facilitating subsequent reintegration and enabling resocialisation. Thereby, they fail to achieve the educational objective . This observation was already recognised by Franz von Liszt at the beginning of the 20th century. Streng refers to this:

> Liszt found the determination of the sentence in the verdict to be problematic. Since the judge has only a very inadequate basis of assessment for the sentencing, the final sentencing should only occur during the execution of the sentence. For in the course of the execution of the sentence, a better knowledge of the person of the offender is to be gained.19

IsThe indeterminate sentence corresponds to this.

3 INDETERMINATE SENTENCING AS A SOLUTION APPROACH

The indeterminate sentence, as a solution-based approach outlined in paragraph 19 of the JGG, presents itself as follows:

If, when sentencing a juvenile to imprisonment at the time of the offence, the duration of the sentence required to achieve the purpose of the sentence cannot be determined in advance, the court may decide that the sentence must last within a certain minimum and maximum period until the purpose of the sentence has been achieved.[20]

Theoretically, this is defined as follows:

> If implemented consistently, the system would consist in dispensing with a statutory time limit for the types of punishment and the threats of punishment imposed on the individual offence (abolition of the penalty). The determination of the penalty

17 Dollinger (n 2) 2.

18 "Diversion" in German juvenile criminal law means the possibility of "diverting" a juvenile offender from full juvenile criminal proceedings, in particular to avoid the main hearing and early stigmatisation. There are different forms of diversion, ranging from a complete waiver of reaction to a waiver under specific conditions." See, Dirk Baier, 'Stigmatization of Juvenile Offenders: Stigma associated with committing crime at a young age can have a strong impact on identity' (2020) 4 Sozial Aktuell 20, doi: 10.21256/zhaw-20076.

19 Franz Streng, 'Franz v Liszt and Juvenile Criminal Law – A Look Back to the Future' (2017) 3 Journal for Juvenile criminal law and Youth Welfare 210.

20 RStG, 1929, art 72, para 9; Vormbaum (n 12) 166f.

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> amounts would then be left to judicial discretion. The further development of the idea is that the judge's verdict also refrains from determining the size of the sentence, that the duration of a custodial sentence is only determined later and made dependent on the success of the sentence. An indeterminate sentence is, however, also conceivable within a maximum and minimum set by the law or by the judge.[21]

The purpose of the punishment depends on how the juvenile's development changes throughout the sentence . In cases where a genuine attitude of remorse and insight was demonstrated, the punishment could be reduced, and measures of the Reich Youth Welfare Act (RJWG (Reichsgesetz für Jugendwohlfahrt (German)) of 1923 were applied.[22]

This is not to be confused with the system of preventive detention, as this sentence extends beyond the sentence given and thus in no way corresponds to the actual purpose of indeterminate distribution. There is a defined maximum in the indeterminate sentence; beyond that, no further sentences are given for the present offence that requires an extension of imprisonment.

Hafter defines here:

> The difference, in essence, between punishments and measures must have an effect above all in the implementation. Since the measure is not a reaction to a culpably committed offence but is linked to the pathological, dangerous, anti-social state of an offender, the measure must, in principle, last as long as this state exists. It must cease as soon as it is no longer necessary. Unlike in sentencing, there is, therefore, no room for mitigating and aggravating circumstances for rules of assessment in general. As far as deprivations of liberty are concerned, the nature of the measure leads, in principle, to an indeterminate sentence because the judge, when passing a sentence, cannot possibly know how long a pathological, dangerous condition requiring special treatment will last in a person.[23]

With the abolition of indeterminate sentencing by the legislature in 1990, the question arises whether the legislature acted correctly here. As a result, the requirements of determinate sentencing continue to apply to juvenile sentences to this day, eliminating the flexibility of judicial decision-making power. This has created a legal loophole in cases where it is impossible to accurately predict when offenders will achieve full rehabilitation through education. It should be mentioned again that the 1990 version fails to provide a specific definition of education or incorporate it as a determinable measure.[24] Nevertheless, it is still utilised as a justification for punishments.

Actual or even perceived educational deficits are used as a justification for imposing harsher punishments than would be handed out in adult criminal law if the punishment were purely based on guilt.[25]

As a consequence of the reform, judges must now pass a certain sentence, disregarding the predictability of successful resocialisation (whether shorter, longer, or up to maximum sentence).

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21 Ernst Hafter, *Textbook of Swiss criminal law: General Part* (Julius Springer Verlag 1926) 343f.

22 Klaus Laubenthal, 'Historical Development of the JGG' in K Laubenthal, H Baier and N Nestler (eds), *Juvenile Criminal Law* (3rd edn, Springer 2015) 12.

23 Hafter (n 21) 243.

24 DVJJ 2nd Juvenile Criminal Law Reform Commission, 'Proposals for a Reform of Juvenile Criminal Law: Final report of the commission's deliberations from March 2001 to August 2002' (2002) 5 DVJJ-Journal EXTRA 4 <https://www.dvjj.de/wp-content/uploads/2020/04/Kopierfassung_Extra_5.pdf> accessed 10 March 2023.

25 ibid.

On the basis of systems theory and Luhmann's principle of individualisation theory , it is impossible to predict a judgement and thus assign a specific punishment. This is particularly true for adolescents who, in their developmental process, do not yet exhibit definitively fixed behaviour, thus making them still receptive to education.

The educational measures introduced here aimed to prevent lengthy imprisonment for juvenile offenders , which reflects the educational character of the law that has been already emphasised since 1923 and likewise seeks to strengthen crime prevention.[26]

4 SYSTEMS THEORY AND INDIVIDUALISATION THESIS OF SOCIETIES IN THE LEGAL SPHERE, ACCORDING TO LUHMANN, AS A THEORETICAL JUSTIFICATION FOR THE REINTRODUCTION OF INDETERMINATE SENTENCING

The predictability of resocialisation must therefore be regarded as impracticable in the majority of cases. This can be attributed to the increasing diversity of societies, which has become so differentiated that today one can no longer generally assume a single determinable unified society. Cultural backgrounds still determine ways of thinking and behaving, even in the context of current citizenship.

Generative differences are also emerging in public discourse, spanning topics such as digitalisation, environmental concerns , perspectives on art and culture, and so on . Moral concepts and norms are equally transforming, necessitating an interdisciplinary approach to criminology and jurisprudence. For these lines of development, Luhmann's systems theory which encompasses legal aspects comprehensively addresses all these developments and can be applied to juvenile criminal law in the context of indeterminate sentencing.

The connection between systems theory and the rationale for reintroducing indeterminate sentencing cited here can be derived from Luhmann's oeuvre as a whole. Quotations from Luhmann provide the rationales that would theoretically speak in favour of reintroduction.

Niklas Luhmann defines society and its self-perception in relation to the environment. According to Luhmann, systems can be categorised as follows:

Biological systems are alive. Cognitive systems operate in the form of consciousness processes such as perception and thinking. And the characteristic mode of operation of social systems [...] is communication. The operations of all three systems – however different the types and forms of operation may be – follow the same guiding principles. These are the system/environment difference and autopoiesis. According to Luhmann, everything is a system that operates in this way. Or conversely: that which does not have system/environment difference and autopoiesis is not a system.[27]

He further differentiates systems based on their modes of communication, with each communication representing a system and the collective communication between individual systems defining society as a whole . This perspective emphasises the individuality of each communicating system. [28] This individualisation thesis presupposes that each system is driven to act by individual incentives, which also includes criminal acts. From this standpoint, the reintroduction of indeterminate sentencing is justified based on the understanding that

26 Laubenthal (n 22) 13.

27 Margot Berghaus, *Luhmann Made Easy: An Introduction to Systems Theory* (3rd edn, Böhlau 2011) 38.

28 Niklas Luhmann, *Social Systems: Layout of a General Theory* (Suhrkamp 1984) 33.

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individuals behave differently in punitive situations, rendering the prognosis of remorse and resocialisation by means of determinate sentencing insufficient . Luhmann himself speaks during the 1980s, a time of increasing pressure exerted by politics on the judiciary, thus denying the judiciary flexibility.[29] This ultimately led to the removal of indeterminate sentencing, despite its alignment with the existing social system.

For Luhmann, the legal legitimisation of judgements and judgement-making is determined as a process of development since the decisions are borne by several people who are involved in this legal process. Development occurs through a communicative act where the perspectives on decisions can continuously evolve. The process, referred to as a 'fair procedure', facilitates negotiation and bargaining that ultimately results in a judgement.[30] However, this judgement cannot be definitively predicted in terms of the chances of successful resocialisation. Luhmann speaks of '[...] real events and not about a normative relationship of meaning'.[31] There are thus determinants of influence in a decision-making process that are composed of social circumstances, life experiences and knowledge.

He assumes that due to the impossibility of a prognosis in the determination of punishment, a sentence can never do justice to convicted individuals since they are involved in a criminal act and react just as individually to the punishment.

A prognosis of the factual development cannot be justified on the present knowledge base. However, from a sociological perspective, understanding the positivity[32] of law reveals that problem solutions cannot be combined arbitrarily, and shifts in the area of system differentiation will therefore lead to consequences. Above all, it is crucial to acknowledge and properly value the special circumstances surrounding programming decision-making high complex situations . The rationality of programming decisions cannot be judged according to the criteria of the rationality of programmed decisions; this would mean misjudging the function of this differentiation. Legislation should not be equated with the application of the law, and therefore its effectiveness cannot be measured in the same standard .[33]

According to Luhmann, both state and private organisations serve as decision-making and implementation entities, forming the basis of constitutionalism . Consequently, t his constitutionalism is thus a basis for all organisations, regardless of how diverse they are in society. Luhmann does not assume a stringent constancy of organisations but speaks of an 'evolutionary system' in which social organisations can adapt to the respective environmental conditions of society as a whole.[34] This implies that certain systems and the organisations within them (here, the legislature and the judiciary) adapt to these through formal changes in the environment and thus conform to overall developments in societies, which transform them in a horizontally and vertically determining manner .[35]

It is an 'evolutionary achievement' because this system-building principle does not already determine but rather allows for the respective determination of which structural specifications are chosen in the course of its use and within the framework of its general possibilities. Irrespective of whether individual structural specifications can then prove themselves or not, this fundamental openness of the organisation to structural specifications

29 Niklas Luhmann, *Sociology of Law* (3rd edn, Westdeutscher Verlag 1987) 242.

30 Montenbruck (n 3) 117.

31 Luhmann (n 28) 37.

32 Luhmann (n 29) 294. According to Luhmann, this means that legal norms become the subject of selective decisions.

33 ibid 242.

34 Niklas Luhmann, *Functions and Consequences of Formal Organization* (Duncker & Humblot 1964).

35 Georg Kneer and Armin Nassehi, *Niklas Luhmann's Theory of Social Systems: An introduction* (Fink 1993) 38f.

not only opens up the potential for variation and diversification but has the ability to adapt to the most diverse environmental conditions. Its openness also contributes to the social proving of this 'one-time invention'.[36]

Organisations have a high degree of legitimacy within society – especially politically and legally if they are recognised by the majority. The basis of legitimacy is formal acceptance, which is socially legitimised by ensuring equal access. An example of this is equality in court proceedings. [37] Courts are thus organisations that society considers capable of making decisions and asserting itself in court proceedings, where everyone participates in an egalitarian manner.[38]

For Luhmann, the legal legitimacy of decisions is determined through a developmental process involving multiple individuals who are part of systems within the legal process. Development occurs as a process that can be understood as a communicative act, and the decisions are subject to a constantly changing view of the systems.[39]

If one relates this further to sentencing according to the principle of indeterminate sentencing, punishment also corresponds to a behavioural and communicative process carried along by the instances, but also by the accused and influences him. The extent of these influences depends indirectly and directly on the degree of education and opportunities for participation.

'In modern societies, the social structure is more heterogeneous than in traditional societies; for example, there is not only 'above' and 'below'. Industrialisation and the social division of labour have expanded the spheres of production and consumption, the level of education and mobility has risen, and belief in gods and goddesses has been replaced by knowledge'.[40]

D efining law, the legal system and its institutions as an independent authority are inherently problematic from within the social system. This is because the law is fundamentally based on laws that form a legally binding norm that must be generally upheld. This applies to various levels of regulations, from the Ten Commandments to human rights to precisely defined laws . This is a fact for Niklas Luhmann, and he formulates this reality as follows:

In any case, the concept of a norm as a basic concept is also considered indispensable in the general theory of law. As a basic concept – but that means: as a concept defined by itself, as a short-circuited self-reference. The norm prescribes what is intended or expected. This establishes the essential distinction between norms and facts, which becomes an indispensable guiding principle . Facts are evaluated from the perspective of norms and can be judged as conforming or deviating from the standard. Already with these determinations, legal theory assigns itself to the legal system.[41]

As a result, if the 'hierarchy' is fully adhered to, change or flexibility of the law can only be introduced through the normative power of the legislature. Consequently, the determination of legal norms becomes a purely political decision, disregarding the core technical competence of the judiciary. This approach implies that legal decisions must strictly be implemented to the letter by judicial decision, which neither corresponds to reality as it disregards potential minor deviations that may occur. It also fails to accommodate the implementation of indeterminate sentencing, which demands a high degree of necessary

36 Maja Apelt and Veronika Tacke (eds), *Handbook of Types of Organisations* (Springer 2012) 12.

37 Annette Treibel, Introduction to Sociological Theories of the Present (7th edn, VS-Verlag GWV 2006) 28.

38 Niklas Luhmann, *Organization and Decision* (Westdeutscher Verlag 2000) 288f.

39 Berghaus (n 27) 62.

40 Treibel (n 37) 29.

41 Niklas Luhmann, *The Law in Society* (Suhrkamp Taschenbuch Wissenschaft 1183, Suhrkamp 1995) 12.

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flexibility. In this context, decisions cannot be based on predetermined determinants. A judgement is not always made according to the pure content of legal texts but incorporates situational and environmental factors . This results in complexity, requiring a sustainable framework that manages to reduce and navigate its intricacies . [42]

The complexity of the world must not only be grasped imaginatively but also brought close to experience and action, i.e., reduced. [43]

This corresponds to the basic idea that legal theory and its practical implementation can always be linked to sociology and can, if not must, incorporate the social parameter at various levels, be it the individual, group-specific or society as a whole, into the decision-making process for legal cases.[44]

Niklas Luhmann recognises the increasing complexity of societies and the greater differentiation of individual identity groups as a challenge for state leadership. This includes the conception of law and the applicable law, which have to adapt to societal conditions. Complexity is both a problem area and an opportunity for new problem-solving approaches that can be used.[45] Nevertheless , high complexity also places high demands on society and its organisational elements such as politics, economy, justice, and police . Luhmann formulates this as follows:

Functional differentiation gives rise to social subsystems aimed at solving specific social problems. The problems relevant to this change become more refined during the course of social development, making increasingly abstract, more presuppositional, structurally risky differentiations possible. For example, systems arise not only for resource procurement but also for resource distribution, not only for forced goals such as child- rearing and defence but also for chosen goals such as research, including research on research. Similarly, systems exist not only for education but also for pedagogy, not solely for making collectively binding decisions but also for their political preparation, and not only for the administration of justice but also for legislation. The essential consequence of this process is an overproduction of possibilities that can only be realised to a very limited extent, thus requiring processes of increasingly conscious selection.[46]

As a result of society becoming increasingly diverse and multi-oriented , the task of establishing and upholding generally accepted norms and attitudes becomes more challenging. D ifferent interests are diametrically opposed to this, impacting all areas of society and even influencing political perception. In a democratic society, where legislative power is based on society's consensus, the principle should not be mistaken for a dictatorial approach. But in our democratic society, it presents itself as a major obstacle to swift and unified decision-making on fundamentally important problem areas.[47] Such issues also concern the question of juvenile criminal law. Since 1990, there have been no fundamental changes in the German juvenile justice system ; instead, only isolated decisions have been made whose effectiveness raises doubts .

42 Niklas Luhmann, 'Sociological Enlightenment (Inaugural Lecture Münster 1967)' in N Luhmann, *Sociological Enlightenment*, vol 1 (VS Verlag für Sozialwissenschaften 1970) 73.

43 ibid.

44 Luhmann (n 41) 15ff.

45 Luhmann (n 29) 190.

46 ibid 190.

47 One example is that everyone perceives environmental policy as important, but responsibility is shifted from one side to the other. Mentioned here is the construction of wind power plants and the Germany-wide interconnection. But the federal states reject this because it would harm the citizens and the landscape. Consequently, there is a wind farm in the North Sea, but no connection to the general electricity grid. There are too many individual interests clashing here, so in the end no decision is made.

The abolition of indeterminate sentencing in the German juvenile justice system has ultimately created a legal loophole in handling custodial sentences that cannot be adequately addressed by determinate sentencing. This situation leads to determinate sentences without far-reaching resocialisation measures and targeted support for future prospectives, where imprisonment becomes the centre of the punitive measure. Yet , the consequences of prolonged imprisonment are demonstrably responsible for behavioural changes in a large proportion of those imprisoned, leading to their exclusion and otherness vis-à-vis the majority society. Psychological and, thus also, real resocialisation remains difficult in such cases and, in others, impossible without educational and training interventions during imprisonment.

5 DISCUSSION

The 30 years of incremental changes based on the legislature are deemed as insufficient as they do not fully align with the prevailing spirit of the times and the attitudes of society as a whole . They also no longer correspond to the realities in their implementations, as reflected in the development of juvenile delinquency.

In response to the complexity stated by Luhmann, it becomes apparent in these individual decisions that politics react to this complexity with additional complexity within individual decisions. These decisions are then imposed as norms, leaving little room for leeway for legal institutions, especially in juvenile delinquency, since the subjects within this domain are still considered capable of change and education, coming from different backgrounds and act according to different moral concepts, which cannot be equated 1:1 with the adult world. From this perspective, t he causality of the act requires a different sense of justice. This results in causes and preconditions to which a determination of punishment must do justice since the existing law must include the whole of society.[48] Consequently, a fundamental reform must be undertaken that provides additional material and human resources to effectively address these pressing issues faced by the new generation. This implies that while law is subject to contingency (the institutions and their tasks have a clear meaning and constancy), decision-making on law is subject to constant change and must exhibit flexibility in response to these broader societal changes when opportune . [49] Luhmann positions himself clearly in this regard :

Temporally, the law must be institutionalised as changeable without compromising its normative function. This is possible. The function of a structure does not presuppose absolute constancy but only requires that the structure is not problematised in the situations it structures. It is perfectly compatible with this that it is made the subject of decision in other situations (at other times, for other roles or persons), i.e., that it is variable. All that is then required is a clearly recognisable, firmly institutionalised boundary that separates these situations. The positivisation[50] of law consists of a contradictory treatment of structures based on system differentiation.[51]

Furthermore, it is more important for young people as they find themselves in a critical stage of character development, navigating various challenges on their way to adolescence.

Particularly in the age-development stage of adolescents, the processes of perceiving the environment, forming one's own perceptions and values, and undertaking developmental

48 Luhmann (n 29) 208.

49 ibid 210.

50 ibid 294. According to Luhmann, this means that legal norms become the subject of selective decisions.

51 ibid 210.

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milestones are in a state of construction that will later help them to position themselves in the adult world. Four developmental tasks are pivotal here:

1. Development of intellectual and social competence to cope with school or professional demands, ensuring a secure occupational foundation for the future.

2. Development of a sense of personal identity concerning gender and accepting one's own physical appearance to build a social bond with peers of the same or opposite sex and thus laying the foundation for starting a family later.

3. Development of independent patterns of action for the use of the consumer goods market as well as the media to secure one's own lifestyle and make use of leisure opportunities .

4. Development of a system of values and norms and ethical and political awareness to responsibly assume the role of a citizen in society.[52]

Change can thus be the return to a formerly positive sentencing factor, as represented by indeterminate sentencing. And if law and the finding of law is grasped as a phenomenon of society as a whole – Luhmann makes this explicitly clear – then it is necessary to carry out a reform even it is with an instrument that was formerly rejected, since it once again finds its clear justification in the current situation. Luhmann expresses himself as follows regarding the possibilities of a time- and society-oriented law:

The possibility of temporally different law is thus gained. Laws that did not apply yesterday and will possibly or probably, or certainly not apply tomorrow can apply today. Thus, contradictory law can apply if it is temporally separated [...]. Its validity can also be limited; an ongoing revision of the law [...] can be planned in advance and even standardised. The law can be provisionally put into force. Small reforms can be anticipated because the big ones cannot be brought to a decision so quickly. This seems to be no longer in the past but in an open future. All in all: the time dimension illustrates the complexity of law. Law thus embraces change in a legitimate and technically controllable way; it adjusts to the fact that in functionally differentiated societies, due to the high interdependence of all processes, time becomes scarce and begins to flow more rapidly.[53]

Indeterminate sentencing, which takes into account the complexity and integration of various factors, such as life circumstances, preconditions in family situations, and educational background, can influence a judgement. But, at the same time, it reduces it by making further developments dependent on other relevant individuals (including the sentenced individual) and institutions. In Luhmanns's view, a court proceeding and the sentencing process form their own system that considers all factors inherent in the system and aligns them accordingly. However, juvenile offenders' lack of trust in the legal system and the state through the omission of perspectives as an alternative to criminal behaviour prevents a change in behaviour through the feeling of exclusion. This creates an imbalance which undermines the purpose of juvenile criminal law as an educational law that enables resocialisation. Incorporating tangible prospects, such as education, training and support, would help reduce recidivism rates through a comprehensive understanding of punishment and a future avoidance strategy through socio-educational measures.

Dollinger's view is based precisely on recognising complexity in the context of juvenile criminal law.

52 Ruth Festl, *Perpetrators on the Internet: An Analysis of Individual and Structural Explanatory Factors of Cyberbullying in the School Context* (Springer 2015) 55 f.

53 Luhmann (n 29) 210f.

Decisions on how to deal with young, accused individuals present considerable complexity – a complexity whose handling is primarily the responsibility of the individual professionals. Even scientific findings can only partially convey relevant certainties and revise imponderables in the handling of 'cases'. Diagnostic and prognostic instruments, for example, only allow for unsatisfactory decision-making certainties. Young people and adolescents are not fixed in their development, and recent longitudinal criminological research emphasises that criminal careers are highly contingent. Thus, predicting persistent delinquency based on early social conspicuousness is challenging. [54]

By introducing indeterminate sentencing, not only can the variable factor of the entire law be accommodated, [55] but involving juvenile offenders in the criminal process creates potential for personal growth. This approach not only shortens the punishment but also does justice to the character of punishment as education, prevention, and resocialisation.

As early as 1998, the Federal Constitutional Court issued a judgement obligating the legislature to establish and integrate a resocialisation concept into the penal system. The reasons for this judgement read as follows:

In the execution of the custodial sentence, the prisoner should become capable of leading a life without committing a crime in the future in a socially responsible manner (execution goal). The execution of the custodial sentence also serves to protect the general public from further criminal offences.[56]

Furthermore :

Resocialisation also serves to protect the community itself: The latter has a direct interest of its own in ensuring that the offender does not relapse and again harm his fellow citizens and the community.[57]

This was also commented on the factor of work as an educational measure in the penal system.

...work in prison, which is assigned to the prisoner as compulsory work, is only an effective means of resocialisation if the work done receives appropriate recognition. This recognition does not necessarily have to be financial. However, it must be suitable to show the prisoner the value of regular work for a future self-responsible and punishment-free life in the form of a tangible advantage for him.[58]

Although implementing work as a compulsory measure during imprisonment may seem reasonable , it ultimately falls short from a long-term perspective. Simply offering work as a compulsory measure during the period of imprisonment does not offer any perspective as to how it will continue once the offender is released back into society . This lack of perspective in the measures must be addressed by shifting the focus from mere employment to a training pathway that paves the way to fully recognised vocational qualification through suitable and recognised measures.

In terms of successful resocialisation, this pathway must extend beyond the period the young person has served his sentence and be brought to a successful conclusion upon the

54 Dollinger (n 2) 6.

55 Luhmann (n 29) 294.

56 Cases nos 2 BvR 441/90, 2 BvR 493/90, 2 BvR 618/92, 2 BvR 212/93, 2 BvL 17/94 (BVerfG, 1 July 1998) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1998/07/rs19980701_2bvr044190.html> 10 March 2023.

57 ibid.

58 ibid.

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juvenile offender's release. Any measures that do not follow this path fail to provide a meaningful perspective for the offender, as they are aware that their chances of entering the workforce without educational qualifications and the stigma of being an offender will be limited . The evolving conditions within the penal system towards greater social integration and empowerment, as addressed by Obergfell-Fuchs, are not yet sufficiently a topic of public discussion:

A particularly important aspect is the correlation between the quality of life and the previous target variables of the penal system, such as developmental progress or aspects of resocialisation. Not only is there the greatest need for research here, but such studies could be used to demonstrate empirically that the quality of life for prisoners in the penal system is not an unnecessary luxury but rather an important instrument for their rehabilitation, and thus, also for the prevention of future criminal offences.[59]

However, for these measures to be effective, they must require the support of organisations, experts, and the acceptance of society . Particularly, acceptance and support from the economy is important as it loses a potential worker with every juvenile convict. Integrating work and education in the form of further training and providing an honest chance of a smooth transition into a working life can contribute to a more effective resocialisation process. This approach promotes financial independence and helps resource formation and the overwell being of individuals.

Previous research has shown that factors leading to an exit from criminal activities or criminality as a unique factor of one's life are significantly influenced by certain factors. Among these factors, w ork plays an important role .

It is still emphasised that certain life events, such as establishing strong connections , starting a family or taking up work (interpreted as ties and informal social control) promote the exit from criminal life paths.[60]

Neubacher highlights the example of digitalisation as a factor in addressing the educational needs of individuals serving sentences to emphasise the importance of career opportunities after leaving the penal system.

His opinion is

[...] social challenges such as digitalis ation do not stop at the penal system. The security issues that go hand in hand with this are obvious and justified. Nevertheless, the prison system will not be able to stop at allowing a few prisoners access to computers or new media in occasional and small-scale model projects. Here, a clear distinction must be made between learning on the computer as a measure of vocational (or school) training and further qualification, which must no longer be denied against the background of the imperative of social reintegration into the work process [...].[61]

Nevertheless, the prison will not be able to stop at allowing a few prisoners access to computers or new media in occasional and small-scale model projects. Here, a clear differentiation

59 Joachim Obergfell-Fuchs, 'Quality of Life in the Penal System' in HJ Kerner, J Kinzig and R Wulf (eds), *Criminology and Penitentiary: Symposium on 19 March 2016* (Eberhard Karls University; Institute of Criminology 2017) 82.

60 Hans-Jörg Albrecht, 'Sanction Effects, Recidivism, and Criminal Careers' in A Dessecker, S Harrendorf and K Höffler (eds), *Applied Criminology – Justice-Related Research: 12th Criminology Colloquium and Symposium in Honour of Jörg-Martin Jehle, 22-23 June 2018* (Göttingen Studies in Criminology 36, Universitätsverlag Göttingen 2019) 173, doi: 10.17875/gup2019-1223.

61 Frank Neubacher, 'Priorities and Problems of Prison Research in Germany' in A Dessecker, S Harrendorf and K Höffler (eds), *Applied Criminology – Justice-Related Research: 12th Criminology Colloquium and Symposium in Honour of Jörg-Martin Jehle, 22-23 June 2018* (Göttingen Studies in Criminology 36, Universitätsverlag Göttingen 2019) 119, doi: 10.17875/gup2019-1223.

must be made between learning on the computer as a measure of vocational (or school) training and further qualification, which must no longer be denied against the background of the requirement of social reintegration into the work process [...].[62]

Transformations of societies also occur without being initiated by state organisations or other institutions. They can also result from other causes in society. Digitalisation and all its technical possibilities are not only impulses but have become part of life and determine and develop themselves in their fields of use.[63]

Such digital transformation has led to a transformative process that encompasses all areas of life. However, state institutions have been relatively slow in fully embracing this transformation. Manuel Castells, Professor of Sociology at the University of California, explains:

During the last quarter of the 20th century, a technological revolution centred on information has transformed the way we think, produce, trade, manage, communicate, live, die, wage war and love each other. Across the planet, a dynamic global economy has emerged, linking valuable people and activities around the world, while people and territories deemed irrelevant from the perspective of dominant interests have been shut down from networks of power and wealth. [64]

This observation aligns with the principle of systems theory, according to Luhmann, which assumes an evolutionary development that repeatedly demands new conditions for the organisation of societies and their inherent institutions. According to Luhmann, new complexities continue to arise as differences between smaller groups continue to grow. Thus, the ongoing process of digitalization brings about new challenges and complexities that societies and their institutions must navigate and address.

Recent developments in systems theory make it more difficult, rather than easier, to address and solve this problem. For if one has to start from the closed nature of systems and their structural determinations, it becomes all the more difficult to understand (1) how structural changes can occur at all and (2) why directions of change sometimes become discernible (not necessarily, or do they?) such as the diversification of the ways of life or the increasing complexity of the social system. Understanding these questions become difficult as the complexity of the problem intensifies. As the problem becomes more specific and concise, the demands on the theoretical apparatus considered to be a solution also become more demanding. The criteria under which something can be considered as an offering for evolution must meet higher standards. It is clear that evolution can only come about when there is a simultaneous preservation of difference and adaptation in the relationship between a system and its environment. Without these elements, the object of evolution would disappear.[65]

Adjustments made in juvenile justice, based on the principles of education and resocialisation, must adapt to changes in such a way to allow access to new requirements in practically all professions. This thus includes providing education and training that equip young individuals with the necessary skills for a successful and socially acceptable future .

The principle of prevention in avoiding delinquency must be an integral part of the punishment process as well. Implementing a punishment in juvenile criminal law must

62 ibid 128.

63 Klaus Mainzer, *Artificial Intelligence – When Will the Machines Take Over?* (2nd edn, Springer 2019) doi: 10.1007/978-3-662-58046-2.

64 Manuel Castells, *Millennium: The information age, Economy, Society, Culture*, vol 3 (2nd edn, Springer 2017) doi: 10.1007/978-3-658-11272-1.

65 Luhmann (n 41) 240.

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not lose its character to retain its deterrent effect. In its enforcement, it must have a strong preventive character to ensure juvenile individuals do not repeat criminal behaviour and avoid falling into a cycle of limited opportunities that can foster criminal careers.

Education is a field anchored in juvenile criminal law. However, its implementation differs from the broader sociological-pedagogical idea of education.[66] This does not imply that the delinquents have never received any form of education before.

'Such an assertion would already be nonsensical in view of the ubiquitous and transitory character of juvenile delinquency and cannot serve as a justification for substantially intervening in the lives of young people and adolescents.'[67]

Education operates on multiple levels and is thus linked to educational upbringing, training and insight, which plays a crucial role in shaping an individual's character and thereby enabling them to lead a socially accepted life. However, education must be more oriented towards the needs of the young individual and his or her perceptions rather than being imposed by a generation already further removed from the present generation. This implies that measures in juvenile justice must be more oriented towards the expectations and aspirations of young people for their future, focusing on what they consider meaningful and purposeful. In the rarest of cases, this is a criminal career.

In contrast, the determinate sentence partially removes the educational idea in connection with an integrated educational mode for delinquent juveniles completely. This applies to offences of particular severity and offenders who become adults during imprisonment. In general, juvenile criminal law tends to pursue more the idea of retribution for guilt rather than emphasising education and, thus, successful resocialisation.[68]

The high recidivism rates in Germany[69] and other European countries indicate that the current prevention, resocialisation and education system is ineffective because the dominant focus on punishment and resocialisation loses its effect during and after serving a sentence.

However, this completely contradicts the actual idea of education, which is still theoretically anchored as a basis in juvenile criminal law but lacks practical efficiency . A punitive measure in the correctional system should be focused on the resocialisation of the inmate, ensuring their reintegration into society as integral and productive individuals. [70] In this way, t he prisoner remains an integral part of society, and work should be done in the correctional system to ensure that their return is completely successful and well-equipped. [71]

It follows from this that the extrinsic factor of punishment does not foster the intrinsic motivation to improve. Indeterminate sentencing, coupled with the active influence of the offender during the sentence, provides an opportunity to address motivational factors. However, a thorough examination of their 'sincerity of repentance' is necessary to achieve

66 Bernd Dollinger and Henning Schmidt-Semisch, 'Social Pedagogy and Criminology in Dialogue: Introductory Perspectives on the Event of Juvenile Delinquency' in B Dollinger and H Schmidt-Semisch (eds), *Juvenile Delinquency Manual: Criminology and Social Education in Dialogue* (3rd edn, Springer Fachmedien 2018) 14.

67 ibid.

68 Swoboda (n 16).

69 The figures in Germany are 30% after fines, approx. 40% for custodial sentences with probation and approx. 47% for custodial sentences without probation. See, Jörg-Martin Jehle and others, *Legal Probation after Criminal Sanctions: A Nationwide Recidivism Study 2010 to 2013 and 2004 to 2013* (Federal Ministry of Justice 2016) 56.

70 Karl Heinz Auer, *The Human Image as a Legal-Ethical Dimension of Jurisprudence* (Law: Research and Science 2, LIT Verlag 2005) 180.

71 ibid; Heinz Cornel, 'Retribution, Custody, Treatment, or Therapy: What Happened to the Prison Reform?' (2003) 28 (12) Social Magazine, The Journal for Social Work 18.

genuine societal integration. With the certain sentence without a direct effect on the attitude, evaluating the success of resocialisation is very difficult. While sentence reductions apply in the case of good behaviour, a large measure of the punishments have already been served, and changes in behaviour may have already occurred. Furthermore, prisoners who have completed their sentence often are confronted with psychological behavioural changes that further alienate them from the rest of society. [72]

Education, training, and resocialisation are consequently not different aspects of criminal law, but they are interconnected and inseparable and must be implemented as a normative framework. To do so, this approach requires broad recognition and establishing a holistic system that allows young people to be truly resocialis ed. The normative focus is fundamentally important here because it includes the perspective of society as a whole, i.e., politics, the public, the police, and legal authorities, as well as the economy. However, at the same time, it also includes the perspective of the juvenile offenders, taking into account their expectations and intrinsic wishes. This perspective also entails equal participation in social opportunities. Perspective is thus not only the point of view but also the expectation of a future life without the negative factor of crime. This is in the interest of both sides since the absolute majority of young people do not want to be criminals but become criminals through circumstances, wrong decisions, bad influences, and lack of financial and social resources. In this regard, Dollinger states,

'Prevention is supposed to deal effectively with juvenile delinquency, and this expectation of effectiveness is adhered to even if problems become apparent in empirical terms, i.e., if measures are not successful, because the underlying principle of prevention is accepted.'[73]

This is especially true within the context of punishment, as prevention is not solely aimed at ensuring that young people do not become criminals in the first place (optimal case). However, that prevention is also continued in punishment so that no repetition occurs . However, this can only succeed if the perspectives of young individuals are also implemented even more strongly in the prevention work. In addition to an educational approach , an emphasis on education-based strategies is necessary, offering young offenders access to professional and financial opportunities that make delinquency appear unnecessary or less appealing . By combining punishment, prevention, education and perspectives, we can maximise their full effect and efficiently reduce recidivism rates.

The responsibility for establishing the legal framework to ensure conditions that give prevention, education, and resocialisation in juvenile law lies with politics rather than solely resting on the shoulders of the police or legal authorities. However, the current reality looks different.

Reforms that have been carried out in recent years – and only partially – show that policy decisions are rarely based on scientific findings and implemented. While the introduction of outpatient measures implemented through the reform of the JGG in 1990 was a good approach towards alternative strategies to avoid imprisonment, it has become clear that the social institutions and support programmes are inadequately equipped. As Drewniak states noted in 2018:

Nationwide qualified youth welfare services are crucial for effectively addressing the needs of young people who have committed serious offences. This group of young people and

72 Andrea Seelich, *Handbook Prison Architecture: Parameters of Contemporary Prison* Planning (Springer 2009) 52.

73 Bernd Dollinger, 'The Construction of Evidence in Prevention Work: Implications and Perspectives of Impact-Oriented Crime Prevention' in M Walsh and others (edn), *Evidence-Oriented Crime Prevention in Germany: A Guide for Policy and Practice* (Springer 2018) 189, doi: 10.1007/978-3-658-20506-5.

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adolescents must be understood by the youth welfare services as their target group. The conceptual design of the outpatient measures must ensure the provision of individual needs-based socio-educational support services in order to foster the development of young people into independent and community-minded individuals. [74]

This also applies to youth detention and the demand and partial implementation of higher penalties. The majority opinion among experts in criminology, psychology, and jurisprudence are against this, arguing that these aggravating measures have the opposite effect.[75] Graebsch formulates this in very sharp terms:

The legislature relies on the expansion of criminal sanctions in constantly expanded offences and on incarceration even when this is even capable of producing counterproductive effects so that in a pointed reversal of the otherwise common attributions, one can also speak of the legislature as a 'dangerous repeat offender', which invites experts to committee hearings but only rarely hears them [...].[76]

Consequently, relying solely on harsher punishment does not equate to more successful resocialisation. Similarly to the outpatient measures, the state must be willing to invest in effective measures that provide inmates with adequate prospects and opportunities, ultimately minimising the likelihood of reoffending. However, this has not happened.

By adopting such attitudes, politicians are blocking prevention, education, or resocialisation by incarcerating individuals more quickly and easily, thus exposing them to the lack of prospects mentioned above . Ostendorf is very clear here.

'The harsher the punishment, the greater the risk of recidivism. This does not have to be due to the punishment alone, but it is difficult to learn how to use freedom when imprisoned with other offenders and dangerous persons.[77]

In 2003, a valid empirical study was conducted by Jehle, Heinz and Sutterer that examined the correlation between various measures and recidivism rates. The findings revealed that a juvenile sentence without probation resulted in 77.8% recidivism. Even w ith probation, the rate remained high at 59.6%. Outpatient sanctions resulted in a 31.7% recidivism rate, while after detention was 70% .[78] The study continued to gather results from 2010 to 2016, whereby a period of three years was included in which recidivism could occur. Imprisonment still exhibited a significant recidivism rate of 60%, indicating that without extended and targeted measures, it remains one of the largest reasons for repeat offences . Other sentencing measures also displayed high rates ranging from 30 – 45%. All rates combined resulted in an average of 35% which illustrates the explosive nature of the problem. [79] In addition, previous research on recidivism has clearly stated that imposing severe sanctions by means of deprivation of liberty contributes to an

74 Regine Drewinak, 'Outpatient Socio-Educational Services as Alternatives to Imprisonment' in B Dollinger and H Schmidt-Semisch (edn), *Handbook Juvenile Crime* (3rd edn, Springer 2018) 470, doi: 10.1007/978-3-531-19953-5_24.

75 Dollinger (n 73) 190.

76 Christine Graebsch, 'Evidence Orientation of Criminal Sanctions – Opportunities, Risks and Side Effects' in M Walsh and others (edn), *Evidence-Oriented Crime Prevention in Germany: A Guide for Policy and Practice* (Springer 2018) 205.

77 Heribert Ostendorf, 'Juvenile Criminal Law – Ultimo Ratio of the Social Control of Young People' in DVJJ (ed), *Herein-, Heraus-, Heran- Let young people grow: Documentation of the 30th Youth Court Day, Berlin, 14-17 September 2017* (Forum Verlag Godesberg 2019) 663.

78 See in detail in Jörg-Martin Jehle, Wolfgang Heinz and Peter Sutterer, *Legal Probation after Criminal Sanctions: A Commented Recidivism Statistic* (Federal Ministry of Justice 2003).

79 Jehle and others (n 69) 15.

increase in the recidivism rate, potentially leading to the development of criminal careers.[80]

Furthermore, it prevents the normative acceptance of prevention, education in punishment and resocialisation, leading to a lack of viable alternatives for the public, who often unquestionably and unreflectively follow prevailing norms .[81] This is exacerbated by media portrayals of criminality that subliminally promote this opinion but disregards the reality of the decline in juvenile delinquency, especially violent crimes. Castells sees a connection between perception and the direct consequences of imprisonment.

The prison environment perpetuates and promotes a culture of criminality so that those who end up in prison have substantially reduced chances of social integration, both because of the social stigma and psychological trauma . [82]

In summary, this means that punishment and resocialisation cannot be considered valid by a judge's decision within a fixed framework of the punishment period. It contradicts the idea of individualisation and can only be translated into a measure appropriate to the circumstances of life through flexibility in the punishment, motivation by the offender and extrinsic motivation by the legal institutions.

Thus, alongside the laws [...] plans are formed which, as congruent generalised expectations, convey orientation similar to law, above all, open up certainties and possibilities of prognosis but cannot be justified. The regulatory intentions that still assert themselves under such circumstances are no longer determined or even expressed by laws. Instead, they become hindered and redirected through alternative pathways that correspond neither to a weighed legislative intention nor to the actual conception of the planner.[83]

The success of resocialisation is an important and relevant factor for society and also has a strong impact on the national economy. If the consequences of crime can be effectively addressed and ex-offenders are supported by opportunities to enter educational systems and professions, then there are moments of advantage on many levels and also real savings.

However, i t remains to be stated that the predictability of resocialisation successes and the duration until they occur is not given. Consequently, criminal law measures alone do not offer a promising solution for achieving a good educational effect through specific convictions . The reasoning for this opinion stems from the fact that juveniles, for the most part, are not yet developed a stable personality that allows them to establish a character and thus a clear view of future behaviour regarding criminal acts. Given the diametrical differences among individuals , employing indeterminate sentencing becomes an adequate means of meeting the requirement for punishment (reflecting the courts' social responsibility towards the law) while simultaneously observing the social development of the juvenile offender. The custodial sentences can be shortened based on a remorseful attitude, initiative towards resocialis ation , and willingness to reform . This should not be done solely based on existing probation guidelines serving half or two-thirds of the sentence. Negative behavioural changes can already occur here, leading to negative feedback and promoting further criminality if the prisoner were to repent prematurely. According to Baier, the consequence of this perception would be :

On the one hand, as the talk of 'identity' points out, it is assumed that contacts with law enforcement agencies change a person's self-image. Experiences with the police, the legal

80 ibid 84; Albrecht (60) 169.

81 Dollinger (n 73) 190.

82 Castells (n 64) 171.

83 Luhmann (n 29) 331.

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profession or judges that are perceived as aversive encourage young people to maintain subcultural, norm-defying attitudes and values. The label 'lawbreaker' becomes the self-definition of being a lawbreaker, who is then also reflected in future behaviour'.[84]

The flexibilis ation of parole must be continued with indeterminate sentencing to ensure that measures extend into freedom and provide a promising perspective. Special attention should be paid to educational opportunities and training that enable gainful employment, thereby preventing further criminality.

If we look at the international comparison of juvenile criminal law, the discussion about more and harsher punishments was increasingly held until the 2010s and was also incorporated in different ways into the respective national laws.[85] However, the trend here is towards a more moderate legal structure. The USA, in particular, tightened up its juvenile criminal law from the 1990s by lowering the age limits for applying adult criminal law. In the meantime, however, a move away from greater punitiveness is discernible here.

Over the past decade , many states have recognised the need for reform and have taken steps to withdraw the punitive measures. Eleven states, including Illinois, Louisiana, Massachusetts and New York, have also included age groups that were previously traditionally excluded from the juvenile court system by raising the maximum age limit for jurisdiction (Campaign for Youth Justice 2011; National Conference of State Legislatures 2015).[86]

Dünkel summarises here in detail on the international level:

The causes of a tightening of juvenile criminal law that can be observed in some countries are manifold. Certainly, the (Anglo-American) 'punitive' trend with borrowings from retribution- and offence-oriented penal philosophies from the USA has not remained without effect to some extent. However, one can hardly speak of a 'new penal lust' in juvenile criminal law – also in view of clear international guidelines. Punishment-oriented concepts have gained importance, especially in countries with increasing problems with migrants and ethnic minorities and difficulties in the labour market with a considerable and increasing share of poorly educated young people with hardly any prospects. In this context, a certain helplessness in dealing with multiple offenders also plays a role. Therefore, tendencies to increase punishment are often limited to multiple offenders or recidivists, as evidenced in particular by developments in France or Scandinavia.[87]

The Netherlands remains a good benchmark in the context of European comparisons concerning these issues.

Another alternative [...] is the possibility of enforcement in the form of an education and training programme. This is, according to the Dutch legislator, 'a combination of activities in which minors may participate for the purpose of carrying out the execution of a custodial sentence or other custodial measure relating to their stay in an institution.'[88]

In the case of juvenile offenders, incorporating education and training within the framework of indeterminate sentencing provides the opportunity to combine a sentence with an

84 Baier (n 18) 18.

85 Heribert Ostendorf, 'From Punishment Expectations to the "Right" Punishment for Juvenile/Adolescent Offenders' in B Dollinger and H Schmidt-Semisch, *Handbook of Juvenile Crime* (3rd edn, Springer 2018) 159, doi: 10.1007/978-3-531-19953-5_8.

86 Marcus Schaerff, 'Juvenile Delinquency and the Punitive Turn in US Juvenile Criminal Law' in B Dollinger and H Schmidt-Semisch, *Handbook of Juvenile Crime* (3rd edn, Springer 2018) 155.

87 Frieder Dünkel, 'International Trends in Dealing with Juvenile Delinquency' in B Dollinger and H Schmidt-Semisch, *Handbook of Juvenile Crime* (3rd edn, Springer 2018) 110.

88 Anton M van Kalmthout and Zarif Bahtiyar, 'The Netherlands' in F Dünkel and others (eds), *Juvenile Justice Systems in Europe*, vol 2 (2nd edn, Forum Verlag 2011) 949.

integrated educational approach and thereby fostering the development of prospects and opportunities. Furthermore, pre-trial detention avoidance projects have been organised in the past in the Netherlands. During that time, factors such as education , work and training were seen as determinants for the successful reintegration of juvenile offenders for minor offences. These factors were actively implemented .[89] The legal view was that the premise of children and adolescents must be one of protection and that if parental duty failed, children and adolescents must be placed in the care of the legal organisation [90.] . This meant that children and adolescents were placed in state institutions. Here, the institution was responsible for the moral and educational task of upbringing, including the development of basic skills and training for the professional field. In the Netherlands, at the turn of the 17th/18th centuries, recidivism rates of only about 7% per year were recorded. [91]

According to van Kalmthout, this approach 'anticipates the subsequent imposition of punishment', based on the principle that a 'sanction is all the more effective, the sooner it follows the commission of the offence.' [92]

If a uniform juvenile criminal law was agreed upon in EU circles, incorporating indeterminate sentencing with educational and training- focused concepts, it could contribute to more effective resocialisation .

Regardless of whether it takes place nationally or internationally, r eform is urgently needed. However, for any meaningful transformation to take place, there must also be a willingness on the part of the state to explore new avenues.

6 CONCLUSIONS

The rationale behind reintroducing indeterminate sentencing in juvenile criminal law lies in its potential to combine punishment with the right conditions and opportunities for the offender's own contribution to resocialisation. It needs catalysts that promote personal qualities. Although t he legislator has named the principle in law by speaking of a right to education, no results have been achieved.

Prospects for accepted life plans are defined in meritocracies by one's professional life and achievements . Images of people and perceptions of other members of society are constituted by normative general ideas and are not subject to a scientifical definition. [93]

Because of this, an individual cannot generate a motivational attitude to join a resocialisation process. Imprisonment reinforces feelings of inadequacy and hinders the return as a fully recognised member of society. This leads to further rejection and perpetuates criminal careers.

The multitude of tasks that young people face leads to confusion and can result in a departure from societal norms . This can also promote criminal activities.[94]

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89 Hans-Jörg Albrecht, *Juvenile Criminal Law: History of Juvenile Delinquency* (University of Freiburg; Fachbereich Jura 2007) 10.

90 Lloyd DeMause (ed), *Do You Hear the Children Crying? A Psychogenetic History of Childhood* (Suhrkamp Verlag 1980).

91 CW Wimmer, *Description of a Journey Through the Kingdom of the Netherlands* (Pustet 1826) 155.

92 Kalmthout and Bahtiyar (n 88) 245; Bastian Dorenburg, *Pre-Trial Detention and Pre-Trial Detention Avoidance Among Juveniles and Adolescents in Germany and Europe* (Forum Verlag 2017) 174.

93 Anna Bunk, *Resocialisation and the Penal System – a lived principle? An Empirical Study on the Image of Humanity of the General Correctional Service* (University of Bonn 2017) 27.

94 ibid.

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It becomes evident that the current system of determinate sentencing cannot be seen as purposeful here. Luhmann confirms that the determination of punishment cannot be pronounced in this way that it corresponds to a proportional measure. Here, prosecutors and judges in relevant professional fields face a dilemma. They are confronted with shortened and stressful decision-making processes that carry ambivalence within juvenile criminal law.

In juvenile criminal law, it is crucial to recognise that the law and professionals working within it are bound to comprehensive value orientations by the educational claim. However, according to para. 37 JGG, the r esearch examining the pedagogical knowledge of juvenile court judges and prosecutors yields rather sobering findings. Moreover, the orientation of juvenile court assistance does not seem to be clearly pedagogical either .[95]

In light of these findings, it becomes imperative to expand the range of m easures available, , adapt the determination of punishment on a more individualised basis , and increase human resources to effectively provide pass on education and training tasks to young people in a targeted manner.

It, therefore, remains doubtful that the existing criminal law prevents young people from relapsing into crime and may even encourage it.[96] The approaches of pure punishment are, therefore, not to be regarded as the ultimate solution but must be embedded more in an overall context. In this context, the individual case decision-making process contributes significantly to the likelihood of success while at the same time retaining punishment as a punitive measure if the success of rehabilitation is at risk. Ultimately, a sanction's success depends on so many factors, making it difficult to draw definitive conclusions in recidivism research . Dölling states in this regard:

When assessing the effectiveness of a sanction, a differentiated approach is appropriate. For example, a sanction may be effective for a certain period of time, but lose its relevance to behaviour after a longer time. If recidivism occurs after a longer period , the sanction cannot be considered ineffective across the board. […] In addition to the sanction, numerous other crime-inhibiting and crime-promoting factors can affect the convicted person's legal behaviour. The stronger the crime-promoting factors are, the lower the chances are that the sanction will prevent the convicted person from re-offending.[97]

Indeterminate sentencing is to be regarded as an adequate solution as it takes both factors into account: involves the offender and, crucially, accompanying measures of resocialisation in education, training and shaping of perspectives to reintegration that is ultimately sought without negative factors. In line with Luhmann's perspective, it requires a flexible application to the law, where individual circumstances of the cases and offenders must be carefully considered to achieve meaningful outcomes .

It must be added to the consideration that increasing flexibility in sentences does not lead to success in the case of harsher sanctions. In fact, the recidivism rate increases statistically. It is, therefore, not primarily about the punitive aspect of the sanction but rather about the juvenile's background and his previous history, allowing for the implementation of appropriate, tailored measures that are more likely to be implemented with greater success. [98]

95 Dollinger (n 2) 12.

96 Dieter Dölling, 'Criminal Sanctions and Recidivism' in A Dessecker, S Harrendorf and K Höffler (eds), *Applied Criminology – Justice-Related Research: 12th Criminology Colloquium and Symposium in Honour of Jörg-Martin Jehle, 22-23 June 2018* (Göttingen Studies in Criminology 36, Universitätsverlag Göttingen 2019) 182, doi: 10.17875/gup2019-1223.

97 ibid.

98 Bernd-Dieter Meier, 'Research Desiderata on the Effects of Criminal Sanctions' in A Dessecker, S Harrendorf and K Höffler (eds), *Applied Criminology – Justice-Related Research: 12th Criminology Colloquium and Symposium in Honour of Jörg-Martin Jehle, 22-23 June 2018* (Göttingen Studies in Criminology 36, Universitätsverlag Göttingen 2019) 216, doi: 10.17875/gup2019-1223.

With indeterminate sentencing, another form of interchangeability of sanctioning is possible for the area of juvenile criminal law, in that the personality of the offender is taken into account, and recognisable deficits can be addressed through appropriate methods.[99]

This includes the implementation of targeted counselling and psychological support, which take effect as soon as the sentence begins. This is diametrically different from approaches that exist to date, which sometimes involve a psychologist's assessment of the offender's capacity to understand prior to criminal prosecution .[100]

In addition, the establishment of educationally supportive measures and also educationally supportive courses in the penal system is necessary to bring a future-oriented and perspective-promoting element to punishment, ensuring that it is not solely seen as a punitive act of atonement for guilt but also as an opportunity that motivates the active participation of offenders.

The state must recognise the positive impact of such measures. Not only do they prevent recidivism, but they have resocialising and reintegrating effects that contribute to the overall health of the national economy. On the side of the offender , such measures result in reduced reliance on social welfare benefits due to improved access to the labour market. .[101] Failure to consistently prioritise this treatment can lead to additional negative effects .

To initiate further development on reforming juvenile criminal law, the legislature needs to rely on scientific research and findings. Additionally, there is a need for key stakeholders within the relevant areas of the justice system, including the police judges and public prosecutors, to effectively address the requirements for change.

However, to reach the problem area of the poorly functioning resocialisation of youths, there is a need for medium-term investments in personnel and facilities that support resocialis ation. Social agencies are overstretched in the private sector and increasingly threaten public agencies.

The success of resociali sation is a relevant factor for both society and national economies. If consequences of crime can be contained and ex-offenders are supported with access to education and career opportunities , it leads to numerous benefits on many levels and also tangible savings.

For young people, it is crucial to ensure that, even in the event of a misdemeanour, they do not lose the opportunity to pursue a clearly defined chance in the future to steer their own life plan into a legal path.

If, therefore, the improvement in education listed, among other things, would have a preventive factor, it should continue to be used and expanded, not only in Germany but to the whole of Europe .[102]

By shifting the focus towards punitive measures while simultaneously focusing the educational idea with more practical and immediately usable effects, resocialisation and upstream prevention can succeed.

In the process, investments in resocialising institutions are a crucial step towards achieving success. Apart from the societal benefits of resocialisation and low recidivism rates, economic advantages can be gained.

99 ibid 218.

100 Heribert Ostendorf and Kristin Drenkhahn, *Juvenile Criminal Law* (9th edn, Nomos 2017) 49.

101 Christoffer Glaubitz and others, 'What is the cost of juvenile delinquency? An Approach' (2016) 99 (2) Journal of Criminology and Penal Reform 123, doi: 10.1515/mks-2016-990203.

102 Tobias Kollmann and Holger Schmidt, *Germany 4.0: How the Digital Transformation Succeeds* (Springer 2016) 17.

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Given the absence of indeterminate sentencing for the past 30 years, comprehensive research is required to adapt to the social conditions in juvenile criminal law. Conducting i ndividual research by pilot projects examining the efficiency of juvenile punishment in correctional facilities would be necessary. To this end, it is recommended to integrate relevant disciplines within such projects to generate a holistic spectrum of results encompassing all effects, opportunities and still-existing problems .

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Research Article

CRYPTOCURRENCY IN THE DECLARATIONS OF GOVERNMENT OFFICIALS: A TOOLKIT FOR MONEY LAUNDERING (TRENDS AND EXPERIENCE OF COUNTERACTION, BY THE EXAMPLE OF UKRAINE)

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Summary: 1. Introduction. – 2. Review of the literature and initial prerequisites. – *2.1. Anti-money laundering: global trends. – 2.2. Stages of the evolution of the legal regime for cryptocurrencies in Ukraine.* – 3. Methods. – 4. Results and Discussions. – *4.1. Submission of declarations is the duty of civil servants. – 4.2. Liability for violating the rules for submitting a declaration by a civil servant. – 4.3. Some decisions of the Constitutional Court of Ukraine: mitigation of responsibility and levers of the fight against corruption. – 4.4. Declaration of cryptocurrencies by civil servants: statistical data. – 4.5. The beginning of the fight against the declaration of cryptocurrencies as a potential tool for money laundering by corrupt people. – 4.6.Generalisation of the result.* – 5. Conclusions and Recommendations.

Keywords: money laundering, income declaration, corruption, civil servants, cryptocurrency, bitcoin.

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ABSTRACT

***Background**: An investigation was conducted into the 2020 campaign to declare the incomes of civil servants in Ukraine. On June 23, 2022, the country became a candidate for full accession to the European Union, subject to increased efforts to combat corruption. During the study period, it was found that 652 Ukrainian officials declared 46,351 bitcoins, which as of 04/01/2021 was the equivalent of 2 billion 564 million US dollars or 2 billion 348 million euros. Against this background, the existing anti-corruption legislation and the state anti-corruption apparatus are characterised .*

***Methods**: To achieve objective scientific results, the author used methods such as analysis and synthesis to understand and build a logical chain of ideas. The author used the statistical method to emphasise their positions with real data regarding the situation that developed in practice.*

***Results and Conclusions**: The study revealed a potential threat of money laundering by civil servants through the declaration of cryptocurrencies before their legalisation, against the background of a complete absence or imperfection of current laws. It was established that this factor was the most acute form on the evening of the planned state legalisation of cryptocurrencies. This highlights the need for states to take preventive measures to eliminate such risks before legalising cryptocurrencies and preventing "silent amnesties" regarding illegal capital transferred to cryptocurrencies or to "whitewash" future illegal proceeds in advance through the declaration of non-existent cryptocurrency.*

1 INTRODUCTION

Ukraine applied for membership in the European Union on February 28, 2022, when active hostilities began on its territory, and it introduced martial law.[2] This happened on the fifth day after Russia announced the start of a special military operation, and its regular troops crossed the state border into Ukraine.[3] On March 7, 2022, the Council of the European Union asked the European Commission to provide its opinion on the application from Ukraine. By June 17, 2022, the European Commission published its conclusion, in which it recommended recognising the European perspective of Ukraine and granting it as a candidate for joining the European community. On June 23, 2022, the leaders of the European Union in Brussels approved the recommendations of the European Commission on granting Ukraine the status of a candidate for joining the European Union.[4]

However, please note that the European Commission, adopting its conclusion on June 17, 2022, on the eve of the adoption of the resolution, put forward several conditions for Ukraine

2 Decree of the President of Ukraine No 64/2022 'About the introduction of martial law in Ukraine' of February 24, 2022 <https://zakon.rada.gov.ua/laws/show/64/2022#Text> accessed 20 July 2022; The law of Ukraine No 2102-IX 'On the approval of the Decree of the President of Ukraine "On the introduction of martial law in Ukraine"' of February 24, 2022 <https://zakon.rada.gov.ua/laws/show/2102-20#Text> accessed 20 July 2022.

3 Decree of the Federation Council of the Federal Assembly of the Russian Federation No. 35-SF 'On the use of the Armed Forces of the Russian Federation outside the territory of the Russian Federation' of February 22, 2022 <https://www.council.gov.ru> accessed 20 July 2022.

4 'European Council Conclusions on Ukraine, the Membership Applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans and External Relations, 23 June 2022' (*Council of the EU and the European Council*, 23 June 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/06/23/european-council-conclusions-on-ukraine-the-membership-applications-of-ukraine-the-republic-of-moldova-and-georgia-western-balkans-and-external-relations-23-june-2022/> accessed 20 July 2022.

to retain its status, and it moved further towards the status of a full member of the European Union. Here are two of the seven requirements that relate to our research:

> Further strengthen the fight against corruption, in particular at a high level, through proactive and efficient investigations and a credible track record of prosecutions and convictions; complete the appointment of a new head of the Specialised Anti-Corruption Prosecutor's Office through certifying the identified winner of the competition and launch and complete the selection process and appointment for a new Director of the National Anti-Corruption Bureau of Ukraine;
>
> Ensure that anti-money laundering legislation complies with the standards of the Financial Action Task Force (FATF); adopt an overarching strategic plan for the reform of the entire law enforcement sector as part of Ukraine's security environment.[5]

It should be noted that the Parliament of Ukraine, much earlier, ratified[6] the international standards for combating money laundering, terrorist financing, and the proliferation of weapons of mass destruction, which are recommended by the FATF.[7] However, based on the recommendations of the European Commission, their implementation was of inferior quality. These two requirements for Ukraine from the European Commission can be summarised as the fight against corruption and money laundering.

Furthermore, it is remarkable that these are two of the three key elements of the title of this research topic. Cryptocurrency is the missing element, but as is widely known, it is precisely this one that has been used recently to launder money obtained through criminal means, in that case also from corruption crimes committed by public officials.[8] In this way, the research will be aimed at laundering money obtained from corruption crimes using cryptocurrencies, using the example of Ukraine, in the context of the requirements of the European Commission dated 13 June 2022 nominated to it during its acceptance as a candidate for membership of the European Union.

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5 'EU Commission's Recommendations for Ukraine's EU Candidate Status' (*EEAS Website*, 17 June 2022) <https://www.eeas.europa.eu/delegations/ukraine/eu-commissions-recommendations-ukraines-eu-candidate-status_en?s=232> accessed 20 July 2022.

6 Recommendations of the International Organization for Combating Money Laundering (FATF) 'Forty Recommendations of the Financial Action Task Force to Combat Money Laundering (FATF)' of September 25, 2003 <https://zakon.rada.gov.ua/laws/show/835_001#Text> accessed 20 July 2022.

7 FATF, '12-Month Review of the Revised FATF Standards on Virtual Assets and Virtual Asset Service Providers' (*FATF*, 2020) <https://www.fatf-gafi.org/media/fatf/documents/recommendations/12-Month-Review-Revised-FATF-Standards-Virtual-Assets-VASPS.pdf> accessed 14 May 2022; FATF, 'Second 12-Month Review of the Revised FATF Standards on Virtual Assets and Virtual Asset Service Providers' (*FATF,* 2021) <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Second-12-Month-Review-Revised-FATF-Standards-Virtual-Assets-VASPS.pdf> accessed 14 May 2022; FATF, 'Guidance for a Risk-Based Approach Virtual Assets and Virtual Asset Service Providers' (*FATF,* 2019) <https://www.fatf-gafi.org/media/fatf/documents/recommendations/RBA-VA-VASPs.pdf> accessed 14 May 2022; FATF, 'FATF recommendations international standards for combating money laundering, terrorist financing and the proliferation of weapons of mass destruction; Methodology for assessing compliance with FATF recommendations and the effectiveness of anti-money laundering and counter-terrorist financing systems; Rules and procedures of the 5th round of mutual evaluations by the MONEYVAL committee' (*FATF,* 2018) <https://fiu.gov.ua/assets/userfiles/books/5%20round%20FATF.pdf> accessed 20 July 2022.

8 '12-Month Review of the Revised FATF Standards on Virtual Assets and Virtual Asset Service Providers' (n 7); 'Second 12-Month Review of the Revised FATF Standards on Virtual Assets and Virtual Asset Service Providers' (n 7); 'Guidance for a Risk-Based Approach Virtual Assets and Virtual Asset Service Providers' (n 7); 'FATF recommendations international standards for combating money laundering, terrorist financing and the proliferation of weapons of mass destruction; Methodology for assessing compliance with FATF recommendations and the effectiveness of anti-money laundering and counter-terrorist financing systems; Rules and procedures of the 5th round of mutual evaluations by the MONEYVAL committee' (n 7).

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2 REVIEW OF THE LITERATURE AND INITIAL PREREQUISITES

To conduct research towards the topic of the article was prompted to conduct research in the direction of the topic of the article by a relatively recent post on the Telegram channel of one of the high-ranking officials of the Ukrainian government, namely the Deputy Prime Minister, Minister of Digital Transformation of Ukraine Mykhailo Fedorov[9]: "*This year, 652 Ukrainian officials declared 46,351 bitcoins worth UAH 75 billion. Either they fantasized them to justify their cash and whiten their money later, or we have more progressive and far-sighted investors than we thought.*"[10] Moreover, at the time of the publication of this post in the Telegram channel, on April 7, 2022, the amount indicated there, according to the exchange rate of the hryvnia (author's note – the national currency of Ukraine) established by the National Bank of Ukraine, was equivalent to 2 billion 564 million US dollars or 2 billion 348 million euros.[11]

2.1 Anti-money laundering: global trends

The antidote to the crime called "money laundering" began in the late 1980s as a response to the violent surge of this phenomenon that occurred in the early 1980s. A pioneer in this direction was the creation at the international level of the Committee on Rules and Methods of Controlling Banking Operations (Basel Committee). Among its participants were European countries, the USA, and Japan. It was the slogan and reflected the views of the central banks of the participatory countries. In December 1988, the Committee adopted the declaration "On preventing the use of the banking system to launder money got through criminal means. "[12] However, for the first time at the international level, the definition of the term "laundering (legalisation) of criminal proceeds" was provided in the UN Convention "On Combating Illicit Traffic in Narcotic Drugs and Psychotropic Substances," dated December 20, 1988.[13] And then, this term was used more and more often: the Convention of the Council of Europe "On Laundering, Search, Seizure, and Confiscation of Proceeds of Crime" (1990);[14]; Resolution of the UN General Assembly adopted the Political Declaration on Combating Drug Trafficking (1998);[15] International Convention for the Suppression of the Financing of Terrorism (1999);[16] UN Convention against Transnational Organized

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9 'About us. Ministry of Digital Transformation of Ukraine' *(Ministerstvo tsyfrovoi transformatsii Ukrainy)* <https://thedigital.gov.ua/ministry> accessed 18 July 2022.

10 M Fedorov, 'Telegram: Contact @zedigital' (7 April 2021) <https://t.me/zedigital/654> accessed 18 July 2022.

11 'The official exchange rate of the hryvnia against foreign currencies' *(Natsionalnyi bank Ukrainy)* <https://bank.gov.ua/ua/markets/exchangerates> accessed 22 July 2022.

12 'Principles for the Management of Interest Rate Risk' (*BIS,* 1997) <https://www.bis.org/publ/bcbs29a.htm> accessed 20 July 2022; 'Enhancing Bank Transparency' (*BIS,* 1998) <https://www.bis.org/publ/bcbs41.htm> accessed 20 July 2022; 'Framework for Internal Control Systems in Banking Organisations' (*BIS,* 1998) <https://www.bis.org/publ/bcbs40.htm> accessed 20 July 2022; 'Enhancing Corporate Governance for Banking Organisations' (*BIS,* 1999) <https://www.bis.org/publ/bcbs56.htm> accessed 20 July 2022; 'Principles for the Management of Credit Risk' (*BIS,* 1999) <https://www.bis.org/publ/bcbs54.htm> accessed 20 July 2022.

13 United Nations Convention, 'Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances' 1988 <https://www.unodc.org/pdf/convention_1988_en.pdf> accessed 20 July 2022.

14 Council of Europe No. 141, 'Convention on laundering, search, seizure and confiscation of the proceeds from crime' 1990 <https://rm.coe.int/168007bd23> accessed 20 July 2022.

15 Resolution of the UN General Assembly, 'Political Declaration on Combating Drug Trafficking' 1998 <https://www.unodc.org/unodc/en/commissions/CND/Political_Declarations/Political-Declarations_1998-Declaration.html> accessed 20 July 2022.

16 United Nations, 'International Convention for the Suppression of the Financing of Terrorism' 1999 <https://treaties.un.org/doc/db/terrorism/english-18-11.pdf> accessed 20 July 2022.

Crime (2000);[17] UN Convention against Corruption (2003)[18] and other. Such widespread use led to the term "income laundering" becoming accepted, i.e., understood by ordinary citizens, as a negative social phenomenon.

The Financial Action Task Force (FATF) is currently the key institutional organisation of intergovernmental (international) cooperation combating money laundering. They initially established the FATF in July 1989 at a Group of Seven (G-7) Summit in Paris to examine and develop measures to combat money laundering. In October 2001, the FATF expanded its mandate to incorporate efforts to combat terrorist financing and money laundering. In April 2012, it added efforts to counter the financing of the proliferation of weapons of mass destruction. Since its inception, the FATF has operated under a fixed lifespan, requiring a specific decision by its ministers to continue. Three decades after its creation, in April 2019, the Ministers of the FATF adopted a new, open-ended mandate for the FATF. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory, and operational measures for combating money laundering, terrorist financing, and other related threats to the integrity of the international financial system. Starting with its members, the FATF monitors countries' progress in implementing the FATF recommendations ; reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of the FATF Recommendations globally.[19] First issued in 1990, it revised the FATF Guidelines in 1996, 2001, 2003, and then again in 2012, all to show their relevance and universality.[20]

Money laundering is often referred to as a process of disguising the origin of illegally obtained funds and integrating them into the mainstream financial system to appear as a legitimate source of income. It is considered one of the biggest threats to a well-established economy and public safety. Money laundering has three stages: placement , layering, and integration. Placement involves introducing illicitly acquired funds into the financial system[21] . In the layering stage, illicit funds previously deposited into the financial system are obfuscated with complex transactions to frustrate auditing traceability. The integration stage channels the "washed" money that appears legitimate to mainstream investments. Since the fintech industry introduced new payment technologies that enable complex money transactions, money laundering has been identified as "cyber laundering". If cryptocurrencies are used in the money laundering process, it is named "crypto-laundering" or "virtual money laundering". As a result, cryptocurrencies have become a new tool for crime groups to launder illegally obtained funds.[22]

17 UN General Assembly, 'United Nations C onvention A gainst T ransnational O rganized C rime and the P rotocols T hereto' 2000 <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> accessed 20 July 2022.

18 United Nations, 'United Nations Convention against corruption' 2003 <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf> accessed 20 July 2022.

19 FATF, 'Group for the development of financial measures to combat money laundering – FATF' <https://www.fiu.gov.ua/content/uk/fatf.htm> accessed 14 May 2022; FATF, 'About – Financial Action Task Force' <https://www.fatf-gafi.org/about/> accessed 20 July 2022.

20 FATF, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. FATF Recommendations' (*FATF,* 2012) <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> accessed 15 May 2022.

21 Ilbiz, E., & Kaunert, C. (2022). Sharing Economy for Tackling Crypto-Laundering: The Europol Associated 'Global Conference on Criminal Finances and Cryptocurrencies.' Sustainability, 14(11), Article 11. https://doi.org/10.3390/su14116618

22 E Ilbiz, C Kaunert, 'Sharing Economy for Tackling Crypto-Laundering: The Europol Associated 'Global Conference on Criminal Finances and Cryptocurrencies' (2022) 14(11) Sustainability Article 11. https://doi.org/10.3390/su14116618; C Albrecht, K Duffin, S Hawkins, V M Morales Rocha, 'The use of cryptocurrencies in the money laundering process' (2019) 22(2) Journal of Money Laundering Control 210–216. https://doi.org/10.1108/JMLC-12-2017-0074.

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Tracing back illegitimate sources of cryptocurrency becomes more challenging if criminals use "mixing" and "tumbler" services. Mixing and tumbler services' put another obfuscation layer to cryptocurrency transactions. These services pool crypto assets from many users and randomly send mixed coins to the recipient wallet addresses after deducting a transaction fee. The difference between the two services is that while tumblers distribute the same kind of cryptocurrency to the client's wallet, mixers send a different cryptocurrency, making blockchain analysis more complicated. Some mixing and tumbler services use random delay times and randomised fees to make correlation analysis more difficult for investigators.[23]

Money laundering with cryptocurrencies has similar stages to fiat currencies. At the placement stage, cryptocurrencies are purchased from unregulated cryptocurrency exchanges, ATMs, or online platforms where peers exchange cryptocurrencies. Crime groups also recruit money mules to buy cryptocurrencies on their behalf. During the layering stage, the source of cryptocurrencies is obfuscated with mixing and tumbler services or converted to privacy coins to make them untraceable. Initial coin offerings (ICO) are another method exploited in the layering stage in which dirty cryptocurrencies are exchanged with newly minted coins. The use of non-fungible tokens (NFTs) in layering is another technique of recent times that there is increasing suspicion of their role in crypto-laundering. These tokens are collectables that represent a digital art piece in the blockchain. Perpetrators buy their self-created NFT through an anonymous account, declaring they have sold their piece to a higher bid. Their unpredictable valuation makes them a perfect tool to clean illegitimate proceeds. In the integration stage, the cleansed cryptocurrencies are cashed out by money mules in a regulated cryptocurrency exchange offering cryptocurrency exchange with fiat currencies.[24]

Most texts dealing with the relationship between cryptocurrencies and corruption focus only on the issue of whether cryptocurrencies can facilitate corruption or, on the contrary, reduce corruption. The authors who believe that cryptocurrencies can serve as means for corruption transactions usually emphasise the anonymity of cryptocurrency users. However, several authors (e.g., Aldaz-Carroll and Aldaz-Carroll, 2018) take the opposite view, arguing that cryptocurrencies can reduce corruption. They believe that if a cryptocurrency contains information about all transactions made in the past, it is possible to identify, at least approximately, the different parties to the transactions from the history thereof using current methods (big data analysis) or, where appropriate, it would be possible to create a cryptocurrency where information about the contracting parties is included in the transaction. It is essential to emphasise that not all authors share the above optimism . Simply put, if those in power still seek to perpetrate fraud , especially those that involve collusion, blockchain may not be a deterrent. Dudley, Pond and Carden (2019) thus offer, in our opinion, a realistic vision emphasising the fact that cryptocurrencies may reduce corruption, as well as the fact that they can contribute to corruption.[25]

Wawrosz Petr and Jan Lansky's (2021) scenarios imply that cryptocurrencies allow parties to a corrupt contract to transfer a bribe (or, more generally, a benefit received by a corrupt agent or person associated with that agent) in a relatively anonymous way. Cryptocurrencies thus extend the possibility for corruption to situations which, until now, had posed the risk that the bribe would identify the parties to the corruption-tainted contract and expose their corrupt behaviour. If fiat money is used as a bribe, handing over such bribe in cash is associated with the risk of loss or the risk that counterfeit bills will be used for the bribe. In

23 Ilbiz, Kaunert (n 21).

24 Ibid.

25 P Wawrosz, J Lansky, 'Cryptocurrencies and Corruption' (2021) 7(69) Ekonomický Časopis 687–705. https://doi.org/10.31577/ekoncas.2021.07.02.

bank transfers, it is nowadays relatively easy to identify both the payer and the beneficiary. Other forms of bribes often require a personal meeting between the corrupting agent and the corrupt agent or other persons representing them. Cryptocurrencies reduce those risks at least partially. Although the corrupting agent must still find a suitable person who will violate their duties in favour of the corrupting agent, this search can now also take place online. Consequently, cryptocurrencies, together with the online environment, reduce the transaction costs of corruption, making contact between the parties to a corruption-tainted contract easier. All of this can result in the expansion of corruption practices.[26]

2.2 Stages of evolution of the legal regime for cryptocurrencies in ukraine

Moreover, all this is happening against the background of the implementation in 2016 of a wide-ranging state program aimed at legalising cryptocurrencies in Ukraine.[27]

It can be conditionally divided into two stages: 1) before, 2) and after the Law of Ukraine "On Virtual Assets", which introduced several legal definitions, classifications and regulations of cryptocurrencies and the legal framework that established the "legal era" of cryptocurrencies in Ukraine.

In the first stage, the vast majority of draft laws submitted to the Parliament of Ukraine were not so much about regulating cryptocurrency circulation as about taxation of cryptocurrency. This is due to the proposed amendments to the Tax Code of Ukraine and/or other regulatory acts, usually solely for the purpose of taxation of cryptocurrency circulation:

Draft Law on the circulation of cryptocurrency in Ukraine dated 06 October 2017 No. 7183;[28]

Draft Law on Stimulation of the Market for Cryptocurrencies and Their Derivatives in Ukraine dated 10.10.2017 No. 7183-1;[29]

Draft Law on Amendments to the Tax Code of Ukraine on Taxation of Transactions with Virtual Assets in Ukraine dated 14.09.2018 No. 9083;[30]

The Draft Law on Amendments to the Tax Code of Ukraine on Taxation of Transactions with Virtual Assets in Ukraine dated 27.09.2018 No. 9083-1;[31]

The Draft Law on Amendments to the Tax Code of Ukraine and Some Other Laws of Ukraine on Taxation of Transactions with Crypto Assets dated 15.11.2019 No. 2461.[32]

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26 Ibid.

27 'Ministry of Digital Transformation / Virtual asset' (*Ministry of Digital Transformation*) <https://thedigital.gov.ua/projects/virtual_assets> accessed 2 July 2022.

28 Draft Law on Cryptocurrency Circulation in Ukraine No 7183 of October 6, 2017 <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62684> accessed 2 July 2022.

29 Draft Law on Stimulating the Market of Cryptocurrencies and Their Derivatives in Ukraine No 7183-1 of October 6, 2017 <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62710> accessed 2 July 2022.

30 Draft Law on Amendments to the Tax Code of Ukraine on Taxation of Transactions with Virtual Assets in Ukraine No 9083 of September 14, 2018 <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64597> accessed 15 April 2022.

31 Draft (second edition) of the Law on Amendments to the Tax Code of Ukraine on Taxation of Transactions with Virtual Assets in Ukraine No 9083-1, September 27, 2018 <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64696> accessed 15 April 2022.

32 Draft Law on Amendments to the Tax Code of Ukraine and Some Other Laws of Ukraine Regarding Taxation of Transactions with Crypto Assets No 2461 of November 15, 2019 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67423> accessed 15 April 2022.

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The position of lawmakers and tax authorities in the formation of the draft legal framework for the taxation of cryptocurrencies was based on the fact that such relations are associated with the circulation of certain values, and therefore, with the receipt of certain benefits (income or profit) during or as a result of such circulation.

The evolution of the definition of cryptocurrencies in the draft laws mentioned above followed a downward trend: from endowing them with the properties of fiat money to altogether rejecting this idea.

On February 17, 2022, the Parliament of Ukraine adopted the Law of Ukraine "On Virtual Assets" No. 2074-IX (hereinafter – Law 2074)[33], which the President of Ukraine signed on March 15, 2022. This law fully legalises the circulation of cryptocurrencies in Ukraine at the legislative level. According to Clause 1 of Section VI "Final and Transitional Provisions" of Law 2074, the law itself will enter force: a) from entry into force of the Law of Ukraine On Amendments to the Tax Code of Ukraine, regarding the specifics of taxation of operations with virtual assets; b) implementation of the State Register of service providers related to the turnover of virtual assets, which is additionally specified in Clause 2 of Chapter VI of the Final and Transitional Provisions, as a limitation in the possibility of applying sanctions provided for in Article 23 of Law 2074. To fulfi l Clause 1 of Chapter VI of Law 2074 and to put it into effect, the Parliament of Ukraine registered draft law No. 7150 with amendments to the Tax Code of Ukraine on 13.03.2022.[34]

Significant events have taken place since February 17, 2022, namely since the adoption of Law 2074 by the Parliament of Ukraine and until the beginning of 2023. They significantly influenced the plans of the Parliament of Ukraine to introduce mandatory amendments to the Tax Code of Ukraine (regarding the taxation of virtual assets) from 01 October 2022 and simultaneously enact Law 2074.

Among these events is Ukraine's acquisition of the status of a candidate for accession to the European Union on 23 June 2022[35.] The text of the Markets in Crypto Assets Regulation (MiCA) bill was seized on 5 January 2022.[36] This will become the basis for regulating cryptocurrencies in the European Union. Furthermore, on October 10, members of the European Parliament's Committee on Economic and Monetary Affairs adopted a draft law on cryptocurrency regulation, thus supporting the MiCA regulation and all relevant provisions.

These two factors caused the suspension of enacting the relevant Law 2074 regulating cryptocurrencies. As Ukraine becomes a candidate for EU membership, the norms of domestic legislation, including those related to virtual assets, should be adapted to European standards, and the MiCA Regulation is no exception.

33 The Law of Ukraine No 2074-IX 'On virtual assets' of February 17, 2022 <https://zakon.rada.gov.ua/laws/show/2074-20#Text> accessed 15 April 2022.

34 'Draft No. 7150 of the Law on Amendments to the Tax Code of Ukraine on Taxation of Transactions with Virtual Assets' <https://itd.rada.gov.ua/billInfo/Bills/Card/39211> accessed 15 April 2022.

35 'European Council Conclusions on Ukraine, the Membership Applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans, and External Relations, 23 June 2022' (*Council of the EU and the European Council*, 23 June 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/06/23/european-council-conclusions-on-ukraine-the-membership-applications-of-ukraine-the-republic-of-moldova-and-georgia-western-balkans-and-external-relations-23-june-2022/> accessed 20 July 2022.

36 Proposal for a R egulation of the European P arliament and the C ouncil on M arkets in C rypto-assets, and amending directive (eu) 2019/1937 2022 380.

An advisory board has already been established,[37] which is developing amendments to Law 2074 to implement the European MIiCA regulation into Ukrainian legislation.[38]

3 METHODS

The subject and scope of the study determined the set of methodological tools used by the author . The methodological basis of the research includes a set of philosophical, general scientific, and special legal methods of scientific knowledge. The applied methodology made it possible to: outline the circle of potential threats when declaring cryptocurrencies by public officials on the eve of the legalisation of cryptocurrencies, identify the main problems in the activities of a large number of state anti-corruption agencies when declaring cryptocurrencies by officials, and develop the main directions of state policy in solving the problem of anti-corruption activities on the eve of the legalisation of cryptocurrencies. The descriptive method made it possible to present the research results logically . Using philosophical methods, in particular, the dialectical approach, the correlation between the beginning of the procedure of legalisation of cryptocurrencies and their mass declaration by officials on the eve of such innovations is highlighted. The arithmetic calculation, ranking, comparison for different periods, and the dynamics of the declaration of cryptocurrencies by civil servants on the eve of their legalisation were carried out using statistical methods. At the theoretical level of analysis, the legislative framework's main provisions regulating state bodies' anti-corruption system were studied. The normative method was used to analyse aspects of issues arising within the legal regulatory framework of civil servants' duty to submit income declarations. The use of the assessment method allowed the author of the study to conclude the potential level of corruption among civil servants based on the cryptocurrencies they had declared . The research also adopted methods of synthesis, analogy, system, classification and analysis. Thanks to the structural and functional analysis, it was possible to consider the structure of declared cryptocurrencies by civil servants in terms of their positions. Thanks to the classification method, authorities whose civil servants declared cryptocurrency were classified according to their value level (local, regional or state-wide). The synthesis method made it possible to solve the research problems of the analysis of the primary sources of the subject (declarations of civil servants).

Furthermore, applying the analytical method to these primary sources made it possible to determine the most effective provisions that can be implemented in the national legal system as a preventive anti-corruption protection. Induction and deduction methods were used to analyse the content and structure of legislative texts and features of legal provisions in the context of anti-corruption activities regarding the verification of the origin of declared cryptocurrencies. The technical-legal and systematic methods were used to study the anti-corruption practice of state bodies and courts regarding verifying the declarations of public officials who declared cryptocurrency. The methods used allowed the author to obtain reliable and substantiated conclusions and results on the research topic.

37 'The first meeting of the Advisory Council on Regulation of Virtual Assets was held' (*Natsionalna komisiia z tsinnykh paperiv ta fondovoho rynku*, 1 December 2022) <https://www.nssmc.gov.ua/vidbulos-pershe-zasidannia-konsultatsiinoi-rady-z-pytan-rehuliuvannia-virtualnykh-aktyviv/> accessed 30 January 2023; 'Cabinet of Ministers of Ukraine – The first meeting of the Advisory Council on Regulation of Virtual Assets was held' (*Uriadovyi portal*, 1 December 2022) <https://www.kmu.gov.ua/news/vidbulos-pershe-zasidannia-konsultatsiinoi-rady-z-pytan-rehuliuvannia-virtualnykh-aktyviv> accessed 30 January 2023.

38 'The Advisory Council on the Regulation of Virtual Assets has started drafting changes to the relevant law' (*Natsionalna komisiia z tsinnykh paperiv ta fondovoho rynku*, 27 December 2022) <https://www.nssmc.gov.ua/konsultatsiina-rada-z-pytan-rehuliuvannia-virtualnykh-aktyviv-prystupyla-do-rozrobky-zmin-v-profilnyi-zakon/> accessed 31 January 2023.

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4 RESULTS AND DISCUSSIONS

Corruption is an insidious plague with a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to human rights violations , distorts markets, erodes the quality of life, and allows organised crime, terrorism, and other threats to human security to flourish. All countries, big and small, rich and poor, have found this evil phenomenon, but it is in developing countries that its effects are most devastating. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.[39]

In Ukraine, the new Anti-Corruption Strategy for 2021–2025 was recently adopted, which shows that the results of sociological studies show that the share of citizens who have direct experience of corruption has significantly decreased in recent years (in 2013, about 60 percent had such experience, as of by the beginning of 2020 – only 40 percent of citizens). There is a gradual improvement in the comparative indicators of the level of corruption in Ukraine. According to the data between 2013 and 2019 of the international organisation "Transparency International", the Corruption Perception Index (CPI) in Ukraine increased from 25 to 30 points. This confirms that the progress made in recent years does not satisfy society, as it is too slow. The European Commission, in its conclusion on the applications for membership in the European Union submitted by Ukraine, Georgia, and the Republic of Moldova dated 17 June 2022, noted that Ukraine had made significant progress on the way to the rule of law but still has a long way to go in its fight against corruption .[40]

In addition, it is noted that in addition to the above-mentioned improvement of the CPI indicator for 2013-2019 stated in the Anti-Corruption Strategy for 2021-2025, the Corruption Perception Index for 2021 decreased, putting Ukraine from 117th to 122nd place out of 180 countries. This can be seen in Table 1.

Table 1. Analysis of CPI index for Ukraine in 2012–2021 by order of 188 countries from the rating list[41]

№	The Year	Ukraine's place in the ranking of countries by the CPI index	CPI index dynamics for Ukraine
1	2012	144	26
2	2013	144	25
3	2014	142	26
4	2015	130	27
5	2016	131	29
6	2017	130	30
7	2018	120	32
8	2019	126	30
9	2020	117	33
10	2021	122	32

39 United Nations Convention against corruption (n 18).

40 The Law of Ukraine No 2322-IX 'On the principles of the state anti-corruption policy for 2021–2025' of June 20, 2022 <https://zakon.rada.gov.ua/laws/show/2322-20#Text> accessed 31 January 2023.

41 '2021 Corruption Perceptions Index – Explore the Results' (*Transparency.org*) <https://www.transparency.org/en/cpi/2021> accessed 10 July 2022.

The low rate of implementation of the anti-corruption policy in Ukraine significantly slows down its economic growth. A business survey shows that the prevalence of corruption and distrust of the judicial system are the principal obstacles to attracting foreign investment to Ukraine. The concentration of efforts on implementing an anti-corruption policy will enable Ukraine to catch up with the CPI indicators of the Eastern European states – members of the European Union in the coming years and reach the average European CPI values in 10 years.[42]

For this purpose, Ukraine has created a network of specialised government agencies to counteract corruption. It should be noted right away that it is quite extensive in Ukraine and comprises seven specialised state institutions: the National Anti-Corruption Policy Council,[43] the National Anti-Corruption Bureau of Ukraine,[44] the National Agency for the Prevention of Corruption,[45] the Specialized Anti-Corruption Prosecutor's Office,[46] the State Bureau of Investigation,[47] the High Anti-Corruption Court;[48] National Agency of Ukraine for detection, search, and management of assets got from corruption and other crimes.[49]

Note that only specialised institutions are listed, without considering the existing general law enforcement system of Ukraine, which has the following main departments: the Prosecutor General's Office, the National Police, the Bureau of Economic Security, the Supreme Court, and others.

According to the President of Ukraine, Volodymyr Zelensky, in recent years Ukraine has created an anti-corruption structure with no analogues in Europe.[50] However, such a significant number of specialised state institutions to combat corruption in Ukraine is at least surprising against the background of the rather poor results they show in the fight against corruption in Ukraine, which can be observed from the above analysis of CPI indicators in table 1.[51]

4.1 Submission of declarations as the duty of civil servants

One of the anti-corruption tools introduced back in 2014 was the obligation of civil servants to submit electronic declarations of property, income, and financial liabilities (the

42 'On the principles of the state anti-corruption policy for 2021–2025' (n 39).

43 Decree of the President of Ukraine No 808/2014 'On the National Council on Anti-Corruption Policy' of October 14, 2014 <https://zakon.rada.gov.ua/laws/show/808/2014#Text> accessed 10 July 2022.

44 The Law of Ukraine No 1698-VII 'About the National Anti-Corruption Bureau of Ukraine' of October 14, 2014 <https://zakon.rada.gov.ua/laws/show/1698-18#Text> accessed 10 July 2022.

45 The Law of Ukraine No 1700-VII 'On Prevention of Corruption' of October 14, 2014 <https://zakon.rada.gov.ua/laws/show/1700-18#Text> accessed 10 July 2022.

46 Order of the Prosecutor General's Office No. 125 'On Approval of the Regulations on the Specialized Anti-Corruption Prosecutor's Office of the Prosecutor General's Office' of March 5, 2020 <https://zakon.rada.gov.ua/laws/show/v0125905-20#Text> accessed 10 July 2022.

47 Resolution of the Cabinet of Ministers of Ukraine No. 127 'On the establishment of the State Bureau of Investigation' of February 29, 2016 <https://zakon.rada.gov.ua/laws/show/127-2016-%D0%BF#Text> accessed 26 July 2022.

48 The Law of Ukraine No 2447-VIII 'On the Supreme Anti-Corruption Court' of June 7, 2018<https://zakon.rada.gov.ua/laws/show/2447-19#Text> accessed 26 July 2022.

49 The Law of Ukraine No 772-VIII 'About the National Agency of Ukraine for Identification, Search and Management of Assets Obtained from Corruption and Other Crimes' of November 11, 2015 <https://zakon.rada.gov.ua/laws/show/772-19#Text> accessed 26 July 2022.

50 Yuliia Zakharchenko, 'Antykoruptsiina struktura Ukrainy ne maie analohiv u Yevropi – Zelenskyi' (*FAKTY ICTV,* 20 August 2021) <https://fakty.com.ua/ua/ukraine/polituka/20210820-antykoruptsijna-struktura-ukrayiny-ne-maye-analogiv-u-yevropi-zelenskyj/> accessed 26 July 2022.

51 '2021 Corruption Perceptions Index – Explore the Results' (n 40).

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Declaration) owned by the civil servant. This obligation came into force after the creation of the NAPC and the Unified State Register of Declarations [52] in August 2016.

The Law of Ukraine "On Prevention of Corruption"[53] (hereinafter Law 1700) and the Procedure for filling out and submitting a declaration of a person allowed to perform the function of the state or local self-government [54] provide the following cases of declaration submission by public servants.

1) Annual declaration – a declaration submitted by Part 1 of Art. 45 of the Law of 1700, or paragraph 2 of Part 2 of Art. 45 of Law 1700 in the period from 00 hours 00 minutes on January 1 to 00 hours 00 minutes on April 1 of the year following the reporting year. Such a declaration covers the reporting year (the period from 1 January to 31 December inclusive), which precedes the year in which they submitted the declaration, and, as a general rule, contains information as of December 31 of the reporting year. The obligation to submit an annual declaration arises from the subject of the declaration:

> every year during the period of carrying out an activity that involves the obligation to submit a declaration or holding a position that requires carrying out such activity (annual declaration (continuing activity));
>
> the following year after the termination of the activity that involves the obligation to submit a declaration, or holding a position that requires the implementation of such activity (annual declaration (after dismissal)).

2) Declaration upon dismissal – a declaration submitted by paragraph 1, part 2 of Article 45 of Law 1700 no later than 30 calendar days from the day of termination of activity. Such a declaration is submitted for a period that was not covered by declarations previously submitted by the subject of the declaration and contains information as of the last day of such period, which is the last day of the activity that entails the obligation to submit a declaration, holding a position that causes carrying out such activities.[55]

3) Declaration of a candidate for a position – a declaration that is submitted following paragraph 1, part 3 of Article 45 of Law 1700 and covers the reporting period from 1 January to 31 December inclusive, which precedes the year in which the person applied for the position unless otherwise provided by law, and as a general rule contains information as of December 31 of the reporting year. Such a declaration is submitted after the person is determined as the winner of the competition, before the day of appointment or election of the person to the position.[56]

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52 NASK of Ukraine, 'Entrance to the system' (*Yedynyi derzhavnyi reiestr deklaratsii*) <https://portal.nazk.gov.ua/login> accessed 20 July 2022.

53 On Prevention of Corruption (n 44).

54 Order of the National Agency for the Prevention of Corruption No 449/21 'On approval of the declaration form of the person authorised to perform the functions of the state or local self-government, and the Procedure for filling out and submitting the declaration of the person authorised to perform the functions of the state or local self-government' of July 23, 2021 <https://zakon.rada.gov.ua/laws/show/z0987-21#Text> accessed 20 July 2022.

55 On Prevention of Corruption (n 44); On approval of the declaration form of the person authorised to perform the functions of the state or local self-government and the Procedure for filling out and submitting the declaration of the person authorised to perform the functions of the state or local self-government (n 53).

56 Ibid.

4.2 Liability for violation of the rules for submitting a declaration by a civil servant

Civil servants may be subject to disciplinary, administrative, and criminal liability for failure to submit or submission of false information in the declaration. Information on persons who have been prosecuted for corruption or corruption-related offences shall be entered in the Unified State Register of persons who have committed corruption or corruption-related offences (Register of Corrupt Persons).[57] This portal contains information on all individuals and legal entities that have committed corruption offences ; NAPC has been administering this register since February 2019. The matter will go further by detailing each type of responsibility.

1) Disciplinary responsibility. If inaccurate information is stated in the declaration, which differs from reliable information in the amount of up to 100 subsistence minimums for non-disabled persons (author's note – as of 07/01/2022, this is the equivalent of 8887 US dollars or 8552 Euros)[58] ,the subject disciplinary measures may be applied. A person who has committed a corruption offence , or an offense related to corruption but the court has not imposed a penalty on him or imposed a penalty as deprivation of the right to hold certain positions or engage in certain activities related to performing functions of the state or local self-government, or similar to this activity, is subject to disciplinary action by the procedure established by law.[59]

2) Administrative responsibility. According to Part 4 of Article 172-6 of the Code of Ukraine on Administrative Offenses [60], the submission of knowingly false information in the declaration entails the imposition of a fine from 1,000 to 2,500 non-taxable minimum incomes of citizens (n.t.m.i.s.) (note of the author – as of 07/01/2022, 1,000 n.t.m.i.s. is the equivalent of 581 US dollars or 559 Euros)[61]. Liability under this article for the submission of knowingly inaccurate information in the declaration regarding property or another object of declaration that has value arises if such information differs from reliable information by an amount of 100 or more (author's note – as of 01.07.2022 this is the equivalent of 8,887 US dollars or 8,552 Euros)[62] to 500 living wages for non-disabled persons.

3) Criminal liability. Currently, two articles in the Criminal Code of Ukraine provide liability for non-submission or improper submission of a declaration by public servants: Article 366-2 "Declaration of false information"[63] and Article 366-3 "Failure by the subject of the declaration to submit the declaration of the person allowed to execute functions of the state or local self-government".[64] Liability under Article 366-2 begins with the submission of knowingly inaccurate information in the declaration regarding property or another object of

57 'Unified State Register of Persons Who Committed Corruption Or Corruption-related Offenses' *(Natsionalne ahentstvo z pytan zapobihannia koruptsii)* <https://corruptinfo.nazk.gov.ua/> accessed 23 July 2022.

58 The official exchange rate of the hryvnia against foreign currencies (n 11); The Law of Ukraine No 1928-IX 'On the State Budget of Ukraine for 2022' of December 2, 2021 <https://zakon.rada.gov.ua/laws/show/1928-20#Text> accessed 23 July 2022.

59 On Prevention of Corruption (n 44).

60 Code of Ukraine on administrative offenses (Articles 1–212-24) No 8073-X of 7 December 1984 <https://zakon.rada.gov.ua/laws/show/80731-10#Text>.

61 The official exchange rate of the hryvnia against foreign currencies (n 11); On the State Budget of Ukraine for 2022 (n 57).

62 Ibid.

63 Criminal Code of Ukraine No 2341-III of 4 April 2001 <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 23 July 2022.

64 Ibid.

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declaration, which has a value or such information differs from reliable information in the amount of 500 subsistence minimums for non-disabled persons (author's note – as of 01.07. 2022 is the equivalent of 44,435 US dollars or 42,760 Euros).[65]

In addition, until recently, the Criminal Code of Ukraine contained Arts. 366-1 "Declaration of false information" and 368-2 "Illegal enrichment", which at least posed a serious threat to corrupt officials; explore their other qualities further.

Art. 368-2 provided for the following composition of the crime:

> Acquisition by a person allowed to perform the functions of the state (in that case and occupies a responsible position or a responsible position) or local self-government, in the ownership of assets in a significant amount, the legality of the grounds for the acquisition of which is not confirmed by evidence, as well as its transfer of such assets to any other person.

Art. 366-1 provided for the following composition of the crime:

> Submission by the subject of the declaration of knowingly false information in the declaration of a person authorized to perform the functions of the state or local self-government, provided for by the Law of Ukraine "On Prevention of Corruption", or the deliberate failure of the subject of the declaration to submit the said declaration.[66]

The subjects of the declaration are persons who, under the first and second parts of Article 45 of the Law of Ukraine "On Prevention of Corruption",[67] are required to submit a declaration of a person authorised to perform state or local self-government functions. Moreover, the responsibility under Article 366-1 for the submission by the subject of the declaration of knowingly inaccurate information in the declaration regarding property or another object of declaration that has a value arises if such information differs from the reliable information in the amount of more than 250 subsistence minimums for non-disabled persons (author's note – as of 01 July 2022, this is the equivalent of 22,219 US dollars or 21,380 Euros).[68]

Why did Articles 366-1 and 368-2 existed until recently? Let us continue the research and answer this question.

4.3 Some decisions of the constitutional court of ukraine: mitigation of responsibility and levers of the fight against corruption

On 27 October 2020, at the request of 47 People's Deputies of Ukraine, the Constitutional Court of Ukraine adopted Decision No. 13-p/2020,[69] which is recognised as inconsistent with the Constitution of Ukraine (are unconstitutional): many articles of the Law of Ukraine "On Prevention of Corruption" regarding the operation of the State Register of electronic declarations and formation of NAPC; and Article 366-1 of the Criminal Code of Ukraine. The court's reasoning regarding cancelling Article 366-1 was the disproportionality of the punishment and the crime committed. The court recognised the norms as unconstitutional and became invalid from the day the of their adoption. Thus, court disoriented the work of one of the key state bodies in the fight against NAPC and the prevention of corruption.

65 The official exchange rate of the hryvnia against foreign currencies (n 11); On the State Budget of Ukraine for 2022 (n 57).

66 Criminal Code of Ukraine (n 62).

67 On Prevention of Corruption (n 44).

68 The official exchange rate of the hryvnia against foreign currencies (n 11); On the State Budget of Ukraine for 2022 (n 57).

69 Constitutional Court of Ukraine 2020 <https://ccu.gov.ua/docs/2962> accessed 23 July 2022.

According to the NAPC, as of October 27, 2020, they were conducting 110 criminal proceedings, within which detectives were investigating about 180 facts of deliberate entry of false information by officials into the declarations:

> Seven persons, including three former people's deputies, were notified of suspicion. They sent 34 cases to court. About 13 persons, there are court decisions (six verdicts, about seven persons, the cases were closed on non-rehabilitative grounds). Because of the decision of the Constitutional Court of Ukraine, all these cases must be closed. Therefore, officials exposed for abuses will avoid responsibility.[70]

Regarding the absence of postponement of the entry into force by repealing the provisions recognised as unconstitutional in Decision 13-p/2020, the Venice Commission notes that the Constitutional Court did not use its competence provided for in Article 91 of the Law "On the Constitutional Court", which empowers the Court to set a deadline for its implementation by the legislative body in the decision. The Constitutional Court established such three months, for example, in its decision No. 11-r/2020 of September 16, 2020, which declared some provisions of the law as unconstitutional. establishing the NACB, noting that he does this "because of the need to ensure the proper functioning of the National Anti-Corruption Bureau of Ukraine." Although the NAPC is also an anti-corruption body, the same was not done by the Court in Decision No. 13-p/2020, because of which the decision took effect from the moment it was promulgated, and therefore many anti-corruption cases were immediately closed, and court decisions in criminal cases issued based on Article 366-1 of the Criminal Code of Ukraine were cancelled.[71]

The Venice Commission additionally noted Decision 13-p/2020. Not all systems of constitutional justice allow such a delay in the execution of a decision on unconstitutionality. However, if the authority to temporarily suspend the effect of the ruling on unconstitutionality exists, the Venice Commission usually advocates such a delay in the entry into force of the decisions of the constitutional courts to avoid legal gaps and legal uncertainty because of the repeal of legal norms.[72]

Moreover, one more, not so distant but also worthy of attention decision of the Constitutional Court of Ukraine is anti-corruption. On February 29, 2019, at the request of 59 People's Deputies of Ukraine, the Constitutional Court of Ukraine adopted Decision No. 1 r/2019[73], declaring Article 368-2 of the Criminal Code of Ukraine as unconstitutional. The court's reasoning was because Article 368-2 contradicted Article 62 of the Constitution of Ukraine[74] and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 11 of the Universal Declaration of Human Rights: which provides for the presumption of innocence and the right not to prove one's innocence, but Article 368-2 forced the accused to prove his innocence.

As a response to several criminal articles aimed at fighting corruption, cancelled by the Constitutional Court of Ukraine, the Parliament of Ukraine adopted laws that introduced two new articles into the Criminal Code of Ukraine, which are currently in force and aimed at expanding the tools for punishing corrupt officials, in particular for non-submission or

70 Sofiia Sereda, 'Closed declarations and unpunished corrupt officials: what consequences will the decision of the Constitutional Court have for Ukraine?' *(Radio Svoboda,* 29 October 2020) <https://www.radiosvoboda.org/a/rishennia-ksu-i-borotba-z-korupcijeju/30917567.html> accessed 23 July 2022.

71 Venice Commission, 'Urgent Opinion on the Reform of the Constitutional Court' (Venetsiiska komisiia 2020) CDL-AD(2020)039 <https://rm.coe.int/urgent-opinion-of-the-vc-on-the-reform-of-constitutional-court-uk/1680a116c9> accessed 22 July 2022.

72 Ibid.

73 Constitutional Court of Ukraine 2019 <https://ccu.gov.ua/docs/2487> accessed 22 July 2022.

74 Constitution of Ukraine No 254k/96-VR of 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 22 July 2022.

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improper submission of declarations by civil servants: Article 366-2 "Declaration of false information"[75] and Article 366-3 "Non-submission by the subject of the declaration of the person allowed to perform the functions of the state or local self-government"[76].

The restoration of criminal responsibility for improper submission of declarations by civil servants, due to the introduction of Articles 366-2 and 366-3 to the Criminal Code of Ukraine, initially did not have a sanction in the form of deprivation of liberty in contrast to the repealed Article 366-1, but only a small one, as the maximum punishment, limitation of will. This only occurred after civil society[77] and the European Union[78] criticised such changes for establishing relatively soft sanctions in their view. Repeated amendments to these articles were initiated and carried out, which entered into force on 21 July 2021, and then the maximum sanction in the form of imprisonment appeared: in Article 366-2, up to two years; in Article 366-3, up to one year.[79] However, this is all a mitigation, since the threshold of the amount of hidden income, after which criminal prosecution is possible, has increased from 250 to 500 subsistence minimum incomes for non-disabled persons (author's note – as of 07 January 2022, this is equivalent to 44437 US dollars or 20624 Euros;[80] the threshold of the amount, after which deprivation of liberty is possible, has also increased from 250 to 2,000 subsistence minimum incomes of a non-disabled person (author's note – as of 07 January 2022, this is equivalent to 177,748 US dollars or 17,104 Euros).[81]

4.4 Declaration of cryptocurrencies by civil servants: statistical data

Here are the statistics taken from the Unified State Register of Declarations,[82] and only as of 1 January 2021, because there is no complete data for 2021. As far as anyone knows, they are not going to show up quickly. This is because from 24 February 2022, they have imposed martial law on the entire territory of Ukraine,[83] and the requirement for the mandatory annual submission of declarations by civil servants was removed until its termination. After that, an additional three months has been given for its submission.[84] Also, during the period

75 Criminal Code of Ukraine (n 62).

76 Ibid.

77 'Parliament Supports "Compromise" Law on Liability for False Declarations' (*Transparency International Ukraine*, 4 December 2020) <https://ti-ukraine.org/en/news/parliament-supports-compromise-law-on-liability-for-false-declarations/> accessed 23 July 2022.

78 'Ukraine's Law on Asset Declarations Has Several Deficiencies, EU Says' (*Unian*, 8 December 2020) <https://www.unian.info/politics/legislation-ukraine-s-law-on-asset-declarations-has-several-deficiencies-11248694.html> accessed 23 July 2022.

79 Criminal Code of Ukraine (n 62); The Law of Ukraine No 1576-IX 'On Amendments to the Code of Ukraine on Administrative Offenses, the Criminal Code of Ukraine on Improving Liability for Declaring Unreliable Information and Failure to Submit by the Declaring Subject a Declaration of a Person Authorized to Perform the Functions of the State or Local Self-Government' of 29 June 2021 <https://zakon.rada.gov.ua/laws/show/1576-20#Text> accessed 23 July 2022.

80 The official exchange rate of the hryvnia against foreign currencies (n 11); On the State Budget of Ukraine for 2022 (n 57).

81 Ibid.

82 Entrance to the system (n 51).

83 About the introduction of martial law in Ukraine (n 2); On the approval of the Decree of the President of Ukraine "On the introduction of martial law in Ukraine(n 2).

84 NASK of Ukraine, 'Regarding the application of certain provisions of the Law of Ukraine "On Prevention of Corruption' regarding financial control measures under martial law (declaration submission, notification of significant changes in property status, notification of opening a foreign currency account in a non-resident bank institution, conducting inspections)' (*NASK of Ukraine,* 7 March 2022) <https://nazk.gov.ua/uk/documents/roz-yasnennya-4-vid-07-03-2022-shhodo-zastosuvannya-okremyh-polozhen-zakonu-ukrayiny-pro-zapobigannya-koruptsiyi-stosovno-zahodiv-finansovogo-kontrolyu-v-umovah-voyennogo-stanu-podannya-deklaratsiyi-p/> accessed 20 July 2022.

of martial law or a state of war, full checks of declarations and control measures regarding the correctness and completeness of filling out the declaration are not carried out.[85]

Since the beginning of implementation, the state policy was aimed at legalising cryptocurrencies in Ukraine, which relatively speaking began in 2016,[86] with the submission to the Parliament of Ukraine of the first draft laws in this area. The situation with the declaration of cryptocurrencies by public servants, which are allegedly in their possession, has also changed. Table 2 shows the dynamics from 2016 to 2020 regarding government officials' declared ownership of Bitcoin (BTC) by government officials.

Table 2. Dynamics of BTC ownership declarations by government officials in 2016–2020[87]

№	Date	Number of BTC holders' officials, (persons)	Increase to the previous year, (%)	Increase by 2016, (%)
1	01.01.2016	25	0	0
2	01.01.2017	58	132	132
3	01.01.2018	71	22	184
4	01.01.2019	424	497	1596
5	01.01.2020	652	54	2508

The analysis shows that the significant annual growth in the previous year ranged from 22 % to 497 %. The most significant jump of 497 % occurred between 2018 and 2019. Considering the growth at the beginning of 2016, it has an almost cosmic growth rate. From 2016 to 2020, it was 2508 %. In actual numbers, this amounted to 652 declarants against 25 declarants at the beginning of 2016, i.e., an increase of 627 declarants – civil servants who allegedly gained BTC.

Declarations of civil servants for 2020. The campaign for civil servants to declare their property status for 2020 has a leading position not only in terms of the number of people who declared cryptocurrency but also in terms of the number and amount of their inclusion. 791,872 government employees filed returns, of which 652 declared cryptocurrency in their assets, as shown in Table 2. Table 3 provides an analysis of which cryptocurrencies government employees invested in 2020.

85 NASK of Ukraine, 'Regarding the application of certain provisions of the Law of Ukraine "On Prevention of Corruption' regarding financial control measures under martial law (declaration submission, notification of significant changes in property status, notification of opening a foreign currency account in a non-resident bank institution, conducting inspections)' (n 83); The Law of Ukraine No 2115-IX 'On protection of the interests of subjects submitting reports and other documents during the period of martial law or a state of war' of 3 March 2022 <https://zakon.rada.gov.ua/laws/show/2115-20#Text> accessed 24 July 2022.

86 Ministry of Digital Transformation / Virtual asset (n 26).

87 Entrance to the system (n 51); 'Telegram: Contact @OpendatabotChannel' <https://t.me/OpendatabotChannel> accessed 24 July 2022.

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Table 3. The structure of investments in cryptocurrency by government officials in 2020, according to the results of the declaration for 2020[88]

№	Name cryptocurrency	Amount, (persons)	Relation to total (%)
1	Bitcoin Gold	1	0,16
2	Bitcoin Cash	3	0,47
3	MIOTA	10	1,55
4	Monero	13	2,02
5	Stellar	18	2,80
6	ADA	18	2,80
7	Litecoin	27	4,19
8	Ethereum	157	24,38
9	Bitcoin	397	61,65
*	Total amount	644	100

The analysis shows that BTC (61.65 %) has the largest share among cryptocurrencies in which government officials invested in 2020. Next, let us find out which institutions the civil servants who declared BTC in their 2020 declarations worked for and present these results in Table 4.

Table 4. Distribution of owners (civil servants) of BTC by place of work in state bodies, according to the results of the declaration for 2020[89]

№	State agency	Number of people	Relation to total (%)
1	City Council	77	11,81
2	National Police	58	8,90
3	Ministry of Defense	38	5,83
4	District councils	38	5,83
5	Prosecutor's Office	29	4,45
6	Parliament of Ukraine	24	3,68
7	Regional councils	20	3,07
8	Regional councils	17	2,61
9	Others	351	53,83
10	Total amount	652	100

The analysis shows that the largest holders of BTKs work in city councils, the national police, the Ministry of Defense, district councils, and the prosecutor's office.

This data further individualises data regarding BTC owners by identifying the ten richest state officials, their positions, and places of work in the state bodies of Ukraine. However, this paper does not mention their names as this does not significantly affect the overall study. Although

88 Entrance to the system (n 51); NASK of Ukraine, 'Regarding the application of certain provisions of the Law of Ukraine "On Prevention of Corruption' regarding financial control measures under martial law (declaration submission, notification of significant changes in property status, notification of opening a foreign currency account in a non-resident bank institution, conducting inspections)' (n 83).

89 Ibid.

the open functioning of the Unified State Register of Declarations and the Law of Ukraine "On Prevention of Corruption" gives us such a right. The obtained results are presented in Table 5.

Table 5. Individualisation of the ten largest owners (civil servants) of BTC according to the results of the declaration for 2020[90]

№	State agency	Job title	Number of BTC owned	The equivalent of the cost of BTC on 01 April 2021	
				Dollar USA	Euro
1	Dnipro City Council	Deputy	18000	1 056 929 400	898 075 800
2	Ministry of Foreign Affairs of Ukraine	The first secretary of the Embassy of Ukraine in Vietnam	6528	383 313 062	325 702 157
3	Odesa Regional Council	Deputy Chairman of the Odesa Regional Council of the 8th convocation	5328	312 851 102	265 830 437
4	Parliament of Ukraine	People's Deputy of Ukraine	4256	249 905 085	212 345 034
5	City Council	Deputy of the city council	3493	205 103 022	174 276 598
6	Odesa City Council	Deputy of Odesa City Council	1318	77 390 719	65 759 106
7	Uzhhorod City Council	Deputy of the Uzhhorod City Council	826	48 501 316	41 211 701
8	Kyiv City Council	Deputy of the Kyiv City Council	398	23 369 883	19 857 454
9	State Geology and Subsoil Service of Ukraine	Deputy head of the State Geology and Subsoil Service of Ukraine	380	22 312 954	18 959 378
10	Valkivska District State Administration	Head of the Valkivska district state administration	322	18 907 293	16 065 578
*	Total amount	*	40849	2 398 583 837	2 038 083 242

Some conclusions can be made by a nalyzing the data in Table 5. Since, according to the 2020 declaration, 652 government officials own 46,351 BTC, it can be concluded that out of 46,351 BTC, 40,849 BTC or 88.1 %, are owned by ten government officials. Next, let us present the aggregation of BTCs by groups of their owners in Table 6.

90 Entrance to the system (n 51); 'Cryptocurrency quotes Bitcoin - Bitcoin for the past periods' (*Investing.com*) <https://ru.investing.com/crypto/bitcoin/historical-data?cid=1057388> accessed 24 July 2022; NASK of Ukraine, 'Regarding the application of certain provisions of the Law of Ukraine "On Prevention of Corruption' regarding financial control measures under martial law (declaration submission, notification of significant changes in property status, notification of opening a foreign currency account in a non-resident bank institution, conducting inspections)' (n 83).

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Table 6. Aggregation of BTC by groups of their owners (civil servants) according to the results of the declaration for 2020[91]

№	The group under investigation	The number of state officials studied		Number of BTC owned	
		Number of people	Relation to total (%)	Number of BTC	Relation to total (%)
1	Top ten largest owners of BTC	10	2	40849	88
2	The second ten largest owners of BTC	10	2	1805	4
3	The third ten largest owners of BTC	10	2	903	2
4	Other BTC holders	622	95	2794	6
*	Total amount	652	100	46351	100

The analysis shows that the first 30 of the 652 government officials who declared the most BTC in 2020 collectively own 94 % of all declared BTC, that is, 43557 of 46351 BTC.

4.5 The beginning of the fight against the declaration of cryptocurrencies as a potential tool for money laundering by corrupt people

The NAPC has launched a review of officials who have declared owning cryptocurrency in their 2020 tax return . In particular, Serhiy Petukhov, the head of NAPC's mandatory full inspections department, announced this on his Facebook page:

> Bitcoins in declarations for 75 billion hryvnias (author's note – as of 04/07/2021, this is the equivalent of 2 billion 564 million US dollars or 2 billion 348 million euros[92]) – how to check it? Indeed, this year we see significantly more cryptocurrencies in declarations. But we were ready for this, and at the beginning of the year, NAPC indicated in its Explanations that cryptocurrencies must be declared as intangible assets in Section 10 of the declaration, indicating the type of crypto (Bitcoin, Ethereum, etc.), the date of acquisition and the total value of the acquired asset as of the date acquisition When checking the declaration, we will see whether the declarant owns the specified number of crypto tokens, whether the money for its purchase was transferred, and whether the declarant can explain the origin of the money spent on the purchase of tokens. If you have doubts about the authenticity of the specified data regarding the crypto, or whether the declarant has sufficient funds for its purchase, write a statement to the NAPC stating the facts, we can take such a declarant for verification. We have already started 250 checks this year and some of them are already checking declared bitcoins. If we find that the specified information about ownership of cryptocurrency is unreliable, this is grounds for administrative or criminal liability.[93]

This post on Facebook is dated April 8, 2021, as a reaction of NAPC to the indignant post of April 7, 2021, on the Telegram channel of the Deputy Prime Minister, Minister of Digital

91 Entrance to the system (n 51); NASK of Ukraine, 'Regarding the application of certain provisions of the Law of Ukraine "On Prevention of Corruption' regarding financial control measures under martial law (declaration submission, notification of significant changes in property status, notification of opening a foreign currency account in a non-resident bank institution, conducting inspections)' (n 83).

92 The official exchange rate of the hryvnia against foreign currencies (n 11).

93 Sergiy Petukhov, 'Facebook. Bitcoins in declarations for 75 billion hryvnias – how to check it?' (*Facebook,* 8 April 2021) <https://www.facebook.com/sergiy.petukhov/posts/2898994357042851> accessed 25 July 2022.

Transformation of Ukraine Mykhailo Fedorov, already mentioned at the beginning of this work[94] on corruption and cryptocurrency in declarations.

4.5.1 Cryptocurrency validation mechanism in declarations: NAPC

Let us continue to analyse the chronology of the implementation of mechanisms for checking cryptocurrencies in the declarations of civil servants as a potential tool for laundering their income. Indeed, on the peculiarities of declaring cryptocurrencies, the Law of Ukraine from 02.10.2019 № 140-XI amended paragraph 6 of part one of article 46 of the Law of Ukraine "On P revention of C orruption"[95]:

Intangible assets belonging to the subject of the declaration or members of his family, including objects of intellectual property that can be valued in monetary terms, cryptocurrencies. Information on intangible assets includes data on the type and characteristics of such assets, the value of assets at the time of ownership, as well as the date of ownership.[96]

As seen, they only reduce the declaration requirements for cryptocurrencies to display 1. Type and characteristics; 2. Cost; 3. The date of origination of the right to them. The laws of Ukraine do not require other information, such as other evidence about the places of storage of such assets, the right to own them, their history of origin, and so on .

NAPC, in our opinion, tried to correct this provision with its Order No. 449/21[97] and Explanation No. 11 of the NAPC dated 12 September 2021,[98,] i.e. two days before the start of the new income declaration campaign for 2021 which runs from 01 January 2022 to 04 January 2022. Why did it fail? In short, it should reflect all this in Article 46 of the Law of Ukraine "On Prevention of Corruption" in order to not contradict it or expand it independently (which is unconstitutional). Otherwise, they have no legal force, as reflected only in Order No. 449/21 and Explanation No. 11, and contradict the Law of Ukraine "On Prevention of Corruption". Also, as can be understood, the NAPC did not have enough time for the start of the new campaign for the declaration of income in 2021.

The legislation of Ukraine is a system of normative legal acts and international treaties Ukraine formed on a hierarchical basis. A regulatory legal act is an official document adopted (issued) by an entity authorised to do so in the form and procedure defined by law, which establishes legal norms for an unspecified circle of persons and is designed for repeated use. Law is a normative legal act adopted by the Parliament of Ukraine or an all-Ukrainian referendum, which regulates the most important social relations by establishing the status, universally binding rules of conduct of the subjects of such relations, and liability for violations of these rules. The laws of Ukraine have the highest

94 About us. Ministry of Digital Transformation of Ukraine (n 9); Fedorov (n 10).

95 The Law of Ukraine No 140-IX 'On Amendments to Certain Legislative Acts of Ukraine on Ensuring the Effectiveness of the Institutional Mechanism for the Prevention of Corruption' of October 2, 2019<https://zakon.rada.gov.ua/laws/show/140-20#Text> accessed 25 July 2022.

96 On prevention of corruption (n 44).

97 On approval of the declaration form of the person authorised to perform the functions of the state or local self-government, and the Procedure for filling out and submitting the declaration of the person authorised to perform the functions of the state or local self-government (n 53).

98 NASK of Ukraine, 'Clarification on the application of certain provisions of the Law of Ukraine "On Prevention of Corruption" in relation to financial control measures (declaration submission, notification of significant changes in property status, notification of opening a foreign currency account)' (*NASK of Ukraine,* 29 December 2021) <https://wiki.nazk.gov.ua/wp-content/uploads/2021/12/1111_compressed.pdf> accessed 25 July 2022.

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legal force after the Constitution of Ukraine and are adopted based on the Constitution of Ukraine and must correspond to it.[99]

This opinion is confirmed by the preamble of Explanation No. 11: 'it provided these explanations to ensure the uniform application of the Law regarding financial control measures, considered as recommendations and does not contain new legal norms.'[100]

It is important to understand what Order No. 449/21 contains, and what it recognises is lacking in Article 46 of the Law of Ukraine "On Prevention of Corruption" for these norms to have an indisputable legal force. Section IV "Rules for filling out sections of the declaration", in point 11 contains the following requirements:

"In section 10 "Intangible assets": 3) information on cryptocurrency includes data on the type of object; identifier in the system of circulation of virtual assets; amount and value of cryptocurrency; date of acquisition; a provider of services related to the circulation of cryptocurrency; the person to whom the object belongs (the subject of the declaration and/or members of his family). Information identifying the cryptocurrency and the person to whom it belongs, as well as the amount of cryptocurrency, the date of acquisition, and its value, must be specified.[101]

Explanation No. 11 recognises the deficiencies in Article 46 of the Law of Ukraine "On Prevention of Corruption" for these norms to have indisputable legal force:

> The amount of a certain type of cryptocurrency can change because of its exchange (conversion) for other types of cryptocurrencies. To confirm the change in the quantity that occurred because of a set of trade (exchange) operations, it is worth keeping the history of the relevant transactions.;
>
> The presence of a "public address" of a cryptocurrency makes it possible to track the previous dates of transactions and the amount of cryptocurrency purchased on those dates. In addition, the subject of the declaration can confirm the date of acquisition of cryptocurrency through the history of relevant transactions;
>
> In the field "Identifier in the system of circulation of virtual assets (public address)", the public address of the cryptocurrency, the so-called public (public) key, must be specified. The presence of a public address characterises any cryptocurrency owned by a person.;
>
> In the field "Information about the provider of services related to the circulation of cryptocurrency", the name of the cryptocurrency exchange should be shown.[102]

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99 Constitution of Ukraine (n 73).

100 NASK of Ukraine, 'Regarding the application of certain provisions of the Law of Ukraine "On Prevention of Corruption' regarding financial control measures under martial law (declaration submission, notification of significant changes in property status, notification of opening a foreign currency account in a non-resident bank institution, conducting inspections)' (n 83).

101 On approval of the declaration form of the person authorised to perform the functions of the state or local self-government, and the Procedure for filling out and submitting the declaration of the person authorised to perform the functions of the state or local self-government (n 53).

102 'Order of filling. Section XII of the declaration: Intangible assets' (*Ofitsiina baza znan NAZK*, 30 December 2021) <https://wiki.nazk.gov.ua/category/deklaruvannya/hii-nematerialni-aktyvy/> accessed 25 July 2022.

4.5.2 State financial monitoring service of Ukraine

The State Financial Monitoring Service of Ukraine has reported on its performance in 2022. Among the measures taken by the agency were those focused on cryptocurrencies.[103]

According to the report, the State Financial Monitoring Service of Ukraine, together with the team of the Ministry of Digital Transformation, as well as "key crypto experts of Ukraine", worked to identify a list of Russian bitcoin exchanges associated with sanctioned banks to block their hosting completely .[104]

In addition, a "mechanism of spontaneous blocking" of Russian wallets was launched in cooperation with cryptocurrency providers. The State Financial Monitoring Service of Ukraine reported that it had addressed the Binance exchange "with specific proposals for actions to curb Russian aggression in the virtual asset market."

'[After reviewing it], Binance changed its policy and, on 20.03.2022, excluded the possibility of P2P transactions for a number of Russian banks and payment systems that were included in the sanctions list. In addition, other practical measures have been implemented to block Russian crypto assets and transactions of Russian residents', the report says.[105]

Representatives of the State Financial Monitoring Service, as part of the events held in November-December 2022 in Vienna (Republic of Austria), organised with the assistance of the OSCE and the UNODC, were actively involved in the discussion of the taxonomy. Vienna (Republic of Austria), organised with the assistance of the OSCE and the United Nations Office on Drugs and Crime (UNODC), was actively involved in discussions on the definition of a taxonomy of virtual acts, regulatory activities of the virtual asset market, sectoral risk assessment of the virtual asset sector, current tools and technical capabilities for investigating virtual transactions and coverage of an overview of international and national legislation in the field of virtual assets.[106]

To further develop the national anti-money laundering system, the State Financial Monitoring Service of Ukraine, together with the OSCE, UNODC and other stakeholders, will continue active cooperation within the framework of the project "Innovative policy solutions to reduce money laundering risks associated with virtual assets".[107]

On 29 December 2022, the State Financial Monitoring Service of Ukraine held the fourteenth meeting of the Council on Prevention and Counteraction to Legalization (Laundering) of the Proceeds of Crime, Terrorist Financing and Financing of the Proliferation of Weapons of

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103 'Information on the results of the State Financial Monitoring Service for 2022' (*State Financial Monitoring Service of Ukraine*, 18 January 2023) <https://fiu.gov.ua/pages/dijalnist/funkcional/news/Informuvannya-pro-rezultati-roboti-derzhfinmonitoringu-za-2022-rik.html> accessed 25 January 2023.

104 State Financial Monitoring, 'Information on the Results of the State Financial Monitoring for 2022' (*Facebook,* 18 January 2023) <https://www.facebook.com/FIU.Ukraine/posts/pfbid03ohyxzd1Y2DqwA6QwkURAXngX6bHxiT6jk1pEzJTTmt5tYwoqYLnBo5byHdc18JGl> accessed 1 February 2023.

105 'Information on the results of the State Financial Monitoring Service for 2022' (*ForkLog*, 19 January 2023) <https://forklog.com.ua/derzhfinmonitoryng-rozpoviv-pro-identyfikatsiyu-bitkoyin-obminnykiv-rf-ta-vzayemodiyu-z-binance/> accessed 25 January 2023.

106 'Derzhfinmonitoring Talked About Interaction with Binance' (*Facebook,* 22 December 2022) <https://www.facebook.com/FIU.Ukraine/posts/pfbid0254LA4YcyUBrp2R2AVpiMfiRZQcmoAhU38dSaR7fkc5iUVUbdAA2iUuyhMhwKPr7xl> accessed 1 February 2023.

107 'Representatives of the State Financial Monitoring took part in activities within the framework of the project "Innovative political solutions to reduce money laundering risks related to virtual assets"' (*Facebook,* 22 December 2022) <https://fiu.gov.ua/pages/dijalnist/funkcional/news/Predstavnyky-Derzhfinmonitorynhu-vzialy-uchast-u-zakhodakh-v-ramkakh-proektu-Innovatsiini-politychni-rishennia-shchodo-zmenshennia-ryzykiv-z-vidmyvannia-hroshei,-poviazanykh-z-virtualnymy-aktyvamy.html> accessed 1 February 2023.

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Mass Destruction (hereinafter – Laundering) in the format of a video conference. During the meeting, the members of the Council discussed key aspects of the laundering system under martial law, as well as the issues of improving the legislation on the creation of the Unified Register of Accounts of Individuals and Legal Entities and Individual Bank Safes as a single state information system and the state of regulatory and legal support for the formation of comprehensive administrative reporting in the field of l aundering.[108]

4.5.3 National agency of Ukraine for asset recovery and management (NAUARM)

In 2022, NAUARM began cooperation with several cryptocurrency exchanges to exchange information. They also noted that the agency establishes the existence of digital assets in the hands of the defendants only within the framework of criminal proceedings. This includes cooperation with Binance, Coinbase, KuCoin, Kraken, and WhiteBit.[109]

This makes it possible to obtain the identification data of the cryptocurrency wallet owner, in particular: an identity document; email address; IP address; name and IMEI of the device used to log in to the cryptocurrency exchange account; information about the transaction; availability of additional cryptocurrency wallets and bank accounts through which cryptocurrency wallets are replenished; account numbers to which funds are withdrawn, etc.[110]

In addition, interaction with cryptocurrency exchanges allows us to additionally establish the existence of digital and virtual assets of the persons involved in criminal proceedings. It contributes to the efficiency of interaction with law enforcement agencies to provide additional information for the seizure of the identified cryptocurrency assets.

NAUARM, together with experts, has developed recommendations on the identification, tracing and seizure of cryptocurrency assets in criminal proceedings. The guidelines disclose the main provisions of the organisation of criminal proceedings, which include operations using cryptocurrency wallets, methods of preparation for certain procedural actions, ways to detect software related to the use of virtual currencies for criminal purposes, their main identifiers, and also highlight the legal aspects of seizing virtual currency wallets used in criminal activities.[111]

The guidelines include six sections and contain up-to-date information on ways to detect software required for the use of virtual currencies and on the search for stored passwords,

108 'Representatives of the State Financial Monitoring took part in the events within the framework of the project "Innovative Political Solutions to Reduce Money Laundering Risks Related to Virtual Assets"' (*Facebook,* 28 December 2022) <https://www.facebook.com/FIU.Ukraine/posts/pfbid0zrgcTdSt7p9DnCvKh4fa4Jf3mPXnBBCt2Xs7wVQsX9DfATjWr3B2eBRoS9cZXqKil> accessed 1 February 2023.

109 'A meeting of the Council on preventing and countering the legalization (laundering) of criminal proceeds, the financing of terrorism and the financing of the proliferation of weapons of mass destruction was held' (*ForkLog*, 7 December 2022) <https://forklog.com.ua/eksperty-z-ukrayiny-obgovoryly-regulyuvannya-ta-konfiskatsiyu-virtualnyh-aktyviv-z-obsye/> accessed 25 January 2023; 'Experts from Ukraine Discuss Virtual Assets Regulation at OSCE-UNODC Joint Workshop' (*OSCE*, 7 December 2022) <https://www.osce.org/oceea/533732> accessed 25 January 2023.

110 'ARMA Establishes Cooperation with the World's Leading Crypto Exchanges' (*APMA*, 15 November 2022) <https://arma.gov.ua/news/typical/arma-nalagodjue-spivrobitnitstvo-z-providnimi-kriptobirjami-svitu> accessed 25 January 2023; 'ARMA of Ukraine Cooperates with Exchanges to Identify Owners of Crypto Wallets' (*ForkLog*, 16 November 2022) <https://forklog.com.ua/arma-ukrayiny-nalagodylo-kontakt-z-birzhamy-dlya-identyfikatsiyi-vlasnykiv-kryptogamantsiv/> accessed 25 January 2023.

111 ARMA Establishes Cooperation with the World's Leading Crypto Exchanges (n 109); ARMA of Ukraine Cooperates with Exchanges to Identify Owners of Crypto Wallets (n 109).

including their most common forms and places of storage. In addition, the guidelines provide samples of petitions for searches and seizure of property submitted by law enforcement agencies to the court. The developed guidelines allow for streamlining the algorithm of actions, thus increasing the effectiveness of measures to identify, search and seize cryptocurrency assets.

Also, following a proactive approach to the formation of state policy and the implementation of best international practices in the field of asset tracing, including cryptocurrency, NAUARM has addressed international organisations working in the field of asset tracing and recovery with a proposal to familiarise themselves with the practice of Ukraine, share their approaches and join the development of a study in this area.[112]

NAUARM has initiated consultations with international organisations : Interpol and Europol; global asset recovery networks: Camden Asset Recovery Inter-Agency Network (CARIN) and Stolen Asset Recovery Initiative (StAR); regional asset recovery networks; Asia-Pacific, South Africa, East Africa, West Africa and the Caribbean; platform of asset recovery institutions of the European Union Member States. This platform for discussing the NAUARM Recommendations brings together more than 150 jurisdictions. This will facilitate the exchange of experience between specialised institutions and the resolution of several problematic issues faced by authorised institutions in the area of tracing, immobilisation and subsequent seizure of cryptocurrencies. In addition, NAUARM looks forward to establishing a dialogue with foreign partners for further possible joint actions in this area.[113]

4.6 Generalization of the result

Only until 15 March 2022, that is, before the adoption of Law 2074, which legalised cryptocurrencies, the latter did not have a defined legal status and a legally established mechanism for confirming their ownership. Many civil servants took advantage of this, declaring them as property against the absence of a legal field, thus causing society to suspect money laundering. This is because declaring a cryptocurrency does not exclude the possibility of the fictitiousness of such actions aimed at laundering the income received from corruption. This is because the fortunes of most of the declarants – state employees, based on their salary level, did not allow them to purchase the declared cryptocurrency worth millions of US dollars.

On 27 October 2020, the Constitutional Court of Ukraine adopted decision No. 13-r/2020, in which it cancelled a number of anti-corruption instruments. In particular, the Constitutional Court invalidated Article 366-1 of the Criminal Code, which established criminal liability for failure to submit a declaration or submission of knowingly inaccurate information by the subject of the declaration. This decision led to the closure of criminal proceedings in cases related to the declaration of false information about the property or the failure to submit a declaration at all, which was pending at that time. Only the administrative responsibility related to the declaration of inaccurate information about the property or the failure to submit a declaration remained. The Parliament of Ukraine subsequently introduced new similar sanctions, but time was lost, leading to negative consequences. In fact, it was an amnesty for civil servants who had previously submitted information to their declarations, even if it was unreliable. The information about the presence of cryptocurrencies in the hands of

112 ARMA Establishes Cooperation with the World's Leading Crypto Exchanges (n 109).

113 'ARMA Has Developed Recommendations on the Search and Seizure of Cryptocurrency Assets' (*ARMA*, 24 April 2020) <https://arma.gov.ua/news/typical/arma-rozrobilo-rekomendatsii-z-rozshuku-ta-areshtu-kriptovalyutnih-aktiviv> accessed 25 January 2023.

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government officials was not an exception to such information. These declared fortunes were likely to be obtained from corruption, taking into account the imbalance between the low level of salaries of officials and the level of declared fortunes in cryptocurrency. Even after the reintroduction of two criminal articles (366-2 and 366-3) on 30.12.2020, which provide for the composition of the crime similar to the repealed article 366-1, it became impossible to bring civil servants to justice for previously committed crimes in the field of corruption. Since , in accordance with Article 58 of the Constitution of Ukraine, adopted laws and regulatory acts do not have a retroactive effect in time, in our case, it is until December 30, 2020 (the date of adoption of new sanctions).

As of December 30, 2020, the restoration of criminal liability for improper submission of declarations by civil servants, due to the introduction of Articles 366-2 and 366-3 to the Criminal Code of Ukraine, initially did not have a sanction in the form of deprivation of liberty, but only as a maximum punishment, restriction of liberty. Only after repeated amendments were made to these articles, which entered into force on July 21, 2021, the maximum sanction in the form of imprisonment appeared: in Article 366-2, up to two years; in Article 366-3, up to one year. However, interestingly, much more brutal introductions occurred after the 2020 declaration campaign ended on April 1, 2021 which made it possible to declare 46,351 bitcoins for the year 2020 to public servants, which as of April 01, 2020, amounted to almost 2 billion 564 million US dollars or 2 billion 348 million euros. This happened almost against the background of the absence of effective penalties in the legislation since the maximum that threatened corrupt officials (it can be assumed that such exist, based on the imbalance in their level of wages and stated wealth) was a fine. Even the limitation of their will could not be applied to them, as those who are attracted for the first time, as the most severe of list of punishments available until 21 July 2021 (or extremely rare).

Article 46 of the main anti-corruption Law of Ukraine "On Prevention of Corruption" contains meagre requirements regarding the declaration of cryptocurrencies by public servants and is reduced only to the mandatory display of 1. Type and characteristics; 2. Costs; 3. The date of origination of the right to them. That is, the laws of Ukraine do not require other information, such as other evidence about the places of storage of such assets, the right to own them and their history of origin. What gives the law enforcement agency a small toolkit for investigating the corruption component in their acquisition? An attempt to correct this deficiency was Order No. 449/21 and Explanation No. 11 issued by the NAPC on the procedure for filling out the declaration of civil servants. These regulatory documents supposedly clarify and reveal the concepts of "types and characteristics" mentioned more broadly by the Law of Ukraine "On Prevention of Corruption", in particular regarding the disclosure of the additionally established requirements for the following designation: a) "Identifier in the system of circulation of virtual assets (public address)"; b) "History of transactions"; c) "Information about the provider of services related to the circulation of cryptocurrency." But in doing so, the NAPC has greatly overstepped its mandate. Thus, they went beyond the legal provisions of Article 46 of the Law of Ukraine, "On Prevention of Corruption", in their explanations before completing the declarations. Thereby making it likely that their decisions will be recognized as illegitimate in the courts of Ukraine or international courts. However, it should be emphasised that such rules are useful and should be contained not in the order № 449/21 and clarification № 11 of the NAPC but directly in the Law of Ukraine "On Prevention of Corruption" to have unshakable legal force.

5 CONCLUSIONS AND RECOMMENDATIONS

It is necessary to consider the experience of Ukraine, which demonstrated a new way of possible money laundering through the declaration of cryptocurrencies before their

legalisation . This requires the development and adoption of preventive norms in the current legislation of other countries before the legalisation of cryptocurrencies.

An ill-considered and incomplete legislative policy of the state in the fight against money laundering in the process of the legalisation of cryptocurrencies (namely, before the legalisation of cryptocurrencies) can actually lead to the so-called tacit amnesty of previously declared cryptocurrencies received from corruption and other illegal activities.

A promising direction for further development of the study of the phenomenon is the use of cryptocurrencies in general and in particular in the declarations of public officials for money laundering, and the detection and counteraction to this should continue in the following areas: 1) improving the existing mechanisms of prevention and combating; 2) the development (experimentation) of new mechanisms that should meet the ever-increasing challenges of the FinTech industry and criminal schemes of their use. The experience of Ukrainian state institutions in combating money laundering with the use of cryptocurrencies: NAUARM's experience of cooperation with Binance, Coinbase, KuCoin, Kraken, and WhiteBit; practical and theoretical developments of cryptocurrency checks in NAPC declarations; preventive measures from the State Financial Monitoring Service of Ukraine and NAPC – can be implemented in the global community seeking to prevent money laundering.

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Research Article

REFUGEE CHILDREN'S RIGHT TO EDUCATION: THE EDUCATION OF SYRIAN REFUGEES IN JORDAN – REALITY AND PROSPECTS

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Summary: 1. Introduction. – 2. Literature Review. – 3. The Legal Framework for the Right to Education of Refugee Children. – 4. National and International Efforts to Implement the Right to Education for Syrian Refugee Children in Jordan. – 5. The Reality of the Education of Syrian Refugee Children in Jordan and its Challenges. – *5.1 Economic Hardship. – 5.2 Safeguarding and Safety Concerns. – 5.3 Low Quality of Education. – 5.4 Obstacles Related to Educational Policies.* – 6. Conclusions and Recommendations.

Keywords: Children's rights, human rights, refugee protection, rights of refugee children

ABSTRACT

The number of Syrian refugees has increased in light of the deteriorating political, economic, and humanitarian situation in the country, and they have spread to various parts of the world in search of security and stability, whether in Syria's neighbouring countries or other countries in the Middle East, North Africa, and Europe.

International reports have revealed the tragic situations resulting from protracted refugee situations in which Syrian refugees, including children, are often denied access to essential services or have difficulty exercising their rights, including their

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right to education, as a fundamental right guaranteed by international charters and conventions.

The current research pays special attention to the reality of the education of Syrian refugee children in Jordan, given the obstacles and difficult educational conditions encountered by many of these children, taking into account the achievements and gains made in this context that must be preserved and generalised, as well as identifying the difficulties and challenges encountering the Jordanian State, in an attempt to overcome them, work to confront them, and ultimately improve the situation of Syrian refugee children with regard about education and provide them with hope for a better future.

***Background:** Since the outbreak of political violence in Syria in 2011, vast numbers of Syrians have gone to the Jordanian border to escape one of the most devastating civil wars in recent times, and about one-third of the refugees fleeing their countries, i.e., about one million three hundred thousand Syrian refugees, have arrived. These refugees are distributed within the Zaatari, Azraq, Rakban, and Emirati-Jordanian camps. Some of them live outside the scope of these four camps, especially in the governorates of Irbid, Mafraq, Amman, and Zarqa. More than half of these refugees are children.*

***Methods:** The research uses the descriptive analysis method, which is based on the detailed description and in-depth analysis of the topic of the study through gathering detailed data related to the research problem, analysing legal texts and relevant information as well as their clear interpretation, concluding with proposing appropriate solutions and recommendations aimed at supporting the right of Syrian refugee children in Jordan to obtain their right to education.*

***Results and Conclusions:** The study concluded the importance of the efforts made by the Jordanian government, with the support of donors and humanitarian organisations, regarding assisting Syrian students in obtaining a quality education and its contribution to the steady increase in the percentage of children enrolled in education.*

On the other hand, the study confirmed the many obstacles and difficulties that impede the education of Syrian refugees in Jordan, such as child labour and early marriage, the lack of appropriate educational infrastructure in light of the scarcity of essential financial resources, the lack of international funding; the limited availability of school, the shortage of qualified human resources to deal with refugee children, and the lack of the necessary documentation to enrol in education.

However, despite all the challenges and difficulties related to the education of Syrian refugees in Jordan, the opportunity remains to overcome the difficulties effectively, develop the educational reality, achieve an increase in the rates of absorption in the educational systems, and improve the quality of education provided to these students, which will contribute to the realisation of their dreams and aspirations and help them rebuild their society and host society alike.

1 INTRODUCTION

The Jordanian Government provides Syrians in its territory with access to many essential services. However, despite the importance of efforts to provide refugee children with the right to education at the local and international levels, tens of thousands of such children are out of school, two-thirds of refugees do not have the opportunity to enrol in secondary education, and only 3% of them can attend university programs due to poverty and lack of resources or because of Jordanian policies that limit refugees' access to education. Therefore, there is an urgent need to strengthen the efforts of the international response to the needs of Syrian refugees in the field of education, address and overcome obstacles to their access to education, improve their access to education, and ensure that they will complete it.

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2 LITERATURE REVIEW

Due to protracted conflict and displacement, refugee education must be re-evaluated as a long-term project. Sarah Dryden-Peterson examines how refugees view education and its function in promoting certainty and resolving gaps in their refugee journeys. Her article discusses the technical, methodological, and relational aspects of refugee education that help refugee children prepare for an uncertain future through the portrait of a refugee teacher.[2]

After World War II, there were more displaced people than ever before. The effects of forceful relocation are significant and impact many elements of human existence. Forced migration has a tremendous impact on education – an important subject. Education has been one of the global strategic priorities of the United Nations Refugee Agency since 2010. A significant part of the life of refugees has been their optimism and aspiration for an education that would enable them to obtain stable and respectable employment. In their article, Bashir and Munira studied the refugee's right to education and outlined the nation's obligations under international law concerning educational matters.[3]

Focusing on the specific forms of harm refugee student experience domestically, other researchers are investigating how refugee educators implement protection. They highlight the interactions between Jordanian teachers and Syrian students and the preventive measures teachers take in response through photos of two classrooms in Jordan. Finally, they propose a broader definition of protection in refugee education, adding socio-political protection to the legal and human rights protections often included in humanitarian efforts.[4]

Humanitarian advocacy has included education as part of the humanitarian response. Brun and Shuayb discuss the advantages and disadvantages of humanitarian assistance for providing educational services during long-term displacement. Their article examined the potential and constraints of policies and programs for Syrian refugees in Lebanon. It also included the effects of the humanitarian response and the guiding principles for providing socially equitable, inclusive, and more developmental education for refugees in long-term displacement situations.[5]

Despite international treaties protecting the right to education, refugee children are primarily educated by the national educational systems of host nations. For example, researchers assessed schools offering lower primary education to refugee children in a refugee camp in Kenya. These youngsters' test scores were dangerously low, much lower than those of underprivileged children in the neighbourhood where they were being hosted. The study demonstrates the urgent need to prioritise increasing learning outcomes for immigrant children rather than only emphasising their access to education.[6]

The current research agrees with previous studies focusing on the critical importance of refugee children's education. It Introduces the steps the Jordanian authorities took to enable

2 Sarah Dryden-Peterson, 'Refugee Education: Education for an Unknowable Future' (2017) 47 (1) Curriculum Inquiry 14, doi: 10.1080/03626784.2016.125593.

3 Ummer Bashir and T Munira, 'Durable Solution: Right to Education a Hope for Better Future for Refugees' (2022) 1 (6) East Asian Journal of Multidisciplinary Research 1157, doi: 10.55927/eajmr.v1i6.779.

4 Hiba Salem and Sarah Dryden-Peterson, 'Protection in Refugee Education: Teachers' Socio-Political Practices in Classrooms in Jordan' (2022) 54 (1) Anthropology & Education Quarterly 75, doi: 10.1111/aeq.12436.

5 Cathrine Brun and Maha Shuayb, 'Exceptional and Futureless Humanitarian Education of Syrian Refugees in Lebanon: Prospects for Shifting the Lens' (2020) 36 (2) Refuge: Canada's Journal on Refugees 20, doi: 10.25071/1920-7336.40717.

6 Benjamin Piper and others, 'Are Refugee Children Learning? Early Grade Literacy in a Refugee Camp in Kenya' (2020) 5 (2) Journal on Education in Emergencies 71, doi: 10.33682/f1wr-yk6y.

Syrian refugee children to be educated, reveals the difficulties of access to education for Syrian refugee children in Jordan, presents violations related to exercising the right to education by Syrian refugee children in Jordan, and discloses of national and international mechanisms to support the efforts of Syrian refugee children in Jordan to have access to quality and inclusive education. Finally, it submits recommendations and proposals to support the right of Syrian refugee children in Jordan to obtain their right to education.

3 THE LEGAL FRAMEWORK FOR THE RIGHT TO EDUCATION OF REFUGEE CHILDREN

Education is a fundamental human right stated in numerous international and regional conventions and instruments, particularly the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the Convention Relating to the Status of Refugees, and the International Covenant on Economic, Social, and Cultural Rights.

The Universal Declaration of Human Rights affirmed everyone's right to education, obliging the state parties to provide free education at the primary and essential levels and for primary education to be compulsory, technical and vocational education to be available to the public, higher education to be open to all by their competence. Furthermore, as a matter of priority, the Declaration also gave parents the right to choose the type of education to give their children.[7]

The right to education is stated in the 1960 UNESCO Convention against Discrimination in Education, which called for international cooperation in support of universal respect for everyone's equal access to education, without distinction of any kind, such as colour, sex, language, religion, national or social origin, economic condition or birth; the obligation of the state parties to make primary education free and compulsory; secondary education available and accessible; higher education open to all based on capacity; ensuring equal levels of education in all educational institutions; improving the quality and quality of education; and supporting and promoting education for persons who have not received or are unable to continue teaching by appropriate means, as well as the obligation to provide education for all teachers without discrimination.[8]

Children's right to education was stated in the Convention on the Rights of the Child in 1989, which obligated the state parties to make primary education compulsory, available, and accessible to all children, including refugees; general and vocational secondary education available and accessible to all; and higher education is also available based on capacity. The state parties are obliged to encourage children's regular attendance at school and reduce dropout rates, promote international cooperation in matters relating to education to eliminate ignorance and illiteracy, and facilitate access to scientific and technical knowledge and modern means of education. The Convention emphasises that education should be directed to the development of the child's personality, talents, and mental and physical abilities, to the development of respect for human rights and fundamental freedoms, and for the principles stated in the Charter of the United Nations, and to the promotion of respect for the child's own cultural identity, language, values, and convictions, while raising the child

7 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) art 26 <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 30 May 2023.

8 Convention against Discrimination in Education (adopted 14 December 1960 UNESCO General Conference) art 1 <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-discrimination-education> accessed 30 May 2023.

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and preparing them for a social life in a spirit of understanding, tolerance, peace, equality, and friendship. This means that the Convention not only enforces the right to education but also sets out several goals for education linked to the child's dignity, taking into account the strengthening of their skills and abilities to enable them to develop their personality and to live satisfactorily in society.[9] The 1950 Convention relating to the Status of Refugees provided for the refugee's right to the same treatment as that of the nationals of the contracting states in respect of elementary education, the best possible treatment in the care of branches of non-primary education, and respect of the pursuit of studies, the recognition of certificates, diplomas, and degrees granted abroad, exemption from fees, and the receipt of scholarships.[10]

The 1966 International Covenant on Economic, Social, and Cultural Rights addressed in Art. 13 the right to education, recognising that primary education is compulsory for all, that there is an obligation to introduce free secondary education progressively, and that access to university education must be allowed on an equal footing. That education must be directed at developing the human personality and the sense of human dignity.[11]

The right to education is also stated in Goal 4 of the Sustainable Development Goals, which is to ensure quality, equitable, and inclusive education and promote lifelong learning opportunities for all, providing that children have accessible and quality primary education and have access to affordable technical, vocational and university education, along with working to eliminate gender discrimination in education and ensuring equal access to all levels of education for all vulnerable groups, including refugees, as well as to upgrade the existing educational infrastructure and provide it safely and effectively and increase the number of qualified teachers and trainees.[12]

The Incheon Declaration of 2015 committed various countries to follow strict and unified education policies and plans to ensure the achievement of the fourth sustainable development goal by 2030, which would change people's lives through education, address national and global education challenges such as marginalisation and inequality, take into account the selection and qualification of teachers, prepare curricula that promote access to education opportunities and achieve appropriate learning outcomes, and ensure the acquisition of knowledge and skills that enable learners to enjoy happiness in their lives. The Declaration also stressed the need to meet the needs of refugees worldwide who could not access education. It pledged to develop appropriate educational systems to meet their needs in a safe, encouraging, and violence-free educational environment.[13]

On the other hand, the INEE Minimum Standards for Education in Emergencies linked enhancing the quality of education and improving its services with preparedness and response to crises, including natural disasters and conflicts, and clarified the minimum rate of education and access to it until the stage of recovery from these crises, with a focus on the possibility of obtaining safe and appropriate opportunities for education, and the

9 Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25) (UNCRC) art 22 <https://undocs.org/en/A/RES/44/25> accessed 30 May 2023.

10 Convention Relating to The Statues of Refugees (adopted 14 December 1950 UNGA Res 429 (V)) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees> accessed 30 May 2023.

11 International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) (ICESCR) art 13 <https://undocs.org/en/A/RES/2200(XXI)> accessed 30 May 2023.

12 Transforming our World: The 2030 Agenda for Sustainable Development' (adopted 25 September 2015 UNGA Res 70/1) <https://sdgs.un.org/2030agenda> accessed 30 May 2023.

13 Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all (adopted May 2015 World Education Forum) <https://catesco.org/en/2018/02/28/incheon-declaration> accessed 30 May 2023.

need to promote effective teaching and learning through paying attention to curricula, training, support, supervision, and accountability, to ensure contribution to building robust educational systems in the phase of recovery from emergencies.[14]

Among the international instruments related to the protection of refugees' right to education, we mention the UNHCR Education Strategy 2012-2016, which sought to ensure the provision of education to refugees as an essential component of protection and durable solutions and not as a temporary and stand-alone service, by enabling refugee children and youth to obtain a complete educational cycle, from pre-school to higher education, to establish the knowledge and experiences that provide them with protection and help them to live a better life, using technology, relying on modern educational curricula, and training those working in the teaching profession using modern methods and curricula.[15]

Finally, the Refugee Education 2030 Program, which includes an update of the UNHCR Education Strategy 2012-2016, addressed refugee education. The program's objectives are to ensure that refugees have increased access to quality education at all educational levels, increase their acceptance rates in higher education, and enrol more of them in technical and vocational training. At the same time, they are achieving equitable gender representation concerning enrolment in higher education.[16]

In addition to the aforementioned international conventions and instruments that have paid attention to the right to education, many regional conventions include education as well. For example, the Arab Charter on Human Rights in 2004 referred to the duty of state parties to eradicate illiteracy and make education a right for all, provided that primary education is free and compulsory as a minimum and that both secondary and university education is available and accessible to all without discrimination. Furthermore, the Charter requires state parties to ensure education to develop the human personality and promote respect for human rights and fundamental freedoms.[17]

Thus, we conclude that the various international and regional conventions and instruments declare the right to education so that international covenants guarantee that primary education is obligatory and free. Higher education is available equally and without discrimination except based on competence, including the children's right to obtain an appropriate and equitable education for those refugees. Instead, the teaching of this group is almost more important because the realisation of the right to education for refugee children is an indispensable way to ensure their enjoyment of other human rights, protect from their violation, enable them to develop their potential and prepare them to participate in the reconstruction of their country in the future.

4 NATIONAL AND INTERNATIONAL EFFORTS TO IMPLEMENT THE RIGHT TO EDUCATION FOR SYRIAN REFUGEE CHILDREN IN JORDAN

Jordan hosts one of the largest concentrations of refugees in the world. Still, the Jordanian government needs to ratify treatment agreements, including the 1950 Refugee Convention,

14 INEE. *Minimum Standards for Education: Preparedness, Response, Recovery* (INEE 2012) <https://inee.org/resources/inee-minimum-standards> accessed 30 May 2023.

15 UNHCR, *Education Strategy 2012–2016* (UNHCR 2012) <https://www.unhcr.org/media/30975> accessed 30 May 2023.

16 UNHCR, *Refugee Education 2030: A Strategy for Refugee Inclusion* (UNHCR 2019) <https://www.unhcr.org/media/38077> accessed 30 May 2023.

17 Arab Charter on Human Rights (adopted 22 May 2004) art 41 <https://digitallibrary.un.org/record/551368?ln=en> accessed 30 May 2023.

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although Jordan signed a memorandum of understanding with the United Nations High Commissioner for Refugees in 1998. The memorandum includes recognition of UNHCR's mandate concerning determining the status of refugees and a commitment to implement the main principles of international protection for refugees, especially the principle of non-refoulment. This means Jordan's legal obligation to implement standards to protect the right of refugee children on its territory to access education.[18]

Hiring new teachers is one of the most prominent Jordanian steps to help Syrian refugees who struggle to access education. The national educational system allows refugees to access education-related services equally with citizens freely.[19]

Refugee and citizen students also study the same curricula, and Syrian students are allowed to enrol in formal education programs, whether in Jordanian public schools with single shifts or in schools that apply morning and evening shifts, which have been relied upon to accommodate and enable a more significant number of Syrian students to enrol in formal education. It also prepared more schools and classrooms and provided non-formal education programs in the form of courses and compensatory lessons for those between the ages of nine to twelve who have not enrolled in formal education, knowing that the Syrian students who have enrolled in Jordanian public schools inside and outside the camps have recently been exempted from paying school fees and the price of textbooks.[20]

The Jordanian Ministry of Education has cooperated with several organisations to monitor the guarantee the Syrian refugee children's right to education and to implement programs to meet their educational needs and encourage them to enrol in and attend school.[21]

For example, UNICEF supported the Jordanian Government's efforts in refugee camps by launching a spatial program (the so-called Child Friendly and Safe Spaces), which aims to provide access to education for children who are not eligible to attend formal or non-formal education programs by allowing them to benefit from alternative learning services that seek to develop their capacities and skills, with a focus on training and psychosocial support. Thus, reliance on this program provides an alternative to educating affiliated children. In addition, this program offers the basics of science until a suitable opportunity is provided for their transition to formal education.[22]

To encourage Syrian refugee students in Jordan to continue their education, they have been allowed to benefit from distance education programs organised by the Ministry of Education in cooperation with its partners in the education sector to educate students in the eleventh and twelfth grades. Enrichment courses are offered in physics, chemistry, biology, mathematics, Arabic, and English. The ministry also supported e-learning, providing students with the (Darsak) platform for distance education by broadcasting classes on local television channels and via the Internet. The ministry also worked to adopt the (Kolibri) platform, which is compatible with the Jordanian curricula, to secure the education of refugee students in innovative ways without the need for Internet access or the use of high-cost electronic

18 Memorandum of Understanding between the Government of the Hashemite Kingdom of Jordan and UNHCR adopted 5 April 1998) [1998] 4277 The Official Gazette of the Hashemite Kingdom of Jordan arts 1, 2.

19 Susan M Akram and others, 'Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing' (2015) 7 (3) Middle East Law and Governance 287, doi: 10.1163/18763375-00703003.

20 Human Rights Watch, *"We're Afraid for Their Future": Barriers to Education for Syrian Refugees Children in Jordan* (Human Rights Watch 2016) 61 <https://www.ecoi.net/en/document/1198724.html> accessed 30 May 2023.

21 Akram and others (n 19).

22 UNICEF Jordan, 'Makani – My Space: All Children in Jordan Accessing Learning': Situation Report (Reliefweb, 22 March 2015) <https://reliefweb.int/report/jordan/unicef-brief-makani-my-space-all-children-jordan-accessing-learning> accessed 30 May 2023.

devices. The platform provides students with a wide range of tools supporting innovative education and open educational resources, which enhances the quality of teaching and provides it to a more significant segment of students present in refugee camps.[23]

Given that a third of Syrian refugees have already enrolled in higher education in their homeland but could not complete it, in addition to the critical role of higher education in the protection of young refugees, donor countries have participated in cooperation with the educational authorities to provide a range of scholarships to cover the university expenses of several Syrian refugee students who aspire to pursue their higher education and join Jordanian universities in various academic programs, such as the (Edu-Syria) scholarship funded by the European Union and the (DAFI) scholarship, which is provided with funding support from the German government, to ensure the achievement of the ambition of these students and enable them to rely on themselves and improve their future and ultimately support reconstruction efforts in their country.[24]

The positive impact of the steps taken by Jordan to increase the enrolment of Syrian refugee students in education must be acknowledged. International reports showed that Syrian refugees enrolled in official Jordanian schools increased from 12% in 2012 to 64% in 2016.[25]

However, despite the critical steps Jordan and many international organisations took to help Syrian children enjoy their right to education, thousands of school-age refugees still need to be in school. Moreover, only a tiny percentage of them have access to higher education. This makes it imperative to highlight the challenges facing these children in exercising their right to education and to identify the reasons behind them to address them and ensure greater access to education.

5 THE REALITY OF THE EDUCATION OF SYRIAN REFUGEE CHILDREN IN JORDAN AND ITS CHALLENGES

International reports noted that the enrolment levels of Syrian refugee children in Jordan in schools and universities must be improved, as one-third of refugee children did not attend school. In addition, nearly two-thirds of children dropped out of secondary school, while a low percentage, at most 3%, have completed their university studies.[26] According to the Office of the United Nations High Commissioner for Refugees (UNHCR), girls and boys do not have the equal exercise of the right to education at all levels, which is evident from the low attendance of female students or the fact that a large proportion of them do not complete schooling. HRW noted that only a tiny fraction of refugees can access formal and informal education programs that international NGOs offer.[27]

Many difficulties and challenges hinder the enrolment of Syrian refugee children in Jordan or cause them to drop out of school. The most prominent of these are as follows.

23 Mohammad Hawari, 'Investing in E-learning Remains a Priority for UNHCR Jordan' (UNHCR Jordan, 25 August 2020) <https://www.unhcr.org/jo/13661-investing-in-e-learning-remains-a-priority-for-unhcr-jordan.html> accessed 30 May 2023.

24 'EDU-Syria: Funded by the European Union' <https://edu-syria.eu> accessed 30 May 2023; 'DAFI Scholarship Programme – Opening Higher Education to Refugees' (Global Compact on Refugees, 2023) <https://globalcompactrefugees.org/good-practices/dafi-scholarship-programme-opening-higher-education-refugees> accessed 30 May 2023.

25 Human Rights Watch (n 20) 1.

26 UNHCR, Stepping up: Refugee Education in Crisis (UNHCR 2019) 23 <https://www.unhcr.org/steppingup> accessed 30 May 2023.

27 'Jordan: Secondary School Gap for Syrian Refugee Kids' (Human Rights Watch, 26 June 2020) <https://www.hrw.org/news/2020/06/26/jordan-secondary-school-gap-syrian-refugee-kids> accessed 30 May 2023.

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5.1 Economic hardship

Some 86% of Syrian refugees in Jordan live below the poverty line, which limits the ability of children to achieve education due to the inability of parents to bear the financial burden and meet the educational needs of children, including feeding them and paying the costs of transportation to schools and health care for them.[28]

Both child labour and early marriage are the most common means used by Syrian refugee families in Jordan to overcome poverty, obtain additional income, and reduce the number of dependants, which naturally affects the ability of children to attend educational institutions.

Doubling the earnings of children who drop out of education to join work is contrary to international standards related to children's rights. Unfortunately, nearly half of the refugee children do not attend school to work and provide for themselves. These boys and girls often work illegally and in deplorable conditions, which puts them at risk of being trafficked or exploited.[29]

Regarding child marriage in Jordan for Syrian refugee girls, it is mainly due to the urgent need of parents for money. Girls' marriage rates have doubled dramatically to 35% of Syrian marriages in Jordan. The reasons for the high incidence of underage marriages and the denial of access to schools are poverty, the parents' lack of sense of the usefulness of girls' education, their attempt to improve their living conditions and lives, and the lack of awareness of the dangers of early marriage.[30]

Additionally, a crucial economic barrier to obtaining education for Syrian refugee children is based on the failure of international donors to provide sufficient support at the level of education that enables refugee children to enter proper schooling and education.[31]

5.2 Safeguarding and safety concerns

A report by UNICEF stated that about 70% of Syrian students in Jordanian schools are subjected to beatings and corporal punishment, and 58% are subjected to psychological violence and ill-treatment.[32] Perhaps the problem lies in the lack of experience of teachers and administrative staff and their lack of training on how to help and support refugee students who have been exposed to psychological trauma or need health care because of what they suffered during the conflict in Syrian territory, which shows the urgent need to train teachers appropriately and work to hold them accountable in the event of their failure or violence against students.[33]

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28 UNHCR, 'Global Trends: Forced Displacement in 2015' (UNHCR, 20 June 2016) 2 <https://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html> accessed 30 May 2023.

29 UNHCR, Stepping up (n 26) 47.

30 The Office of the United Nations Special Envoy for Global Education, 'Press Release: $250 Million Secured for Syrian Refugee Education' (The Office of the United Nations Special Envoy for Global Education, January 2016) <https://educationenvoy.org/press-release-un-press-briefing> accessed 30 May 2023.

31 Katherine Everest, 'Refugee Children Failed by Lack of Humanitarian Aid Funnelled into Education' (The Organization for World Peace (OWP), 18 October 2019) <https://theowp.org/reports/refugee-children-failed-by-lack-of-humanitarian-aid-funnelled-into-education> accessed 30 May 2023.

32 Abeer Allan, 'Violence Against Children: National Study… Alarming Numbers' (UNICEF Jordan, 16 December 2021) <https://www.unicef.org/jordan/stories/violence-against-children> accessed 30 May 2023.

33 Human Rights Watch (n 20) 6.

In addition, factors such as discrimination regarding sex and nationality, bullying by peers, and the social isolation and exclusion felt by Syrian children lead to their low rates of access to education or having to drop out. For example, some 1,600 Syrian students dropped out of education in 2016 due to harassment and violence from their Jordanian counterparts, whether inside or outside the school walls. This demonstrates the importance of promoting social integration between Syrian and Jordanian children, ensuring adaptation and good social relations.[34]

5.3 Low quality of education

Another problem that is considered one of the most prominent obstacles facing the education of Syrian refugees in Jordan is the low quality of education, along with the lack of financial resources necessary to open and operate schools, especially in light of the lack of support and the lack of continuity of funding provided by international donors, and the resulting lack of recruitment and training of specialised educational cadres, in addition to the poor buildings dedicated to the education of refugee students and the lack of school feeding programs, and the lack of electricity, water, heating, and ventilation in some refugee schools.[35]

Reliance on schools that apply the system of morning and evening shifts has also caused a decline in the quality of education and limited benefits, given the reduction in teaching hours and the volume of education received by Syrian refugee students, as classes in schools with two shifts last only five hours per day. In contrast, Jordanian students study seven hours per day.[36]

Finally, the diminished opportunities for refugee students to complete secondary and tertiary education, and their perception of the futility or low level of education, are among the most important reasons for their abandonment of education.[37]

That is why the quality of education has to be improved, giving hope to students with their ability to finish secondary education and complete their university education by providing educational opportunities based on grants and international aid, and partnerships with universities and higher education institutions.

5.4 Obstacles related to educational policies

Jordanian educational institutions must provide Syrian refugees with missing or non-existent identification documents as a condition for their children's enrolment in education, such as birth certificates, children's identity papers, or original Syrian school certificates. This requirement is one of the most critical concerns of Syrian families wishing to educate their children due to the lack of legal documents and the difficulty of obtaining them from the concerned authorities, which lowers the desire of many Syrian children to learn. Therefore, the Jordanian authorities must narrow the scope of imposing these conditions to ensure

34 UNHCR Jordan, 'Education Activities for Refugees': Situation Report (Reliefweb, 28 August 2019) 5 <https://reliefweb.int/report/jordan/jordan-education-activities-refugees-august-2019> accessed 30 May 2023.

35 Human Rights Watch (n 20) 19.

36 Jordan: Secondary School (n 27).

37 UNICEF, Comprehensive Child-Focused Assessment: Za'atari Refugee Camp (UNICEF Jordan June 2015) <https://reliefweb.int/report/jordan/comprehensive-child-focused-assessment-za-atari-refugee-camp-jordan-june-2015> accessed 30 May 2023.

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refugees attend school. In addition to the above, the Jordanian Ministry of Education has implemented the so-called three-year rule, which prohibits all children over three years of age from enrolling in the required classrooms. This has constituted a significant obstacle to the enrolment of thousands of Syrian children in formal education. Therefore, the application of this rule must be waived, and these children must be allowed to complete their education from the point where they left school.[38]

Additional barriers to the education of Syrian refugees in Jordan is a need for more effective use of Syrian refugee teachers in education. Thus, it is essential to stress the need to use Syrian teachers' human energy to work alongside the Jordanian teachers in educating Syrian children and reduce the burden caused by having too many students in one class.[39]

6 CONCLUSIONS AND RECOMMENDATIONS

To ensure the realisation, respect, and promotion of the right to education for all Syrian refugee children in Jordan, it is essential to apply the following recommendations.

1) Providing more protection regarding the right to education of Syrian refugee children and its enforcement by providing more financial support to Syrian refugee families, allowing them to work to earn money and meet their basic needs legally, thus alleviating economic pressures on them and enabling them to cover the costs associated with their children's education, increasing their access to schools and universities and reducing their chances of withdrawing from school.

2) Organising campaigns to raise awareness among the families of Syrian refugee children regarding the importance and priority of education to curb the phenomenon of child labour, which hinders their education and affects their future.

3) Activating compulsory primary education to reduce the school dropout rate of Syrian refugee students in Jordan and ensure their right to quality educational opportunities.

4) Using the support of international humanitarian and development organisations and other national associations of Jordanian education authorities, which will increase university scholarships for Syrian refugee students in Jordan.

5) Reviewing legislative policies and administrative procedures that impede the Syrian refugees' right to education.

6) Providing the necessary training for teachers, educational bodies, and local students in schools attended by Syrian students to enable them to exercise their right to education.

7) Improve the infrastructure and provision of educational services in schools dedicated to educating Syrian refugees in Jordan.

38 Human Rights Watch (n 20) 41.

39 Elizabeth Adelman, 'Refugee Teachers: The Challenges of Managing Professional Expectations with Personal Experiences' (Inter-agency Network for Education in Emergencies (INEE), 17 December 2019) <https://inee.org/resources/refugee-teachers-challenges-managing-professional-expectations-personal-experiences> accessed 30 May 2023.

8) Providing psychological support and social rehabilitation for Syrian children and helping them to overcome the trauma they experienced during the conflict phase, to facilitate their involvement in the educational process.

9) Increasing the employment of Syrian refugee teachers who teach Syrian students in Jordan.

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Research Article

CRIMINAL LAW PROTECTION OF A CHILD BY MEANS OF SLOVAK CRIMINAL LAW AND EUROPEAN UNION LAW

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Summary: 1. Introduction. – 2. Child as a Protected Person Under the Slovak Criminal Code. – 3. Definition of Victim and Damaged. – 4. Child as a Particularly Vulnerable Victim. – 5. Child in the Process of Victimisation. – 6. Concluding Remarks.

Keywords: Criminal law, Criminal Code, Criminal offence, Child, Victim, Damaged.

ABSTRACT

Background: *The contribution is focused on current challenges in the criminal protection of children field by means of criminal law in the Slovak Republic and the European Union. The authors define the term, "child," in the applicable law. They examine in detail the legal regulation of the child's position as a victim, especially as a particularly vulnerable victim in criminal law. Attention is given to the victimisation process in relation to the specifics of the child. The legal regulation of criminal law in the Slovak Republic, as well as within the European Union, reflects*

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the need for a special approach to the protection of children and youth, and adequate legal instruments are gradually being created and introduced.

Methods: *Legal comparison, content and functional analysis of legal acts, analysis of court decisions, historical analysis, and comparisons were used to process research data.*

Results and Conclusions: *The current criminal law regulation of the status and protection of children and youth in the Slovak Republic requires regulation to effectively respond to new threats and risks, primarily associated with the increase of criminal activity against children in the virtual world. New forms of criminal activity by using computer technology and social networks are constantly increasing. Prevention and education are irreplaceable aspects of the protection of children and youth from crime. It is more effective to have a good prevention system than to deal with the consequences. Based on our research, we recommend introducing a subject focused on the prevention and intervention of crimes of a sexual nature into the education of school-age children. At the same time, we recommend continual building of specialized workplaces within law enforcement bodies in the Slovak Republic.*

1 INTRODUCTION

The provision of Article 41 of the Constitution of the Slovak Republic[3], sentence four, places special emphasis on the protection of children and adolescents, guaranteeing and emphasising their special protection. This constitutional principle is specified by the regulations of various legal sectors, in particular, civil and family law, administrative law, labour law, social security law, and, lastly, as it is also intended in this work, by the regulations of the criminal law sector. The state therefore considers it necessary to establish a legal basis for the protection of this vulnerable group of persons, so that their physical or psychological development is not affected in any negative way, guaranteeing children the most suitable conditions for their lives and future.

Crimes against children is a current phenomenon that is increasingly being discussed in public spheres and gaining society's attention. Society must be aware that children and young people are an extremely vulnerable group, with most not even realizing or admitting that they are more vulnerable than adults to become victims of crime. It is necessary to communicate openly with children both at home and at school, and in a manner appropriate to the child's specific age, to warn them of the potential danger of various crimes. Then, they can respond appropriately to potential dangers or critical situations from their beginning to ask for help from parents, friends, teachers at school, or experts. Children are born as defenceless and innocent, easily influenced and learning to distinguish right from wrong or black from white. They learn to live and adopt their own opinions and attitude about life. Each child is unique, holding the potential to make the world a better place, which is why it is often said that children are our future.

2 CHILD AS A PROTECTED PERSON UNDER THE SLOVAK CRIMINAL CODE

Pursuant to S. 127(1) of the Criminal Code[4], the term 'child' means a person who is under 18 years of age, unless the Criminal Code provides otherwise; this term is part of the special

3 Constitution of the Slovak Republic No 460/1992 'Ústava Slovenskej Republiky' of 1 September 1992 (as amended of 26 January 2023) <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460> accessed 24 April 2023.

4 Criminal Code of the Slovak Republic No 300/2005 'Trestný zákon' of 20 May 2005 (as amended of 17 July 2022) <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/300> accessed 24 April 2023.

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qualification term, 'protected person,' pursuant to S. 139(1a) of the Criminal Code. We speak about a child from the moment it is born, when the foetus begins to independently live as a human being. This also results from S. 146 of the Criminal Code, which discusses the crime of murder of a new born child at the time of its birth. A person ceases to be a child when reaching the age of 18. However, there may be a situation when the child reaches the age of majority earlier than on the day of their 18th birthday. This situation is the marriage of a person who is over 16 years of age, though to conclude such a marriage, the court's permission is needed pursuant to S. 11(1) of the Family Act[5].

According to the Civil Code[6], the age of majority acquired in this way is not terminated by the possible dissolution of the marriage, nor by the declaration of marriage as null and void. Thus, we understand a child is a person under the age of 18, and such an understanding of the term 'child' is in accordance with the requirements arising from the Convention of the Council of Europe on the Protection of Children against Sexual Exploitation and Sexual Abuse[7], as well as with the obligations of the Slovak Republic under Art. 2(a) of Directive 2011/92/EU,[8] which defines a child as any person under the age of 18. According to that international law, the fact that a child reaches the age of majority before the age of 18 by marriage does not constitute grounds for restricting the scope of the criminal protection of that child in criminal proceedings.[9] It should be noted that a minor child becomes an adult gradually because they acquire certain rights or responsibilities sooner or later, depending on reaching a certain age, i.e., in proportion to their intellectual and volitional maturity.[10]

3 DEFINITION OF VICTIM AND DAMAGED

The first international document defining the concept of *victim* (from Latin *victima*) is the EU Council Framework Decision of 15 March, 2001, on the standing of victims in criminal proceedings (2001/220/JHA)11 that describes the victim as a natural person who has suffered harm, including psychological and physical harm, emotional suffering, or economic loss which was directly caused by an act or omission that violates the law of the Member States.[11] At the same time, Article 2 of that Decision required the Member States to provide the appropriate status for the victim in their criminal law systems. Following the Decision, the Council Directive 2004/80/EC was drafted. However, it should be noted that there is still no uniform and generally accepted definition of a victim of crime, resulting in inconsistencies in its definition at both international and national legislation levels.[12]

5 Act of the Slovak Republic No 36/2005 On family 'Zákon o rodine a o zmene a doplnení niektorých zákonov' of 19 January 2005 (as amended of 1 January 2023) <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/36/20230101> accessed 24 April 2023.

6 Civil Code of the Slovak Republic No 40/1964 'Občiansky zákonník' of 26 February 1964 (as amended of 1 December 2019) <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1964/40> accessed 24 April 2023.

7 Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse (Signed 25 October 2007) [2007] CETS 201.

8 Directive 2011/92/EU of the European Parliament and of the Council 'On combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA' (13 December 2011) [2011] OJ L 335.

9 Jozef Čentéš a kol, *Trestný zákon: Veľký komentár* (2 aktualiz vyd, Eurokódex 2015) 239.

10 Robert Vlček a Zdenka Hrubešová, *Sociálnoprávna ochrana maloletých: Vybrané aspekty* (Epos 2006) 11.

11 Council Framework Decision 2001/220/JHA 'On the standing of victims in criminal proceedings' (15 March 2001) [2001] OJ L 82.

12 Jiří Jelínek, Tomáš Gřivna a kol, *Poškozený a oběť trestného činu z trestněprávního a kriminologického pohledu* (Leges 2012) 109.

Member States' legislation was, to a large extent, inadequate because of the incompleteness and partiality, which opened room for the adoption of the Directive 2012/29/EU of the European Parliament and of the Council, aimed to improve Member States' legislation to protect victims, and to pay particular attention to, protect, and support all victims, including victims of terrorism.[13]

The expression *victim of crime* under the Slovak law was enshrined in the Act No. 274/2017 Coll. on Victims of Crime, which was approved on 12 October, 2017.[14] The adoption of this law significantly improved the status of victims of crime and their access to justice. The Act was enacted on 1 January, 2018, and on that date, the Act No. 215/2006 Coll. on compensation to persons injured by violent crimes was repealed as not being comprehensive.[15] The Act's subject covers three main areas, which include the *definition of the rights of victims* of crime, the scope of assistance, support, or services to which victims are entitled (S. 4 - 9), *compensation of victims of violent crimes* (S. 10 - 22), and *relations between the state and entities that provide assistance to victims* (accreditation, subsidies, register of entities that provide assistance S. 23 - 32).[16] However, the Act on Victims of Crime was initially criticised for using the term 'victim' because its definition does not coincide with the term 'victim' used in the Code of Criminal Procedure. This problem was subsequently solved by the provision of S. 3(6) of the Act on Victims of Crime, which regulates the victim's procedural status in criminal proceedings so that the victim is granted the *status of a whistle-blower, injured party, or witness,* and includes their rights and responsibilities provided for in the Code of Criminal Procedure as related to that status.[17]

4 CHILD AS A PARTICULARLY VULNERABLE VICTIM

Pursuant to the provisions of S. 2(1c) of the Act on Victims of Crime, a child is considered to be a *particularly vulnerable victim*. A child, for the purposes of this Act, is a person under the age of 18. If the age of the person is unknown and there is reason to believe that the person is a child, such person shall be considered a child until proven otherwise. Here, we would like to point out a legislative error committed by the Slovak legislator, because they did not link the definition of a particularly vulnerable victim, and thus, a child, to the fulfilment of the conditions or signs of the victim in general, pursuant to S. 2(1b). Therefore, the definition of a 'particularly vulnerable victim' may appear to be self-explanatory without the need for investigation as to whether or not harm was caused to a person who is a particularly vulnerable victim.[18] A more appropriate way to express this definition of a particularly vulnerable victim would be including the word '*victim*' clearly, or referring to the previous provision on the victim within the meaning of S. 2(1b), for example, by formulating '*under the conditions specified in the provision of S. 1(b).*'

In general, all victims of crime are vulnerable, but some are *particularly vulnerable* to further victimisation by the accused or suspected person. Such persons, in this case, a child, need

13 Jozef Čentéš a kol, *Trestný poriadok: Komentár*, 1 d (CH Beck 2020) 254.

14 Jaroslav Holomek, *Viktimológia* (Aleš Čeněk 2013) 19.

15 Čentéš a kol (n 13) 255.

16 Jozef Záhora, *Zákon o obetiach trestných činov: Komentár* (Wolters Kluwer 2018) 43.

17 Natália Hangáčová, 'Vybrané aspekty postavenia obetí/poškodených v podmienkach Slovenskej republiky' (Ústavnoprávne, zákonné a kriminologické atribúty o obetiach trestných činov: Bratislavské právnické fórum 2018, Bratislava Univezita Komenského, Právnická fakulta, 22-23 februára 2018) 83.

18 Jaroslav Ivor, Peter Polák a Jozef Záhora, *Trestné právo hmotné: Všeobecná časť* (Wolters Kluwer 2016) 116.

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special protection and support because there is a risk that they could suffer further harm during the criminal proceedings. By *victim vulnerability*, we mean the victim's condition, as conditioned by the victim's personality traits, health problems, or behaviour. Vulnerability is comprised of either one or more of these traits, expressing a person's vulnerability to being a victim of crime. The issue of the child as a particularly vulnerable victim is regulated, for example, in Directive 2011/92/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography[19], or in Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting victims of trafficking, which mainly concerns adult victims, but also includes measures concerning child trafficking victims.[20] It is a generally accepted view that a child involved in criminal proceedings, whether as a victim, witness, or accused person, requires a special need for protection, as provided for in Article 22(4) of the Directive 2012/29/EU of the European Parliament and of the Council of 25 October, 2012, on minimum standards on the rights, support, and protection of victims of crime.[21]

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the Convention on the Rights of the Child, in Article, 8 obliges Member States to take measures to protect child victims' rights and obligates them to recognise the vulnerability of these victims, adapting procedures to account for the specific needs and rights of children.[22] Such special care for child victims is conditioned by the unfinished development of the child's personality, given that the child is not yet experienced or educated enough to effectively exercise all their rights in criminal proceedings while the child experiences enormous stress during the criminal proceedings, which may affect their testimony. There is also a particular emphasis on criminal liability towards the offender who committed the offence against the child.[23]

Under S. 5 of the Act on Victims of Crime[24], the victim also has *the right to receive professional assistance*. The entities providing such assistance shall provide the victim with general or, in the case of a particularly vulnerable victim, specialised professional assistance. Specialized professional assistance is understood as the provision of classic general professional assistance as it is provided to the victim; this includes the provision and explanation of information provided by a police officer or other entities providing assistance to victims, legal assistance for the exercise of the victim's rights, psychological assistance or counselling assistance relating to the risk and prevention of repeated victimisation. In addition, specialized professional assistance also includes the provision of crisis psychological intervention, evaluation of whether or not there is a threat to life or health, mediation of the social services provided in emergency housing facilities, or mediation of specialized social counselling in the event of an immediate threat to the life or health of a particularly vulnerable victim.

Subsequently, it follows from the provisions of S. 6 of the Act on Victims of Crime that a particularly vulnerable victim must be provided for by the entity providing such assistance,

19 Directive 2011/92/EU (n 8).

20 Directive 2011/36/EU of the European Parliament and of the Council 'On preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA' (5 April 2011) [2011] OJ L 101; Záhora (n 16) 64.

21 Directive 2012/29/EU of the European Parliament and of the Council 'Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA' (25 October 2012) [2012] OJ L 315.

22 UNGA Res 54/263 'Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography' (16 March 2001) UN Doc A/RES/54/263.

23 Záhora (n 16) 71.

24 Act of the Slovak Republic No 274/2017 On victims of crime 'Zákon o obetiach trestných činov a o zmene a doplnení niektorých zákonov' of 12 October 2017 (as amended of 1 April 2023) <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2017/274> accessed 24 April 2023.

on request, without any undue delay and free of charge, while providing assistance for a period of 90 days, even if the criminal complaint has not been filed or regardless of the active participation of such a victim in the criminal proceedings. After a period of 90 days, it is possible to continue providing assistance to a particularly vulnerable victim with regard to their needs or the harm caused by the crime, throughout the criminal proceedings, and for a reasonable period afterwards. Regarding *legal aid* within the meaning of S. 7 of the Act on Victims of Crime, we understand it as providing legal information related to ensuring protection and exercising the rights of the victim, or legal representation of the victim in criminal and civil proceedings. Such assistance is provided by the Legal Aid Centre, the victim assistance entity, and the victim's lawyer. Pursuant to S. 4 of the Act on Victims of Crime, the victim also has the *right to protection against secondary or repeated victimisation*, and within this protection, law enforcement authorities, the court, and entities that provide assistance to the victim must proceed so that their activities do not cause the victim and their family members secondary victimisation and take measures to prevent repeated victimisation. It is necessary to use suitably adapted office rooms or to provide for measures to prevent contact between the offender and the victim. If in criminal proceedings, there is a particularly vulnerable victim who was interrogated as a witness by the victim of the crime, the Code of Criminal Procedure provides in S. 134(4 and 5) 5 rules and methods of questioning.

The interrogation must be carried out with care and content so that it does not have to be repeated by using technical devices designed to record sound and images. The law enforcement authority shall ensure that interrogations in pre-trial proceedings are conducted by the same person, provided that the conduct of the criminal proceedings is not thereby impaired. It is necessary to recruit a psychologist or expert who conducts the interrogation in the correct manner, considering the subject of the interrogation, if there is a risk that the interrogation could adversely affect the physical integrity or mental integrity of the victim, or expose the victim to the risk of secondary victimisation. When a particularly vulnerable victim is heard as a witness in criminal proceedings relating to a criminal offence against human dignity, an offence of trafficking in human beings, or an offence of mistreatment of a close person and a person entrusted, the hearing in pre-trial proceedings shall, generally, be conducted by a person of the same sex, unless there are compelling reasons to the contrary. In accordance with S. 262a of the Code of Criminal Procedure, during the examination of such victim at the main hearing, the President of the Chamber shall examine the victim so there is no visual contact with the defendant which is ensured, in particular, by technical devices intended for the transmission of sound.[25]

5 CHILD IN THE PROCESS OF VICTIMISATION

Due to their young age, immaturity, increased suggestibility, or their physical fragility, one of the most vulnerable groups at risk of crime, especially violence, is children who are targeted by the content of this rigorous work.

Whether a child becomes a victim of crime in the future, and thus can be considered a child at risk, is conditioned by two factors, biological and educational socialization.

Biological factors include: *1) Premature child or a child with low birth weight* as these children need more care from their parents, which often leads to depression and anxiety; *2) Unmanageable temperament of the child* as a child suffering from hyperactivity may evoke a feeling that they intentionally do not control their behaviour and instead provoke

25 Záhora (n 16) 69.

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the environment, which can prompt aggression towards the child at home and at school; *3) Chronic illness or congenital physical or mental defect* as these children are absolutely dependent on the person who provides them with care, therefore, if they become a victim of crime committed by the parent, it is primarily the result of unmanaged care and improper ambitions of the parent.

The educational-socialization factors include improper upbringing, when children are led to obey an adult in every situation; the absence of one of the parents in the family; the child's ignorance, inability to defend and help themselves; the lack of interest from parents or teachers; the inability to confide in another person or entrust the child to the care of another person.[26] The gender of the child is also an important factor in certain crimes. Girls are more likely to be victims of sexually-motivated crimes while boys are more often victims of violent crimes. Children often face violence from adults, but also from one another in the form of bullying. Many times, the most serious forms of violence occur in the child's home environment when the child becomes a victim of abuse, torture, or neglect. Child abuse is closely related to socio-economic factors occurring in the child's living environment, and in particular, unemployment, poverty, poor housing or no housing conditions, lack of care, upbringing, or education. All these factors threaten and harm the child's mental and physical development and, in extreme cases, may also cause their death. It should be noted that child abduction offences are also multiplying; the abductor may be one of the parents or a person whose aim is to blackmail the parents to obtain a ransom for the child.[27]

A home environment that should be a safe place for the child, though the abused child experiences a feeling of helplessness in an environment of fear and suffering, whether physical or psychological, and cannot seek help on their own. It usually takes a long time for the unlawful acts to be discovered. Thus, in the future, resulting from such treatment in childhood, the child victim may become a violent personality who will continue as a perpetrator of domestic violence, thus regaining a sense of superiority or power. The suggestibility or manipulation of children creates suitable conditions for perpetrators of sexually-motivated crimes who can easily coerce children into various sexual practices, often originating from the child's immediate surroundings, and may be a coach, educator, neighbour, etc.

Many perpetrators also influence children through the virtual world when they try to lure children to a physical meeting, exploit them, or force them to expose the body in front of a webcam for the purpose of producing pornography, mostly under threat of blackmail, which is also a criminal offence. In such cases, the risk of becoming a victim of crime increases if the child adds a number of photos and other posts from their private lives to social networks or is active on various online dating sites. In the school environment, children are often victims of bullying, when the perpetrator selects a child that stands out from other children specifically as a victim, and the perpetrator of such bullying has the urge to relieve tension and a sense of inferiority by gaining an advantage over the weaker child by bullying. The child also often becomes a victim of theft crimes in cases of small pocket theft, for example in a bus or school, a robbery crime, when violence against the victim is used and the victim is assaulted, with the intention of stealing, for example, a mobile phone or a bicycle; there are an increasing number of cases when minors assault younger children in this way. Clearly, the most brutal crime where a child can also be a victim is murder, whether by relatives as the culmination of a torture process, for the purpose of depriving the child because it is a burden on the family, or if the child becomes a victim of a sexually-oriented murderer, but there are also cases where the child witnessed a crime and was murdered, as well as the murder of a child out of revenge, hatred, or envy.

26 Ľuboslava Sejčová, *Deti a mládež ako obete násilia* (Album 2001) 72.

27 Ľuboslava Sejčová, *Dieťa ako obeť násilia* (Album 2010) 78.

Victimisation is undoubtedly one of the most traumatic experiences that children can go through in their lives. The consequences that victimisation can cause vary, with some consequences occurring immediately after the offence has been committed, and others occur later. The duration of these consequences can be short- or long-term, in the worst cases even lifelong. Physical abuse of a child can cause very serious health damage to a child, and in extreme cases, even death. An older child often deals with such a situation by running away from home, absences from school, early departure from home, or a complete interruption of contact with the family. These are often a sign of a problematic family environment, if the physical traces of abuse have not been detected (injuries, bruises, burns). In order to detect physical abuse, it is necessary to pay attention to unusual injuries for a child's age, such as fractures in infants, and seeking medical help late for a child's injury is also suspicious. The child may be passive, closed, fearful, and may also show signs of aggression, destruction, or violence. Serious consequences of victimisation in adolescents are suicide attempts, depression, self-harm, eating disorders, or sleep disorders.

Children also react differently to psychological abuse, depending on the intensity and duration of the abuse. A certain group of children reacts with tightened behaviour, becoming anxious, fearful, crying easily, and lowering self-confidence, so it can be observed that they give up in advance and are difficult to enforce. However, as with physical abuse, some children show signs of aggression. In both groups, we can identify a problem in communication with people, in interpersonal relationships, these children often begin to lie, skip school, and run away from home. Physical reactions to psychological abuse can manifest in headaches and abdominal pain, eczema, psychosomatic difficulties, or unexplained temperatures. [28]

When neglecting a child, their mental retardation or emotional deprivation may gradually manifest, physical long-term neglect of the child may cause anaemia, the child may become malnourished, their growth may stop, and in extreme cases, the death of the child may occur. We can state that victimisation in general, including children, manifests itself in the form of various consequences; whether psychological or health-related, it is possible to observe changes in the existing lifestyle in connection with social consequences.

Psychological consequences and their intensity are related to the course of victimisation, the child's personality, and available help. Feelings of anxiety, fear of repetition of victimisation, anger towards the perpetrator, society in general, and the judicial system in general, feelings of sadness, injustice, guilt, feelings of humiliation, and distrust of the environment are common. Children often suffer from sleep disorders, cannot concentrate, constantly return to the traumatic experience (intrusion), or experience the opposite, they do not remember certain details of the crime, they feel nervous, irritable, or easily become scared, proving that stress persists in them. In the extreme case, depression, suicidal tendencies, and post-traumatic stress disorder can also develop, and long-term psychological strain can result in problems in the body through the form of various diseases.[29]

Health consequences include various types of injuries that the victim suffered directly during the crime, such as wounds, fractures, bruises, or those occurring after the crime was committed due to stress and somatization, such as headaches, stomach problems, and in the case of victims of sexual violence, can be diseases associated with the genitourinary system, not originating from injuries caused during the attack. Serious injuries are those that limit the movement of the victim, for example, if a child is hit by a drunk driver, or in the worst

28 Jiří Dunovský, Zdeněk Dytrych a Zdeněk Matějček, *Týrané, zneužívané a zanedbávané dítě* (Grada 1995) 47.

29 Ludmila Čírtková, Petra Vitoušová a kol, *Pomoc obětem (a svědkům) trestných činů: Příručka pro pomáhající profese* (Grada 2007) 14.

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case, if the child loses a limb resulting from this situation; it will have an impact on their family members who must change their lifestyles in order to take care of the victim.

In terms of *financial harm or material damage*, these include damages or loss of the victim's property, and include the costs associated with crime. A child, because of their fragile body structure and naivety, can easily become a victim of larceny, especially in cases of pickpocketing, such as in a bus or school, or robbery, when violence against the victim is used. The person is attacked with the intention to steal, for example, a mobile phone, bicycle, or anything else valuable that the child owns would be stolen, if there were injuries present, this represents for the victim, and in particular, for their relatives, the cost of treatment, treatment with absence from school. The society incurs expenses related to the judiciary, police, and rescue services, expenses for services provided to victims, or possible imprisonment of perpetrators. As a result of these consequences, the quality of life of the victim can be reduced, because simply their presence at the scene of the crime can cause the child to lose feelings of security in any area of their lives. If a child was the victim of violent crimes, this is even more true because they may develop very severe trauma, mental disorders, and syndromes that would greatly affect their future life. Prevention of victimisation is generally understood as a summary of all activities aimed at preventing crime or reducing the occurrence of crimes by eliminating the causes of their occurrence, as well as creating measures that will reduce the scope and severity of crime.[30]

Prevention of victimisation, i.e., prevention directed precisely at victims of crime, emphasises that, in the future, a person does not become a potential victim of crime. Such prevention shall aim at preparing for the adoption and application of preventive measures through training, where the participants will learn how to react safely and appropriately in certain situations. We distinguish between primary, secondary, and tertiary prevention. The essence of *primary prevention* is to affect the general public (public officials, parents, educators, psychologists, doctors, and even children themselves), who may not experienced crime thus far, in order to suppress crime as much as possible in its early beginning; in the case of children, it is implemented mainly by political parties, churches, health care, cultural institutions, civic associations, schools, or media, which should place an emphasis on making the public more sensitive to children's needs and interests to reduce any danger to this group. With regard to *secondary prevention*, this is based on knowledge of children at-risk, adults, families, and specific situations. In this procedure, certain groups of people who can be expected to become victims of crime, such as children, are selected on purpose, and this prevention can be carried out in the form of lectures at school (sex education) or at home with parents in interviews. Finally, *tertiary prevention* is aimed at those who have already been victims of crime in the past and is carried out through other parties (doctor, pedagogue, psychologist, parent) who prevent repeated violence or minimize violence against the child. Resources such as various crisis centres, counselling centres, or helplines can aid these victims as part of this prevention.[31]

6 CONCLUDING REMARKS

However, it should be noted that preparing a child for a potential encounter with the offender is difficult. Because children tend to distrust strangers, they are more cautious, but paradoxically, children are more often threatened by crime by perpetrators within their

30 Sejčová (n 27) 170.

31 Tomáš Strémy, 'Obete kriminality a ich prevencia' (Obete kriminality: Medzinárodná konferencia, Paneurópskej vysokej škole v Bratislave, 25 november 2010) 279.

direct surroundings.[32] It is extremely important that the child is adequately informed about sexuality or sex life, which will ensure that, in the future, such a child will be able to defend themself, protect their rights, or seek professional help. A child who does not have any information in this area, or very little, becomes an easier victim of possible sexual abuse as they are unable to recognize the threat. On the other hand, an informed child is able to recognize the attacker's intention and can better respond to possible sexual aggression. Nowadays, on modern computer technologies and internet social networks, many sex offenders interact with the children first through the internet, i.e., in the digital space. They try to lure children to meetings on various social networks and sexually abuse them there, or force children to expose themselves in front of a webcam for the purpose of producing pornography. If such a meeting through an electronic communication service is proposed for a child under the age of 15 for the purpose of sexual abuse, it is a crime that we also classify as sexually-motivated, namely sexual abuse, although the victimisation began with an 'innocent' communication on the internet. In modern day, children are the main victims of *sexting, grooming, and sexual solicitation*.

By *sexting*, this refers to receiving or exchanging messages with sexually explicit content via a mobile phone, where there are images shared of intimate parts of the body, or video or audio recordings of sexual activities. These are often unsolicited, harassing messages that children cannot effectively defend themselves against and are accepted or even disseminated, either by their own initiative or under peer pressure to fit in.

In the case of *sexual solicitation* and *grooming*, it is the induction of sexual activities via the internet, consisting in inappropriate and unsolicited suggestions or in communication with a sexual undertone addressed to the child by an adult. The aforementioned may also result in a physical meeting of the offender with the child, which is already considered an aggressive form of induction on sexual activities used by sexual predators. Even in such cases, in order to prevent victimisation, the parent should communicate openly with the child about the pitfalls of the virtual world and set certain limits on the use of the internet and social networks. The child should know that they must not accept any requests for friendship from strangers, must not reply to any messages from an unknown person, their profiles on any social network should only be visible to their friends, family, and only people they know, and they should be warned not to, under any circumstance, add or send photographs where they are nude, be it photos from childhood or current photographs.

That said, however, we would like to state that in this rapidly changing area of the digital space, it is necessary to support the lifelong learning of parents, as well as pedagogical and professional staff, workers with children and youth, so that they can subsequently educate and transmit information to children. It is also necessary to financially support digital services and content that help create a more trustworthy, secure, and accountable digital space for children with effective protection against child victimisation. This could include the creation of effective age verification systems on websites or the development of parental control applications to ensure that children are protected from certain digital products, services, and content. A call for an increase in the production of audio-visual programmes is needed to raise awareness aimed at protecting children from harmful digital content and preventing them from engaging in illegal online activities, or to call on all media, and in particular public law, to address the issue of protecting children in the digital space, thereby raising the level of media literacy.

In regard to victim assistance, we can generally state that assistance can be provided on several levels, including *lay aid*, *psychological*, *social,* or *legal* assistance. As we have already mentioned, the vicinity of the victim greatly influences the victim's coping with trauma,

32 Sejčová (n 27) 170.

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especially when processing feelings of guilt. The victim must understand and accept any feelings that help them cope with the crisis, and these feelings should not be underestimated, although they may be incomprehensible to an impartial observer. The surroundings should normalize the consequences of victimisation, and the victim should ensure that whatever they are experiencing is a normal reaction to the negative situation they experienced. It is important that the victim feels a sense of security and trusts their loved ones, as it often happens that a person hides inside and limits their social contact as a result of victimisation. The victim should be encouraged as much as possible to express the emotions that have accumulated during the victimisation, whether fear, anger, or sadness, because the ventilation of all these emotions consumes the accumulated negative energy.[33]

Victims should be encouraged to engage in activities that are within their abilities to cope, or in activities that they themselves want to perform, because often a victim ceases to believe that their activities are meaningful and that they can continue to influence their fate.

Psychological assistance from experts also plays an indispensable role in helping the child victim. This assistance can take place directly at the scene of the crime and is provided by psychologists, doctors, paramedics, or police when it is necessary to mentally stabilize the victim as soon as possible, postulate the necessary information to the victim, provide intervention in the form of reducing stress, and strengthening their own resources to overcome trauma. The subsequent care of psychologists is also important, consisting in prolonged contact with the victim, if they were assessed as endangered or vulnerable, or if the victim themself requires such assistance.[34]

During research, the authors of this paper have further confirmed their opinion that children belong to one of the most vulnerable people groups in our society. A key role in the child's predisposition to become a victim of crime is tied to age, mental maturity, or their physical structure. Also, children do not have sufficiently developed critical thinking skills, are easily influenced, are not aware of the risk of possible danger, or are not adequately informed about it. Therefore, we appeal to the need for prevention and intervention, not only in pedagogical terms at schools or the need for prevention carried out by the helping professions, but we appeal particularly to the parents of minor children to communicate openly with them about the possible pitfalls of the world in the form of various crimes of which they can easily become victims. It is the early experience of the child that shapes his individual development and personality, which will greatly affect the prognosis of the future life of such a person. Especially when we talk about the prevention and intervention of crimes of a sexual nature, we propose the introduction of a compulsory subject of sex education into the educational process. In this subject, there would be time and space for communication with children and young individuals about biological and psychological maturity in the sexual sphere, but also contact between a child and a specialist could contribute to the early detection of sexual offences committed against children.

We are convinced that the processing of this issue has clarified not only the legal terms and legal provisions of substantive criminal law, but also enriched us with theoretical bases in the criminological and psychological field. By analysing this topic, we have managed to capture its meaning and are able to provide answers to questions about a child acting as a victim of a selected crime, as the child or youth is most at risk in our opinion.

33 Čírtková, Vitoušová a kol (n 29) 20.
34 Holomek (n 14) 87.

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Research Article

CAN STRICT INTELLECTUAL PROPERTY LAWS FACILITATE THE RENEWAL OF ENERGY SECTOR GROWTH? THE CASE OF SAUDI ARABIA

Saad Nasser AlQahtani[1]

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Summary: 1. Introduction. – *1.1 Patent rationales – 1.2 The inventive step – 1.3 Strict patent law – 1.4 Soft patent law – 1.5 Patent law in Saudi Arabia.* – 2. The importance of incentive laws for the renewable energy sector – *2.1 Financial incentives rather than patent laws to develop the renewable energy sector. – 2.1.1 The Renewable Portfolio Standards (RPSs). – 2.1.2 Feed-in Tariff Policy (FIT).* – 3. Lessons for Saudi Arabia. – 4. Conclusion.

Keywords: Intellectual property (IP), renewable energy (RE), feed-in tariff (FIT), renewable portfolio standard (RPS).

ABSTRACT

Background: *Saudi Arabia (KSA) is a global leader in producing fossil fuels and has primarily relied on this energy source for its Gross Domestic Product (GDP). However, after the 2014 oil crash, the country established Vision 2030, intending to shift toward a non-oil dependent economy. Through this vision, Saudi Arabia aims to increase generation of electricity from clean energy sources by 30%. This paper examines the effectiveness of strict intellectual property (IP) regulations aiming to develop the renewable energy (RE) sector.*

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Corresponding author, responsible for research and writing the text. **Competing interests:** Any competing interests were included by author. **Disclaimer:** The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.
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Methods: *In this paper, the author examines the effectiveness of strict intellectual property rights in-depth to develop innovation in the renewable energy sector as mentioned in Saudi Arabia's 2030 Vision. The paper makes a comparison with countries, such as the EU and China, regarding the extent to which strict intellectual rights have improved innovation. The author uses an inductive research approach that relies on qualitative data since it critically analyses regulations and policies in many countries, such as Saudi Arabia, the EU, and China.*

Results and conclusions: The author finds that financial incentives are more effective than in developing innovation in the renewable energy sector. Most importantly, developing countries benefit from financial incentives to increase innovation since many developed countries have adopted a strict IP law after their markets developed.

1 INTRODUCTION

Saudi Arabia has relied heavily on oil in its energy production, but the 2014 oil crash pushed the country to diversify its economy, thus, the government established Vision 2030. Through this vision, the country aims to generate 58 gigawatts from clean sustainable sources. The renewable energy (RE) sector is developing and is not compatible with oil and gas in Saudi Arabia. Therefore, laws have been enacted to develop the new emerging sector by increasing innovation, which aims to increase the new sector's competition and prioritise renewable energy over fossil fuels to address the issue of climate change.

There are many methods of increasing renewable energy innovation. One of which is to enact strong intellectual property (IP) laws to make the new sector more attractive to investors. These investors will not spend time and money on a new sector that cannot protect innovations. Thus, patent laws are designed to encourage businesses to innovate. This motivates investors in the RE sector to create new inventions, obtain patents, and gain the right to sell their products exclusively. Hence, patent laws can be seen as a means of developing the RE sector.

However, others argue that patent laws limit competition by giving confident investors exclusive rights to sell their products, and that financial incentives are more effective than patents to develop the RE sector.[2] Patents work particularly well in mature sectors, but most developed countries rely on financial incentives. Flexible IP laws are introduced in the early stages of developing new sectors; strong IP laws are enacted after achieving certain developmental milestones. Therefore, the paper aims to answer the following questions:

> *1. Do strict IP laws increase innovation in the renewable energy sector?*
>
> *2. Are financial incentives efficient to develop the renewable energy sector in developing countries?*

To answer the research questions, the paper first discusses the impact of IP laws on innovation in the RE sector. It compares many IP laws from developed and developing nations. The second part of the paper sheds light on the role of financial incentives on developing the RE sector, especially for developing nations.

2 Linda Yueh, 'Patent Laws and Innovation in China' (2009) 29 (4) International Review of Law and Economics 304, doi: 10.1016/j.irle.2009.06.001.

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1.1 Patent rationales

The free-market theory has spread across many countries, including the European Union (EU). The TFEU treaty mandates movement of goods and services without restriction, and any country that favours its national companies over other EU companies violates the TFEU.[3] The TFEU aims to increase competition, but a free market does not always increase innovation, so investors may hesitate to invest in markets that do not provide patents for their Research and Development (R&D). This led to the development of patent laws as exceptions to the free-market ideology, aiming to increase innovation and develop the market in the long term. Patents may be likened to rewards given to innovators for their hard work and positive role in development. In addition, patent laws are economically beneficial because knowledge development leads to new products and further innovations. Thus, patents encourage inventors in any market, eventually benefiting the public. There are many examples of patents serving the public interest; for example, pharmaceutical patents led many companies to develop COVID-19 vaccines which protected the public and reduced the death rate from the virus.

Although patents may increase innovation, their widespread use can harm a market by damaging rivals and allowing one individual to monopolise a product while restricting others from competing. In other words, easy patent access can lead to long-term monopolies that undermine free-market systems. Another issue caused by the widespread use of patents is the restriction of consumers' choices when purchasing products. Restricting consumers' options violates the principles of a free-market system that offers diverse goods and services. Succinctly, the extensive use of patents can both increase innovation and harm market competition.

1.2 The inventive step

The concept of invention is a vital step in innovation that most patent laws consider. Many countries require new inventions to be original in the field. Norway, for instance, requires a new invention to be "new," concerning what is already known, and to also differ essentially therefrom.[4] This means that the new invention must not be available to the public in writing, lectures, exploitation, or otherwise previously as that would make it known. Chapter 2 of the Norwegian Patents Act states that patent applications must contain a full invention description, including drawings, where appropriate. The description should enable a skilled person to duplicate the invention. However, the term "skilled person" is only used to ensure that a person can duplicate the invention using the description alone differing from other patent laws which will be explored later. Again, a new invention must only be new in terms of what is already known. In fact, Norwegian patents can be awarded for biological materials when the invention is used for industrial purposes.

Similarly, Denmark seems to have lowered its threshold, in comparison to strict IP countries, such as the U.K, to obtain patents.[5] Article 2(1) of the Consolidate Patents Act states that patents shall be granted for inventions that are new to the state of the art. Section 5 of the Act states that the invention can be patented, even if it is available to the public, if the availability is a

3 Treaty on the Functioning of the European Union (consolidated version) arts 34, 56 <https://www.legislation.gov.uk/eut/teec/contents> accessed 10 May 2023.

4 Norwegian Patents Act No 9 of 15 December 1967 <https://www.patentstyret.no/en/norwegian-patents-act> accessed 10 May 2023.

5 Consolidate Patents Act No 366 of 09 June 1998 (as amended by Act No 412 of 31 May 2000) <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/dk/dk129en.pdf> accessed 10 May 2023.

consequence of evident abuse concerning the applicant or an officially-recognised international exhibition falling within the terms of the Convention on International Exhibitions.

As it is in Norway, the new invention must be defined with a full description, allowing a person skilled in the art to duplicate the invention. This, again, means that the test for a person skilled in the art aims only to determine whether that person can duplicate the invention, which differs from other patent laws.

1.3 Strict patent law

However, UK patent law takes a different approach to patents. In many EU countries, a patent is awarded when the description of an invention allows a person skilled in the art to duplicate the invention, but the UK adopts a stricter approach, stating that the invention should undoubtedly be novel. The invention must not be clear for the person skilled in art.[6] UK case law has discussed the meaning of "person skilled in the art." Regarding the Technograph Printed Circuits Limited V. Mills and Rockley (Electronics) Limited case, the court held that the skilled person is a theoretical technician who possesses expertise, extensive knowledge, and familiarity with the literature relating to a particular field.[7] This imaginary skilled person has the capability to distinguish between obvious and non-obvious inventions and to see the obvious, but not necessarily the inventive.[8] Courts in the UK went even further to determine the characteristics of a person skilled in the art, showing that the UK threshold for patents is high. This can cause problems because it makes it difficult for small companies to obtain patents.

UK tests of a person skilled in the art have questioned whether the invention was obvious if that person spends as much time as the inventor did to create the new invention. In other words, it is not clear whether, if an invention took five years to invent, it becomes "obvious" only after a further five years. Such questions can be difficult to answer because the characteristics of a person skilled in the art are unrealistic. Judge Hoffman expressed disapproval of the concept of a skilled person, stating that it was a simplistic method of conveying legal concepts to a jury.[9]

However, UK courts seem to have further raised the threshold for patents. In the Medimmune Ltd v Novartis Pharmaceuticals UK Ltd & Ors case, the court stated that the assessment of obviousness means that the invention should not be obvious and that the steps taken to make the invention must also not be obvious.[10] Thus, the invention does not need to be obvious if the steps taken to make the invention are obvious, and therefore, do not pass the obviousness test. So, it is not necessary for a person skilled in the art to assess an invention if the steps used to make it are obvious, even if the invention is not obvious overall. In fact, the court in the Genetech case raised the patent threshold even higher.[11] The court stated that a person skilled in the art is a person who has inventive capacity in the biotechnology field, thus increasing the stringency of the obviousness test to include the complexity of the field. This increase in stringency had dramatic repercussions for many fields, including the pharmaceutical field. Inventors hesitated to invest time and effort in these sectors because the requirement for inventiveness was so high.

6 Paul Torremans, *Holyoak & Torremans: Intellectual Property Law* (8th edn, OUP 2016).

7 *Technograph Printed Circuits Ltd v Mills & Rockley (Electronics) Ltd* [1972] RPC 346 (per Lord Reid).

8 Torremans (n 6).

9 *Société Technique de Publicité v Emerson Europe Ltd* [1993] RPC 513.

10 *Medimmune Ltd v Novartis Pharmaceuticals UK Ltd & Ors* [2012] EWCA Civ 1234.

11 *Hospira UK Ltd v Genentech Inc* [2014] EWHC 1094 (Pat).

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1.4 Soft patent law

Patent law has been scrutinized by the Chinese government since 1984 and amended four times since then to fulfil the requirements of the Trade-Related Aspects of IP Rights (TRIPS) Agreement.[12] This agreement established the minimum requirements for member states regarding IP protection, thus, China needed to amend its patent law in 2000 before becoming a WTO member in 2001. However, the Chinese government continues to try balancing international agreements with public interests to encourage Chinese producers to innovate.[13] For example, China's adoption of public health measures, in its 2008 patent law,[14] exemplifies its attempt to balance international obligations and public interests.

China's approach to IP is lax. The main reason for this is the desire to develop technology through imitation and foster partnerships with Western companies.[15] Such imitation often violates strict patent laws, and China has adopted soft patent laws to allow for smoother technology transfer. Although China's patent laws should provide sufficient protection for IP, the law itself is less stringent and its enforcement is ineffective, revealing China's aim to learn from foreign technologies by maintaining an inadequate IP protection regime.[16]

China has developed a distinct approach to increase innovation—the "open door" policy—resulting in extensive technological development and innovation in China.[17] The policy prefers foreign investment over strict patent laws to increase innovation. This seems successful in China since the country has clearly developed more technologically. Moreover, China's enforcement of patent laws is poor, indicating the country's reluctance to tighten IP laws. These soft patent laws have allowed China to grow technologically while emphasising industrial policy development to utilise foreign technology and direct investment and foster increased spending on R&D.[18]

One of the methods China has adopted to encourage innovation is the establishment of special economic zones (SEZs), from 1979 onward, to attract foreign investment.[19] These are designated export-oriented areas that provide financial incentives for foreign investment. In 1985, China went even further by creating open port cities known as economic and trade development zones (ETDZs).[20] The establishment of SEZs and ETDZs has led to success in attracting high-technology foreign investment. In 1992, China established free trade zones (FTZs), which exempted exports and imports from tariffs.[21] In 1995, the country established high-technology development zones (HTDZs) in almost every province to attract technology and research centres. These efforts have resulted in increasing technological development in China.[22]

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12 Monirul Azam, *Intellectual Property and Public Health in the Developing World* (Open Book Publishers 2016) doi: 10.11647/OBP.0093.

13 ibid.

14 Patent Law of the People's Republic of China (amended on 27 December 2008) <https://sipa.sh.gov.cn/patent/20191130/0005-28434.html> accessed 10 May 2023.

15 Noura Humoud Abdulaziz AlZaid, *Saudi Arabia and Intellectual Property: Learning from China's Approach* (KFCRIS 2021) <https://kfcris.com/en/view/post/365> accessed 10 May 2023.

16 ibid.

17 Yueh (n 2).

18 ibid.

19 Jung-Dong Park, *The Special Economic Zones of China and Their Impact on Its Economic Development* (Praeger 1997).

20 Shuang Gao and others, 'Dynamic Evolution of the Operating Efficiency of Development Zones in China' (2021) 13 (18) Sustainability 10395, doi: 10.3390/su131810395.

21 Yueh (n 2).

22 ibid.

Many studies show a relationship between foreign direct investment (FDI) and technological development. It is believed that FDI is vital for "catching up" on technological development and bridging the gap between developing and developed countries.[23] In their 1995–2000 study, Cheung and Lim confirmed the significant impact of foreign investment on patent applications, showing its positive impact on the productivity of local businesses.[24] Since it began attracting increased FDI, China has witnessed burgeoning technological and innovative development in coastal areas permitted to experiment with market-oriented reforms, leading to a significant rise in GDP.[25] Many studies show that FDI is more effective in increasing innovation and technological development than R&D because it creates a competitive environment that easily enhances innovation. The development of local technology benefits per capita GDP as exports increase with innovation increases. This clearly shows the significant impact of FDI on development and innovation.[26]

1.5 Patent law in Saudi Arabia

Patent law in Saudi Arabia has been enacted in cooperation with the GCC. The specific law is called the Gulf Cooperation Council Patent Law (also known as the "GCC Patent Law").[27] According to Article 2(2), a patent may be awarded if the invention is both novel and non-obvious and can be utilised in an industrial setting. The same article explains that the invention is considered new when it has not been anticipated by "prior art," meaning everything disclosed to the public by any means. Article 2(3) specifies that, for an invention to be considered patentable, it must possess an inventive step that a person with average skills and knowledge in the relevant field would not consider obvious, and Article 2(4) states that the invention must be considered industrially applicable. According to the Act, the meaning of "industrially applicable" should be broadly understood to include handicrafts. Article 3 explains what is excluded from patents, such as discoveries, scientific theories, mathematical methods, schemes, rules, methods of doing business, the performance of purely mental acts, and game playing. Finally, the act provides 20 years of protection for an invention, beginning from the patent application's filing date.[28]

Saudi Arabia recognises the importance of IP rights, which led to the 2018 creation of a specialised agency called the Saudi Authority for Intellectual Property (SAIP).[29] The agency introduces policies that tailor the provisions of international agreements to Saudi Arabia's needs, and its strategy was developed by seven public, private, and international entities. The agency stated that the Supreme Committee has approved its strategy for scientific research, development, and innovation, demonstrating the importance of the country's agency based on the belief that IP laws increase innovation.[30] The agency aims to balance encouraging local inventions and attracting international investment and innovation.

23 ibid.

24 Kui-yin Cheung and Ping Lin, Spillover Effects of FDI on Innovation in China: Evidence from Provincial Data (2004) 15 (1) China Economic Review 25, doi: 10.1016/S1043-951X(03)00027-0.

25 Yueh (n 2)

26 ibid.

27 Patent Regulation of the Cooperation Council for the Arab States of the Gulf (amended on November 1999) <https://www.wipo.int/export/sites/www/scp/en/meetings/session_14/ips/gcc_reg_2.pdf> accessed 10 May 2023.

28 ibid.

29 AlZaid (n 15).

30 ibid.

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However, in 2020, Saudi Arabia ranked sixty-sixth worldwide according to the Global Innovation Index (GII).[31] The index stated that Saudi Arabia exhibited limited innovative performance, meeting a below expectations rank for its income level. Many countries in the region have a higher GII ranking, such as the United Arab Emirates, ranked thirty-fourth. The index measures innovation based on seven elements, including knowledge and technology outputs, for which Saudi Arabia is ranked eighty-eighth out of 131 countries. The GII report highlights Saudi Arabia's absorptive capacity for foreign technologies, which is recognised as a limitation in Saudi Arabia's Eighth and Ninth Development Plans,[32] since the country still lacks innovation capabilities.[33]

Limited innovation capacity has reportedly resulted from a lack of human capital investment,[34] although the Saudi government greatly emphasises education. In 2021, the Saudi government allocated 186 billion SAR of funding to education,[35] leading to an increased numbers of students graduating into important fields, such as engineering and science.[36] Nevertheless, the number of qualified engineers who work in R&D is low in Saudi Arabia when compared to industrialised countries.[37] A survey conducted by the General Authority for Statistics (GASTAT) in 2018 examined innovation in Saudi Arabia[38] and reported that there were 5,323 PhD holders in Saudi Arabia, and 4,100 of the holders were foreigners.[39] This deficiency may be related to a lack of incentives for Saudi Arabian nationals to work in these fields. King Abdulaziz City for Science and Technology stated in its annual report that human capital and brain drains are the main challenges Saudi Arabia faces due to poor financial incentives.[40]

Another issue in Saudi Arabia presents in the weak links between academia, policy, and industry.[41] The lack of clear roles for government research entities, such as Taqnia and KACST, can lead to conflicts and coordination issues. According to the GASTAT report, industrial R&D in Saudi Arabia remains low and the private sector spends only 2.74% of its revenues on R&D, which is a low percentage compared to other industrialised economies.[42] This issue is significant as the industry is an important factor in the deployment of new technologies and is uniquely positioned to create innovations in manufacturing processes that escape IP innovation.

31 Soumitra Dutta, Bruno Lanvin and Sacha Wunsch-Vincent (eds), *Global Innovation Index 2020: Who Will Finance Innovation?* (Cornell University; INSEAD; WIPO 2020) doi: 10.34667/tind.42316.

32 Sami Alsodais, 'Science, Technology & Innovation in Saudi Arabia' (*WIPO*, September 2013) <https://www.wipo.int/wipo_magazine/en/2013/05/article_0006.html> accessed 10 May 2023.

33 AlZaid (n 15).

34 ibid.

35 Ministry of Finance of Saudi Arabia, 'Budget 2021' (*KSA*, December 2020) <https://www.mof.gov.sa/en/budget/2021/Documents/Budget2021_EN.pdf > accessed 10 May 2023.

36 AlZaid (n 15).

37 ibid.

38 ibid.

39 General Authority for Statistics, 'Institutional Innovation Survey Bulletin 2018' (General Authority for Statistics, 26 November 2020) <https://www.stats.gov.sa/en/1067> accessed 10 May 2023.

40 'King Abdulaziz City for Science's report' (KACST, 2020) <https://www.kacst.edu.sa/docs/annualrep20arb.pdf> accessed 10 May 2023.

41 AlZaid (n 15).

42 ibid.

2 THE IMPORTANCE OF INCENTIVE LAWS FOR THE RENEWABLE ENERGY SECTOR

Innovation is essential in the renewable energy sector because it increases the sector's efficiency, making it more competitive with the fossil fuel sectors.[43] Boosting innovation and efficiency in the new sector is important to transition from fossil fuels to clean energy. At present, oil and gas are the dominant energy sources due to their efficiency and lower costs, so most countries prefer them to renewable energy sources. This implies that innovation can significantly reduce costs, thus increasing the likelihood of countries relying on clean, sustainable energy rather than non-sustainable sources. The development of this emerging sector requires a special boost in education, research, technology, and finance.[44]

Regulations and policies are often used to develop innovation in the renewable energy sector because they establish frameworks for action and impose sanctions for non-compliance.[45] In environmental law, a special agency or government department is typically responsible for enacting laws due to the complexity of environmental matters.[46] This entity can determine the measures required to achieve specific environmental protection goals and promote clean energy sources. In addition, environmental regulations can drive the private sector to identify problems and help decision-makers improve the regulations. These laws should be efficiently coordinated and employ clear market methods, such as tradable allowances. They should also support innovation by giving economic agents the freedom to use technological solutions to both benefit them and ensure compliance with regulatory stipulations.[47]

Developed countries enforce laws and policies to encourage businesses in the sector to use sustainable energy sources. For instance, the United States (US) enacted the Energy Security Act, the Energy Policy Act, and the American Recovery and Reinvestment Act, aiming to limit the use of oil and gas and encourage the use of clean energy.[48] These laws are necessary for boosting a renewable energy sector that cannot compete with fossil fuels. Fossil fuel sectors have received a significant number of subsidies in the past, driving their competition, but this means that renewable energy laws are needed to provide incentives for the emerging sector.[49] The US's enactment of RE regulations increased the renewable energy use in the country by 92% from 2009 to 2010, with a further increase to 109% from 2011 to 2012.[50] This is an example of the government formulating laws to encourage businesses to invest in generating electricity from sustainable sources.

43 Saidi Magaly Flores Sánchez, Miguel Alejandro Flores Segovia and Luis Carlos Rodríguez López, 'Impact of Public Policies on the Technological Innovation in the Renewable Energy Sector' (2020) 10 (2) International Journal of Energy Economics and Policy 139.

44 Adam Jaffe, Richard G Newell and Robert N Stavins, 'A Tale of Two Market Failures: Technology and Environmental Policy' (2005) 54 (2-3) Ecological Economics 164, doi: 10.1016/j.ecolecon.2004.12.027.

45 Ben Daley and Holly Preston, 'Aviation and Climate Change: Assessment of Policy Options' in S Gossling and P Upham (eds), *Climate Change and Aviation: Issues, Challenges and Solutions* (Routledge 2012) ch 16, 347, doi: 10.4324/9781849770774.

46 Sánchez, Segovia and López (n 43).

47 ibid.

48 Joseph P Tomain and Richard D Cudahy, Energy Law in a Nutshell (3rd edn, West Academic Pub 2016).

49 ibid.

50 Kyle Weismantle, 'Building a Better Solar Energy Framework' (2014) 26 St Thomas Law Review 221.

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2.1 Financial incentives rather than patent laws to develop the renewable energy sector

Financial incentives can develop the renewable energy sector when they are awarded for investments in knowledge and indicate government support for scientific research. Scientific research leads to the generation of marketable products or processes, which can eventually encourage investors to contribute more heavily to the sector. It also increases technology development in the RE sector, encouraging it to compete with oil and gas. In addition, laws and policies can promote measures for increasing innovation in renewable energy, including helping to (a) plan, define the problem, and establish the objectives to be pursued, and (b) establish institutions to design, coordinate, implement, and evaluate the resulting actions. According to the literature, these measures have a long-term positive impact on the RE sector.[51]

Significant empirical evidence has shown the positive impact of financial incentives on the renewable energy sector, demonstrating that financial incentives, such as green taxes and tradable certificates, encourage innovation in the RE sector. The financial incentives increase the number of patents in the sector through an increase in innovation, confirming that the renewable energy sector relies heavily on financial resources.[52]

However, there are many challenges facing the renewable energy sector. First, unlike fossil fuel sources, renewable energy sources are still novel.[53] The percentage of clean energy usage ranges from 0.1% to 10% of total energy use in the premier forum for international economic cooperation, "the Group of Twenty" (G20).[54] Other countries are less likely to use renewable energy sources due to the complexity of clean energy technology. Countries with advanced renewable energy sources, such as the UK and Germany, deployed 68 MW and 9.9 MW of wind energy to 13,183 MW and 588 MW, respectively, from 1990 to 2003.[55] This shows that new renewable energy technologies require considerable amounts of financial investment.

Second, renewable energy sources have high initial capital costs. Generating electricity from renewable energy means installing many high-cost products, such as solar panels and wind turbines, that require relevant connecting equipment and space to operate efficiently.[56] Although the price of renewable energy fuel is almost zero, the initial cost remains high.[57] Therefore, long-term financing and investment must be secured before initiating renewable energy projects.[58] One study showed that without financial incentives, investors hesitate to invest in renewable energy sources, in particular, wind energy.[59] Another study, conducted in India, found that limited financial incentives were the main barrier that deterred investors

51 Sánchez, Segovia and López (n 43).

52 ibid.

53 Taedong Lee, 'Financial Investment for the Development of Renewable Energy Capacity' (2021) 32 (6) Energy & Environment 1103, doi: 10.1177/0958305X19882403.

54 ibid.

55 Catherine Mitchell and Peter Connor, 'Renewable Energy Policy in the UK 1990-2003' (2004) 32 (17) Energy Policy 1935, doi: 10.1016/j.enpol.2004.03.016.

56 Lee (n 53).

57 Anthony Owen, 'Renewable Energy: Externality Costs as Market Barriers' (2006) 34 (5) Energy Policy 632, doi: 10.1016/j.enpol.2005.11.017.

58 John Mathews and others, 'Mobilizing Private Finance to Drive an Energy Industrial Revolution' (2010) 38 (7) Energy Policy 3263, doi: 10.1016/j.enpol.2010.02.030.

59 Sonja Lüthi and Thomas Prässler, 'Analyzing Policy Support Instruments and Regulatory Risk Factors for Wind Energy Deployment—A Developers' Perspective' (2011) 39 (9) Energy Policy 4876, doi: 10.1016/j.enpol.2011.06.029.

from investing in the RE sector.[60] Thus, it is clear that the renewable energy sector is still not competitive with fossil fuels, and financial incentives are needed to develop the emerging sector and attract investors.

Third, the development of the RE sector requires a significant amount of R&D, which can increase the competitiveness of renewable energy through technological development.[61] One study showed a clear relationship between R&D and the reduced costs of low-carbon technology, boosting the use of renewable energy sources.[62] These three reasons explain why the renewable energy sector cannot compete with fossil fuels alone.[63] Instead, financial incentives and R&D are vital methodologies to develop the sector, and countries that provide financial incentives for the RE sector are those most likely to develop this new sector.[64]

2.1.1 The Renewable Portfolio Standards (RPSs)

One of the main initiatives for developing the RE sector is the introduction of renewable portfolio standards (RPSs).[65] RPS stipulate the minimum requirements for renewable energy sources that the electricity grid must meet. For instance, the government may use an RPS to force an electricity grid to generate 15% (or any other percentage) of electricity from RE sources. RPSs aim to establish minimum requirements to increase over time.[66] They also work to increase the energy mix's reliability, diversity, and environmental benefits.[67] One study reported that RPSs are the most common policy instrument used in the US to increase the renewable energy use.[68] This policy is applied in many other countries, such as Sweden, Italy, U.K., Japan, and Australia.[69] This policy was studied and implemented in the 80s in the state of Iowa, which was studied heavily after Rader and Norgaard (1996).[70]

There are two forms of RPSs. The first form is voluntary, which attracts many researchers to examine its effectiveness.[71] This type of RPS provides more flexibility, reduces enforcement costs, and creates cooperative regimes compared to the mandatory form of RPS.[72] Moreover, voluntary RPSs can be seen as political devices for signalling the necessity for clean energy

60 A Mahesh and KS Shoba Jasmin, 'Role of Renewable Energy Investment in India: An Alternative to CO2 Mitigation' (2013) 26 Renewable and Sustainable Energy Reviews 414, doi: 10.1016/j.rser.2013.05.069.

61 Lee (n 53).

62 Tobias Wiesenthal and others, 'A Model-Based Assessment of the Impact of Revitalised R&D investments on the European Power Sector' (2012) 16 (1) Renewable and Sustainable Energy Reviews 105, doi: 10.1016/j.rser.2011.07.139.

63 Lee (n 53).

64 ibid.

65 Haitao Yin and Nicholas Powers, 'Do State Renewable Portfolio Standards Promote In-State Renewable Generation?' (2010) 38 (2) Energy Policy 1140, doi: 10.1016/j.enpol.2009.10.067.

66 ibid.

67 ibid.

68 Barry D Solomon and Shan Zhou, 'Renewable Portfolio Standards: Do Voluntary Goals vs Mandatory Standards Make a Difference?' (2021) 38 (2) Review of Policy Research 146, doi: 10.1111/ropr.12424.

69 Ryan Wiser, Jan Hamrin and Meredith Wingate, 'Renewable Energy Policy Options for China: A Comparison of Renewable Portfolio Standards, Feed-in Tariffs, and Tendering Policies' (*Center for Resource Solutions*, June 2002) <https://resource-solutions.org/document/renewable-energy-policy-options-for-china-a-comparison-of-renewable-portfolio-standards-feed-in-tariffs-and-tendering-policies> accessed 10 May 2023.

70 Nancy Rader and Richard Norgaard, 'Efficiency and Sustainability in Restructured Electricity Markets: The Renewables Portfolio Standard' (1996) 9 (6) The Electricity Journal 37, doi: 10.1016/S1040-6190(96)80262-4.

71 Solomon and Zhou (n 68).

72 Gireesh Shrimali and Joshua Kniefel, 'Are Government Policies Effective in Promoting Deployment of Renewable Electricity Resources?' (2011) 39 (9) Energy Policy 4726, doi: 10.1016/j.enpol.2011.06.055.

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goals,[73] encouraging utility companies to reach agreements with renewable energy producers to fulfil state requirements.

The second form of an RPS is mandatory, in which governments force electricity grids to include renewable energy in their electricity production at rates determined by law.[74] In the US, an estimated three-fourths of all state RPSs are mandatory, and many research studies have shown their positive impact.[75] For instance, Carley, Yin, Powers, Shrimali, Kniefel, and Barbose, et al. provided evidence of the significant impact of mandatory RPSs on developing the RE sector.[76] Moreover, preliminary evidence suggests that mandatory RPSs significantly impact project economics more than voluntary RPSs. In other words, voluntary RPSs may provide more flexibility to allow the private sector to adopt cleaner energy for energy production, but enforcement mechanisms also appear significant when developing the emerging renewable energy sector.[77]

There are many benefits of RPSs, such as reducing greenhouse gas (GHG) emissions by 59 million MT of carbon dioxide (CO2) and reducing construction-related life-cycle emissions from fossil plants.[78] Reducing GHG emissions assist in reducing climate change. According to an IWG central-value SCC estimate, RPSs played the main role in 2013 to reduce future pollution damage by approximately $3.5 billion (2.2 ¢/kWh-RE).[79] Furthermore, reducing GHG emissions improves human health since GHGs harm human health and cause environmental damage.[80] Epidemiological studies prove the relationship between air pollution and increased mortality,[81] showing that more than 3 million deaths annually are caused by air pollution.[82] The EPA stated that its Clean Power Plan (CPP) would provide $14–34 billion by 2030 due to a reduced mortality rate.[83] This evidence clearly shows the positive impact of renewable energy initiatives, such as RPSs, on reducing climate change and improving human health.

2.1.2 Feed-in Tariff Policy (FIT)

Feed-in tariffs (FITs) are a second method used to increase the RE sector. An FIT is a policy aimed at promoting renewable energy generation whereby providers of clean energy receive the price of their energy production from large utility companies.[84] This leads to clean energy producers receiving guarantees from the national grid to purchase their renewable energy

73 Christina Boswell, 'The Double Life of Targets in Public Policy: Disciplining and Signalling in UK Asylum Policy' (2015) 93 (2) Public Administration 490, doi: 10.1111/padm.12134.

74 Solomon and Zhou (n 68).

75 ibid.

76 ibid.

77 ibid.

78 Galen Barbose and others, 'A Retrospective Analysis of Benefits and Impacts of US Renewable Portfolio Standards' (2016) 96 Energy Policy 645, doi: 10.1016/j.enpol.2016.06.035.

79 ibid.

80 Johanna Lepeule and others, 'Chronic Exposure to Fine Particles and Mortality: An Extended Follow-up of the Harvard Six Cities Study from 1974 to 2009' (2012) 120 (7) Environ Health Perspect 965, doi: 10.1289/ehp.1104660.

81 ibid.

82 Stephen S Lim and others, 'A Comparative Risk Assessment of Burden of Disease and Injury Attributable to 67 Risk Factors and Risk Factor Clusters in 21 Regions, 1990–2010: A Systematic Analysis for the Global Burden of Disease Study 2010' (2012) 380 The Lancet 2224, doi: 10.1016/S0140-6736(12)61766-8.

83 Environmental Protection Agency, *Regulatory Impact Analysis for the Clean Power Plan Final Rule* (US EPA 2015) 73.

84 United Nations Economic and Social Commission for Asia and the Pacific Fact Sheet, https://www.unescap.org/sites/default/files/26.%20FS-Feed-In-Tariff.pdf

production over a long period, commonly 15–20 years.[85] For example, France fixed the price of wind electricity generation at 8.2 €cents/kW h for 10 years.[86] Portugal also fixed the price of hydropower generation at 5.91 €cents/kW h.[87] Germany has reduced the price of new wind power plant installations by 1% and of photovoltaic (PV) systems by 10%.[88] These examples show that FITs help to increase renewable energy production.

FITs have been widely used to support the RE sector. The US was the first country to adopt FITs to support increased PV systems when the country enacted the Public Utility Regulatory Policies Act in 1978.[89] Most governments recognized FITs in their legislation in the 1980s and early 1990s. For example, Germany introduced an FIT system via the Electricity Feed Law in 1991 and initiated the *1000 Roofs Programme*, which provides compensation for PV systems on small roofs linked to the grid through provision of grants worth 70% of the investment costs.[90] Japan also provided subsidies to PV owners in its *Subsidy Program for Residential PV Systems* in 1994.[91] These financial programs allowed Germany and Japan to become the leading countries in new PV installations in the OECD, reaching 78.5% in 2006.[92]

FITs can play a role in raising the use of RE sources, enhancing their capability to meet new and continuing energy demands. In 2009, the global economy consumed about 11.16 billion tons of equivalent oil.[93] Asia contributed a large share to global energy consumption, accounting for 37% in 2009.[94] By 2035, half of the global energy consumption is expected to come from Asian consumers.[95] FITs can play a significant role in satisfying future energy demand by increasing clean energy generation, but the successful application of FIT policies depends on three components: guaranteed access to the grid (renewable energy producers must ensure that their clean energy will be linked to the grid), a long-term purchase agreement (usually 15–20 years), and a payment level based on the costs of renewable energy generation.[96]

3 LESSONS FOR SAUDI ARABIA

Saudi Arabia cannot apply an unadaptable Chinese model to increase its innovation since it cannot provide companies with the same advantages of colossal market size and low labour costs as China. However, Saudi Arabia can learn from the Chinese model to increase innovation by introducing flexible IP laws for technology transfers, and it can also take advantage of its unique, central location to attract FDI.[97] One study argued that developing countries, including Saudi Arabia, should push for flexible patent laws because developed

85 Toby D Couture and others, *A Policymaker's Guide to Feed-in Tariff Policy Design: Technical Report NREL/TP-6A2-44849 July 2010* (NREL; Golden co 2010) doi: 10.2172/1219187.

86 Ming-Chung Chang, Jin-Li Hu and Tsung-Fu Han, 'An Analysis of a Feed-in Tariff in Taiwan's Electricity Market' (2013) 44 (1) International Journal of Electrical Power & Energy Systems 916, doi: 10.1016/j.ijepes.2012.08.038.

87 ibid.

88 ibid.

89 Elbert Dijkgraaf, Tom P van Dorp and Emiel Maasland, 'On the Effectiveness of Feed-In Tariffs in the Development of Solar Photovoltaics' (2018) 39 (1) The Energy Journal 81, doi: 10.5547/01956574.39.1.edij.

90 ibid.

91 ibid.

92 ibid.

93 United Nations Economic and Social Commission for Asia and the Pacific Fact SheetFact Sheet (n 159).

94 ibid.

95 International Energy Administration, *World Energy Outlook 2011* (OECD/IEA 2011) doi: 10.1787/weo-2011-en.

96 Couture and others (n 85).

97 AlZaid (n 15).

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nations are interested in new markets, not new competitors.[98] Hence, strong IP legislation would force developing countries to navigate uncharted territory.

The need to develop flexible IP laws has been recognised by many conventions, such as the Paris Convention, which allocated for "asymmetries" and allowed countries to adopt different IP protection standards based on their levels of national development.[99] TRIPS has also provided room for flexibility in developing countries by granting them enough flexibility to allow the development of their nation-specific macroeconomic policies, according to TRIPS-compatible norms. Despite efforts to enact international IP laws, national laws are still valid within countries' jurisdictions.[100] Hence, Saudi Arabia should adopt proper IP laws tailored to its economy. As stated previously, many studies show the significant impact of financial incentives on the development of innovation.[101] In fact, financial incentives have been proven to surpass patent laws to develop innovation in the renewable energy sector. A moral argument can be made that developing countries should be given the same flexibility that developed countries once had. There should be no question of *whether* Saudi Arabia should have strong IP laws, but *when*.[102]

4 CONCLUSION

This paper has focused on the role of strong patent laws to increase innovation and, consequently, develop the RE sector. The paper first examined the rationale behind patent laws in market systems, giving examples of patent laws in the EU, the UK, China, and Saudi Arabia, showing that they seem to have increased innovation, but not significantly. The second section of the paper discussed the role of financial incentives in developing the renewable energy sector and innovation, demonstrating that financial incentives increase innovation more dramatically than IP laws. Financial incentives seem more effective than IP laws for developing innovation in the renewable energy sector. Some examples of successful financial incentives for the RE sector have been given, such as RPSs and FITs. In conclusion, Saudi Arabia should adopt flexible IP laws and enact financial incentive legislation to develop its renewable energy sector and achieve this aspect of Vision 2030.

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98 ibid.
99 ibid.
100 ibid.
101 Sánchez, Segovia and López (n 43).
102 ibid.

6. Chang MC, Hu JL and Han TF, 'An Analysis of a Feed-in Tariff in Taiwan's Electricity Market' (2013) 44 (1) International Journal of Electrical Power & Energy Systems 916, doi: 10.1016/j.ijepes.2012.08.038.
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Research Article

APPLICATION OF ARTIFICIAL INTELLIGENCE SYSTEMS IN CRIMINAL PROCEDURE: KEY AREAS, BASIC LEGAL PRINCIPLES AND PROBLEMS OF CORRELATION WITH FUNDAMENTAL HUMAN RIGHTS

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Summary: 1. Introduction. – 2. The main areas of possible application of AI systems in criminal proceedings. – 3. Basic principles of using AI systems in criminal justice and regulatory documents covering this issue. – 4. The problem of AI systems functioning in the context of fundamental human rights and freedoms. – 5. Conclusions.

Keywords: human rights; criminal proceedings; digital technologies; artificial intelligence; predictive justice, Ukraine.

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ABSTRACT

***Background**: Digital technologies are an important factor currently driving society' development in various areas, affecting not only traditional spheres, such as medicine, manufacturing, and education, but also legal relations, including criminal proceedings. This is not just about using technologies related to videoconferencing, automated distribution, digital evidence, etc. Development is constantly and rapidly moving forward, and we are now facing issues related to the use of artificial intelligence technologies in criminal proceedings. Such changes also entail new threats and challenges – we are referring to the challenges of respecting fundamental human rights and freedoms in the context of technological development. In addition, there is the matter of ensuring the implementation of basic legal principles, such as the presumption of innocence, non-discrimination and the protection of the right to privacy. This concern arises when applying artificial intelligence systems in the criminal justice system.*

***Methods:** The general philosophical framework of this research consisted of axiological and hermeneutic approaches, which allowed us to conduct a value analysis of fundamental human rights and changes in their perception in the context of the AI application, as well as apply in-depth study and interpretation of legal texts. While building up the system of the basic principles of using AI systems in criminal justice, we used the system-structural and logical methods of research. The study also relied on the comparative law method in terms of comparing legal regulation and law enforcement practice in different legal systems. The method of legal modelling was applied to emphasise the main areas of possible application of AI systems in criminal proceedings.*

***Results and Conclusions:** The article identifies the main possible vectors of the use of artificial intelligence systems in criminal proceedings and assesses the feasibility and prospects of their implementation. In addition, it is stated that only using AI systems for auxiliary purposes carries minimal risks of interference with human rights and freedoms. Instead, other areas of AI adoption may significantly infringe rights and freedoms, and therefore the use of AI for such purposes should be fully controlled, verified and only subsidiary, and in certain cases, prohibited altogether.*

1 INTRODUCTION

Digital technologies are gradually, year by year, progressively penetrating various areas of our lives. At the same time, the understanding of digitalisation in society is quite plural. Still, we should agree with its broad definition as 'legal, political, economic, cultural, social and political changes caused by the use of digital tools and technologies' .[5] In the mentioned definition, the key point is to indicate the changes caused by digital technologies when they are introduced into our lives. On the one hand, this can serve as the basis for its qualitative improvement and facilitation, while on the other hand, the disproportionate and unreasonable introduction of digital technologies can yield adverse effects. This includes, for example, unreasonable interference with human rights, the risk of unauthorised access to personal data due to insecurity, discriminatory decisions, and more .

These issues are particularly relevant in the context of the use of artificial intelligence (AI) systems, as evidenced, in particular, by the introduction to the White Paper on Artificial Intelligence: A European Approach to Excellence and Trust (the 'White Paper') published

5 Yulia Razmetaeva, Yurii Barabash and Dmytro Lukianov, 'The Concept of Human Rights in the Digital Era: Changes and Consequences for Judicial Practice' (2022) 5 (3) Access to Justice in Eastern Europe 44, doi: 10.33327/AJEE-18-5.3-a000327.

by the European Commission on 19 November 2020. It points to the rapid development of artificial intelligence and its positive impact on our lives, including improved healthcare through more accurate diagnostics, increased efficiency of production systems through predictive maintenance and ensuring a higher degree of security for Europeans . However, it also underscores the potential risks associated with AI , such as non-transparent decision-making, gender or other types of discrimination, invasion of privacy, or criminal misuse.[6]

The European community's anxiety about the rapid development of AI systems and their 'all-pervasive' nature has been reflected in the Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain EU legislative acts.[7] Certain provisions of this European document warrant further analysis. Still, it is worth paying particular attention to the explanatory memorandum accompanying the proposal for the adoption of the AI Act which defines the reasons and objectives for the adoption of the relevant regulatory document. The memorandum outlines both the significant economic and social benefits in various industries and social activities, such as improved forecasting, optimisation of operations, and personalisation of services as well as the new risks and negative consequences for society and individuals associated with the introduction of AI systems. With this in mind, it is particularly noted that in light of 'the speed of technological change and the possible challenges of technological change and the possible challenges, the EU is committed to a balanced approach. It is in the Union's interest to maintain the EU's technological leadership and to ensure that Europeans can benefit from new technologies designed and operated in accordance with EU values, fundamental rights and principles'.[8]

An analysis of the prospective areas of introducing artificial intelligence technologies in the field of criminal justice and the associated challenges necessitates a fundamental understanding of the key categories used in the relevant subject area. The concept of artificial intelligence itself is pivotal . It is worth starting its analysis with John McCarthy, one of the influential proponents of AI systems, who considered it as 'the science and engineering of creating intelligent machines' , where 'intelligence' denotes 'a measurable part of the ability to achieve goals in the world' .[9] D. Castro and J. New further define AI as 'a branch of computer science devoted to the creation of computers and systems that perform operations similar to human learning and decision-making'. [10] These above definitions highlight AI primarily as a certain field of science or activity. [11]

However, the general approach to defining AI now focuses on the system's characteristics, the results of its activities, or the scope of its activities . For example, De Spiegeleire, Stephan, Matthijs Maas, and Tim Sweijs refer to AI as 'non-human intelligence measured by its ability to

6 White Paper on Artificial Intelligence: A European Approach to Excellence and Trust COM(2020) 65 final (*European Commission*, 19 February 2020) <https://commission.europa.eu/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en> accessed 18 March 2023.

7 Proposal for a Regulation of the European parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial intelligence Act) and amending certain union legislative acts COM(2021) 206 final (*European Commission*, 21 April 2021) <https://artificialintelligenceact.eu/the-act> accessed 18 March 2023.

8 ibid.

9 John McCarthy, 'What is Artificial Intelligence? Basic Questions' in *English++ : English for Computer Science Students: Complementary Course Book open book* (English++ project, Jagiellonian Language Center Jagiellonian University 2008) 141 <https://englishplusplus.jcj.uj.edu.pl/listenings/what-is-artificial-intelligence/fulltext/index.html> accessed 18 March 2023.

10 Daniel Castro and Joshua New, *The Promise of Artificial Intelligence* (Center for Data Innovation 2016) 36 <https://datainnovation.org/2016/10/the-promise-of-artificial-intelligence> accessed 18 March 2023.

11 Goda Strikaitė-Latušinskaja, 'The Rule of Law and Technology in the Public Sector' (2023) 6 (1) Access to Justice in Eastern Europe 28, doi: 10.33327/AJEE-18-6.1-a00010.

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reproduce human mental skills, such as pattern recognition, natural language understanding, adaptive learning from experience, and developing strategies and rationales for others'.[12]

The official definition of 'AI system' is provided in the aforementioned AI Act, developed by the European Parliament and the European Council of the EU - thus, paragraph 1 of Article 3 of this document defines it as 'software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with' .[13]

Nevertheless, even an analysis of the above definitions and a review of some of the literature on this relevant topic, it becomes apparent that fully encompassing everything within this field with a single term is, as D. Castro and J. New assert, an unattainable goal. In fact, according to researchers, t his attempt to define the entirety of this domain, led to the emergence of, for example, the concepts of 'weak' and 'strong' AI, which, however, did not add to the ease of understanding . In particular, ' weak' artificial intelligence has come to be understood as technologies that are limited to one function and one task,[14] and 'strong' AI, often also called artificial general intelligence, is 'a hypothetical type of AI that can match or exceed human-level intelligence and apply this ability to solve problems and any type of task, just as the human brain can easily learn to drive a car, cook a meal, and write code' .[15]

Some terms that may also be mentioned in the relevant scientific papers within this field or in certain regulatory documents are machine learning and deep learning. Machine learning is proposed to be understood as ' a part of AI that focuses on giving algorithms the ability to learn to perform tasks without explicit instructions, allowing them to adapt in the presence of new data' ,[16] while deep learning is considered 'an advanced type of machine learning that can detect abstract or complex patterns in data using a multi-layer artificial neural network' .[17] D. Castro and J. New explain the use of the term ' deep' by the fact that this type of AI has more ' layers' than simple machine learning approaches, which allows for more complex processing.[18] Specialised literature also distinguishes certain areas of AI functioning or its branches, for example, natural language processing,[19] computer vision,[20] and cognitive computing. [21]

12 Stephan De Spiegeleire, Matthijs Maas and Tim Sweijs, *Artificial Intelligence and the Future of Defense: Strategic Implications for Small- and Medium-Sized Force Providers* (Hague Centre for Strategic Studies 2017) ch 2, 27.

13 Artificial intelligence Act (n 7).

14 Castro and New (n 10) 36.

15 Irving Wladawksy-Berger, " Soft' Artificial Intelligence Is Suddenly Everywhere' *The Wall Street Journal* (16 January 2016).

16 'What Is Machine Learning' (*TechTarget*, updated in March 2021) <http://whatis.techtarget.com/definition/machine-learning> accessed 18 March 2023.

17 Amit Karp, 'Deep Learning Will Be Huge – and Here's Who Will Dominate It' (*Venture Beat*, 2 April 2016) <http://venturebeat.com/2016/04/02/deep-learning-will-be-huge-and-heres-who-will-dominate-it> accessed 18 March 2023.

18 Castro and New (n 10) 37.

19 Matt Kiser, 'Introduction to Natural Language Processing (NLP)' (*Search Medium*, 29 April 2016) <https://medium.com/@mattkiser/an-introduction-to-natural-language-processing-e0e4d7fa2c1d> accessed 18 March 2023.

20 TS Huang, 'Computer Vision: Evolution and Promise' in CE Vandoni (ed), *19th School of Computing: Egmond aan Zee, The Netherlands, 8-21 Septemder 1996* (CERN 1996) 21, doi: 10.5170/CERN-1996-008.21.

21 Bernard Marr, 'What Everyone Should Know About Cognitive Computing' (*Forbes*, 23 March 2016) <http://www.forbes.com/sites/bernardmarr/2016/03/23/what-everyone-should-know-about-cognitive-computing/#a64bc145d6e7> accessed 19 March 2023; John E Kelly III, 'Computing, Cognition, and the Future of Knowing: How Humans and Machines are Forging a New Age of Understanding' (2016) 28 (8) Computing Research News <https://cra.org/crn/2016/09/computing-cognition-future-knowing-humans-machines-forging-new-age-understanding> accessed 19 March 2023.

At this point, having a general vision of what AI is, its functional purpose and what tasks it can perform, we will try to identify the main areas of possible use of AI systems in criminal proceedings. In this part of our work, we plan to demonstrate both existing examples of using such technologies in certain countries and promising areas of AI use. However, in the next part, we will not evaluate the compliance of such vectors of AI use with the principles that can be derived from the relevant regulatory framework - these issues will be addressed in the final part of this article.

2 THE MAIN AREAS OF POSSIBLE APPLICATION OF AI SYSTEMS IN CRIMINAL PROCEEDINGS

Let us try to identify the main possible areas of AI use that are in some way related to criminal proceedings. To facilitate the perception of information and its systematic presentation, we will distinguish certain groups based on their functional focus and the main purpose of AI application.

(1) *Related to the collection and processing of evidence*. We propose to include in this group: a) recognition of images, such as people and objects in video and photo images; b) DNA analysis; c) identification of weapons and other objects.

(2) *Related to the so-called 'predictable' decision-making*. In this aspect, certain areas of such decisions can be highlighted: a) pre-trial release of a person from custody; b) selection of the most appropriate type and measure of punishment, including probation.

(3) Related to the performance of auxiliary tasks arising in criminal proceedings, which may be embodied in the following: a) automatic preparation of forms of certain procedural documents, including summonses, applications, petitions, and complaints ; b) generalisation and systematisation of evidence; c) search of relevant case law; d) forecasting of judicial prospects; e) automated preparation of court transcripts using natural language recognition technologies; f) provision of legal advice using chatbots, for example .

We will now focus on some of the above areas in more detail. As for the recognition of images, such as people and objects , in video and photo images, it should be noted that the specialised literature on this issue primarily refers to crime prevention, i.e. the use of these technologies to identify potential offenders. However, in our opinion, such AI functions may well be used to collect and analyse potential evidentiary information, for example, by comparing images of a person from CCTV cameras from or near the scene of an incident with information from various databases, as well as with open data from social networks. The same may apply to the comparison of not only images of people but also images of particular material objects.

Considering this vector of AI use for criminal justice purposes, Ch. Rigano emphasises that the analysis of video and photo materials using AI creates opportunities for obtaining information about people, objects and actions that can significantly assist in criminal investigations. At the same time, the researcher also acknowledges that these processes are not fully automated at the current stage, leading to certain difficulties connected with significant investments in personnel with relevant knowledge and experience. Ch. Rigano also draws attention to the substantial potential of this area of using AI systems, extending beyond tasks like face matching and object identification. He points out the potential for AI to detect complex events such as accidents and crimes, both in real- time and after they occur , and, most importantly, without the requirement of human intervention at all.[22]

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22 Christopher Rigano, 'Using Artificial Intelligence to Address Criminal Justice Needs' (2019) 280 NIJ Journal 38-9 <https://nij.ojp.gov/topics/articles/using-artificial-intelligence-address-criminal-justice-needs> accessed 19 March 2023.

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A research report prepared in 2018 by the Australian National University of Cybercrime Surveillance provides some examples of the use of so-called 'computer vision' technologies for pre-trial investigation of crimes. Particularly, the analysis is focused on the 2004 Morris programme , which allows obtaining information from images and related multidimensional data through an automated understanding of photos and videos. Several areas of application for these technologies were identified, namely object recognition, motion detection and evaluation, scene reconstruction and event detection.[23]

However, as the analysis of certain ECtHR decisions shows, such as *Gaughran v. the United Kingdom* (Application no. 45245/15) and *S. and Marper v. the United Kingdom* (Applications nos. 30562/04 and 30566/04), the collection of identification data about a person (in particular, photographs, DNA and fingerprints) after they have been released from criminal liability or served a sentence, might violate Article 8 of the ECHR, provided that the relevant restrictions are disproportionate.[24]

As part of a brief analysis of the second vector of AI systems' use, which is related to assistance in making certain court decisions, i.e. the so-called 'predictive justice' , we will also provide some examples of the current use of these technologies in criminal proceedings. These examples share two characteristics. Firstly, they rely on an approach founded on the analysis of potential risks based on data on a person's previous behaviour, criminal record, living conditions, and more. Secondly, the main areas of application - first of all, for deciding on releasing a person from custody or applying alternative preventive measures to them that are not related to their isolation, as well as rendering final judgments regarding sentencing or assessing the possibility of probation for an individual .

These systems include the following examples that have already been implemented or are currently being developed and tested on the European continent:

- OASys (Offender Assessment System) and OGRS (Offender Group Reconviction Scale) are based on risk assessment and prediction of reoffending. The first is used in pre-sentencing reports to inform sentencing and probation decisions. In the case of a conviction, if the likely sentence for the offence is less than two years, the results of the OASys assessment might influence the choice between imprisonment and community service. The OGRS is used in post-sentence reports to predict the possibility of reoffending (England and Wales);
- RisCanvi is a system aimed at assessing risks at the post-trial stage (Spain);
- Cassandra is a risk assessment programme designed to automate the process of providing pre-trial reports by probation officers and can also be used by the court to assess whether a person should be detained at the trial stage. Among the potential directions of use of this system is the development of standards for the accounting of court decisions in order to 'identify unfair judicial practice' through the analysis of court decisions (Ukraine);
- HART (Harm Assessment Risk Tool) is used to profile suspects and predict their risk of reoffending. The resulting data is used to make an alternative decision on whether to charge the suspect or work with them on an out-of-court settlement

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23 Roderic Broadhurst and others, *Artificial Intelligence and Crime: Report of the ANU Cybercrime Observatory for the Korean Institute of Criminology* (KIC, ANU Cybercrime Observatory, College of Asia and the Pacific 2019) 16, 24, doi: 10.2139/ssrn.3407779.

24 *Gaughran v the United Kingdom* App no 45245/15 (ECtHR, 13 February 2020) <https://hudoc.echr.coe.int/eng?i=001-200817> accessed 20 March 2023; *S and Marper v the United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) <https://hudoc.echr.coe.int/eng?i=001-90051> accessed 20 March 2023.

under the 'Checkpoint' programme, which, if successful, allows the person not to be prosecuted (England).[25]

The United States is a mong the Western countries using AI tools to predict and assess risks, assisting judges in making decisions . For instance, in certain states, such as Alabama, Virginia and New Jersey, AI is used in criminal proceedings when considering the potential release of a person on bail or other non-isolation measures, as well as during the sentencing stage. The most well-known AI systems used in the US are PSA (Public Security Analyse), COMPAS (Correctional Offender Management Profiling for Alternative Sanctions), and PTRA (Pre-trial Risk Analyse).

It is important to note that systems like PSA is primarily designed to offer judges recommendations regarding pre-trial detention or release. Interestingly, judges often tend to trust AI technologies.[26] However, t he importance of using AI systems as auxiliary tools is also emphasised in the report prepared by Fair Trial, which notes that they cannot completely replace human decision-making, but should only help inform and assist the judge.[27]

The final area we intend to consider in this part of our research covers various segments related to the performance of auxiliary tasks that arise in criminal proceedings. Within this realm, there are several noteworthy examples of AI technology applications, including :

1) Voice and speech recognition, which in criminal proceedings could be used not only for verification of persons or for speech recognition, for example, in a video, but also for automated typing of procedural decisions (Russell & Norvig, TextAloud, Acapela, Amazon Ivona, Grandview Research);[28]
2) Prediction of possible court decisions and assessment of judicial prospects. It is about determining the likelihood of success of a case based on decisions that have already been made and predicting possible options for resolving a dispute (generating representative decisions) by sorting court decisions and analysing relevant statistics;[29]
3) The usage of chatbots based on several AI subfields (natural language processing, machine learning, and big data analysis) to obtain legal advice, select information on a specific topic, and more;[30]
4) Measuring the accuracy and quality of court decisions. [31]

Now we have outlined the main possible areas of AI use in the interests of criminal proceedings and their participants; it is crucial to establish clear regulations that comply with fundamental legal principles, particularly considering the potential risks associated with the use of AI in certain legal contexts. For this reason, in the next part of our work, we will focus on analysing regulatory frameworks, primarily international and regional, in terms of the use of AI systems in criminal proceedings.

25 'Automating Injustice: The Use of Artificial Intelligence & Automated Decision-Making Systems in Criminal Justice in Europe' (*Fair Trial*, 9 September 2021) 24-6 <https://www.fairtrials.org/articles/publications/automating-injustice> accessed 20 March 2023.

26 Benoit Dupont and others, *Artificial Intelligence in the Context of Crime and Criminal Justice: A Report for the Korean Institute of Criminology* (KIC, ICCC 2018) 116-9, 126-7, doi: 10.2139/ssrn.3857367.

27 Automating Injustice (n 25) 24.

28 Broadhurst and others (n 23) 16.

29 Dupont and others (n 26) 116.

30 Broadhurst and others (n 23) 16.

31 Dupont and others (n 26) 133-4.

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3 BASIC PRINCIPLES OF USING AI SYSTEMS IN CRIMINAL JUSTICE AND REGULATORY DOCUMENTS COVERING THIS ISSUE

It is important to note that the execution of justice, primarily criminal justice, is inextricably linked to interference with fundamental human rights and freedoms and making decisions that are often determinative of a person's fate. That is why the use of AI technologies in this area should be clearly regulated, controlled and comply with certain standards, as it carries risks of discrimination, restriction of the right to a fair trial, and the right to privacy, among others . Considering that Ukraine is already on the path of integration into the European Union, we propose to focus on certain regulatory documents that play a key role in regulating the basic principles, approaches and recommendations for the use of AI in the field of criminal justice for European states.

In our opinion, the starting point of our analysis should be Conclusion No. 14 (2011) 'Judiciary and Information Technology' ,[32] prepared by the Consultative Council of European Judges in 2011. This document has not yet mentioned AI but focuses on the benefits of using information technology in court proceedings, particularly on the possible improvement of the process of consideration and movement of court cases, raising the level of court activity in general, simplifying access to information on the progress and results of court proceedings for parties to the proceedings and third parties. We would like to emphasise a crucial aspect that this conclusion , regarding an important fundamental provision concerning the special role of a person in the use of digital technologies in the administration of justice. It emphasised the mandatory participation of a judge in making all decisions on the use and development of IT in the judicial system, as well as the impossibility of replacing the powers of a judge to examine and evaluate evidence with information technology. Otherwise, this would violate the rule of law and the guarantees provided for in Article 6 of the European Convention on Human Rights. It will become evident later in the paper that this principle is a 'red thread' in further European regulations on this aspect. Therefore, although the mentioned Conclusion has not yet directly regulated the issues related to the use of artificial intelligence, it has generally defined the guidelines for the further use of this type of digital technology.

A significant milestone in establishing guidelines for the utilisation of artificial intelligence technologies in the justice system was the adoption of the European Charter on the Ethical Use of AI in Judicial Systems and their Environment in 2018. This charter, issued by the European Commission for the Efficiency of Justice (CEPEJ) under the Council of Europe, holds great importance.[33] This document not only identifies priority areas for the use of AI in judicial systems but also accounts for differences in the scope of its application in decision-making in civil, commercial and administrative cases, on the one hand, and criminal proceedings, on the other. In addition, this charter underscores the paramount importance of upholding the fundamental human rights proclaimed by the European Convention on Human Rights and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. These fundamental rights must be taken into account when employing AI and generally serve as a guide for its use.

Nevertheless, the Charter's special significance lies in the fact that, firstly, it contains definitions of the category of 'artificial intelligence' , as well as concepts basic to the IT sector,

32 Opinion No (2011) 14 Judiciary and Information Technology (IT) (adopted CCJE, 9 November 2011) <https://rm.coe.int/168074816b> accessed 20 March 2023.

33 CEPEJ, *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment: Adopted at the 31st plenary meeting of the CEPEJ (Strasbourg, 3-4 December 2018)* (Council of Europe 2019) <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>accessed 17 March 2023.

in particular: 'data' , 'meta-data' , 'database' , 'algorithm' , ' chatbot' , ' data mining' , 'machine learning' , and more . Secondly, it sets out five fundamental principles for using artificial intelligence technologies in judicial systems and their environment.

These are the following principles: (1) *respect for fundamental human rights*; (2) *non-discrimination* (the essence of this principle is based on the basics of artificial intelligence algorithms that can be used at the development stage and is based on the idea that it is inadmissible to use data that is a priori biased against certain groups of people - by race, age, gender); (3) *quality and security* (refers to the requirements to use certified sources for the machine learning mechanism and to ensure the requirements for a secure environment that apply to the storage and use of the created models and algorithms); (4) *transparency, impartiality and fairness* (this principle is based on approaches that provide for the use of accessible and understandable methods of data processing, as well as external verification); (5) *'under user control'* (the user must have access to review court decisions and data used by AI at any time, as well as the ability to make the necessary adjustments to the decision or cancel it).

Based on the Charter and the European Convention on Human Rights, as well as relevant secondary EU legislation (General Data Protection Regulation (GDPR), Regulation (EU) 2018/172521 (EUDPR), the Electronic Privacy Directive and the Law Enforcement Agencies Directive (LED)) and practice, the High Level Expert Group on AI published Ethical Guidelines for Trustworthy AI on 8 April 2019.[34] The recommendations define seven key requirements that AI systems must satisfy: 1) human involvement and supervision; 2) technical reliability and security; 3) privacy and data management; 4) transparency; 5) non-discrimination and fairness; 6) societal and environmental welfare; and 7) accountability and responsibility.

The next step on the way to the controlled introduction of artificial intelligence in the administration of justice can be recognised as the 'White Paper on Artificial Intelligence. A European Approach to Excellence and Trust' ,[35] published on 19 February 2020. This document is not directly devoted to the problems of using relevant algorithms in criminal proceedings. Still, it can be considered as a certain 'roadmap' of the necessary regulatory adjustments since the White Paper contains proposals and recommendations for possible changes to European legislation that could contribute to the reliable and safe development of artificial intelligence in Europe with full respect for the interests and rights of EU citizens, in particular the right to a fair trial. This European document defines specific areas of improvement of the EU legal framework to address possible risks and situations: a) effective application and enforcement of current EU and national legislation; b) limitation of the scope of current EU legislation; c) change in the functionality of AI systems . At the same time, the focus should be on high-risk applications of artificial intelligence, i.e., those that may most likely interfere with fundamental human rights, particularly the right to privacy and respect for human dignity.

The requirements for them, according to the White Paper, should include certain characteristics: 1) the quality of the initial training data underlying the learning algorithms; 2) controlled monitoring and storage of data and records, including those related to algorithm performance and data processing problems; 3) proactive provision of necessary information to users regarding the use of high-risk AI systems, including to promote responsible use of AI, build trust and facilitate compensation, if necessary; 4) reliability and accuracy of high-risk AI software - such systems need to be developed responsibly and with due consideration

34 High-Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' (*European Commission*, 8 April 2019) <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> accessed 17 March 2023.

35 White Paper (n 6).

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of the risks they might pose (including requirements that ensure reproducibility of results, ensure that AI systems can adequately handle errors or inconsistencies at all stages of the life cycle); 5) mandatory human supervision (AI should not undermine human autonomy, as reliable, ethical and human-centred use of AI can only be achieved by ensuring appropriate human involvement in high-risk AI programs).

Furthermore, on 6 October 2021, the European Parliament adopted a Resolution on AI in criminal law and its use by police and judicial authorities in criminal cases. The Resolution confirms the following key aspects: (a) all AI solutions for law enforcement and the judiciary must fully respect the principles of human dignity, non-discrimination, freedom of movement, the presumption of innocence and the right to defence - otherwise, the use of AI technologies should be prohibited; (b) the security of AI systems, which must be reliable and sustainable to prevent potentially catastrophic consequences of malicious attacks on them; (c) special human control before launching certain critical AI apps; (d) the use of only those AI systems that comply with the principle of confidentiality and data protection (without allowing creeping operation). To implement this r esolution, in December 2021, the European Commission adopted two proposals: first, a Regulation laying down rules for digital connection in judicial communication procedures in civil, commercial and criminal matters, and second, a Directive aligning the existing rules of communication with the rules of the proposed Regulation.[36]

Based on the standards set forth in the international documents analysed above, as well as considering the recommendations offered by various non-governmental organisations in their reports and opinions, including those on improving the relevant legal acts, we aim to formulate our own list of basic principles for the utilisation of AI systems for the purposes and tasks of criminal justice:

- Priority of human rights. The essence of this principle is obvious and follows from the fact that the introduction of any innovations, including AI technologies, should be based on a human-centred approach. New technologies should 'adjust' to the fundamental human rights and freedoms enshrined in numerous international documents over the decades and not change them. Undoubtedly, the vast majority of rules contained in conventions and other documents are interpreted based on the concept of a 'living tree' , i.e. taking into account their dynamic nature and current circumstances. However, this does not mean that adopting AI systems can justify the appropriateness of even a slight derogation from fundamental human rights and freedoms or narrow their scope in any way.

This priority of human rights is highlighted in a 2021 report by Fair Trial, which concludes that in order to properly protect individuals and their fundamental rights, including the right to a fair trial and the presumption of innocence, the use of AI systems in criminal proceedings for prediction, profiling and risk assessment should be prohibited. The authors of the report argue that a significant number of AI systems detect certain correlations between inputs rather than causal relationships between a person's characteristics and their likely behaviour, and therefore, as noted in the report, these types of high- impact, fact-based criminal judgements should not be delegated to automated processes.[37]

- Usefulness. Integrating any new technologies into criminal proceedings, as well as into any other sphere of human life, should always be aimed at bringing the level of relevant activities to a qualitatively new and improved level. Such improvement

36 Directorate-General for Justice and Consumers, 'Digitalisation of Cross-Border Judicial Cooperation' (*European Commission*, 1 December 2021) <https://commission.europa.eu/publications/digitalisation-cross-border-judicial-cooperation_en> accessed 19 March 2023.

37 Automating Injustice (n 25) 32.

should not only meet the requirements of promptness and economy but also benefit those for whom any innovations are introduced - that is, an individual or society as a whole. The point is that the adoption of AI systems, in particular, should be carried out only if and only in those areas where the benefits will be far greater than the possible risks it might cause.

In this context, an example of using the well-known and aforementioned COMPAS system seems appropriate. Specifically, in 2018, J. Dressel and H. Farid tried to assess the accuracy of this system, which led to quite striking conclusions - the system was accurate on average only in 65% of cases. In other words, as the researchers summarised, 'the recidivism predictions made by COMPAS were no more accurate than those made by people with little or no criminal justice experience or by simple statistical analysis based on two characteristics'.[38]

B. Dupont, Y. Stevens and others, in our opinion, quite appropriately expressed the principle under consideration, noting in their study that AI might remain ' an attractive tool that can satisfy the intellectual curiosity of policymakers, as well as computer and data scientists, but this technological intervention and judicial prodding can use unreliable data to harm individuals who come into contact with the criminal justice system, without demonstrating why such algorithms are needed in the first place' . At the same time, as rightly noted, such tools ' must not only be justified but also promote due process (or procedural fairness)'.[39]

- Impartiality and prohibition of discrimination. It seems obvious that one of the goals of integrating AI systems into the judiciary, especially when it comes to so-called 'predictive' justice, is not only to automate processes to speed up and simplify them but also, above all, to reduce the influence of the subjective, 'human' factor. However, many negative examples, which we will mention in the last part of this article, indicate that the use of AI tools sometimes increases the risk of biased, discriminatory treatment of a person. First of all, this is due to the fact that the results of AI systems' analyses are based on pre-entered input data, which is, naturally, constantly updated and modified, but may be biased at the stage of their input - for example, skin colour, area of residence, and social origin.

As noted above, many AI tools operate on the basis of identifying correlations between input data and an individual. In light of this, it is fair to say that ' law enforcement actions or court decisions that are either influenced by racial or ethnic profiling or targeted at less economically advantaged individuals may lead to biased data about certain groups in society'.[40]

The requirement of impartiality and non-discrimination is also emphasised in the Fair Trial recommendations to the EU Commission's AI Act in August 2021. For example, it may be noted that this document 'contains unclear and unspecific requirements for 'bias', none of which prevent discrimination and bias. Artificial intelligence systems used in law enforcement and criminal justice should be subject to mandatory independent bias testing, but the possibility of such testing depends on the availability of criminal justice data, which is sorely lacking in the EU' .41 Fully supporting the view that the prohibition of

38 Julia Dressel and Hany Farid, 'The Accuracy, Fairness, and Limits of Predicting Recidivism' (2018) 4 (1) Science Advances doi:10.1126/sciadv.aao5580.

39 Dupont and others (n 26) 134, 137.

40 Serena Oosterloo and Gerwin van Schie, 'The Politics and Biases of the 'Crime Anticipation Systems' of the Dutch Police' in J Bates and others (eds), *BIAS 2018 : Bias in Information, Algorithms, and Systems: Proceedings of the International Workshop on Bias in Information, Algorithms, and Systems co-located with 13th International Conference on Transforming Digital Worlds (iConference 2018), Sheffield, United Kingdom, 25 March 2018* (Springer 2018) 30 <https://ceur-ws.org/Vol-2103> accessed 21 March 2023.

41 'EU Commission 'AI Act' Consultation: Fair Trials' Response' (*Fair Trials*, 13 August 2021) 2 <https://www.fairtrials.org/articles/publications/eu-commission-ai-act-consultation-fair-trials-response> accessed 21 March 2023.

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discrimination and bias in the use of AI systems should be of primary importance, and the relevant risks should be absolutely minimised by ensuring transparency of the relevant tools and their ongoing testing, we will now analyse the following principles, which are completely correlated to the principle under consideration.

Fully supporting the view that the prohibition of discrimination and bias in the use of AI systems should be of primary importance, and the relevant risks should be absolutely minimised by prioritising transparency in the utilisation of these relevant tools and ensuring their ongoing testing. With this in mind, we will now analyse the following principles, which are intrinsically linked to the principle under consideration.

- Transparency. In order to immediately identify the most ' edge' aspects that necessitate the highlighting of this principle, let us quote the thesis that, for example, 'the American criminal justice system ... is one of the most privatised in the world, with an entire industry developing and selling a wide range of products and services to meet its growing needs' .42 There are no significant differences in other countries of the world, where private entities create various AI tools and can later be used by public authorities. This leads to a certain conflict of interest - on the one hand, the developers' intention to protect their trade secrets, and on the other hand, the objective need for transparency in procedural decision-making and openness of AI systems used in criminal proceedings. However, the vast majority of international documents, as well as authors of numerous reports on these issues, are unanimous in this regard - the priority should be given to the public interest, and therefore the algorithms of AI systems and the results of their work should be open.

Notably, the aforementioned Fair Trial report emphasises the crucial role of transparency in AI systems used within the realm of criminal justice. It highlights the need for system processes to be open source and not subject to legal protections such as trade secrets or intellectual property claims. At the same time, individuals should be notified of all cases where an AI system has been applied and has influenced, or could have influenced, a decision in criminal proceedings against them.43 Thus, the special significance of the principle of transparency of AI systems is emphasised not only in terms of ensuring transparency for users of AI systems but also for individuals who are affected by AI or decisions made with its assistance .44 It is also noted that the system's transparency is a prerequisite for its verification and testing by independent auditors (organisations or individuals), which in the long run, makes it possible to avoid bias.[45]

- Multi-stage verification. Numerous analyses and recommendations on the problems of integrating AI systems into the criminal justice system focus on the need for a thorough testing regime, which is the minimum necessary guarantee to reduce the risk of discrimination and ensure equality before the law. That is, the use of AI systems in real-life situations should take place after lengthy 'trials' , not during them. It is underlined that if the relevant tests have not been carried out and/or if it cannot be proved that the AI system is not discriminatory, ' it should be legally prohibited from being used' .46 In this context, it is appropriate to pay attention to some of the specifics of such a framework - namely, that it should be systematic and multi-stage and be conducted by independent stakeholders and not, for example, by the developers themselves.

42 Dupont and others (n 26) 134.
43 Automating Injustice (n 25) 36.
44 EU Commission 'AI Act' Consultation (n 41) 2
45 Broadhurst and others (n 23) 24.
46 Automating Injustice (n 25) 36.

Thus, the reports propose that the requirement for independent testing of AI systems by an independent body before and after deployment in criminal justice systems should be incorporated into legislation. Otherwise, the operational use of AI tools should be prohibited.[47] Based on the above, the relevant verification should occur at the development stage, as well as before the direct implementation, and continuously after the implementation of AI systems in real-life criminal proceedings.[48]

The significance of such verification might be demonstrated by the following example: regular testing of the initial classifiers on which the AI system is based by measuring the quality of their predictions makes it possible to verify the reliability of the relevant indicators in predicting and assessing risks and to evaluate the suitability of their use. The received outcomes, for example, regarding a significant number of false-positive or false-negative results in this case, will highlight the need to remove the relevant indicator from the so-called 'decision-making tree' and the expediency of reviewing and re-analysing previous decisions based on this indicator.[49]

In summarising the analysis of the multi-stage verification principle, it is evident that it is intricately linked to the other principles we have already described. Particularly, implementing this principle necessitates adherence to the requirement of transparency in AI systems and their operational results. Transparency is crucial not only for independent auditors and also for individuals affected by the use of these AI tools . Moreover, a multi-stage independent audit guarantees non-discrimination and safeguards against bias, as it allows identifying not only inefficient inputs but also discriminatory ones. In addition, the principle we are considering is also pivotal for ensuring compliance with other principles that will be further analysed in this article, such as explainability, controllability, and contestability, as their implementation seems impossible without ensuring permanent open independent verification at various stages of AI systems' operation.

- Subsidiarity and controllability. The essence of this principle can be explained by the fact that AI systems cannot entirely replace human involvement in making relevant procedural decisions. That is, they can be used either as auxiliary tools, for instance, to systematise and structure information, automate the filling of certain forms and their mailing, select relevant legislation and practice, and more. Additionally, they can provide additional information of a reference nature that a human judge can consider, particularly when deciding the possible release of an individual from custody pending trial. At the same time, the predictions and risk assessment made by the AI system should not be binding and should be assessed by the judge on par with other information available in criminal proceedings. At the same time, the use of the results of AI tools should be fully controlled by a human prior to its implementation and not after the fact during the subsequent inspection.

Nevertheless, while such standards are in place in most cases , the risk that law enforcement will over-rely on AI as something 'objective' and 'absolutely free from error' is still too high. In particular, it is noted that ' the mere requirement of having a human decision-maker 'in the know' or authorised to review or verify the automated decision is not sufficient, as it may lead to an overestimation of the ability or willingness of human decision-makers to doubt and overturn automated decisions. The sole requirement that an automated decision be reviewed by a human may turn the review into a mere stamping exercise, which in practice

47 'Briefing Paper on the Communication on Digitalisation of Justice in the European Union' (*Fair Trials*, 12 January 2021) <https://www.fairtrials.org/articles/publications/digitalisation-of-justice-in-the-european-union> accessed 22 March 2023.

48 EU Commission 'AI Act' Consultation (n 41) 10.

49 Broadhurst and others (n 23) 16.

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would not constitute any oversight or control' .50 In this regard, a special role will be played by high-quality and proper training of all participants in criminal proceedings who may be involved in the operation of AI tools, including investigators, inquirers, prosecutors, judges, attorneys, and representatives of probation authorities, which should cover not only the explanation of the operation principles of the relevant systems but also the risks associated with the operation of AI and the key principles of its use in criminal proceedings.

- Explainability and comprehensibility. This principle is an obvious extension of several of the previous ones we have identified, particularly transparency, verifiability, and controllability, since its implementation is possible only if algorithms are open, subject to multi-stage verification, and if AI systems used are under human control. We see the essence of explainability and comprehensibility in the nature of AI algorithms' actions should be logical and predictable, and the results of the relevant tools should consistently follow the source data on which the relevant system is based. At the same time, such results should be of the same type for similar factual circumstances and not situational and random. In relation to accessibility, it should be added that this principle not only extends to specialists in the corresponding field, such as independent experts conducting testing but also, and above all, to law enforcement officers who utilise the results of AI systems in their activities. Additionally, accessibility applies as well as to the persons against whom AI tools have been applied.

In support of our above statement, we would also like to present recommendations from several reports and guidelines formulated in different parts of the world in the context of integrating AI systems into the criminal justice system. Specifically, the importance of making any AI-influenced decisions in the criminal justice system understandable to a layperson is emphasised, i.e., explaining the relevant decisions should not require technical knowledge. It is equally important to notify individuals that they have been the subject of an automated decision made by an AI system, which will create preconditions for a possible appeal of the decision.[51]

In Article 32 of the Toronto Declaration titled 'Protecting the right to equality and non-discrimination in machine learning systems,' several duties are imposed on states to guarantee responsibility and the greatest possible transparency in the use of machine learning systems within the public sector. These duties serve as the preconditions for explaining and understanding the use of these technologies, thereby enabling effective verification and, if necessary, the right to appeal and prosecution. These specific duties include (a) publicly disclosing where machine learning systems are used in the public sphere; (b) providing information that clearly and easily explains how automated decision-making using machine learning is performed; (c) documenting actions taken to identify, record and mitigate discriminatory or other impacts that violate human rights.[52] The above standards appear universal for most national legal systems that face the new challenge of introducing AI systems into the judiciary.

Still, this principle is not always feasible in practice due to the peculiarities of the functioning of certain AI systems, particularly machine learning systems that use neural networks. These systems are built in such a way that it is impossible to decipher the decision-making process

50 Automating Injustice (n 25) 32.

51 Briefing Paper (n 47) 10.

52 'The Toronto Declaration: Protecting the right to equality and non-discrimination in machine learning systems' (*Amnesty International*, 17 May 2018) <https://www.amnesty.org/en/documents/pol30/8447/2018/en> accessed 22 March 2023.

and the results they produce.[53] As some reports on the subject state, 'some machine learning algorithms are simply too complex to be understood with a reasonable degree of accuracy; this is particularly true when AI systems include 'neural networks'. Decision-making processes of this kind are referred to as 'intuitive' because they do not follow a specific logical method, making it impossible to analyse the exact process by which a decision is made'.[54]

There is also an opinion that some AI systems are incomprehensible to humans since 'the machine learning algorithms that support them are able to identify and rely on geometric relationships that humans cannot visualise... that is, it is beyond human capabilities' .[55] In our opinion, the way out of this situation should be that the results of such systems should be exclusively advisory and fully controlled by humans. At the same time, law enforcement officers should be separately informed about the relevant features of the functioning of such AI tools.

- Appealability. It seems generally logical that ensuring transparency, explainability and comprehensibility of the course and results of the operation of AI systems in the criminal justice sector goes beyond simply providing individuals with the knowledge and relevant facts. First and foremost, they should have a real opportunity to review the relevant procedural decision made, particularly using AI systems. In this case, the grounds for appeal should include both the procedural decision itself in terms of its illegality, unmotivated and/or unreasonable nature, as well as the procedure for applying AI tools, the prerequisites for such application, conclusions drawn based on the functioning of AI systems, and the initial data used in processing.

The conclusion of the recommendations on the AI Act also underlines the crucial importance of the guarantee of appealability - in particular, it notes that if AI can have a significant impact on people when it is used in law enforcement and criminal proceedings, it is essential that there are effective ways to review not only AI decisions but also the system itself. Meanwhile, the authors of the recommendations emphasise that the relevant Act, unfortunately, does not simplify the regulation of this issue and does not provide clear ways to appeal or compensate for damage to persons who try to appeal against AI systems or their decisions[56]. Therefore, there is currently a need to improve the regulatory framework in this area.

- Security and respect for privacy. The essence of this initial provision can be revealed in the context of the European Charter for the Ethical Use of AI in Judicial Systems and Their Environments, which, among other things, enshrines a similar principle of quality and security. This document states that the use of AI systems in the processing of court decisions and source data should be based on certified sources and using models developed on the basis of an interdisciplinary approach in a secure technological environment. It is further specified that 'the data entered into the software implementing the machine learning algorithm must come from certified sources and must not be changed until it is actually used by the learning mechanism' . This means that the entire process must be monitored to ensure that no tampering or modifications have been made. In addition, the models and algorithms created must also be able to be stored and executed in a secure environment.

53 EU Commission 'AI Act' Consultation (n 41) 7.

54 ibid 8.

55 Yavar Bathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' (2018) 31 (2) Harvard Journal of Law & Technology 889.

56 EU Commission ' AI Act' Consultation (n 41) 2.

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A review of some of the existing ethical norms in the field of AI by Benoît Dupont, Yuan Stevens, Hannes Westermann, and Michael Joyce examined five such frameworks: CNIL (French Data Protection Authority) in France (2017), Japanese Society for Artificial Intelligence Ethical Guideline in Japan (2017), the House of Lords – Select Committee on Artificial Intelligence in the UK (2018), Ethically Aligned Design V. 2 by the IEEE on an international scale (2018), and the Montreal Declaration for a Responsible Development of Artificial Intelligence in Canada (2018). Based on this, it is stated that all these documents are united by a basic set of principles, including not only transparency, usefulness for people and society, and accountability, which were reflected in our work earlier but also respect for privacy. In this context, we note the possible emergence of new risks associated with the use of open data by criminals to achieve their illegal goals.[57] Therefore, the public sector, in the case of the adoption of AI systems, should instead guarantee mechanisms to prevent such risks.

As mentioned earlier, the effectiveness of prediction and operation of AI systems in risk assessment directly depends on the amount of data it can receive and process. However, a significant quantity of data on individuals also has the opposite side, namely, the risk of illegal access to it and its use for purposes unrelated to criminal proceedings. Thus, the state's task , if it wants to use AI tools in the field of criminal justice, is to guarantee the security and confidentiality of the relevant data. This can be ensured both through the appropriate digital infrastructure and the use of cloud storage technologies.

4 THE PROBLEM OF AI SYSTEMS FUNCTIONING IN THE CONTEXT OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

The aforesaid analysis has allowed us to establish that the use of AI systems in criminal proceedings may, in one way or another, affect the provision of certain fundamental human and civil rights and freedoms provided for, in particular, by such documents as the ECHR and the ICCPR. First of all, we refer to the prohibition of any form of discrimination enshrined in Article 14 of the ECHR and Article 4 of the ICCPR; the right to a fair trial in terms of guaranteeing the presumption of innocence (Article 6(2) of the ECHR and Article 14(2) of the ICCPR) and the decision of the case by an impartial, unbiased and independent court (Article 6(1) of the ECHR and Article 14(1) of the ICCPR). The use of AI tools can also lead to interference with the right to privacy guaranteed, for example, by Article 8 of the ECHR, but the problems associated with this have already been outlined in the previous part of our work. In this regard, our analysis will focus on the potential challenges that may arise from the juxtaposition of the desire to introduce innovations in criminal proceedings and the need to respect and uphold fundamental human rights.

The first problem that requires thorough consideration by human rights organisations in the context of integrating AI tools into criminal procedure is the impossibility of completely overcoming discriminatory practices in the operation of AI systems. The factors that cause the existence of this phenomenon seem quite obvious - any AI based on machine learning systems operates based on relevant indicators and input data, which to one degree or another, will be potentially discriminatory towards certain groups of people. This negative impact can only be ' overcome' by removing all input data with signs of 'discrimination' . At the same time, such removal will eventually lead to the removal of almost all classification indicators from AI systems, making the relevant AI tool ineffective or unsuitable for operation.

57 Dupont and others (n 26) 143-7.

To illustrate the signs of discrimination in AI systems, we will consider some examples. For instance, the NDAS system uses data obtained during detentions and searches, which in the police activity of England and Wales targets black people almost ten times more than white ones. The Delia, Sensing Project, HART, and RADAR-iTE systems use ethnicity data, and the RisCanvi system includes ethnicity data in its risk assessment. However, even less obvious classification indicators, such as home addresses, telephone codes, and so on, can potentially be discriminatory, as they overlook the fact that many European countries have pronounced ethnic segregation of the population. In practice, this increases the likelihood that AI systems will inadvertently establish a correlation between ethnicity and predicted risk.[58]

Regrettably , we have to acknowledge the widespread belief that certain factors directly influencing prejudice and discrimination against certain groups of people can be difficult to completely eradicate . Nevertheless, there is a glimmer of hope in the efforts of certain companies, such as IBM, who are developing tools to help organisations put the principles of openness and transparency of code, data and variables into practice. The company's AI OpenScale technology, launched in 2018, can automate bias detection and mitigation for a wide range of machine learning systems. By providing explanations for how decisions are made, this technology seeks to instil confidence in their outcomes, according to its authors.[59] Another potential tool that could help enhance the interpretability and reliability of machine learning methods in the future is the Explainable AI programme developed by the US defence research agency DARPA.[60] These new programmes could be particularly beneficial , especially in the field of criminal justice.

The issue at the heart of the functioning of AI systems in the context of the presumption of innocence is that the use of relevant tools is essentially carried out through the so-called 'predictive justice' . This means risk assessment, prediction of possible illegal activity of a suspect or accused in case of their release from custody or, for example, probation, creation of profiles of relevant persons without sufficient factual data and observance of the standards of proof typical for the relevant stages and stages of criminal proceedings. This can potentially lead to prejudicial treatment or prosecution of individuals in violation of the presumption of innocence.

An example that illustrates the potential violation of the presumption of innoncence is the functioning of certain AI systems. In particular, ProKid uses data on the crimes committed by other individuals in close contact with the child, against the child, as well as the child's own victimisation and even the victimisation of other persons in the child's environment as indicators of the likelihood of the child committing offences in the future. Similarly, the NDAS system uses data based on a person's environment to profile them and assess their likelihood of committing a crime in the future. W hile RisCanvi uses information on the criminal history of a person's family or parental criminal history and their 'criminal or antisocial friends' . According to the authors of the relevant report, this constitutes 'criminalisation by association, without any actual evidence or establishment of guilt'.[61]

Thus, on the one hand, it is usually not a matter of actually convicting a person based on the analysis using AI tools. Still, it is noted that relevant predictions and risk assessments can lead to unjustified police surveillance, harassment and arrests, as well as influence decisions on bringing a person to criminal liability, applying non-isolation measures and

58 Automating Injustice (n 25) 29-30.

59 David Kenny, 'How AI OpenScale Overcomes AI's Biggest Challenges' *(IBM, 2023)* <https://newsroom.ibm.com/IBM-watson?item=30695&mhsrc=ibmsearch_a&mhq=AI%20OpenScale>accessed 22 March 2023

60 Matt Turek, 'Explainable Artificial Intelligence (XAI)' (*DARPA*, 2018) <https://www.darpa.mil/program/explainable-artificial-intelligence>accessed 22 March 2023.

61 Automating Injustice (n 25) 30-1.

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probation.[62] Obviously, this can hardly be considered acceptable in view of the requirement that the issue of guilt or innocence of a person can only be resolved in an impartial and comprehensive trial by a court decision. This makes it crucial to ensure that the principles of subsidiarity and controllability, as well as appealability described earlier, are implemented in law and practically realised. One approach that can enhance transparency and accountability is to subject relevant reports generated by AI systems to open court review. This requires presenting the reports to the prosecution and defence within a reasonable period of time, allowing them to be able to cross-examine them before the judge.

Analysts also note that most regulations and acts that define the sphere and standards of use of AI systems in criminal proceedings do not apply to Europol and other international organisations working in the field of law enforcement and judicial cooperation. At the same time, for example, Europol currently collects and stores a significant amount of sensitive personal data in its databases and information systems.[63]

5 CONCLUSIONS

Thus, this research has identified and analysed the key existing or potential areas of use of AI systems in criminal proceedings, which can be divided into certain groups, namely: (1) related to the collection and processing of evidence, such as recognition of patterns in video and photo images, DNA analysis, identification of weapons and other objects, and so on (2) related to the 'predictive' decision-making; (3) related to the performance of auxiliary tasks arising in criminal proceedings, particularly, automatic preparation of forms of certain procedural documents, generalisation and systematisation of evidence, selection of relevant case law, forecasting of judicial prospects, automated preparation of court transcripts using natural language recognition technologies, and so on .

The following study has shown that only the third group of AI systems vectors pose minimal risks in terms of disproportionate and uncontrolled interference with human rights and freedoms. However, it is important to note that the first two groups may encroach on the rights and freedoms protected , for example, by Articles 6, 8 and 14 of the ECHR. Therefore, the use of AI tools for the relevant purpose in these areas should be fully controlled, verified and only employed as subsidiary measures, and in certain cases - prohibited altogether.

Furthermore, the authors have formulated and characterised the basic principles of using AI systems, in particular: the priority of human rights, usefulness, impartiality and prohibition of discrimination, transparency, multi-stage verification, subsidiarity and controllability, explainability and comprehensibility, appealability, security and respect for privacy. It seems that it is the consideration of these principles in law-making and law enforcement activities in the context of using AI tools in criminal proceedings that will ensure the necessary balance between the benefits of modern technologies and the fundamental rights and freedoms of humans and citizens.

62 European Union Agency for Fundamental Rights, *EU-MIDIS II Second European Union Minorities and Discrimination Survey: Main results* (FRA 2017) <http://fra.europa.eu/en/publication/2017/second-european-union-minorities-and-discrimination-survey-main-results>accessed 22 March 2023.

63 EU Commission 'AI Act' Consultation (n 41) 14.

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Research Article

GENERAL ALTERNATIVE AND CONTRACTUAL JURISDICTION IN MOLDOVA AND ROMANIA BASED ON THE ALTERNATIVE PROCEDURAL RIGHT OF PARTIES

Alexandru Prisac[1]

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Summary: 1. Introduction. – 2. Alternative general jurisdiction in the Republic of Moldova and Romania based on the parties' restricted alternative procedural rights. – 3. General contractual jurisdiction in the Republic of Moldova and Romania based on the full alternative procedural law of the parties. – 4. The limits of exercising the alternative procedural right of the general jurisdiction in the Republic of Moldova and Romania. – 5. Result and conclusion

Keywords: jurisdiction, alternative, contractual, jurisdictional, procedural law

ABSTRACT

Background: The legal institution that delimits the powers of judicial bodies to resolve legal cases is the general jurisdiction. This interbranch institution which incorporates legal norms of several branches of procedural law that interact with one another . Within this jurisdiction, different types of competences exist, including alternative general competence and contractual general competence. This article aims to highlight the particularities of these types of general competence, starting from the alternative procedural right regulated in the legislation of both the Republic of Moldova and Romania.

Methods: *The results were obtained through applying various knowledge methods: synthesis,*

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Author, responsible for writing and research. **Competing interests:** Any competing interests were included. **Disclaimer:** The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations. **Translation:** The content of this article was translated with the participation of third parties under the authors' responsibility.
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analysis, and comparison. The latter was particularly instrumental in highlighting the regulatory framework of alternative and contractual general jurisdiction in both the Republic of Moldova and Romania. This involved exploring the arguments that these jurisdiction types in the alternative procedural right, identifying the limits and conditions governing their exercise, and examining specifics of their regulation in each country. Additionally, the principles governing alternative and contractual general jurisdiction were also highlighted.

Results and Conclusions: This article successfully distinguished *between alternative general jurisdiction and contractual general jurisdiction, recognising them as two distinct types of general jurisdiction. This inability to recognise their difference has led to confusion and incorrect application in the judicial practice of the rules regarding the general competence of judicial bodies. The particularities of exercising the right to choose the jurisdictional body were highlighted both under the regulations regarding the alternative general competence and the contractual one.*

Finally, the study concludes with recommendations to ensure the correct application of these types of general competence in practice. It has been argued that the right to choose the jurisdictional body by virtue of general alternative and contractual jurisdiction constitutes a procedural right, not a substantive one . Proposals have also been proposed to amend the l, improving the alternative general jurisdiction and contract regulations.

1 INTRODUCTION

The general jurisdiction of the judicial bodies constitutes one of the most important procedural legal institutions as it initially determines the appropriate procedural approach for defending individuals' rights and legitimate interests . This delimits the powers of the judicial bodies in the settlement of civil cases. Without this legal institution, any form of defence of civil rights would be incomplete . General jurisdiction encompasses several types, including exclusive general jurisdiction, conditional or imperative general jurisdiction, alternative general jurisdiction, contractual general jurisdiction, and general jurisdiction in the case of related claims. The following two types of general competence have drawn our attention: alternative general competence and alternative general competence. The scientific problem we aim to address is the analysis of the general alternative and contractual jurisdiction in the regulations of the Republic of Moldova and Romania, starting from their connection with the alternative procedural law of litigants as an expression of the interbranch nature of the general jurisdiction. This connection highlights the interbranch nature of general jurisdiction and sheds light on the purpose of this kind of competence. This view complements the views of some authors who consider that the regulations regarding the competence of jurisdictional bodies are determined by a metamorphosis of civil justice and the existence of multiple paradigms of justice.

This work aims to argue that the right to choose the jurisdictional body for the settlement of the dispute constitutes an alternative procedural right regulated by the rules of general alternative and contractual jurisdiction in the legislation of the Republic of Moldova and Romania. Notably, the interdisciplinary nature of this legal institution has yet to the object of thorough research in the specialised literature. Thus, to achieve this, the structure of the work was divided into two main sections one dedicated to the analysis of the alternative procedural law regulated by the rules of general alternative jurisdiction and another section focusing on the analysis of the alternative procedural law regulated by the rules of general contractual jurisdiction.

In the framework of the work, national and international normative provisions were synthesised to elucidate that the right to choose the judicial body constitutes a procedural right. To highlight the procedures for regulating this procedural right in the legislation of the

Republic of Moldova and Romania, some legislative provisions of these countries, which are not without imperfections, were analysed under a comparative aspect.

For the correct application in practice of the regulations regarding general alternative and contractual competence, recommendations were formulated regarding the interpretation of these legal norms and proposals for amending the legislation in this area were put forward.

2 ALTERNATIVE GENERAL JURISDICTION IN THE REPUBLIC OF MOLDOVA AND ROMANIA BASED ON THE PARTIES' RESTRICTED ALTERNATIVE PROCEDURAL RIGHT

In the specialised literature, the concept of alternative general jurisdiction is defined as the jurisdiction that allows the resolution of certain legal cases by several jurisdictional bodies provided by law at the discretion of the interested person.[2] However, we propose a deeper examination of this concept by considering its connection with the alternative procedural law of litigants as an expression of the interbranch character of the general jurisdiction, determined by a contemporary movement of the multiple paradigms of justice.[3] Our belief is that this right is restricted as the defendant does not enjoy the same freedom of choice as the plaintiff in selecting the jurisdictional body.

Regarding the connection between alternative general competence and alternative procedural law, we found no explanations in the specialised literature . Regarding the alternative procedural right, we find approaches only in relation to certain procedural-legal institutions or types of procedure. Particularly, we find that this right is an integral part of the discretionary right, which is also utilised in procedural-legal regulations and is defined in the specialised literature as the totality of the factors from the substantive and procedural law norms, which allow legal subjects to make a lawful , fair, equitable decision in accordance to their will, left by the legislator of their free choice.[4]

Similarly , we consider that this alternative procedural right revives the idea of 'procedural autonomy' in selecting the jurisdictional body,[5] albeit with certain conditions and limitations , as well as the exclusive competence of certain jurisdictional bodies. Exceeding the limits of this right also constitutes a violation of jurisdiction.[6]

In our view, one of these conditions is that this alternative procedural right of alternative general jurisdiction can only be exercised if the law provides for at least two jurisdictional bodies to which the person can address for the settlement of the civil case. Such, for example, exists in Art . 29 para. (6) from the Law of the Republic of Moldova No . 1245 of 18 July 2002 regarding the preparation of citizens for the defence of the Motherland[7], which stipulates the

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2 Alexandru Cojuhari și Elena Belei (eds), *Drept procesual civil: Partea Generală* (Tipografia Centrală Chișinău 2016) 144.

3 Alan Uzelac and Cornelis Hendrik van Rhee, 'The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms – Unity and Diversity' in A Uzelac and CH (Remco) van Rhee (eds), *Transformation of Civil Justice: Unity and diversity* (Springer 2018) 3, doi: 10.1007/978-3-319-97358-6_1.

4 Avornic Gheorghe și Postovan Dumitru, 'Reglementarea juridico-procesuală a "Drepului-Discreționar"' (2012) 1 (136) Revista Națională de Drept 6.

5 Anthony Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 (1) European Law Review 52.

6 Călin-Silviu Săraru, 'Competence Determined Strictly by the Law and the Discretionary Power of Public Administration' (2017) 1 (7) Juridical Tribune 250.

7 Legea Republicii Moldova nr 1245 din 18 iulie 2002 'Cu privire la pregătirea cetăţenilor pentru apărarea Patriei' [2002] Monitorul Oficial al Republicii Moldova 137-138/ 1054.

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alternative general competence. But Romanian Law No . 446 of 30 November 2006 regarding the preparation of the population for the defence of the homeland[8] provides for the exclusive competence of the commission for analysing appeals regarding recruitment-incorporation established at the county level, respectively, of the municipality of Bucharest. But these Romanian legislation regulations provide the general imperative (conditional) jurisdiction for the court.

According to Art . 29 para. (6) from the Law of the Republic of Moldova No . 1245 of 18 July 2002 regarding the preparation of citizens for the defence of the Fatherland, 'Citizens can challenge the decision of the recruitment-incorporation commission in the State Commission for Incorporation, or they can challenge it in court, in the manner established by law, within 10 days from the date of its communication. The execution of the disputed or appealed decision is suspended.' Likewise, Point 1 of the Regulation of the State Commission for Incorporation, approved by the Decision of the Government of the Republic of Moldova No . 387 of 17 May 2010 concerning the State Commission for Incorporation[9]: 'The State Commission for Incorporation (hereinafter - the Commission) is established for the purpose of coordinating the activity of the recruitment-incorporation commissions, exercising control over the implementation of the incorporation of citizens of the Republic of Moldova in the military service in the term, in the short-term and in the civil (alternative) service (hereinafter - the incorporation) and the examination of the appeals submitted by the citizens.' Consequently, these provisions stipulate two jurisdictional bodies that the interested person can choose to challenge the decision of the recruitment-incorporation commission: the State Commission for Incorporation and the court. Had the regulation established that first, the decision of the incorporation recruitment commission be challenged in the State Commission for Incorporation before proceeding to court, in this case, this scenario would represent a case of general imperative (conditional) jurisdiction.

It is worth noting that the rules on alternative general competence are not applied when the law designates two jurisdictional bodies empowered to defend a person's rights, freedoms and legitimate interests. Still, the option to choose between them does not belong to the litigant. In such cases , the rules regarding the alternative general jurisdiction are not applicable as the jurisdictional bodies, in the cases provided by the law ex officio, establish their jurisdiction ex officio. For example, we are not in the presence of genuine legal norms of alternative general competence in the case provided by Art . 69, para. (7) of the Civil Code of the Republic of Moldova states: 'Any person can invoke the existence of instructions for protection. The court or, as the case may be, the guardianship authority will examine ex officio the records provided in paragraph. (5) of the Civil Code.'[10] In this scenario, regarding the verification of the registration of the instructions regarding contractual protection measures, the law provides two jurisdictional bodies competent to defend rights, freedoms and legitimate interests: the court and the authority tutelary, but their powers are established by these two bodies ex officio depending on the specific case.

Furthermore, a specific regulation regarding the alternative general jurisdiction is stipulated in Art . 50 para. (13) from the Law of the Republic of Moldova No. 1134 of 02 April 1997 concerning joint-stock companies.[11] It states that, 'Dodging the decision, as well as the

8 Legea României nr 446 din 30 noiembrie 2006 'Privinid pregătirea populației pentru apărarea patriei' [2006] Moniotrul Oficial al României 990.

9 Hotărîrea Guvernului Republicii Moldova nr 387 din 17 mai 2010 'Cu privire la Comisia de Stat pentru Încoporare' [2010] Monitorul Oficial al Republicii Moldova 78-80/458.

10 Codul civil al Republicii Moldova nr 1107 din 6 iunie 2002 [2002] Monitorul Oficial al Republicii Moldova 82-86/661.

11 Legea Republicii Moldova nr 1134 din 02 aprilie 1997 'Privind societățile pe acțiuni' [1997] Monitorul Oficial al Republicii Moldova 38-39/332.

decision of the company's board regarding the refusal to include the issue in the agenda of the annual general meeting of shareholders or candidates in the list candidacies to be submitted to the vote for the election of the management and control bodies of the company can be challenged in the management bodies of the company and/or in court.' We consider the respective provisions to be specific, considering that one of the bodies to resolve the appeal is a body that is part of the same company in which the violation of the right is invoked, i.e. the management bodies of the company, which would raise doubts as to whether it is a regulation regarding the alternative general competence or the imperative general competence. In our view, these provisions refer to the alternative general competence given the conjunctions 'and/or' are used in the choice of these two bodies, and the appeal does not impose a consecutive order of addressing these bodies.

In our opinion, the basis for exercising this alternative procedural right of the litigant is the *electa una via non datur recursur ad alteram* principle. This principle derives from a Latin expression used to denote the limitation of the right of those who will address justice when the law indicates two or more competent courts to choose and notify only one of them through their action . *Stricto sensu*, [...] aims to extinguish the right of option; once you have chosen one way, namely the jurisdiction of a court, you are not allowed to resort to another.[12] The given principle was developed in ECtHR jurisprudence in the case of Lorgulescu v. Romania[13], which as a whole ruled that as long as a person found a solution to his dispute before an administrative court, the state is not obliged to allow him to use another way of jurisdictional appeal.[14] So, if by virtue of the general alternative competence, the litigant has chosen to address another judicial body provided by law rather than the court for the defence of their legitimate rights and interests, they are no longer entitled to claim access to justice for the resolution of their litigation. The litigant will only be entitled to challenge the decision of the jurisdictional body they initially chose in the court of law. This principle exists to protect the security of the legal relations on which an administrative judicial body has exposed itself.

Therefore, in the example mentioned above from Art . 29 para. (6) from the Law of the Republic of Moldova No . 1245 of 18 July 2002 regarding the preparation of citizens for the defence of the Fatherland, if the decision of the incorporation recruitment commission is challenged in the State Commission for Incorporation, the recruit will already be deprived of the right to address the court against the decision of the recruitment commission incorporation. However, the decision of the State Commission for Incorporation can be challenged in court in the administrative litigation procedure only on the grounds of its illegality.

Another situation arises when submitting an appeal, according to Art . 29 para. (1) from Romanian Law No . 446 of 30-11-2006 regarding the preparation of the population for the defence of the homeland, which states: : 'Recruits can appeal against the decisions of the recruitment-incorporation commissions to the commission for analysing appeals regarding recruitment-incorporation, established at the county level, respectively of the municipality of Bucharest.'[15] Therefore, these provisions stipulate the general imperative (conditional) competence of the court because, after the examination of the appeal by the commission for the analysis of appeals regarding recruitment incorporation established at the county level,

12 'Electa una via non datur recursus al alteram' (*LegeAZ/Dictionar juridic*, 2022) <https://legeaz.net/dictionar-juridic/electa-una-via-non-datur-recursus-al-alteram> accessed 15 May 2023.

13 *Iorgulescu v Romania* App no 59654/00 (ECtHR, 13 January 2015) <https://hudoc.echr.coe.int/?i=001-68131> accessed 15 May 2023.

14 'Iorgulescu contra României – Acces la justiție. Electa una via' (*LegeAZ*, 2022) <https://legeaz.net/hotarari-cedo/iorgulescu-contra-romaniei-n02 > accessed 15 May 2023.

15 Legea României nr 446/2006 (n 8).

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the decision of this commission will be able to be contested in the court of law. The competence of courts has priority in relation to other jurisdictional bodies, and all normative acts, including international acts, provide for the priority of courts. In particular, such a priority is stipulated in Art . 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[16], because the state's coercive force is imposed through national courts.

In some cases within the judicial practice of the Republic of Moldova, the choice of a judicial body other than the court, under the alternative general competence for dispute resolution, is mistakenly regarded as a preliminary procedure. This practice is erroneous because, under alternative general jurisdiction, the litigant can go directly to the court or another jurisdiction provided by law. Addressing this body of jurisdiction does not constitute a prior procedure because the litigant has not chosen the court.

For example , in a case examined in the administrative litigation procedure, pending before the Chisinau Court, Rîșcani headquarters, in the request for a summons against the response of the State Commission for Incorporation, it was ruled to leave the appeal unexamined due to the expiry of the legal appeal deadline. The period deadline was 10 days from the date of communication of the decision of the incorporation recruitment commission. Although, in the end correctly, the Chisinau Court, Rîșcani headquarters rejected the action brought against the State Commission for Incorporation, however, in the reasoning of the court decision[17], it erroneously mentioned among the arguments (in point 34) that the decision of the recruitment-incorporation commission in the State Commission for Incorporation can be challenged both in preliminary proceedings and directly in court.

Although the *electa una via non datur recursur ad alteram* principle requires that if the litigant has already found a resolution to their dispute before an administrative court, they may no longer be entitled to claim the realisation of the right of access to justice for the resolution of the same dispute. However, there is an exception. The right to enjoy a judicial review over the decision issued by the administrative court or another jurisdictional body that does not fully meet all the conditions of a true court of law is not forfeited. This right was elucidated, in practice, in the jurisprudence of the ECtHR in the case of Ficher Against Austria[18], by which it was ruled that the decision of an authority that does not meet the requirements of being a court can be the subject of a judicial review carried out by a court that has the right to examine both factual and legal issues. Therefore, if the jurisdictional body, other than the court, has issued the decision on the litigation, upon its appeal, the court will be entitled to examine the validity and legality of this jurisdictional body within the limits provided by law.

A similar approach is found in Art . 6 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women concerning access to employment, vocational training and promotion, and working conditions[19], which states : 'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.' Thus,

16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)-<https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards> accessed 16 June 2023.

17 Dosar nr 3-3074/19 (Judecătoriei Chișinău sediul Rîșcani, 16 decembrie 2019) <https://jc.instante.justice.md/ro/court-decisions?dossier_number=3-30/74/19&type=Civil&apply_filter=1> accessed 01 June 2023.

18 *Fischer v Austria* App no 16922/90 (ECtHR, 26 April 1995) <https://hudoc.echr.coe.int/eng?i=001-57916> accessed 15 May 2023.

19 Council Directive 76/207/EEC of 9 February 1976 'On the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions' <http://data.europa.eu/eli/dir/1976/207/oj> accessed 16 June 2023.

if the litigant approaches another jurisdictional body than the court and does not obtain a favourable solution, they have the right to contest the decision of this jurisdictional body in a court of law.

3 GENERAL CONTRACTUAL JURISDICTION IN THE REPUBLIC OF MOLDOVA AND ROMANIA BASED ON THE FULL ALTERNATIVE PROCEDURAL LAW OF THE PARTIES

Based on the general contractual competence, both parties have the right to choose the jurisdiction for resolving the dispute, including in the framework of an assisted negotiation.[20] These jurisdictional processes can fall under different procedural law frameworks since general jurisdiction constitutes an inter-mural legal institution. This comprehensive alternative procedural right of the parties was predominantly highlighted in the second generation of arbitration, where jurisdiction of arbitrations could be addressed.[21] Thus, based on the provisions of the general contractual jurisdiction, parties, through a contract, lawfully choose the jurisdictional body for the resolution of the dispute that has arisen or that may arise in the future. Therefore, the alternative procedural right of the parties in the regulations of general contractual jurisdiction is comprehensive, as it involves the will of both parties in choosing the jurisdictional body, which not has an advisory function[22] but also has the authority to resolve disputes. This extension of rights instils confidence in the impartiality and independence of this judicial body chosen by the parties to the dispute.

In Art . 541 para. (1) of the Civil Procedure Code of Romania[23], arbitration is defined starting from the specifics of the alternative general competence, compared to the legislation of the Republic of Moldova, which is reluctant in this regard. According to Art . 541 para. (1) of the Civil Procedure Code of Romania, arbitration is considered an alternative jurisdiction with a private character. This denotes that arbitration, as jurisdictional authority, exists within the framework of general contractual jurisdiction.

In the civil procedural legislation of the Republic of Moldova, this right to choose the jurisdiction of some jurisdictional bodies is only evident within the scope of general contractual jurisdiction. As for jurisdictional jurisdiction, the parties do not possess this right, as Article 41 of the Code of Civil Procedure of the Republic of Moldova,[24] known as 'contractual jurisdiction' was excluded from Art . 41 on the amendment and completion of the Civil Procedure Code of the Republic of Moldova.[25] We believe this exclusion was probably driven by the state's policy in regulating jurisdiction, aiming for stability in determining which court has jurisdiction to hear the civil case. However, general contractual competence was preserved as it covers a wider scope than jurisdictional competence, including arbitration, which, if excluded, would bring about the principles accepted in a democratic society.

20 Alessandro Ferrara, 'Moral Duties and Juridical Duties: The Ambiguity of Legal Ethics Considered Through the Prism of Kant's Metaphysics of Morals' (2022) 23 (1) German Law Journal 127, doi: 10.1017/glj.2022.5.

21 Gary Born, 'A New Generation of International Adjudication' (2012) 61 (4) Duke Law Journal 819.

22 Fátima Castro Moreira, 'The Advisory Role of International Courts in the Evolution of Human Rights Law' (2022) 12 (4) Juridical Tribune 443, doi: 10.2139/ssrn.4314117.

23 Codul de procedură civlă al României nr 134 din 1 iulie 2010 [2015] Monitorul Oficial al României 247.

24 Legea Republicii Moldova nr 244 din 21 iulie 2006 'Pentru modificarea şi completarea Codului de procedură civilă al Republicii Moldova' [2006] Monitorul Oficial al Republicii Moldova 178-180/814.

25 Codul de procedură civilă al Republicii Moldova nr 225 din 30 mai 2003 [2003] Monitorul Oficial al Republicii Moldova 111-115/451.

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The general contractual jurisdiction is based on the comprehensive alternative procedural right of the parties, but its existence is that this possibility is expressly provided by law. In the domestic specialised literature, this type of general contractual competence has manifested in two cases[26]: 1) under the Law on A rbitration No . 23 of 22 February 2008[27], and 2) when the law provides for the exclusion by a contract of the jurisdiction of the courts and the choice of the non-jurisdictional form of defence of rights.

For example, according to Art . 757 para. (3) lit. a) from the Civil Code of the Republic of Moldova[28], the pledge creditor may choose to obtain possession of the property without resorting to court proceedings if the pledge debtor has consented, in the pledge contract or otherwise, to the pledge creditor obtaining possession of the property without recourse to court proceedings or, in the case of a mortgage, if the pledge contract the mortgage was vested with an enforceable formula according to Art . 759 of the Civil Code of the Republic of Moldova.

Regarding the second case, we must mention that it raises many questions about whether it pertains to general contractual competence . These questions arise in connection with the fact that by investing the contract with an enforceable formula, no other jurisdictional body is chosen to resolve the dispute, which is particularl y specific to general jurisdiction. In this case, o nly the court procedure for the defence of the right to claim is avoided. Consequently, it can be argued tha this situation represents a comprehensive procedural right of the parties to evade the court procedure by investing the contract with an enforceable formula through the mortgage contract . However, it does fall under the purview of general contractual jurisdiction since there is no contractual choice between two or more jurisdictional bodies . However, the bailiff does not resolve the dispute; rather, they merely execute the obligation born from a contract invested with an enforceable formula.

The prevalence of general contractual competence becomes evident when parties choose to settle the civil case through arbitration, typically based on a compromise or compromise clause. So, in our view, the parties' full alternative procedural right to settle the case through arbitration is seen in the arbitration or compromise clause.

The issue of whether the alternative right to choose arbitration as a civil procedural right or not could also raise questions. From our standpoint , this right constitutes a civil procedural right as it allows parties to choose between the judicial procedure and other procedures involving other jurisdictional bodies. We also note that the provisions of Art . 81 para. (1) of the Civil Procedure Code of the Republic of Moldova implicitly assigns the right to resort to arbitration for the resolution of the dispute to the category of procedural rights. However, Art . 81 para. (1) of the Civil Procedure Code of the Republic of Moldova lists all the civil procedural rights that must be expressly mentioned under penalty of nullity in a power of attorney issued to the legal entity's representative or in the mandate issued to the lawyer. This perspective is argued by us starting from the provisions of Art . 185 para. (1) lit. e) from the Code of Civil Procedure of the Republic of Moldova, which provides that the judge, during the preparation of the case for judicial debates, explains to the parties the right to resort to arbitration for the settlement of the dispute and the effects of such an act. Thus, being explicitly explained by the judge in an already filed civil case , the right to resort to arbitration, once exercised, will have certain legal consequences for the ongoing civil case (as per Art . 267 letter e) of the Code of Civil Procedure of the Republic of Moldova), which characterises it as a civil procedural law.

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26 Cojuhari and Belei (n 2) 145.

27 Legea Republicii Moldova nr 23 din 22 februarie 2008 'Cu privire la arbitraj' [2008] Monitorul Oficial al Republicii Moldova 88-89/314.

28 Codul civil al Republicii Moldova nr 1107 (n 10).

4 THE LIMITS OF THE EXERCISE OF THE ALTERNATIVE PROCEDURAL RIGHT OF GENERAL CONTRACTUAL JURISDICTION IN THE REPUBLIC OF MOLDOVA AND ROMANIA

Is it necessary to be analysed, and what would be the limits of exercising this right when settling the civil case in arbitration? We consider that the limits of the full alternative procedural right of the parties would be the arbitrability of the dispute itself, which meets a totality of requirements and criteria to determine the dispute that can be settled by arbitration. Additionally, this alternative procedural right also extends to administrative arbitrability, applicable in cases related to the conclusion of administrative contracts.[29] These limits, in particular, are set out in Art . 3 of the Law on Arbitration No . 23 of 22 February 2008. In other words, the elements involved in general contractual competence, when parties opt to settle the case through arbitration, interact in tandem : 1) the full alternative procedural right of the parties; 2) arbitration clause or compromise; 3) arbitrability.

The exercise of the right to choose arbitration for dispute settlement should be exercised within certain limits, because its use contrary to the purpose would constitute a so-called national '*forum shopping,*'[30] which would signify an abusive choice of the jurisdictional body, contrary to the intended purpose of this right. While g eneral contractual competence can constitute allows for an escape from the jurisdiction of a judicial body, it is subjected to certain limits. However, at the present moment, even in the international arena, there is a tendency to escape from the jurisdiction of international courts[31], but even this practice is subject to certain limits within public international law.

The analysis of the limits concerning the choice of arbitration should be analyzed through the prism of the principles, which, in our view, are the basis of the general contractual competence. The proclamation of a principle of law, even if it refers to a jurisdiction based on principles or general provisions, still remains a formal interpretation and not a normative act, as the judge announces rather than imposes the law.[32]

We consider that one of these principles is the *electa una via non datur recursur ad alteram* principle, which was defined in this paper together with the analysis of the alternative general competence. This principle restricts the right of parties to address when the law indicates two or more competent courts and mandates only choosing and notifying one.[33] Interestingly, t he specialised literature does not analyse the respective principle in the context of this procedural law as an alternative to the choice of arbitration. In our view, this principle is intrinsic to the alternative procedural right of the parties and the general contractual competence as a whole, as it facilitates the choice of arbitration over traditional judicial procedure, although it is considered appropriate to analyse it due to it remaining implicitly incorporated in the legislation of the Republic of Moldova.

29 Bárbara Magalhães Bravo and Fátima Castro Moreira, 'Scope and Limits of the Administrative Act Arbitrability' (2019) 9 (1) Juridical Tribune 6.

30 Katarzyna Gajda-Roszczynialska, 'Abuse of Procedural Rights in Polish and European Civil Procedure Law and the Notion of Private and Public Interest' (2019) 2 (3) Access to Justice in Eastern Europe 71, doi: 10.33327/AJEE-18-2.3-a000013.

31 Phedon Nicolaides, 'Escape from the Jurisdiction of the Court of Justice: A Good Reason to Quit the European Union?' (2018) 25 (1) Maastricht Journal of European and Comparative Law 7, doi: 10.1177/1023263X18760550.

32 Oksana Shcherbanyuk, VÑ-talii Gordieiev and Laura Bzova, 'Legal Nature of the Principle of Legal Certainty as a Component Element of the Rule of Law' (2023) 13 (1) Juridical Tribune 22.

33 Electa una via (n 12).

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We consider that the *electa una via non datur recursur ad alteram* principle underlies the concept of general contractual competence, particularly in cases involving an arbitration agreement. This is evident in the provisions of Art. 9 para. (1) from the Law of the Republic of Moldova regarding arbitration No. 23 of 22 February 2008, which stipulates: 'The court where the action regarding the dispute that is the object of an arbitration agreement is filed, at the request of a party made no later than its first statement on the merits of the dispute, removes the request from the role and sends the dispute to arbitration unless the court finds that the agreement is null, invalid or unenforceable'.

So, upon concluding an arbitration agreement, the parties have chosen a jurisdictional body, i.e. arbitration, which prevents either party from turning to the court or to another jurisdictional body. However, this ground of inadmissibility does not operate by law but must be invoked as a procedural exception by the interested party in court. The given exception can be invoked no later than the defendant's first statement on the merits of the litigation, aligning with the provisions of Art. 267 lit. e) from the Civil Procedure Code of the Republic of Moldova, which means that the defendant can raise this exception only in the phase of preparing the case for judicial debates.

Also, the basis of the general contractual competence in the case of arbitration is the principle of double competence, also known as 'competence-competence' [34], which complements the *electa una via non datur recursur ad alteram principle* . According to the specialised literature, the principle of dual competence grants the arbitrator the authority to rule on their own jurisdiction to hear the dispute and the validity of the arbitration agreement. The Law of the Republic of Moldova on arbitration reflects this principle, allowing the arbitrator to decide on their competence in deciding the dispute and, in relation to this, the validity of the arbitration agreement (Art . 27).

Notably, finding the nullity of the contract does not necessarily imply the nullity of the arbitration agreement inserted in the contract. The decision by which the arbitration is declared competent cannot be challenged in court except concurrently with the final decision on the merits of the dispute.[35] So, through this principle, an interaction is achieved between the full procedural right of the parties to choose arbitration with the very competence of arbitration to rule on the arbitrability of the dispute. At the same time, it ensures that the arbitration exercises control over the parties' compliance with their general contractual responsibilities .

Another essential limitation of the right to choose arbitration under general contractual jurisdiction is that public authorities do not possess this right and cannot avoid the rules on national jurisdiction, particularly those concerning exclusive general jurisdiction. This limit exists in most states following the continental law system, including Romania[36] and the Republic of Moldova.

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34 Andrei Munteanu, 'Arbitrajul ca organ de jurisdicție' in S Vladîca si al (eds), Rolul instituţiilor democratice în asigurarea protecţiei drepturilor şi libertăţilor fundamentale ale omului: masă rotundă, Chişinău, 8 decembrie 2020 (AAP 2021) 109.

35 Ion Buruiană, 'Invocarea excepției de incompetență în cadrul procedurii arbitrale' (2012) 1 Relații internaționale. Plus 151.

36 Catalin-Silviu Săraru, 'Arbitration Settlement of Disputes Concerning Administrative Contracts in Romania' (2018) 8 (Spec) Juridical Tribune 227.

5 RESULTS AND CONCLUSION

Based on the points mentioned above, we affirm that the litigant's right to choose the jurisdictional body is a procedural right, not a substantive right. This right originates from various branches of procedural law and is governed by national and international normative acts, which contain both substantive and procedural law norms.

The limits of exercising this right are the following principles: 1) the *electa una via non datur recursur ad alteram principle*; 2) the principle of double competence. While t hese limits may differ within each member state of the European Union, the essence of this procedural right remains the same.

To ensure a coherent regulation of general jurisdiction, particularly in the regulations of the Civil Procedure Code of the Republic of Moldova, which have a common law character, and to provide clarity on the court's approach when a dispute falls under an arbitration agreement, we propose adding a *lege ferenda provision* to the Civil Procedure Code of the Republic of Moldova, similar to Article 33 ² of the Civil Procedure Code of the Republic of Moldova. This addition would state, ' In a civil case under the jurisdiction of the court, the request will be removed from the list and sent for settlement in arbitration if one of the parties requests this at the of preparing the case for judicial debates unless the court determines that the arbitration agreement is null, invalid or unenforceable.' We consider such a regulation opportune and beneficial for the Civil Procedure Code of Romania.

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Reform Forum's Note

ENFORCEMENT OF DECISIONS IN UKRAINE: PROSPECTS FOR THE DEVELOPMENT OF THE LEGAL INSTITUTE[*1]

Maryna Stefanchuk[2]

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Summary: 1. Introduction. – 2. Consolidated enforcement proceedings: legal nature and regulatory certainty. – *2.1. The current state of legislative regulation of consolidated enforcement proceedings and the practice of its application. – 2.2. Legislative prospects for the development of the institute of consolidated enforcement proceedings.* – 3. Appeals against decisions, actions, or omissions of executors: jurisdictional affiliation and legal certainty. – 4. Conclusions.

Keywords: access to justice, consolidated enforcement proceedings, appealing decisions, actions or inaction of executors, legal certainty, defects in legislation, judiciary reform; Ukraine.

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ABSTRACT

Background: *This legal analysis examines the current legislation in the field of legal regulation of some institutes of enforcement of decisions and draft l aws. It demonstrates modern trends in the development of legislation in this sphere and addresses problematic aspects related to the legal regulation of consolidated enforcement proceedings and legal regulation of the specifics of appeals against decisions, actions, or inaction of executors. The declared aim is to form a sustainable justice system in Ukraine, which fosters a peaceful and open society, ensures access to justice for all and creates effective, accountable institutions with broad participation on all levels. Scientific approaches to solving these problems are highlighted.*

Methods*: To achieve the research goals , general scientific and unique methods of scientific research were applied, such as comparative-legal and semantic-structural methods, prognostic method and grouping, analysis, synthesis, and generalisation.*

Results and Conclusions: Two key *problematic aspects of the legal regulation of consolidated enforcement proceedings are the lack of a definition of the term 'consolidated enforcement proceedings' in it and the absence of a defined mechanism for the transfer of enforcement proceedings, which complicates their application in practice. It has been concluded that the gaps in the legislation should be addressed at the legislative level and not remain subject to judicial lawmaking, as the judicial practice is unstable. Moreover, it should be in accordance with the requirements of European institutions in the sphere of enforcement proceedings, according to which national legislation should contain a clear definition of the conditions for enforcement and the statutory enforcement provisions should be set out clearly, avoiding the possibility of misinterpretation.*

A legal analysis of draft laws in the institute of consolidated enforcement proceedings was carried out. It has been established that the shortcomings of the legal regulation of the institute of consolidated enforcement proceedings, which remain unresolved, are the lack of a legislative definition of the legal category 'consolidated enforcement proceedings' , as well as the lack of clear, legal certainty regarding the procedure for the transfer of enforcement proceedings against a single debtor, opened by the state enforcement officer and private executors or only private executors. Considering the performed legal analysis, a definition of ' consolidated enforcement proceeding' is proposed.

A discrepancy has been identified between the Law of Ukraine 'On Enforcement Proceedings' and the procedural codes regarding determining the list of subjects entitled to appeal and the appropriate court for filing such an appeal . It has been proven that such legal uncertainty provokes complications in realising the interested person's right to an effective means of legal protection. A legal analysis of draft laws, regarding the improvement of the institution of appeals against decisions, actions or inaction of executors, was carried out. It was noted that these draft laws intend to eliminate several significant shortcomings of legislation in this area, as well as at the prospective introduction of the institution of pre-trial dispute settlement in this category of cases. However, they also contain some debatable issues, as well as unresolved defects of legislation in the field of enforcement of decisions regarding the legal uncertainty of issues of judicial jurisdiction surrounding appeals against decisions, actions or inaction of executors in consolidated enforcement proceedings. Considering the legal analysis carried out, a specific vision for the elimination of conflicts between special and procedural legislation regarding the regulation of the features of appealing decisions, actions or inaction of executors is proposed.

1 INTRODUCTION

The peculiarity of the reform of the institution of enforcement of decisions, which is currently being implemented in the Ukrainian state, is that it aims to break free from the

existing institutional trap in the form of a stable but ineffective institution of enforcement of decisions determined by law. This systemic issue has been recognised by competent European institutions, with the European Court of Human Rights (ECHR) repeatedly highlighting the systematic nature of the problem of non-enforcement of court decisions. One of the underlying causes of this problem is attributed to the inadequacies of national legislation concerning the enforcement of judgments.

Against this background, the priority task of restoring Ukraine in the field of justice at the present stage of development of the national legal system is to build a new effective system of enforcement of court decisions, in particular, through the digitalisation *of enforcement proceedings, ensuring the execution of ECHR judgments by Ukraine, introducing automatic enforcement of court decisions issued against the state,* embodied in the document of the same name[3].

At the same time, the identified goals and objectives require additional research to develop effective components of the justice system in Ukraine. The research is crucial for preventing and resolving possible controversial measures to restore justice in the justice sector in Ukraine. It is vital to take into account the declared goal of forming a sustainable justice system in Ukraine; one of the goals at the present stage is promoting peaceful and open societies, ensuring access to justice for all, and creating effective, accountable and participatory institutions at all levels[4].

Several draft laws pending in the legislature of the Ukrainian state are currently aimed at resolving these issues, including the Draft Law on Enforcement of Judgments (hereinafter – Draft Law No. 5660)[5] and the Draft Law on Enforcement Proceedings (hereinafter – Draft Law No. 3726)[6]. The purpose of these draft laws coincides with and is to increase the efficiency of execution of court decisions and decisions of other bodies and comprehensive improvement of the process of enforcement of decisions in the areas specified in these draft laws.

Notably, none of these draft laws defines enforcement proceedings as the final stage of court proceedings. B ut instead, they are solely described as a set of procedural actions or a procedure for enforcing court decisions and other bodies (officials). Despite the fact that, according to the case law of the ECtHR, the execution of court decisions together with the trial of cases are recognised as elements of the justice system.

So, to ensure real justice, based on the legal positions formed in the case law of the ECtHR, which in this context can hardly be questioned, it can be asserted that true justice can only be achieved when not only a fair final decision in the case has been made, but also when its actual enforcement is guaranteed. It is evident that the party involved in a case is more concerned with the outcome of the proceedings and the actual implementation of the resulting decision rather than the process itself. That is why, taking into account the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, proceedings in court and proceedings for the execution of court decisions are interconnected stages of one process. T hat is, proceedings for the execution of court decisions cannot be separated from court proceedings, but they are components of a single justice process. This legal position is reflected in numerous ECHR decisions.

3 National Council for the Recovery of Ukraine from the Consequences of the War, 'Draft Ukraine Recovery Plan: Materials of the working group 'Justice' (July 2022) <https://uploads-ssl.webflow.com/625d81ec8313622a52e2f031/62dea471331181b583d43ec5_Юстиція.pdf > accessed 25 May 2023.

4 Decree of the President of Ukraine No 722/2019 'On the Sustainable Development Goals of Ukraine for the period until 2030' of 30 September 2019 [2019] Official Gazette of Ukraine 79/2712.

5 Draft Law of Ukraine No 5660 'On Enforcement of Decisions' of 14 June 2021 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72223> accessed 25 May 2023.

6 Draft Law of Ukraine No 3726 'On Enforcement Proceedings' of 23 June 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69256> accessed 25 May 2023.

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The above-mentioned conceptual understanding of the legal nature of the enforcement of court decisions has found its embodiment in the provisions of the current legislation, particularly regarding the definition of enforcement proceedings, first of all, as the final stage of court proceedings. Considering this , the question arises about the reasons for the potential refusal of the new draft law developments from the above-mentioned conceptual understanding of the legal nature of enforcement proceedings, which, from the point of view of legal hermeneutics, testified to the implementation of the Convention provisions in the national legislation of Ukraine in the field of ensuring the enforcement of jurisdictional decisions.

At the same time, while clarifying the grounds for such a change in the legislative understanding of the legal nature of the institution of enforcement of judgments is rather conceptual , other key aspects of these draft laws require increased attention. These aspects are crucial to pragmatically ensure proper regulatory regulation of legal relations in this area to overcome the systemic problem of ineffective enforcement of court decisions in Ukraine stated in the ECHR Judgments.

One of such critical aspects of the institution of enforcement of judgments that require improvement of legal regulation to overcome the problem outlined above is the issue *of legal nature and regulatory certainty of the institution of consolidated enforcement proceedings, as well as jurisdictional affiliation and legal certainty of the institution of appealing against decisions, actions or omissions of executors.*

2 CONSOLIDATED ENFORCEMENT PROCEEDINGS: ASPECTS OF LEGAL CERTAINTY

2.1 The current state of legislative regulation of consolidated enforcement proceedings and practice of its application

The provisions of the present Law of Ukraine 'On Enforcement Proceedings' (hereinafter – the Law) [7], which regulate the issues of enforcement of decisions by different executors (public and private) regarding one debtor, have caused several problems of their practical application. These challenges pertain to the so-called institution of consolidated enforcement proceedings, which seeks to streamline the enforcement proceedings by consolidating several enforcement documents related to one debtor. The institutions' main objectives are to achieve procedural efficiency and ensure fairness in the distribution of amounts recovered from the debtor in compliance with the principles of priority and proportionality [8]. The objective need to consolidate open enforcement proceedings into one consolidated enforcement process , as rightly noted in the scientific legal literature, is caused, in particular, by the need to avoid competition in the procedures for enforcing the debtor's property. This is particularly relevant when the debtor is subject to enforcement documents of a property nature and several decisions have been made which involve multiple claimants. Consolidation serves to eliminate potential difficulties that may arise in such circumstances[9].

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7 Law of Ukraine No 1404-VIII 'On Enforcement Proceeding' of 2 June 2016 (as amended of 22 May 2023) <https://zakon.rada.gov.ua/laws/show/1404-19#Text> accessed 25 May 2023.

8 Andriy Avtorgov and Oleksiy Solomko, 'Problematic aspects of summary enforcement proceedings' (*Legal Newspaper online*, 30 January 2018) <https://yur-gazeta.com/publications/practice/vikonavche-provadzhennya/problemni-aspekti-zvedenogo-vikonavchogo-provadzhennya.html> accessed 25 May 2023.

9 Oleksandr Snidevych, 'Legal Regulation of Consolidated Executive Proceedings in the Legislation of Ukraine on Executive Proceedings' (2019) 2 (2) Jurnalul juridic național: teorie și practică 72.

Among the shortcomings of the law in this area, the expert community have noted the lack of a clear definition of 'consolidated enforcement proceedings' and the absence of a defined mechanism for the transfer of enforcement proceedings, resulting in complications of their application in practice[10]. These problems are also further confirmed by the application of relevant legislation. Thus, it is evident from the Supreme Court's practice that an assessment of the effectiveness and legal certainty of the current provisions in this field is necessary, which is highly relevant for the practice of its application. At the same time, this practice is not sustainable, and also unambiguous, and even more so, cannot claim to be recognised as the rule of law, but only as a marker of the need for legislative settlement of gaps to ensure compliance with the requirements of relevant standards, in particular paragraphs 23, 24 of the Guidelines on better implementation of the Council of Europe recommendations on enforcement adopted by the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ). These guidelines emphasise the importance of a clear definition of what constitutes enforcement as well as explicit conditions for such enforcement and unambiguous provisions that leave no room for interpretation[11].

The Grand Chamber of the Supreme Court (hereinafter – the SC) noted significant gaps in the legislation on enforcement proceedings. At the same time, it should be noted that the current legislation of Ukraine allows for cases to be transferred to the SC on the ground that the case *contains an exceptional legal problem. Such transfer is necessary to ensure the development of law and the formulation of a unified law enforcement practice*. One such exceptional legal problem enforcement proceedings is currently the issue of legislative regulation of relations of consolidated enforcement proceedings, which became more acute after the introduction of the institution of private enforcement officers. The legal uncertainty surrounding the interaction between public and private enforcement officers in this aspect has exacerbated the issue. A l egal analysis of the conclusions of the Supreme Court on the application of legislation in consolidated enforcement proceedings indicates that they are legislative defects in this area, particularly the legal uncertainty in regulating important elements of this legal institution. These gaps in legislation should be addressed at the legislative level rather than being left to judicial lawmaking. Since judicial practice is not established, and according to the requirements of European institutions in the field of enforcement of judgments, national legislation should contain a clear definition of the conditions for the enforcement of judgments, with clear enforcement provisions , leaving no room for ambiguous interpretation[12].

In the context of a conceptual rethinking of the existing system of enforcement of jurisdictional decisions, it seems justified to introduce changes that would ensure equality of creditors in exercising their right to effective enforcement of court decisions, including compliance with priority and proportionality for all claimants, regardless of whether one or more executors conduct their case. In this regard, t he possible options proposed in the scientific, legal literature for determining the executor in consolidated enforcement proceedings. These options include allowing the court to appoint an executor at the request of one of the executors carrying out enforcement proceedings against the debtor or at the request of one of the creditors, as well as the possibility of changing the court procedure of this executor. This could be, for example, if they violate the law or the rights of one of the creditors or circumstances have arisen that indicate the need for their replacement. In

10 Avtorgov and Solomko (n 8).

11 CEPEJ, Guidelines for a Better Implementation of the Existing Council of Europe Recommendation on Enforcement (Strasbourg, 17 December 2009) <https://rm.coe.int/16807473cd> accessed 25 May 2023.

12 Maryna Stefanchuk, 'The Practice of the Supreme Court as an Indicator of the Defects in Legislation on Enforcement Proceedings' (2019) 1-2 University Scientific Notes 49.

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the expert community, the following procedure is recognised as taking into account the objective conditions that will exist and be devoid of signs of artificiality[13].

2.2 Legislative prospects for the development of the institution of consolidated enforcement proceedings

Legal analysis of the current draft laws, which currently demonstrate current trends in the development of legislation in the field of enforcement of judgments, reveals a special focus by the authors on the institution of consolidated enforcement proceedings. An example of this can be seen in Article 69 of Draft No. 5660 which regulates *the peculiarities of executing several decisions in case of receipt of several enforcement documents regarding one debtor.* In such cases, the *execution of several decisions regarding one debtor is carried out in consolidated enforcement proceedings*.

According to the authors of the draft law, these features are, in particular, as follows:

1) in consolidated enforcement proceedings, the sale of the debtor's property is carried out by the executor who first carried out the inventory and arrest of such property. However, this excludes cases where enforcement proceedings have been suspended , within the framework of which the inventory and seizure of property was carried out or when the described and seized property has not been transferred for sale within sixty calendar days from the date of inventory and arrest;
2) distribution of funds recovered from the debtor (including those received from the sale of the debtor's property) in consolidated enforcement proceedings is carried out by the executor who ensured the recovery of funds;
3) if debt collection took place under consolidated enforcement proceedings, which include enforcement proceedings that are enforced by several state and/or private enforcement officers, the enforcement sanction is collected in proportion to the satisfaction of the claims of the creditors by the executor who provided for the recovery, the amount of the enforcement sanction is distributed in proportion *seventy-five percent in favor of the private bailiff/body of the state enforcement service that carried out the recovery and twenty-five percent of the enforcement sanction in favor of the private bailiff/body of the state enforcement service in which the enforcement proceedings were pending, in respect of which the funds were collected*[14].

It should be noted that one of the shortcomings of the legal regulation of the institution of consolidated enforcement proceedings, which remains unsettled prospectively, is the lack of a legislative definition of the legal category 'consolidated enforcement proceedings' , which, according to experts of the Main Scientific and Expert Department of the Verkhovna Rada of Ukraine, complicates the understanding of the content of this article of D raft L aw No. 5660, which determines the procedure for the execution of several decisions regarding one debtor[15].

It should be reminded that the current version of the l aw lacks a a definition for the term 'consolidated enforcement proceedings'. This has led to discussions within the

13 Snidevych (n 9) 75.

14 Draft Law of Ukraine No 5660 (n 5).

15 ibid, Conclusion of 30.06.2021.

expert community about the so-called generally accepted understanding of consolidated enforcement proceedings, the essence of which is reduced to the same understanding by all subjects of law enforcement of certain legal categories, which, in such circumstances, may not require a separate definition. [16] In developing this opinion, when it comes to consolidated enforcement proceedings, of course, the generally accepted understanding of this legal category is proposed *as proceedings against one debtor under several enforcement documents, which* may cover both enforcement documents for recovery and non-property enforcement documents. Taking into account the conclusions of some experts that the current version of the law does not answer whether the concept of 'consolidated enforcement proceedings' includes enforcement documents other than enforcement documents for recovery[17] we can only partially agree with this conclusion. Since the current law clearly stipulates that several decisions *on the recovery of funds from one debtor* by both public and private executors are enforced under the procedure of consolidated enforcement proceedings, this is not observed in Article 69 of Draft No. 5660.

In this context, the provisions of Draft Law No. 3726 seem to provide clarity at the legislative level on the legal nature of consolidated enforcement proceedings by highlighting the key aspects of enforcement proceedings that can be consolidated into consolidated proceedings or joined to existing consolidated enforcement proceedings. In particular, it refers to the consolidation in Article 112 of Draft No 3726 *peculiarities of execution of several enforcement documents in respect of one debtor, among which are the following:*

– consolidated enforcement proceedings which encompass the execution procedure of several enforcement documents regarding one debtor, *including the recovery of alimony and other periodic payments, which creates legal certainty in a situation where* several enforcement documents regarding one debtor issued for one court decision will be in execution;

– the automated system of enforcement proceedings checks whether there are other enforcement proceedings or consolidated enforcement proceedings against the debtor when initiating new enforcement proceedings. If such proceedings exists, the system sends a corresponding information message to the executor;

– in case of establishing the existence of open enforcement proceedings for the recovery of funds from one debtor, the executor on the day of opening of enforcement proceedings is obliged to issue a resolution on consolidating the enforcement proceedings into consolidated *enforcement proceedings, and in case of detection of consolidated enforcement proceedings – a resolution on joining enforcement proceedings to consolidated enforcement proceedings;*

– the automated system of enforcement proceeding facilitates communication by *informing the executor responsible for the open enforcement proceedings and the executor (executors) involved in the consolidated enforcement proceedings about their respective roles and responsibilities*

– in cases where debt is collected under consolidated enforcement proceedings, which include enforcement proceedings that are enforced by public and private bailiffs, the *enforcement sanction is collected by the executor who secured the collection*[18].

16 Avtorgov and Solomko (n 8).

17 ibid.

18 Draft Law of Ukraine No 3726 (n 6).

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At the same time, the scientific legal literature notes that the legislative approach to understanding consolidated enforcement proceedings solely as proceedings for the execution of decisions (enforcement documents) for the recovery of funds needs to be revised. This interpretation fails to take into account the functional characteristics of the implementation in enforcement proceedings of such an institution as consolidated enforcement proceedings, which encompass more than just the procedural economy and compliance with the principle of priority and proportionality of distribution of recovered funds debtor amounts. Consolidated enforcement proceedings also aim to prevent the likelihood of legal conflicts during the foreclosure of the same property simultaneously by several executors.

In view of this, it is rightly proposed that all enforcement proceedings that may give rise to such conflicts or contradictions, or those requiring the distribution of recovered funds among creditors, be consolidated within the framework of consolidated enforcement proceedings. This would encompass all property proceedings, particularly enforcement proceedings under enforcement documents on the transfer of items to the collector, whether individually determined and determined by generic characteristics), as specified in the enforcement document, and not only proceedings for recovery of funds[19].

Attention is drawn to one of the peculiarities of consolidated enforcement proceedings envisaged by Draft Law No. 5660, which boils *down to the fact that enforcement proceedings against one debtor initiated by state executors are transferred for execution to the state executor or to the state enforcement service body in accordance with the procedure established by the Ministry of Justice. In such circumstances, the issue of the procedure for transferring enforcement proceedings against one debtor opened by public and private requires legal certainty executors or only private performers.* Given the peculiarities of consolidated enforcement proceedings enshrined in the draft law, it seems that prospectively these issues should find their embodiment in the order of forming information on the implementation of consolidated enforcement proceedings by an automated system of enforcement proceedings, which, according to the authors of the draft law, should also be established by the Ministry of Justice.

In this regard, it should be noted that similar attempts to regulate these issues through legislative means have already taken place in the draft law and received an appropriate expert assessment. Thus, the Verkhovna Rada of Ukraine registered the Draft Law on Amendments to Certain Laws of Ukraine on the Enforcement of Court Decisions and Decisions of Other Bodies No. 8198 dated March 26, 2018[20], According to which Part 2 of Article 30 of the Law was proposed to state that the specifics of executing several enforcement documents regarding one debtor in case of execution by a state executor and a private executor would be determined by the Ministry of Justice. However, upon analysing the version of the amendments proposed in the draft law, it can be concluded that they are unlikely to fundamentally affect the legal certainty of the provisions of Article 30 of the Law. Moreover, it is doubtful that these amendments would be favourable to private executors, given that the bodies of the state executive service are formed by the Ministry of Justice in the manner prescribed by law.

Moreover, it seems that these amendments create a legal situation where there is a risk of defining new rights and obligations for executors through a subordinate legal act, which is not consistent with the provisions of Article 5 of the Law of Ukraine 'On Bodies and Persons Engaged in the Enforcement of Court Decisions and Decisions of Other

19 Snidevych (n 9) 73-4.

20 Draft Law of Ukraine No 8198 'On Amendments to Certain Laws of Ukraine on Enforcement of Court Decisions and Decisions of Other Bodies' of 26 March 2018 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63741> accessed 25 May 2023.

Bodies'[21]. Thus, in accordance with the provisions of this article, state executors and private executors are independent and are guided by the principle of the rule of law, *acting exclusively in accordance with the law.* A similar norm is contained in Article 7 of Draft No. 5660, which regulates legal protection and guarantees the activities of executors. A ccording to P art 1, *the contractor is independent while carrying out professional activities, guided by the principles of enforcement of decisions and acts exclusively in accordance with the law*.

In this context, the provisions of Part 4 of Article 17 of Draft No. 3726, according to which the activities of a private executor are regulated by law, with the provision that by-laws may regulate the procedure for committing certain procedural actions by a private executor – an exhaustive list of which is set out in Article 8 of this bill.

Thus, the practice of application of legislation in the field of enforcement proceedings shows that the legal regulation of relations regarding the peculiarities of enforcement of several decisions involving several enforcement documents against one debtor does not comply with the principle of legal certainty and requires improvements in the enforcement procedures carried out by state enforcement bodies and private executors.

At the same time, achieving this goal should be carried out by means that would contribute to the certainty, clarity and unambiguity of the legal norm, as well as taking into account the existing guarantees of the activities of executors and other participants in enforcement proceedings regarding the certainty of their legal status exclusively by law. We believe that these issues should be addressed through legislative means rather than subordinate regulations to establish a balanced framework for the activities of public and private executors and to justify a legislative definition of the status of private executors as independent professionals authoris ed by the state to engage in enforcement activities in the manner prescribed by law. In addition, it is assumed that the legislative consolidation of these issues will align with European standards for enforcement, particularly in terms of requirements for the clear development of enforcement provisions, thereby leaving no room for ambiguous interpretation.

In view of the foregoing, we propose the following definition of the legal category 'consolidated enforcement proceedings' – this is enforcement proceedings regarding the execution of property-related decisions against a single debtor based on several enforcement documents. It aims to ensure procedural savings, in particular, through foreclosure on the debtor's property to the extent necessary for the execution of all enforcement documents, the order and proportionality of the distribution recovered from the debtor amounts, elimination of the likelihood of legal conflicts during the foreclosure of the same property simultaneously by several executors, and implemented by appropriate executors in the manner prescribed by the Law.

3 APPEAL AGAINST DECISIONS, ACTIONS OR OMISSIONS OF EXECUTORS: JURISDICTIONAL AFFILIATION AND LEGAL CERTAINTY

In accordance with the already mentioned Enforcement Guidelines laid down in the Recommendations of the Committee of Ministers of the Council of Europe to member states on enforcement*, the enforcement procedure should be regulated in detail by law, i.e.*

21 Law of Ukraine No 1403-VIII 'On Bodies and Persons Ensuring Enforcement of Court Decisions and Decisions of Other Bodies' of 2 June 2016 (as amended of 6 May 2023) <https://zakon.rada.gov.ua/laws/show/1403-19#Text> accessed 25 May 2023.

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defined by clear legal rules in order to be reliable and transparent and, as far as possible, predictable and effective.[22]

One of the topical issues of the institution of enforcement proceedings, which is currently characterized by legal uncertainty and creates problems in its application, is the legal regulation of the peculiarities of appealing against decisions, actions or inaction of executors regarding the execution of court decisions. The state of such legal uncertainty provokes complications in the exercise by the interested person of the right to an effective remedy since the provisions of Part 1 of Article 74 of the Law, which gives participants in enforcement proceedings and other persons the right to appeal against decisions, actions or omissions of the executor and officials of the state executive service regarding the execution of a court decision to the court that issued the enforcement document. However, this provision needs to be harmonised with the jurisdictional competence of the courts, to establish a systemic connection . One of the possible variants of such a version is the construction of the disposition of the article by referencing corresponding provisions in the procedural law. S uch wording would resolve conflicts between procedural rules, as well as bring the legal regulation of relations in the field of appeal against decisions, actions or omissions of the executor and officials of the state executive service in the execution of a court decision, thereby aligning it closer to the principle of legal certainty as a crucial element of the rule of law.

However, in the current draft laws aimed at improving the institution of enforcement of decisions, the option of determining in special legislation the procedure for appealing against decisions, actions or inaction of executors and officials of the state executive service is chosen. Thus, in accordance with Article 155, 156 of Draft Law No. 5660 provides two avenues for appeal are proposed: judicial and administrative.

According to the provisions of these articles of Draft No. 5660, decisions, actions or omissions made by both public and private executors, as well as officials of the state executive service *regarding the execution of a court decision may be appealed by the parties, other participants and individuals to the court that initially handled the case as the court of first instance*, in the manner prescribed by law. At the same time, decisions, actions or omissions of the executor and officials of the state executive service regarding the execution of decisions of other *bodies or officials , including resolutions of the executor on the recovery of enforcement sanctions, costs of enforcement proceedings and fines, may be appealed by the parties, other participants and persons to the relevant administrative court in the manner prescribed by* law[23].

Similar changes are proposed in the Draft Law on Amendments to Certain Legislative Acts of Ukraine on the Enforcement of Court Decisions and Decisions of Other Bodies No. 3609 dated 5 June 2020 (hereinafter – Draft Law No. 3609) [24] with the justification for the prospective elimination of conflicts of provisions of the Law and procedural codes under such wording, as well as the establishment of a unified procedure for appealing against the actions of executors.

The administrative procedure consists of the possibility of the collector and other participants in enforcement proceedings (except for the debtor) to appeal against decisions, actions or omissions of the state bailiffs to the head of the department to which the state bailiff

22 Recommendation Rec(2003)17 of the Committee of Ministers to Member States on Enforcement (adopted 9 September 2003) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805df135> accessed 25 May 2023.

23 Draft Law of Ukraine No 5660 (n 5).

24 Draft Law of Ukraine No 3609 'On Amendments to Certain Legislative Acts of Ukraine on Enforcement of Court Decisions and Decisions of Other Bodies' of 5 June 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69057> accessed 25 May 2023.

is directly subordinate. So, according to Part 3 of Article 156 of Draft Law No. 5660, the complaint filed in enforcement proceedings to the head of the department to which the bailiff is directly subordinate is considered *within 10 working days from the date of its receipt. Then,* the head of the department makes a *decision to satisfy or refuse the complaint* . At the same time, decisions, actions and omissions of the head of the department to which the state executor is directly subordinate may be appealed to the head of the state executive service of a higher level based on the results of consideration of the relevant complaint by the head of the higher level; a resolution is made.

This d raft also provides for the possibility of a private executor, at the request of a party and subject to objective grounds, to cancel the resolution or other procedural document (or part thereof) made in enforcement proceedings. This decision is accompanied by a reasoned resolution, which can be appealed in the manner prescribed by law.

Therefore, attention is drawn to the *fact that, as under the provisions of the current l aw, judicial protection is the only way for the debtor to protect violated rights in enforcement proceedings. However, the creditor and other participants in enforcement proceedings can also use the administrative method to protect their rights. At the same time, Draft No. 5660, in the field of legal regulation of the administrative procedure for appealing decisions,* actions or omissions of the bailiffs, are proposed to eliminate several significant shortcomings of the current l aw, one of which, as rightly noted in the scientific legal literature, is the lack of legislative fixation of the *term for consideration of such a complaint and the procedural document that formalises the resolution of this issue and the method of its appeal*[25].

In contrast to the perspective mentioned above , Draft Law No. 3726 sets out the legal regulation of the issues under study in a separate section dedicated to appealing against decisions, actions and omissions of executors, which, with some probability, can be argued, *introduces a mandatory pre-trial dispute settlement procedure*. Thus, according to Articles 127-128 of this draft law, decisions, actions or omissions of a private executor may be appealed by the parties and other participants in enforcement proceedings against such executor within ten days from the day the person learned or should have known about the violation of his rights, freedoms or legitimate interests. In case of disagreement with the decision, based on the results of consideration of the complaint, such a decision may be appealed to the court within ten days from the date of its receipt as prescribed by law. Decisions, actions or omissions of the bailiffs may be appealed by the parties and other participants in enforcement proceedings to the head of the state enforcement service within ten days from the day when the person learned or should have known about the violation of his rights, freedoms or legitimate interests. In case of disagreement with the decision based on the results of consideration of the complaint, such a decision may be appealed to the court within ten days from the date of its receipt in the manner prescribed by law[26].

The chosen approach in the draft law to refer to corresponding provisions of procedural law in the article's disposition appears to be a justified means of eliminating the conflict of procedural norms in the field of legal regulation of relations regarding the judicial procedure for appealing against decisions, actions or omissions of executors.

At the same time, it seems debatable to file a complaint with a private executor regarding their own decisions, actions or omissions since such legislative regulation may raise objectively

25 Lyubov Malyarchuk, 'New Rules for Appealing Decisions, Actions or Inaction of Executors During Foreclosure of the Debtor's Property: Advantages and Disadvantages' (2018) 2 Law Review of Kyiv University of Law 160.

26 Draft Law of Ukraine No 3726 (n 6).

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reasonable doubts about the compliance of such national practice with the legal axiom according to which no one should be a judge in their own case (nemo judex in re sua), and therefore – in the impartiality of consideration of such a complaint.

It is also necessary to pay attention to another gap in the current legislative regulation of the institution of enforcement proceedings, stated in the Resolution of the Supreme Court of October 17, 2018 in case No. 5028/16/2/2012,[27.] This gap pertains to the lack of clarity regarding judicial jurisdiction when appealing against decisions, actions or inaction of executors in consolidated enforcement proceedings. Thus, in the said resolution, the Supreme Court concluded that complaints against the executor regarding the enforcement of enforcement documents issued by courts of different jurisdictions in consolidated enforcement proceedings should be considered in administrative proceedings. Complaints against the executor regarding the enforcement of enforcement documents issued by courts of a single jurisdiction in consolidated enforcement proceedings should be considered by the relevant court that issued the enforcement document in the appropriate type of proceedings.

In essence, the determining criterion for assigning a dispute to administrative jurisdiction is the presence of court decisions adopted under the rules of different jurisdictions or decisions of other non-judicial bodies within consolidated enforcement proceedings, if these decisions are subject to enforcement. The SC justified its position by pointing out that neither the Law of Ukraine 'On Enforcement Proceedings' nor the relevant procedural codes regulate the issue of appealing against the actions of executors in consolidated enforcement proceedings, thereby indicating the existence of a defect in legislation in the field of enforcement of decisions, which, unfortunately, remains unresolved in the analysed draft law initiatives.

4 CONCLUSIONS

The ongoing reform of the enforcement of decisions, which is currently being implemented in the Ukrainian state, is aimed at breaking free from the existing established yet inefficient institutional enforcement trap, which has been characteris ed as a systemic problem by competent European institutions. One of the key aspects that require improvement in order to overcome the systemic problem of ineffective enforcement of court decisions in Ukraine is the issue of legal nature and regulatory certainty of consolidated enforcement proceedings, as well as the issue of jurisdictional affiliation and legal certainty of the institution of appealing against decisions, actions or omissions of executors.

The practical application of the current legislation in the field of enforcement proceedings reveals that the legal regulation of relations regarding the enforcement of several decisions involving several enforcement documents regarding a single debtor does not comply with the principle of legal certainty. Consequently, in this regard, there is a need to enhance the procedure for the enforcement of decisions by both state enforcement bodies and private executors . At the same time, the aim is to achieve this by means that would contribute to the certainty, clarity and unambiguity of the legal norm while also taking into account the existing guarantees of the activities of executors and other participants in enforcement proceedings, ensuring their legal status is determined by law. It is assumed that the legislative consolidation of these issues will align with European standards on enforcement, particularly in terms of requiring

27 Case No 5028/16/2/2012 (Grand Chamber of the Supreme Court of Ukraine, 17 October 2018) <http://www.reyestr.court.gov.ua/Review/77607634> accessed 25 May 2023.

clear and unambiguous development of enforcement provisions, leaving no room for ambiguous interpretation.

The conducted legal analysis of draft laws in the field of legal regulation of consolidated enforcement proceedings revealed that some shortcomings in the legal regulation of relations in this area remain unresolved. This includes an absence of a legislative definition for the legal category of 'consolidated enforcement proceedings' and the lack of clear legal certainty regarding the procedure for transferring enforcement proceedings against a single debtor initiated by either a state executor, a private executor, or exclusively by a private executor.

To address this, i t is proposed *to understand 'consolidated* enforcement proceedings' as enforcement proceedings that involve the execution of property decisions against a single debtor based on several enforcement documents. This objective aims to ensure procedural savings by facilitating the foreclosure of the debtor's property to the extent necessary for the execution of all enforcement documents, ensuring a systematic and proportional distribution of the recovered amounts from the debtor, and eliminating the likelihood of legal conflicts among multiple executors during the foreclosure of the same property simultaneously. These consolidated enforcement proceedings are to be implemented by appropriate executors in the manner prescribed by the Law.

The Law of Ukraine 'On Enforcement Proceedings' establishes the criteria of the subjects entitled to the right to appeal and specifies the court to which such an appeal should be addressed, in line with the procedural codes established. However, the existing legal uncertainty in this regard provokes complications in exercising the right to an effective remedy for interested individuals. In order to address this issue, a legal analysis of draft laws on improving the institution of appealing against decisions, actions or omissions of executors has been carried out. The results which have been established are aimed at eliminating several significant shortcomings of legislation in this area and also propose the potential introduction of the institution of pre-trial consideration of disputes. However, these draft laws still contain controversial issues, as well as unresolved shortcomings of legislation in the field of enforcement of decisions regarding the legal uncertainty of judicial jurisdiction issues regarding appeals against decisions, actions or inaction of executors in consolidated enforcement proceedings. Further research in this field should be directed towards addressing these issues.

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CASE NOTE

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Case Note

THE ROLE OF CIVIL SOCIETY FOR PREVENTION AND COMBAT OF VIOLENT EXTREMISM AND RADICALIZATION LEADING TO TERRORISM-WAR

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Summary: 1. Introduction. – 2. The role of the main civil society actors in crisis areas. – 2.1. The role of young *people in preventing extremism and terrorism that leads to war through civil society. – 2.2. The role of women in preventing extremism and terrorism leading to war through civil society.* – 3. Community representatives in the prevention of PETW. – 3.1. The role of educators and educational institutions in PETW. – *3.2. Law enforcement services, preventive measures, and community policing PETW. – 3.3. University staff and their role in PETW. – 3.4. The sector of information technology (IT) and social media in their role towards PETW.* – 4. Analysis of the adequate possibility of success by civil society in preventing extreme wars. – 5. Partnerships for peace. – 6. Conclusions.

Keywords: Civil society, Prevention, War, Extremism, Terrorism, Kosovo

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ABSTRACT

Background: *The civil society of different groups of actors, communities, and social formations, registered or unofficial, achieves responsibility and commitment in public life for the protection and promotion of values and common objectives for the good of society. Youth, women, and community representatives are the main actors in civil society that work to prevent and combat deviant phenomena in times of peace and especially during war, due to their influence and ability to promote social changes. Other interest groups, such as the media, law enforcement authorities, universities, researchers, and representatives of the academic world, as well as those involved in the private sector, can make important contributions to prevent wars and post-war events in crisis countries. The civil societies' capacities in war and post-war countries can be strengthened by exchanging good practices for the programs of international institutions. Countries that have endured this situation, such as Kosova, Bosnja, Hercegovina, and Croatia, identify and support lesser known, reliable groups, creating networks and regional platforms for collaboration, and bringing professionals into contact with researchers and academics to gain results based on practical data and their implementation as soon as possible towards the countries in crisis.*

Methods: *For this work, a combined methodology was used from the studies of self-accusation and victimisation to the fear of criminality: the method of legal analysis which is used to analyse the legal basis and current legislation that regulates strategies for the prevention of crimes, terrorism, and radicalism. The method of systemic analysis is used to study and analyse the position of legislation in the field and its position in the current legal system. The historical analysis method is used to explain the rates from the past and to compare the new rates with the historical ones. Finally, the researcher analysis method is used to explain the purpose and objectives of the study from the actual perspective of the survey and interview.*

Results and Conclusions: *The paper is only the beginning of the research and analysis into the role of civil society in preventing and fighting extremism and terrorism that leads to harsh wars. The case studies and analysis will primarily encompass countries that have suffered from the following: the wars during 1990 to 1999 in the former Yugoslavia, the war in Syria, the unrest in Libya, and the current war in Ukraine. These will be part of the publication in the future.*

The main topics will cover the state of a country before, during, and after a war, the level and extreme inertia that led to terror and war, the consequences after conflicts, material and human trafficking, corruption and organised crime, humanitarian problems and refugees, and, finally, the role of civil society in this field, especially in light of human rights and freedom.

Understanding the role of civil society in preventing, combating, and protecting human values is the first step in efforts towards national and comprehensive strategies to address the fear of horrific attacks from extremism and terrorism at war. This paper aims to provide good practices in the post-crisis country for crisis experiences, advance ideas and adequate methods of success, as well as give various suggestions and descriptions of their connection, describing the civil society that should follow, including educational programs, both preventive and rehabilitative with a positive impact on the community.

It is important that civil society is given criteria, political issues, financial resources, and guidelines to succeed in its reasoning, and that its role appears as a reason to promote the adequate company in society. Prevention, combat, rehabilitation, and resocialisation programs in conflict and post-conflict countries, as a result of wars, are long-term and complex. Their success depends largely on the promotion of good practices and the sharing of lessons learned and resources in different contexts, both nationally and internationally. Through this work, we aim to contribute to this discourse by highlighting international organisations, such as the OSCE, UN, IOM, and the EU, and the role that civil society can and will play in making communities safer and more resilient to the challenges in the future, after wars end, as a result of extremism caused by wars in the 21st century.

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1 INTRODUCTION

If a definition of civil society were to be sought, then the interpretation would be more focused on the components that do not constitute civil society, such as "field outside the family, the market, and the state," "non-governmental" organizations, "non-profit" and "non-commercial", rather than focus on the characteristics of civil society's organisations. In general, civil society is better understood as "groupings of different actors, communities and social formations, registered formally or informally, representing a variety of roles and commitments in public life for the protection and promotion of the values and objectives of common."[3] Civil society actors typically include: leaders and community groups; local associations and entities; religious leaders and religious organisations; online groups and social media communities; international, national, and field-based non-governmental organisations (NGOs); trade unions and professional associations; charitable and philanthropic foundations; academic and research institutions; and community arts groups.[4]

Civil society is dynamic, vibrant, and influential, but also selectively limited. Over the past two decades, civil society has significantly evolved. Globally, civil society appears to flourish. Technology, geopolitics, and markets have created opportunities and pressures, fuelling the creation of millions of civil society organisations around the world, creating exciting models for citizen expression, both online and offline, and generating increased involvement in governance processes and global governance. An explosion in the number of civil society organisation (CSO) registrations has been observed, including a significant increase in activity in emerging and developing economies. Although under-resourced when compared to business and government, funding for civil society activities has greatly increased in specific areas with the support of major foundations and matched funds.

The roles that different stakeholders play in civil society have become blurry. Sources of social capital are constantly changing in an increasingly global, hyperconnected, and multi-stakeholder world. Within the complex ecosystem of a myriad of civil society's activities and relationships, some actors, such as those in faith and religious cultures, as well as in social media communities and networks, are starting to play an enhanced role.

3 Center for Civil Society, *Report on activities, July 2005 - August 2006*<https://www.csis.org/analysis/concept-and-definition-civil-society-sustainability> accessed 2 June 2023.

4 The European Union , the multi-year indicative program for the Thematic Program «Organizations of civil society (CSO) and local authorities for the period 2014-2020» includes the following examples of CSOs: 'Non-governmental organizations, organizations representing indigenous peoples, organizations representing national minorities and/or ethnic groups, diaspora organizations, migrant organizations in partner country clubs, local trade associations and groups of citizens, cooperatives, employers' associations and trade unions (social partners), organizations representing interests economic and social, organizations that fight against corruption and fraud and that promote good governance, civil rights organizations and organizations fighting discrimination, local organizations (including networks) involved in regional cooperation and decentralized integration, consumer organizations, women's and youth organizations, environmental, teaching, cultural, research and scientific organizations, universities, churches and religious associations and communities, philosophical and non-religious organizations, the media and any non-governmental association and independent foundation. The new 'Thematic Program for Civil Society Organizations: Multiannual Indicative Program 2021-2027' may be found here <https://international-partnerships.ec.europa.eu/system/files/2022-01/mip-2021-c2021-9158-civil-society-organisations-annex_en.pdf>

2 THE ROLE OF THE MAIN CIVIL SOCIETY ACTORS IN CRISIS AREAS

Civil society roles include:

- Watchdog: holding institutions accountable; promoting transparency and accountability
- Advocate: raising awareness of societal issues and challenges; advocating for change
- Service provider: delivering services to meet societal needs, such as education, health, food, and security; implementing disaster management, preparedness, and emergency response
- Expert: bringing unique knowledge and experience to shape policy and strategy; identifying and building solutions
- Capacity builder: providing education, training, and other capacity building
- Incubator: developing solutions that may require a long "gestation" or payback period
- Representative: giving power to the voice of the marginalised or under-represented
- Citizenship champion: encouraging citizen engagement; supporting citizens' rights
- Solidarity supporter: promoting fundamental and universal values
- Definer of standards: creating norms that shape market and state activities

Various policy documents from international institutions primarily address the prevention and combating of extremism that leads to war. As a model, we use that of the OSCE. During the last years, especially the Ministerial Declaration 4/15, it has encouraged states to work in all sectors, reaching out to civil society and other community actors to proactively engage in prevention and combating of deviant behaviours that lead to extremism or war.[5]

Youth, women, and community representatives, including political, religious, and university leaders, are key civil society actors who can make effective and sustainable contributions to preventing and countering extremism. Young people in particular are recognised as initiators of social change and as valuable partners in efforts to achieve success with restorative strategies in crisis areas, such as those with ideological and political challenges, and those with socio-economic problems.[6] Community representatives are critical for fostering cultural tolerance and open dialogue, and easily work with members of vulnerable communities in the fight against violent ideologies. In this case, we see socio-economic,

5 *OSCE Ministerial Council Decision No 9/11 'On the Strengthening Coordination and Coherence in OSCE Efforts to Address Transnational Threats' (7 December 2011) <https://www.osce.org/mc/86089> accessed 2 June 2023; OSCE Ministerial Council Declaration No 5/14 'On the OSCE Role in Countering the Phenomenon of Foreign Terrorist Fighters in the Context of the Implementation of UN Security Council resolutions 2170 (2014) and 2178 (2014)' (5 December 2014) <https://www.osce.org/files/f/documents/e/a/130546.pdf> accessed 2 June 2023; OSCE Ministerial Declaration No 4/15 'On Preventing and Countering Violent Extremism and Radicalization that lead to Terrorism' (4 December 2015) <https://www.osce.org/cio/208216> accessed 2 June 2023; OSCE Ministerial Council Declaration No 1/16 'On Strengthening OSCE Efforts to Prevent and Counter Terrorism' (9 December 2016) <https://www.osce.org/files/f/documents/f/2/288176.pdf> accessed 2 June 2023.*

6 *UN Secretary-General, 'Plan of Action to Prevent Violent Extremism: Report of the Secretary-General' (24 December 2015) <https://digitallibrary.un.org/record/816212?ln=en> accessed 2 June 2023.*

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ideo-political problems that pose a risk wherein the residents of crisis countries will turn into socio-pathological problems.[7]

The changing nature of war compels civil society to use unconventional tactics by warring parties, which dramatically increases the costs of conflict for ordinary people. Non-combatant civilians are the main targets of violence, and civilian deaths account for the majority of all casualties. Forcible displacement and massacres; the targeting of women and children and abduction of children as soldiers; environmental destruction and economic collapse, creating profound impoverishment; the legacies of crippling bitterness, fear, and division are some of the many reasons that cause civil society actors feel compelled to use their energy and creativity to find alternatives to violence, to end wars, and prevent them from starting or reoccurring. As people become directly affected by armed conflict, they develop a central interest in contributing to its resolution. Living alongside the armed actors, they share in a greater need and potential to participate in peacebuilding.[8]

While often part of the forces supporting war, it is also one of the powerful forces in promoting peace. Civil society's roles in humanitarian relief, development, and human rights protection are well understood. What is lesser well-known is the myriad of ways that they actively build peace. Civil society plays a role during every point of the conflict's development and resolution, from surfacing situations of injustice to preventing violence, from creating conditions conducive to peace talks to mediating a settlement and working to ensure its consolidation, from setting a global policy agenda to healing war-scarred psyches. These roles can be mapped out into eight main functions of civil society peacebuilding.[9]

2.1 The role of young people in preventing extremism and terrorism that leads to war through civil society

Young people are the primary target of recruitment and mobilisation efforts by violent, extremist organisations when changes are expressed in countries with ideological and socio-economic crises. Regardless of objective criminogenic factors, such as geographic location, religion, nationality, or educational level, young people are the most vulnerable social group to violent extremism. Psychologists attribute this sensitivity to several factors, including, but not limited to, young people's search for identity and to find meaning in life, society, purpose, recognition, and religious affiliation.

Youth representatives, activists, volunteers, and young professionals are often effectively engaged in prevention programs at the local level, both offline and online, through engaging with their peers or communities, raising awareness of recruitment's negative consequences by terrorist groups, and providing alternative, positive ideas. Facilitating dialogue is another common practice by young people. This practical approach offers opportunities for reflection and constructive debate on topics related to personal and social development, education, independence, justice, honour, identities, gender norms, belonging, post-conflict reconciliation, etc. Other topics to explore that require help from professional counsellors those related to post-traumatic stress, discrimination, intolerance, and domestic violence. As a result of crises in a country that has been disrupted due to the area's armed conflicts,

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7 *General Secretariat of the Council of EU, 'Council Conclusions on EU External Action on Counter-terrorism' (19 June 2017) <https://www.consilium.europa.eu/media/23999/st10384en17-conclusions-on-eu-external-action-on-counter-terrorism.pdf> accessed 2 June 2023.*

8 *Catherine Barnes, Agents for Change: Civil Society Roles in Preventing War & Building Peace (The Global Partnership for the Prevention of Armed Conflict Iss 2, European Centre for Conflict Prevention 2006) 7.*

9 ibid 8.

it is necessary to treat young people and provide adequate professional rehabilitation; in this way, civil society has a special importance in having the right approach. [10]

2.2 The role of women in preventing extremism and terrorism leading to war through civil society

There is a broad international consensus among policymakers and professionals that efforts to engage women in preventing extremism leading to terrorism and war should occur. International and national efforts for peace and security were emphasised with the adoption of Resolution 1325 of the United Nations Security Council on Women, Peace and Security and, more specifically, regarding the prevention of extremism leading to terrorism and war (PETW) through the drafting of Resolution 2242 of the United Nations Security Council (2015).[11]

This intensification of women's engagement can be considered positive due to analytical approaches to gender dynamics around terrorist radicalism and addressing the knowledge gathered from PETW policies and programmatic activity. Gender refers to the roles, behaviours, needs, and expectations built on social models that are considered appropriate for women and men in a society. These roles are considered contextual, variable, and time-specific.[12]

Women can exert influence on PETW efforts as policymakers, political leaders, educators, mothers, community members, and activists, as they are directly related to the younger individuals, and face challenges in war and post-war zones in managing this group towards performance and prevention of extremism in general. They can shape and lead education programs, actively engage with vulnerable youth, and be portrayers of the counter-extremism narrative, especially when they speak as victims or survivors of terrorist attacks or as former violent extremists. One of the key roles women can play in PETW relates to their ability to directly intervene with girls and women either at risk of terrorist radicalisation or already radicalised, as well as influence girls and women who have returned from conflict zones to countries abroad where they may have been involved in armed conflict. This is especially important in conservative cultural communities.[13]

3 COMMUNITY REPRESENTATIVES IN THE PREVENTION OF PETW

Community representatives can serve as mediators between communities and government authorities. Partnerships are useful for addressing a variety of public safety concerns,

10 Peter R Neumann, *Countering Violent Extremism and Radicalisation that Lead to Terrorism: Ideas, Recommendations, and Good Practices from the OSCE Region* (OSCE 2017); Bibi van Ginkel, 'Engaging Civil Society in Countering Violent Extremism: Experiences with the UN Global CounterTerrorism Strategy' (The Hague Research Paper, ICCT 2012); OSCE, *Youth Engagement to Counter Violent Extremism and Radicalization that Lead to Terrorism: Report on Findings and Recommendations* (Expert Roundtable of the Joint OSCE Secretariat – OSCE ODIHR, Vienna, 23-24 October 2012).

11 UN Security Council Resolution 1325 (2000) (31 October 2000) <http://unscr.com/en/resolutions/doc/1325> accessed 2 June 2023); UN Security Council Resolution 2242 (2015) (13 October 2015) <http://unscr.com/en/resolutions/doc/2242> accessed 2 June 2023.

12 Office of the Special Adviser on Gender Issues and Advancement of Women, 'Gender Mainstreaming: Strategy for the Promotion of Gender Equality' (UN Women, August 2001) <https://www.un.org/womenwatch/osagi/conceptsandefinitions.htmhttp://unscr.com/en/resolutions/doc/2242> accessed 2 June 2023.

13 Veton Vula dhe Mensut Ademi, Kriminaliteti i Organizuar (Kolegji AAB 2020) 112.

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including PETW. Working with community leaders to create a sense of shared purpose in PETW is a good investment that leads to successful outcomes.[14]

Community leaders can influence a range of efforts ranging from early-stage prevention to the rehabilitation and reintegration of violent extremist perpetrators and returning foreign fighters. As credible activists with unique knowledge on sensitive issues to vulnerable community members, they can effectively communicate alternatives to violence. They can use their position, authority, image credibility, and close ties with community members to orient young people to value peace and tolerance, building resistance to hate messages.[15]

The effectiveness of the "integrated society" approach to PETW depends on the active and continuous participation of many actors in its implementation. In addition to the main civil society actors as described above, there are other important people involved, including educators/teachers, law enforcement professionals, academics/researchers, former violent extremists, information technology and media professionals, journalists, and media specialists. It is important to recognise the influence of actors holding different views within the community, as well as formal and informal local organisations, which can exert a negative influence on the PETW program. In the following section, a comprehensive, non-exhaustive treatment of the spectrum of actors with a direct and positive influence in this field is given.

3.1 The role of educators and educational institutions in PETW

Schools are especially sensitive to PETW as they are considered avenues of social interaction for young people in the construction of their personal and social identities. Educators, as frontline professionals, are imperative to preventing violent extremism, not only because of their ability to impart knowledge that can influence students' worldviews and value systems, but also because they can identify vulnerable individuals to these impacts and those in need of support. Training teachers to understand the risks of PETW and to approach these situations carefully and constructively is a critical investment. They can support efforts through the preparation of curricula and texts that foster respect for diversity and promote non-violent social norms. Educators can play a vital role in rehabilitation and reintegration by providing technical vocational training and programs to increase the cognitive skills of violent and extremist perpetrators in preparation for reintegration into society.[16]

3.2 Law enforcement services, preventive measures, and community policing PETW

Police services are responsible for maintaining public order and safety. The practice of community policing emphasises "cooperative efforts between the police and the community to identify, prevent, and solve problems with crime, potential risks for crime, safety and physical security issues, social unrest, and problems of peaceful and disorderly

14 *Global Counterterrorism Forum, 'Lifecycle Toolkit: The role of families in preventing and combating violent extremism: strategic recommendations and opportunities programming' (GCTF, 2016) <https://www.thegctf.org/BU/Tools-and-Manuals/Overview> accessed 2 June 2023.*

15 *Abbas Barzegar, Shawn Powers and Nagham El Karhili, Civic Approaches to Countering Violent Extremism: Sector Recommendations and Best Practices (EU, Georgia State University, British Council, Institute for Dialogue Strategic 2016).*

16 'Rome Memorandum on Good Practices for the Rehabilitation and Reintegration of Perpetrators of Violent Extremism Offenders' (*Global Counterterrorism Forum (GCTF)*, 2012) <https://capve.org/components/com_jshopping/files/files_products/GCTF-Rome-Memorandum-ENG-rehab_reintegration.pdf> accessed 2 June 2023.

neighbourhoods, and to improve the quality of life for all."[17] Close cooperation, based on mutual trust, between law enforcement institutions and communities to reduce tensions and grievances improves the ability to intervene in the cycle of terrorist radicalisation, reduce threats to public safety, and make communities more capable of responding to the situation.[18]

According to the author R. Maslesa, these efforts provide real results if the components of policing in the field reflect the racial, ethnic, and religious diversity of the communities that are addressed. Moreover, the development of clear and transparent policies to coordinate contacts, collect and administer confidential information, and use in criminal investigations furthers the common trust and effectiveness of police engagement in these areas. After 1999, in the Republic of Kosovo, community advisory boards or security councils were formed in the former Yugoslavian war zone. They have proven to be effective forums for raising and dealing with relevant issues related to the prevention of extremism and terrorism that leads to war. They are also useful and transparent platforms for engaging civil society and community leaders for feedback to law enforcement in ongoing efforts to coordinate potential interventions.[19]

3.3 University staff and their role in PETW

National security policies related to the quality of studies should be adapted and analysed for their support of their development and guidance of the implementation of PETW intervention programs. Therefore, the integration of experienced researchers, research institutes, and academic institutions in the PETW policy-making processes and program implementation is of strategic importance. Evidence-based and rigorous techniques, as well as objective evaluation methodologies, can accurately identify the causes and dynamic tendencies of radicalism that leads to terrorism and war.[20] In turn, this information can help design effective responses as needed. However, opportunities for studies may not be possible, so government actors should consider continuous training and capacity building for researchers as one of the main courses of PETW. The study's quality depends on access to information. In this way, by facilitating researchers' access to relevant and reliable data, it can systematically and periodically contribute to better evaluations and policies. Another step to develop a strategic approach to PETW is to establish policy forums to discuss policy priorities, disseminate research findings, and facilitate regular exchanges between researchers, policymakers, and professionals.

3.4 The sector of information technology (IT) and social media in its role towards PETW

The internet and social media revolution has broken down traditional communication barriers, creating an active online world of communication. Violent extremist organisations recognize and exploit the unparalleled power and opportunities that social media platforms

17 Ramo Masleša, *Policia Dhe Shoqëria* (Univerzitet u Sarajevu 2016) 23.

18 OSCE, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (OSCE TTD, ODIHR 2014).

19 David Schanzer and others, *The Challenge and Promise of Using Community Policing Strategies to Prevent Violent Extremism: A call for community partnerships with law enforcement to enhance public safety: Final report* (National Institute of Justice, US Department of Justice 2016).

20 Ivan Nađ (ed), *Crisis Management Days: Book of Papers 8th International Scientific Conference*, Velika Gorica, Croatia, 14–15 May 2015 (Veleučilište Velika Gorica 2015).

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provide, using them to inspire, recruit, and mobilise support, incite psychological warfare, instigate and coordinate attacks, and raise funds. Their propaganda refers to media platforms as tools of comparable importance to lethal weapons used on the battlefield. Given the strategic and tactical use of the internet and social media by violent extremists, the IT sector has an important role in disrupting the abusive use of its platforms and supporting civil society PETW initiatives. Social media platforms, in recent years, have increased their efforts to address online abuse and online hate speech, leading to the removal/reporting/blocking of content promoting violent extremism online. These efforts must be done carefully and within the parameters of laws protecting free speech. Adding a proactive approach to this reactive behaviour can yield even better results. In partnership with CSOs and IT, institutions handling technology have the capacity and technological resources to develop communication strategies and campaigns that challenge narratives of violent extremism and promote a culture of tolerance, dialogue, and non-discrimination. They can also encourage and support research on the misuse and exploitation of the internet and social media platforms by violent extremist organisations that help policymakers develop more effective responses. Other efforts could focus on empowering victims to engage in PETW work by providing them with online forums to share their stories.[21]

4 ANALYSIS OF THE ADEQUATE POSSIBILITY OF SUCCESS BY CIVIL SOCIETY IN PREVENTING EXTREME WARS: CASE STUDY KOSOVO

Networking and cooperation between CSOs: Experts point out that cooperation between CSOs in the region differs from each organisation's specific history, although the general level of direct communication and cooperation is insufficient and rare. Civil society networks are often cited as good practice, but significant regional links are rare. Although civil society actors often meet during conferences, they do not often engage in joint project implementation efforts.

Overlapping efforts: Experts appreciate the existence of new ideas and initiatives for PETW, but the tendency to create new structures and platforms dedicated to each challenge can be inefficient, especially when the sector itself offers few capacities. Local security councils are repeatedly mentioned as useful tools of engagement in the context of PETW.

Reputation and personal safety issues: When talking about involvement when working for PETW, we address reputational and personal safety issues, especially if these issues are named as such. For fear of putting their reputation and personal safety at risk, but also because of the possible legal obligations that may come resulting from working with individuals who are radicalised or convicted of terrorist crimes, many civil society organisations are reluctant to engage in this field.

Terminology issues: Some experts point out terminology issues that do not translate well in the context of the region, such as: "community leaders" and "youth leaders." Furthermore, "countering violent extremism" is translated as "fighting violent extremism" in all Western Balkan languages. However, participants also suggested that this challenge should not be addressed by creating new terms or adapting language-specific terminology, but by providing concrete explanations and examples.

Lack of access: Conservative communities rarely offer opportunities for CSOs to engage with them. Religious leaders, who enjoy higher credibility than others within particular communities, may be better able to work in these settings.

21 Plan of Action to Prevent Violent Extremism (n 6).

The complex challenges listed above require approaches tailored to each context. The guidelines outlined in the following section provide an opportunity to learn from existing good practices and develop effective responses to these and other challenges in the PETW field.

Local dynamics and socio-economic sensitivities: In today's globalised and interconnected world, violent extremism is an increasingly complex phenomenon resulting from the dynamic interaction between geopolitical factors and a highly contextual set of conditions, grievances, and circumstances. Therefore, the treatment of local manifestations of violent extremism requires both a general understanding of its transnational dimension and ideological nature, as well as an objective and nuanced assessment of the local and dynamic drivers of terrorist radicalism. In communities with highly politicised ethnic or religious identities that may have experienced sectoral discrimination or violence in the past, violent extremism may emerge across political, ethnic, or religious divides. Programs should be designed so that they do not target or stigmatise specific groups, increase polarisation, or exacerbate ethnic tensions.

5 PARTNERSHIPS FOR PEACE

Ultimately, civil society initiatives are often the source of innovative responses to conflict. While civil society is not necessarily a force for peace, the debates and initiatives cultivated by CSOs are often the motors for it. Their contributions to the underlying transformation of conflict and building peace extends from efforts to support individual development and cultivate positive norms in communities to tackling exclusionary policies, systems, and structures that give rise to grievances. Ultimately, a widespread, inclusive, and vibrant engagement within civic life can be the incubator for the institutions and habits needed to resolve conflict peacefully and generate more responsive and better governance for sustainable peace. While it is rare for grassroots efforts to transform wider systems of conflict and war, it is not possible for these wider systems to be transformed without stimulating changes at the community level. Therefore, many analysts and practitioners agree with John Paul Lederach's observation that there is a need to build peace from the bottom up, the top down, and the middle out.[22] Yet, the methodologies for crossing the scale barrier simultaneously and in a coordinated manner are not well-developed. The key seems to lie in negotiating dynamic and strategic partnerships. Primary responsibility for conflict prevention rests with national governments and other local actors. Greater ownership is likely to result in a more legitimate process and sustainable outcomes.

The primary role of outsiders is to create spaces and support inclusive processes that enable those directly involved to make decisions about the specific arrangements for addressing the causes of conflict. Outsiders should help to build on the capacities that exist and avoid actions that displace and undermine homegrown initiatives, or that promote short-term objectives at the expense of long-term prevention.

Based on a collaborative understanding of the sources of conflict and the factors that continue to generate it, people based elsewhere can seek to address some of the causes that are "located" elsewhere in the conflict system (such as arms suppliers in third world countries or policies promoted by foreign governments that further escalate war). Partnerships for peace may be the antidote to systems and networks that sustain war. To achieve this potential, we need to acknowledge the legitimacy of CSOs in peace and security matters and strengthen official recognition of their roles in conflict prevention partnership. The partnership can then be

22 John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (US Institute of Peace Press 1997).

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operationalised through stronger mechanisms and resources for interaction between IGOs, CSOs, and governments to institutionalise the capacity for prevention. It is likely, however, that efforts to shift to a culture of peace and prioritise prevention over crisis management will be sustained only when there is widespread awareness amongst the general public around the world that common security cannot be obtained through the barrel of a gun. Instead, we can all best work towards sustainable peace through collective efforts to meet basic human needs and strengthen systems for managing differences peacefully.

6 CONCLUSIONS

Problems arising from conflicts, such as war, riots, protests, and epidemics force civil society to use tactics with the aim of offering help to the endangered population, accounting for the cost and unconventional tactics and techniques from warring parties, which dramatically increases the costs of conflict to ordinary people. In every conflict, civilians who are not in military formations, police, or any other combat organisation are the main targets of violence; the deaths of civilians make up the majority of all casualties. Use of civilians as shields, forced displacement, massacres, the targeting of women and children, abduction of child soldiers, environmental destruction and economic collapse creating deep impoverishment, the legacy of bitterness, fear, and crippling division are some of the reasons why civil society actors feel compelled to offer their energy, volunteerism, and creativity to find alternatives to prevent and combat the occurrence of violence against civilians, to end wars, and to prevent wars from starting or re-emerging. As individuals are directly affected by armed conflict, they develop a central interest in contributing to its resolution. Living alongside armed actors, they have a greater need and potential to participate in peacebuilding.

The roles of CSOs in humanitarian aid, development, and human rights protection are well understood. What is less well known are the multitude of ways they actively build peace. However, they play roles at every point in the development of conflict and its resolution: from the emergence of situations of injustice to the prevention of violence, from creating favourable conditions for peace talks to mediating solutions and working to ensure their consolidation, from defining a global political agenda to healing the war-wounded psyche. These roles can be defined in eight main peacebuilding functions of civil society.

Networking and cooperation between CSOs, in relation to the prevention and combating of radicalism and extremism, should aim to provide adequate answers to:

1. Crime prevention through the development of the intervention-early response system using well-known scientific methods and studies.
2. To implement the laws in action and further develop the legal infrastructure in accordance with the laws and international conventions.
3. Provide training and preparations for the advancement of institutional and civic capacities in countries in conflict with the aim of crime prevention.
4. Promotion and advancement of scientific research in criminal law, criminology, crime prevention policies, and disciplines related to the further development of cooperation and coordination of all governmental and non-governmental institutions for crime prevention.
5. Establishing cooperation with other institutions, organisations, and associations in crisis countries and those in conflict and post-conflict that have the same or similar program goals as education and training, moving in the direction of achieving the objectives of the policies of the fight against extremism and radicalism.

6. Providing scientific and professional contributions to the creation and implementation of policies for the prevention and fight against extremism and radicalism leading to terrorism.

Therefore, dealing with the manifestations of violent extremism requires a general understanding of its dimension and ideological nature, as well as an objective and nuanced assessment of the local and dynamic drivers of radicalism and extremism leading to terrorism.

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Note

ROUNDTABLE DISCUSSION ON UKRAINIAN RECONSTRUCTION AFTER THE WAR: KEY POLICY PAPER AND RECOMMENDATIONS

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Keywords: reconstruction, law reform, war, investments, geopolitics, Ukraine.

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ABSTRACT

Background: *The work examines the results and conclusions of the roundtable held on May 24, 2023, within the framework of the research project. The participants of the event discussed the main challenges that the Ukrainian government will face after the war when restoring the economy. The war and Ukraine's expected victory should significantly change the geopolitical and economic situation in the world, change the understanding of energy as a weapon, and thus, create a guarantee of energy independence for the entire European continent. Scholars, policy makers, scientists, and practitioners joined together in discussion about addressing the needs of Ukraine after the victory, during the reconstruction phase. The participants noted the inevitability of institutional changes in the Ukrainian state, which is required by the future accession to the EU and NATO. However, in addition to economic challenges, Ukraine will face a complex of significant post-war problems: ensuring social stability, restoring infrastructure, ensuring the integration of the military into peaceful life, restoring the ecology of the territories where military operations were conducted, and significantly reforming the judicial system.*

Results and Conclusions: *The policy paper concerning Ukraine's reconstruction efforts was announced as a result of the roundtable. It was highlighted that, to establish a future regional infrastructure and foster a win-win business perspective, it is crucial to engage in practical discussions with the Romanian government and private companies. Creating a shared business platform would facilitate the transition from expressing interests to direct participation in the recovery process. To achieve broader reconstruction goals, it is essential to involve other Western industry actors from countries like Germany, France, Italy, the U.S., the UK, Poland, Norway, etc., with their financial, technological, and implementation capabilities.*

1 INTRODUCTION AND THE PROJECT BACKGROUND

On the 24th of May 2023, our Romanian-Ukrainian research team from the Lucian Blaga University of Sibiu and Taras Shevchenko University of Kyiv organised the roundtable entitled 'Addressing the needs of Ukraine: reform, reconstruction and recovery in post-war Ukraine.' The event was executed within the research project, '*A Modern Science-Based Concept for Ukraine to Ensure the Sustainable Development, Recovery and Reconstruction: Cost Assessment, Model and Policy Framework,*' and implemented by the Lucian Blaga University of Sibiu and the Global Studies Center with the support of the Hasso Plattner Foundation.

Ukraine's current model of economic development is resource-intensive and environmentally dangerous, unable to increase the welfare of the population, and does not correspond to the current level of technological development in the world. The consequences of the global COVID-19 pandemic and the war have significantly affected the stability of the economy and society, ruined infrastructure, destroyed trade and logistic nets, stimulated great streams of refugees, and temporarily displaced persons inside and outside Ukraine. This can be overcome particularly by ensuring Ukraine's sustainable development along with its rapid renovation and modernisation by following the UN Sustainable Development Goals and the requirements of the Fourth Industrial Revolution.

A broad discussion of the possibility of recovery and reconstruction of the Ukrainian economy became the focal point for participants. The war significantly changed not only the geopolitical layouts in the world, but also led to the realisation of the inevitable significant changes needed in political, economic, social, and cultural spheres. Ensuring security on the European continent requires Ukraine to join NATO and the EU in the near future, which should significantly affect the economy through all of Eastern Europe and Turkey, and change European trade flows, especially energy flows. Emphasis on the use of energy

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carriers, the introduction of technologies to produce alternative fuel sources, and energy's storage will obviously change. However, such changes also require institutional changes in the Ukrainian economy, politics, and social structure. The results of the discussions on these issues became the basis for the development of the policy paper and other recommendations for the Ukrainian government after the war.

2 KEY SPEECHES AND INSIGHTS FROM THE SPEAKERS

The panel section set the priorities of the roundtable and raised important issues for discussion.

H.E. Ihor Prokopchuk, Ambassador Extraordinary and Plenipotentiary of Ukraine in Romania, spoke about Russian aggression to Ukraine, the destroyed houses, companies, people and children killed, and heavily damaged energy equipment. In only the year 2023, Ukraine demands over 40 billion USD to fund reconstruction projects. Without interference from the EU and U.S. assistance, Ukraine needs to develop and implement a compensation mechanism from the aggressor country. He stated the importance of Romanian enterprises to become involved in the economic reconstruction of Ukraine, providing not only special goods, but also technologies for a smart economy.

H.E. Victor Chirilă, Ambassador Extraordinary and Plenipotentiary of the Republic of Moldova in Romania, said that Ukraine plays a crucial economic role for Moldova, therefore, all European countries must work to guarantee Ukraine wins the war, reoccupying the entire territory. Also, the EU and U.S. must provide serious political and safety guarantees to Ukraine to avoid new wars in Europe. Such a decision requires Ukraine's acceptance to the EU and NATO. A new Marshall plan should be launched for Ukraine as private investments will not step in without security guarantees.

Dr Iulian Fota, State Secretary for Strategic Affairs, Ministry of Foreign Affairs, Romania, estimates Ukrainian current losses in the sum of over 150 billion USD, and demand 450 billion USD in reconstruction. Accounting for the size of damages, he sees the importance of private investors in the future reconstruction of Ukraine. Several conferences are planned to coordinate public and private interests, particularly in London where financial opportunities for recovery should be found. However, all these steps require significant institutional reforms in Ukraine.

Sergiy Nikolaychuk, Deputy Head of the National Bank of Ukraine, stressed that Ukraine's reconstruction must involve private investments to build a modern and competitive economy with a strong domestic private sector. Long-term success in attracting foreign direct investment and promoting private sector investment depends on implementing structural reforms to improve the business climate, strengthen the rule of law, and protect property rights. International financial institutions and foreign export credit agencies can provide initial insurances against risks related to war. Establishing a military insurance pool in Ukraine is anticipated to reduce costs and cover political and military risks. Nikolaychuk stressed that the banking sector plays an essential role in the recovery of local businesses, remaining highly operational despite losses and challenges during the war. The Central Bank's updated strategy, focused on the financial sector's participation in the reconstruction policy, serves as a benchmark for the International Monetary Fund. Regulation aligning with EU standards, approaching regulatory equivalence, and addressing existing gaps are crucial steps towards EU membership.

First Panel discussion was devoted to the valuable dialog on 'Economy; Priorities of Socio-Economic Development Under War and Post-War Reconstruction of Ukraine' with the circle of known experts.

A. Colibasanu (Romania) provided a big-picture overview on geoeconomic challenges in the Black Sea region's status update. In the context of war and post-war reconstruction in Ukraine, the Black Sea region must prioritise socio-economic development to overcome challenges. This involves enhancing infrastructure, promoting economic diversification, supporting SMEs and entrepreneurship, investing in human capital, and addressing regional disparities. By focusing on these aspects, the region can build resilience and a prosperous future.

O. Pyschulina and V. Yurchyshyn (Ukraine) presented the insight into the war through public opinion survey results. Two polls by the Razumkov Centre Sociological Service conducted in Q1 of 2023 reveal differing views on Ukraine's ability to overcome challenges. Around 90% of both experts and the public are confident in the country's capacity to conquer difficulties in the coming years. Citizens are slightly less optimistic than experts about the near future, but both groups expect positive economic changes in 2-3 years. Uncertainty is prevalent among citizens regarding Ukraine's future trajectory.

G. Melehanych (Ukraine) accented the damage costs on the war in Ukraine and its impact on the EU neighbours. The Russian Federation's war against Ukraine, starting in 2014 and escalating in February 2022, has caused devastating human suffering and significant environmental consequences. Military activities led to fires and emissions of pollutants, affecting the local climate. Around 5.5 million tons of pollutants were released into the atmosphere as of March 2023. Infrastructure damage exceeded $143.8 billion, with housing and public facilities heavily affected. The war's impacts on both the environment and the economy must be addressed in the future. Confronting the environmental fallout entails the imperative task of restoring Ukraine's ecosystems, rebuilding damaged infrastructure, and securing a sustainable future.

M. Nazarov (Ukraine) discussed political and social transformations in post-war Ukraine. For successful post-war reconstruction in Ukraine, rebuilding trust within society between the government and citizens, and among the government, society, and military forces, is crucial. Addressing changes in the educational system and social support structures is imperative, alongside preparing for demographic challenges and potential authoritarian tendencies. Electoral procedures should be reinstated for democratic stability and development. The path to post-war reconstruction lies in rebuilding trust and restoring hope.

L. Leca (Romania) mentioned the importance of risk mitigation towards long-term resilience in the post-war period. To ensure a successful post-war recovery, Ukraine must focus on risk mitigation and long-term resilience in the economic dimension. Diversifying the economy, rebuilding infrastructure, addressing unemployment, attracting foreign investment, and ensuring financial stability are crucial measures. Coordinated efforts are essential for sustainable growth and a prosperous future.

V. Vdovychenko (Ukraine) highlighted the complex security paradigm needed to restore Ukraine. Ukraine's conflict underscores the importance of robust responses to evolving security challenges. Policymakers should focus on situational awareness, defence capabilities, cybersecurity, resilient infrastructure, and diplomatic efforts. International collaboration, exemplified by the Vilnius Summit, is key to fostering collective resilience and safeguarding peace and security in the region.

The panellists came to the following conclusions:

1. Clearly defining recovery priorities is crucial for Ukraine's post-war reconstruction.

2. Restoration of damaged property and critical infrastructure, including energy facilities, in non-occupied territories is a primary focus.

3. De-occupied regions require extensive reconstruction, embracing smart technologies, environmental friendliness, and energy efficiency.

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4. A comprehensive reform of state-citizen relations is needed, transitioning to a digital model to prevent corruption, and investing in human capital for further development.

5. Preparedness for future challenges, including potential conflicts with Russia, necessitates deep military reform and the introduction of new technologies and weapons. These efforts aim to create a balanced and resilient society, fostering economic and social development.

The second panel discussion was dedicated to the treasured discourse on 'Advancing Justice: Legal Reforms in Post War Ukraine,' with the circle of recognised legal experts and policy makers. The panel devoted to the issues of justice - how to perform justice amid war and how to provide legal reforms in post-war period with a special focus on compensation mechanisms. This is not about solely reconstruction and recovery of Ukraine after the war, but about restarting and rebuilding the bridges broken, and I am happy that we may contribute to this discussion.

Dr. Oleksandr Bakumov, Chairman of the Interim Special Commission of the Verkhovna Rada of Ukraine on International Humanitarian and International Criminal Law in the Conditions of Armed Aggression of the Russian Federation against Ukraine, People's Deputy of Ukraine, stated that the new realities in Ukraine embody four international crimes established by the Rome Statute: genocide, crimes against humanity, war crimes, and crimes of aggression. Law enforcement agencies have documented 105,803 crimes related to Russian aggression, including war crimes and crimes against Ukraine's national security. The Verkhovna Rada's Temporary Special Commission on International Humanitarian and International Criminal Law collaborated to develop a draft law to apply international humanitarian law in Ukraine and assessed conditions for Russian prisoners of war, adhering to the Geneva Conventions, while Ukrainian prisoners faced inhumane treatment, torture, and hunger.

Dr. Volodymyr Kravchuk, Justice of Supreme Court, Ukraine, claimed that during martial law, courts' powers cannot be suspended and they must act within the limits set by the Constitution and laws. Courts solely administer justice in the area under martial law, facing challenges such as non-execution of decisions, personnel shortages, overwhelming caseloads, and low legal culture. Reforms encompass competitive selection, optimising the court system and addressing the issue of insufficient judges.

Dr. Serhii Kravtsov, Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg and Yaroslav Mudryi National Law University, Ukraine, argued that the establishment of a unified compensation mechanism for damages caused by Russian troops is a crucial issue with national regulations in progress. However, without international support, implementation may be hindered by resource limitations. Efforts by the international community have resulted in approved documents, but they lack specific compensation mechanisms. The main problem is the absence of a law governing the procedure for compensation from Ukraine's State Budget, creating challenges for those seeking compensation.

In concluding remarks, moderator Dr. Iryna Izarova mentioned that, in the pursuit of justice and post-war recovery, it is crucial for states to address human rights violations by acting against criminals and compensating victims. Scholarly efforts should focus on research, debunking falsehoods, developing protective institutions, and advocating for inclusive justice. Collaborative work with professionals and stakeholders is essential in rethinking justice and promoting sustainable development. The envisioned reforms in post-war Ukraine should prioritise full compensation mechanisms, fair trials, and legal system reforms to prevent the recurrence of conflicts.

Summarising the discussion, the panellists concluded:

1. The new realities in Ukraine reflect grave international crimes documented by law enforcement agencies, demanding justice and compensation for damages caused by Russian aggression.

2. The Temporary Special Commission of the Verkhovna Rada accomplished crucial tasks, including developing a draft law on international humanitarian law.

3. The challenges faced by the judicial authority under martial law need to be addressed for a more credible and efficient system.

4. Establishing a unified compensation mechanism is a pressing issue, requiring support from the international community.

5. The discussion highlighted the importance of restoring justice, territorial integrity, and upholding the rule of law in post-war Ukraine.

3 CONCLUSIONS AND POLICY PAPER

To achieve Ukraine's recovery and reconstruction, it is essential to focus on restoring territorial integrity and standing against Russian aggression. This entails providing support for military capabilities and improving infrastructure, while also ensuring global freedom of navigation, especially in the Black Sea region. The process of liberating Eastern Europe from Soviet/Russian influence will require sacrifices and sustained reforms. By restoring its sovereignty, Ukraine gains the opportunity to stabilise and further integrate the country and the region.

A critical aspect of progress lies in enhancing infrastructure as it is vital for economic growth and attracting foreign investment. Additionally, promoting economic diversification and supporting small and medium-sized enterprises (SMEs) will reduce vulnerability to external shocks and foster sustainable economic development. To aid economic recovery, it is critical to implement comprehensive risk mitigation strategies and attract foreign direct investment.

Encouraging academia and think tanks to contribute to finding solutions can greatly benefit decision-making in addressing the challenges Ukraine faces. By supporting civil society networks and research-based reports, the country can make informed and effective policy choices.

In the Annex to this Note, the prepared Policy Paper 'Addressing the needs of Ukraine: reform, reconstruction and recovery in post-war Ukraine' may be found.

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GLOBAL STUDIES CENTER
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POLICY PAPER

ADDRESSING THE NEEDS OF UKRAINE
REFORM, RECONSTRUCTION AND RECOVERY IN POST-WAR UKRAINE

Silviu Nate, Ganna Kharlamova, Iryna Izarova, Andriy Stavytskyy, Răzvan Șerbu, Eduard Stoica

Research grant: A Modern Science-Based Concept for Ukraine to Ensure the Sustainable Development, Recovery and Reconstruction: Cost Assessment, Model and Policy Framework

THE CONTEXT

Russia's unprovoked and illegitimate war in Ukraine reflects its irreversible geopolitical decline due to losing all other forms of global competition except military power. Moscow's increasing inability to control regimes and exert political influence in its Western neighbourhood has increased aggressiveness against aspiring democratic countries.

Russia's aggression has dramatically affected Ukraine's domestic and broader economic environment in the Black Sea region. Before Russia's invasion, Ukraine was a key economic player in the region, and all coastal states have been affected drastically by Russia's belligerence.

Military activities during the war have resulted in fires at industrial sites, residential

Nation's Pulse. Inside the War: A Public Opinion Survey

The results of two polls conducted in the first quarter of 2023 by the Razumkov Centre Sociological Service compare the views of experts and the general public, revealing conflicting perspectives on Ukraine's ability to overcome its current problems.

Both experts and citizens (around 90%) express a relatively high level of confidence in the country's capacity to overcome existing difficulties in the coming years or beyond.

However, regarding the following few years' trends, citizens are slightly less optimistic than experts. Approximately 49% of citizens and 46% of experts believe that Ukraine can overcome its problems in the near future. Meanwhile, citizens are more hesitant in predicting the longer-term future's success, with 36% indicating the ability to overcome challenges compared to 46% of experts. This discrepancy may be attributed to the difficulty citizens face in forecasting developments further into the future, resulting in a higher percentage of undecided respondents (11% compared to 5% among experts). Pessimism is equally low among citizens and experts, with only 3% believing that Ukraine cannot overcome its challenges.

areas, and natural ecosystems, leading to the emission of greenhouse gases and other pollutants into the air. The exact scale of these repercussions is difficult to predict, but it is evident that combat activities impact the local climate.

The conflict in Ukraine highlights the evolving nature of security challenges and the urgent need for robust responses.

Engaging multiple actors requires a comprehensive effort; therefore, the international community (governments, private donors, companies, think tanks, academia, and civil society) plays a vital role in the reconstruction process.

Providing political and economic help to Ukraine and the Republic of Moldova is directly linked with a greater purpose of supporting their becoming EU members. Concrete achievements in reforms will solidly argue for their fast accession, increasing support, and coordination for a successful reconstruction plan.

In terms of the domestic economic situation over the next three months, nearly half of both experts and citizens do not anticipate any significant changes. Experts, however, are slightly more likely (36%) to expect a worsening situation than citizens (23%).

Looking at the mid-term perspective of economic changes within 2-3 years, experts and the population hold predominantly positive expectations. Approximately 59% of the total interviewed experts and 52% of citizens anticipate improvements. Conversely, citizens are less inclined (11%) than experts (23%) to expect negative changes, possibly due to seeing the impact of past aggression and its consequences.

It is noteworthy that a significant proportion (26%) of citizens express uncertainty ("hard to say") regarding the future trend of economic changes in the country over the next 2-3 years.

In summary, while neutral sentiments dominate the short-term prospects, with neither experts nor the population foreseeing substantial changes, Ukrainians believe the country will overcome its problems and difficulties in the next few years.

WINNING THE WAR

Any discussion related to Ukraine's reconstruction and recovery should consider the war's premises, and *Ukraine has to win this war* with the support of a large coalition of democratic nations. Consequently, there's an objective need to help Ukraine with all the means and solidarity to succeed.

Ukraine continues to need assistance from its partners. The key is *promptly delivering necessary military and technical assistance to end the war as soon as possible*. Enhancing long-range artillery and modern combat aircraft capabilities remains critical for ensuring comprehensive air defence, including ammunition and spare parts.

Winning the war means *repelling the aggressor and completely liberating Ukraine*, withdrawing Russian troops from Ukraine's territory, and *restoring absolute territorial integrity*.

Without long-term security assurances, the region would not experience successful

Winning the war has a practical understanding that requires proper action:

- Prompt enhancement of long-range artillery and modern combat aircraft capability, including ammunition and spare parts.
- Complete liberation of Ukraine, withdrawing Russian troops from Ukraine's territory, and restoring absolute territorial integrity.
- Long-term security assurances for Ukraine and strong deterrence towards Russia, transatlantic defence posturing in the Black Sea region.
- Transnistrian conflict settlement.
- Prioritise capacity-building in cybersecurity for Ukraine and the Republic of Moldova.
- Diplomatic engagement, dialogue, and negotiation are essential for de-escalating conflicts.
- Steps toward the next level of the NATO-Ukraine Council at the Vilnius Summit.

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reconstruction and recovery, especially in Ukraine. Strong deterrence towards Russia, allied defence posturing in the Black Sea region, and transatlantic commitment to Ukraine and the Republic of Moldova will *provide the necessary practicality to signal to Moscow the amplitude of a superior Western commitment for ensuring a stable path in the region*.

An effective regional reconstruction and recovery process implies a successful Transnistrian conflict settlement, which jeopardises the Republic of Moldova's European integration path. *The complete withdrawal of Russian troops from the territories of Ukraine and the Republic of Moldova is a precondition for an effective reconstruction process and regional stabilisation*. While *Russia is not anymore a credible mediator* of this conflict, a committed role of the EU, the UK, the United States, and other democratic partners is critical for *a Transnistrian political settlement under a revised negotiating format and status*.

One should not forget about future challenges, meaning readiness for a new war with the Russian Federation or its parts. Profound reform of the Ukrainian army must be enacted, restoring its protective power and introducing new technologies and weapons.

Enhancing situational awareness is crucial in navigating complex security challenges. The allies should consider stepping up to the next level of *the NATO-Ukraine Council* at the Vilnius Summit, which entails *permanent consultations, improving intelligence sharing, early warning mechanisms, and utilising advanced surveillance technologies*. Collaborative efforts among international partners and regional organisations will enable the timely identification and response to emerging threats.

Ukraine's experience emphasises the importance of strengthening its defence capabilities. It involves ensuring defence production capacity and participating in joint military exercises.

The growing significance of cyber threats necessitates robust cybersecurity measures. Governments and organisations should prioritise capacity-building in cybersecurity, information sharing, and cooperation to mitigate risks effectively. *Public-private partnerships and international cooperation frameworks are vital for addressing cyber challenges*. Romania could be a substantial contributor, as it is notorious for its valuable cyber capacity and vast knowledge in the field.

Investing in resilient infrastructure is crucial for establishing efficient disaster response mechanisms and diversifying energy sources.

Diplomatic efforts play a significant role in addressing security challenges. *Diplomatic engagement, dialogue and negotiation are essential for de-escalating conflicts, promoting peacebuilding, and advancing regional stability.* Multilateral forums provide a valuable platform for constructive discussions and cooperation.

REESTABLISHING ECONOMIC SYNERGIES

Rebuilding and modernising Ukraine's economy is part of a broader geopolitical effort.

Economic recovery and security assurances go hand in hand with practical discussion on the reconstruction plan. *Emphasising Ukraine's needs, a comprehensive program will include infrastructure and residential rebuilding, restarting the region's economy, and advancing an extended security architecture for the Black Sea region in alignment with the European integration agenda.*

Last year, Ukraine and the Republic of Moldova successfully applied to become candidate states for EU integration. Proactive support and continuous assistance offered by neighbouring countries, like Romania, for fulfilling the European Union's conditionalities will increase

both countries' potential to start negotiations for accession to the EU. *Romania and Poland are pivotal regional actors in providing assistance and support to increase institutional capacity for acquiring EU integration standards; they also have the connecting potential for energy, trade, infrastructure, and digital corridors between Ukraine, the Republic of Moldova, and the rest of Europe.*

New reforms and structural adjustments lead to short and mid-term efforts for Ukraine and the Republic of Moldova. There's a strong need for engagement on behalf of the EU, which represents accelerated tools for political solidarity, financial assistance, and investments.

Weak engagement to institutional and private financial investments in the reconstruction and recovery of Ukraine and the Republic of Moldova, and also in the Black Sea region, will push the area forward into the periphery, creating an insecurity loop and perpetual strategic vulnerabilities linked to eastern neighbouring countries' harmful exposure to Russia's abuse. Therefore, *long-term Europe's stability requires an extensive geopolitical project and a comprehensive plan for the Black Sea region.*

The reconstruction of Ukraine is the second crucial strategic goal, following defending the country and stepping into the logic of security guarantees. At the same time, it is extremely important for Kyiv to start the country's rebuilding process as soon as possible without waiting for the war's end. According to the *Joint Assessment*, made by Ukraine's government, the World Bank Group, the European Commission, and the United Nations on 23 March 2023, the estimated cost of reconstruction and recovery of Ukraine's growth to $411 billion, which means it will be the largest reconstruction project since World War 2 and amounts to two times Ukraine's 2021 GDP, so it requires a consistent effort.

Financial sources identified by the government of Ukraine:

- *Coordinated funds* directly allocated from the Ukrainian state budget, funds of international partners, and donor funds from countries worldwide.

The historic decision to establish an *international register of damages* forced by the aggression of the Russian Federation against Ukraine, adopted at the Council of Europe Summit in Reykjavik on 16-17 May 2023, is an essential milestone in the process to establish justice and explore appropriate funding options for a full-fledged compensation mechanism.

A large-scale restoration programme was launched in Ukraine that provided financial assistance to repair houses damaged by hostilities. The Ukranian government is keen to carry out these repairs for the people who returned to the areas liberated from the temporary Russian occupation. As of 12 May, nearly 6.000 applications have been accepted under this programme. Almost 60 countries are helping to restore and repair different settlements in Ukraine and repair the infrastructure destroyed by the Russian attacks. Over 300 territorial communities are included in 1.000 partnership agreements with municipalities of other countries. Last year, a summit of regional and municipal authorities was held in Kyiv to bolster cooperation on the regional level between Ukrainian regions and partner countries' regions. In one year since its establishment on 5 May 2022, the *United24* fundraising platform raised more than $325 million in contributions from international companies, Ukrainian businesses, charitable organisations, world celebrities, and donors from over 100 countries. Complete liberation of Ukraine, withdrawing Russian troops from Ukraine's territory, and restoring absolute territorial integrity are the ultimate goals.

During 2023, Ukraine needs $14 billion to fund immediate critical requirements, priority reconstruction, and recovery of the country.

Numerous industrial targets, including various industries' thermal power stations, production, and storage facilities, have been exposed to shelling, leading to fires and releasing combustible products into the atmosphere. The combination of various stored materials creates a hazardous chemical mixture, further contributing to environmental damage.

Estimates provided by The Kyiv School of Economics indicate that, as of March 2023, around 5.5 million tons of pollutants were released into the atmosphere due to military activities

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in Ukraine. The destruction of the environmental protection system in combat zones has resulted in the loss of ecological data, the absence of monitoring, and the inability to implement measures to reduce greenhouse gas emissions and adapt to climate change.

Moreover, Russia's military aggression has caused significant, direct damage to the economy. Within one year of the invasion, documented direct damage to residential and non-residential real estate and infrastructure exceeded $143.8 billion at replacement cost.

Three stages for rebuilding residential infrastructure:

- *Restoration of damaged property in non-occupied territories is much easier to implement.*
- *Restoration of critical infrastructure, particularly energy facilities and telecommunications, is essential for keeping the economy alive and sustaining Ukraine's defence capacity.* Russia seeks a prolonged confrontation and hopes to use the winter months to socially demoralise and gain more damaging leverage against Ukraine due to the lack of proper energy resources. Military aggression demands energy production and transmission decentralisation through appropriate transformers on new bases, including environmental friendliness, efficiency, and protection against missile strikes. However, *there is an acute need to prioritise the immediate restoration of indispensable critical infrastructure facilities.*
- Kyiv's and the Western commitment to Ukraine's defence follows the principle of prevailing against the aggressor, which means de-occupying all regions as of 1991. Many cities and towns were completely destroyed, especially in the Eastern part of the country. *Cities like Bakhmut, Maryanka, Soledar, Mariupol, and many others require a complete reconstruction based on smart technologies, environmental friendly materials, and energy efficiency.*

Russia's direct damage to Ukraine's economy:

- The largest share in the total volume of direct losses belongs to residential buildings (37.3% or $53.6 billion) and infrastructure (25.2% or $36.2 billion). Losses of business assets amount to at least $11.3 billion and continue to grow. Direct losses in the agricultural sector, as a result of the war, constitute $8.7 billion.
- Cumulative direct losses from the destruction and damage of public sector facilities (social objects and institutions, educational, scientific and healthcare institutions, cultural buildings, sports facilities, administrative buildings, etc.) amount to about $13.69 billion. The shelling of cities and towns, a tactic employed by Russia, has led to extensive destruction of the housing market. As of February 2023, over 50% of the housing sector in numerous locations near the frontline was damaged or destroyed, including private houses, multi-apartment buildings, and dormitories.
- According to preliminary data of the regional military administrations, as of February 24, 2023, the total number of destroyed or damaged housing supply amounts to about 153,860 buildings, of which 136,000 are private (individual) houses; 17,500 are multi-apartment buildings; and 300 are dormitories.

ENVIRONMENTAL CONSEQUENCES OF THE RUSSIAN INVASION

Russia's military aggression has not only brought tragic circumstances to human destinies but also created new threats to Ukraine's natural environment. So *the impact of Russia's crimes against the environment needs to be examined, condemned, and compensated for in the future*.

Military activities that have caused fires at industrial and infrastructural sites, in the residential sector, and natural ecosystems, and *emissions of volatile compounds due to damage done to industrial sites have emitted large quantities of greenhouse gases and other pollutants into the air.*

Fires in production and warehouses occur regularly because of enemy shelling, which emits many combustible products into the atmosphere. The danger of these fires is explained by the fact that *products and materials of various origins are often stored in warehouses, creating favourable conditions for forming a chemical "cocktail" that negatively affects the environment on a scale that is difficult to estimate*. Some materials relate to the damaged tanks, where dangerous, volatile substances had been stored.

The destruction of the environmental protection system in the combat zones has led to the loss of information about the state of the environment; in some areas, environmental monitoring is not carried out, ecosystem services are not provided, and measures to improve the environment's state, reduce greenhouse gas emissions, and adapt to climate change are not implemented.

Russia's military aggression has led to several dangerous effects on all components of the environment – atmospheric air, soils and landscapes, surface and underground waters, vegetation, and animal life.

The destruction of the Nova Kakhovka hydroelectric dam in southern Ukraine generated catastrophic floods, engulfing towns and villages in the south of Ukraine, flooded mines uncontrollably, accelerated irreversible drought processes in Crimea with severe consequences on Ukrainian agriculture, and additionally affected the Black Sea flora and fauna.

ENGAGING CIVIL SOCIETY

Engaging domestic and Western civil-society actors in Ukraine will contribute to retaining people's freedom.

Sociology shows that Ukrainians trust themselves, their relatives, and their closest social circles. The situation improved in the first months of the war, but now there are also tendencies toward social atomism.

It is necessary to comprehend the changes in the educational and social support systems. *After the war, many people in Ukraine will need social, psychological, material, and other services provided by the government*. The issue of retraining is acute – *Ukraine needs new specialists focused on restoring the economy and providing psychological and social support*.

Due to the war, Ukraine lost a significant active population (deaths, physical infirmity, migration). Therefore, *it is necessary to significantly increase human capital and invest in it to ensure the possibility of further development*. Demography in post-war Ukraine is a painful issue. Even before the war, demographic problems associated with ageing and depopulation were recorded, and the war only aggravated this declining pattern to the limit. It is difficult to determine the number of citizens who will return to Ukraine to estimate how many will live in the country after the war. This figure is necessary for production planning, government orders for universities, social services, etc.

Even if some experts believe that authoritarian tendencies in Ukraine may be confirmed after the war's end, it may be a false issue. Still, it remains to be evolutionally studied as a working hypothesis. A request for a firm hand and a quick renewal of the country should be complementary with accountable and transparent leadership. *A comprehensive reform of state-citizen relations in the country is needed as a complete transition to a digital model of communication and relations to prevent corruption. Society must be ready to retain freedom*

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and the right to change its government. Electoral procedures must be restored as soon as the security situation advances.

Georgia, another Black Sea coastal state, records a high societal motivation for Euro-Atlantic integration while its domestic political dynamic decreased reform efforts and Western commitment. Extensive logic suggests supporting Georgian society's aspirations and keeping the country in the regional stabilisation process is fundamental.

At the Black Sea region level, ensuring social inclusion and addressing regional disparities are vital components for sustainable development. Investing in healthcare, education, and social welfare programs will improve human capital and reduce inequalities, fostering regional social cohesion and stability.

Additionally, *investing in human capital is crucial for long-term socio-economic development.* This entails *prioritising education, vocational training, and healthcare services.* By equipping individuals with the necessary skills and ensuring their well-being, the region can build a resilient workforce and enhance productivity.

Finally, *addressing regional disparities and promoting social inclusion is paramount because the war has exacerbated inequalities within the Black Sea region.* Implementing targeted policies and programs to reduce disparities, improve access to services, and promote social cohesion will foster stability and sustainable development.

ADVANCING JUSTICE FOR POST-WAR UKRAINE

Ukraine's new realities represent the embodiment of all four international crimes established by the Rome Statute: genocide, crimes against humanity, war crimes, and crimes of aggression. According to Dr Oleksandr Bakumov, Chairman of the Interim Special Commission of the Verkhovna Rada of Ukraine on International Humanitarian and International Criminal Law in the Conditions of Armed Aggression of the Russian Federation against Ukraine, People's Deputy of Ukraine, as of today, *"the law enforcement agencies of Ukraine have already documented 105,803 crimes related to Russian aggression, 88,591 crimes against peace, security of humanity, and international order, including 85,949 war crimes, as well as 17,212 crimes against the foundations of our state's national security."*

The Temporary Special Commission of the Verkhovna Rada of Ukraine on International Humanitarian and International Criminal Law in the Conditions of Armed Aggression by the Russian Federation Against Ukraine has accomplished the following tasks:

- It was developed in collaboration with the Ministry for Reintegration of Temporarily Occupied Territories of Ukraine as an infrastructural draft law on the application and observance of international humanitarian law in Ukraine.
- Members of the Special Commission, the Members of Parliament, have repeatedly visited places of detention for Russian prisoners of war, communicated with them, and confirmed that these conditions comply with the Geneva Conventions. The same cannot be said about the inhumane conditions, torture, and hunger experienced by Ukrainian prisoners of war.

- **The judicial authority faces various problems that impede its effectiveness.** These challenges include the non-execution of court decisions, a shortage of personnel with over 20 courts lacking judges, an overwhelming caseload with more than 1.000 cases per judge, a low legal culture among employees and citizens, and a diminished authority of the court. These issues need to be addressed to establish a more efficient and credible judicial system that upholds justice and the rule of law.
- **Reforms in the judicial authority encompass competitive selection with international expert involvement for key bodies** like the High Council of Justice, the High Qualification Commission of Judges of Ukraine, and the Constitutional Court of Ukraine. Additionally, measures include optimising the court system through consolidation, addressing the issue of insufficient judges with over 2.500 vacancies (45% of positions), and implementing strategies to reduce the overall number of court cases.

During the period of martial law, the powers of the courts cannot be suspended. In the conditions of the legal regime of martial law, courts, bodies and institutions of the justice system act exclusively on a basis within the limits of authority and in the manner determined by the Constitution of Ukraine and Ukrainian laws. Justice in the territory where martial law has been imposed is administrated only by courts. Courts, which were created in accordance with the Constitution of Ukraine, operate in this territory.

To date, *establishing a unified compensation mechanism* for the damage caused by the illegal actions of Russian troops remains a crucial issue on the agenda. At the national level, some regulations have already been prepared and submitted for discussion, which will aid those suffering damage with receiving compensation for their destroyed property. *Yet, without the international community's support, Ukraine's efforts to implement ideas for actual compensation to citizens who lost their property may be impossible due to the lack of resources.*

Regarding the efforts of the international community to help establish a tribunal that will deal with issues of compensation for damage, it is known that during 2022-2023, numerous international documents were developed and approved. However, when justifying their position, the states that supported the Resolution noted that this international document does not entail the creation of any compensation mechanisms but only declares the need to create such a compensation mechanism.

The main problem facing this effort is that exercising the right to obtain the specified compensation depends on a compensation mechanism, which a separate law must establish. *The law, which regulates the procedure for compensation from the funds of the State Budget of Ukraine for damage caused by an act of terrorism, does not exist, both at the time when disputed legal relations emerged and at the time of the case proceedings in the courts.* Moreover, Ukrainian legislation lacks the payment procedure for the relevant amount and the precise conditions necessary to declare a property claim to the state regarding granting such compensation.

The envisioned reforms in post-war Ukraine should prioritize full compensation mechanisms, fair trials, and legal system reforms that prevent the recurrence of conflicts.

FINAL REMARKS

Addressing the complete need for Ukraine's recovery and reconstruction implies meeting the precondition of restoring complete territorial integrity. Meanwhile, Kyiv must resist Russia's aggressive war and needs urgent practical support to increase its military capacity and infrastructural resilience. Additionally, Western nations should fight to preserve and guarantee the freedom of navigation worldwide, including in the Black Sea region.

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Russia shows the world that it decides to destroy what it can't take by force. Unfortunately, Vladimir Putin pushes for more humanitarian disaster, and the democratic coalition must engage itself promptly in supporting Ukraine. The second liberation of Eastern Europe from Soviet imperialism comes with sacrifices, long-term reform, and an adaptation process. Russia under Putin will not abandon its aggressive behaviour towards its neighbours, but Ukraine's triumph will inspire other nations in the region to fulfil their democratic aspirations. As Albert Einstein said, *"In the midst of every crisis lies great opportunity."*

Restoring Ukraine's sovereignty as of 1991 brings a tremendous chance to stabilise, innovate, rebuild, and sustainably integrate the country and the region.

Enhancing infrastructure is essential for promoting economic growth and stability. Investment in transportation networks, energy systems, and digital connectivity will facilitate trade, attract foreign direct investment, and strengthen regional integration. Furthermore, focusing on modernising ports and logistics facilities will enhance the region's competitiveness and facilitate international trade. The war has taken a toll on vital transportation networks, energy systems, and communication infrastructure. Rehabilitating and modernising these systems will enable the flow of goods and services, attract investments, and enhance regional integration.

The Black Sea region has been grappling with significant geoeconomic challenges, particularly in the context of the war and post-war reconstruction efforts in Ukraine. Prioritising socio-economic development is crucial to address the pressing issues faced by the region.

Promoting economic diversification is vital to reducing the region's vulnerability to external shocks. The Black Sea region can foster innovation, job creation, and sustainable economic growth by encouraging the development of sectors beyond traditional industries, such as agriculture and heavy manufacturing. By encouraging innovation, supporting entrepreneurship, and promoting a favourable business environment, the region can diversify its economy, create new jobs, and reduce dependence on vulnerable industries.

Fostering entrepreneurship and supporting small and medium-sized enterprises (SMEs) will stimulate economic activity and create employment opportunities. Providing access to financing, promoting business-friendly regulations, and investing in vocational training and education will empower entrepreneurs and contribute to economic resilience. SMEs

Recommendations for the Romania-Ukraine bilateral agenda:

It is noticeable that Romania is an important Black Sea actor and neighbour in providing assistance and support for Ukraine's Euro-Atlantic integration; it has the potential to link energy, trade, infrastructure, and digital routes between Ukraine, the Republic of Moldova, and the rest of Europe.

As a significant contributor to NATO's Eastern Flank and broader transatlantic security, Bucharest could help Kyiv accelerate reforms in the defence and intelligence sectors.

Ukraine's reconstruction requires public support in Western society; therefore, Romania could be conducive to increasing public diplomacy efforts in explaining the importance of mutual engagement within the regional, European, and international forums.

Boosting practical talks with the Romanian government and private companies is crucial for setting up a future regional infrastructural web and bringing a win-win business perspective.

Setting up a mutual business platform facilitates the transition from declarations of interest to direct participation in recovery.

Engaging other Western industry actors from Germany, France, Italy, the USA, the UK, Poland, Norway, etc., with financial, technological, and implementation capacities is mandatory to fulfil broader reconstruction objectives.

are a driving force for job creation and economic growth. Providing them with access to finance, business support services, and technology will empower entrepreneurs and stimulate local economies.

The war with Russia has left a trail of destruction, causing significant economic losses and disrupting key sectors. By implementing comprehensive risk mitigation strategies and focusing on long-term resilience efforts, Ukraine can overcome the economic challenges posed by the war and create a foundation for a solid start in its adhesion process to the EU.

Attracting foreign direct investment (FDI) is crucial for economic recovery. Ukraine needs to enhance its business environment, streamline regulations, and provide incentives to attract foreign investors. It includes improving governance, combating corruption, and ensuring a level playing field for domestic and international businesses.

The European Union and other partner countries should encourage and financially support academia and think tanks to establish civil society networks and research-based reports to find solutions. Therefore, confronting independent ideas and policy recommendations will contribute to the political establishment's decision-making.

***

On the 24th of May, 2023, our Romanian-Ukrainian research team from the Lucian Blaga University of Sibiu and Taras Shevchenko University of Kyiv organized the roundtable entitled: *ADDRESSING THE NEEDS OF UKRAINE: REFORM, RECONSTRUCTION AND RECOVERY IN POST-WAR UKRAINE*. Event executed within the research project named: *A Modern Science-Based Concept for Ukraine to Ensure the Sustainable Development, Recovery and Reconstruction: Cost Assessment, Model and Policy Framework*, LBUS-UA-RO-2023; 455/01.02.2023, and implemented by the Lucian Blaga University of Sibiu and the Global Studies Center with the support of the Hasso Plattner Foundation.

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The policy paper is a result of a valued dialogue with the following distinguished participants:

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OPINION ARTICLE

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Opinion Article

THE RIGHT OF OWNERSHIP AND LEGAL PROTECTION IN KOSOVO

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Summary: 1. Introduction. – 2. Problems of defining and understanding of property rights. – *2.1. Definition of property rights under civil laws and codes*. – *2.2. Understanding and methods of protection of property*. – 3. Protection of property rights in Kosovo. – *3.1. Actio rei vindication*. – *3.2. Actio publiciana (the lawsuit from the alleged property right)*. – *3.3. Actio nagatoria (negative lawsuit due to obstruction of ownership)*. – 4. Conclusions.

Keywords: ownership, civil codes, law, legal protection, Kosovo.

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ABSTRACT

Background: *The Republic of Kosovo is a country located in Southeast Europe with partial diplomatic recognition. Kosovo declared its independence on 17 February 2008, and has since gained diplomatic recognition from 116 member states of the United Nations. On 22 July 2010, the International Court of Justice rendered an advisory opinion on the legality of Kosovo's declaration of independence, which was not in violation of neither general principles of international law, nor specific international law. In 2022, Kosovo filed a formal application to become a member of the European Union.*

In the Republic of Kosovo, the Constitution is the highest legal act. Laws and other legal acts shall be in accordance with this Constitution. Civil law is not codified but divided into separate laws. The property right is regulated by the Law on Property and Other Real Rights Law No. 03/L-154. Property rights and other real rights in the Republic of Kosovo originate from this law.

Keeping this in mind, in our article, we are going to highlight the range of problems related to property rights' regulation and protection, including gaps in primary and secondary legislation, analysing case law, courts, state attorneys, and administrative authorities' activities.

Methods: *In this paper, we analyse the institution of property rights. We used comparative and analytical methods based on the current legislation in Kosovo, utilising resources from the former Yugoslavia. Additionally, we used some historical methods to derive concrete results. Kosovo has inherited the relics of the former Yugoslav legal system; building a new system is a challenge in and of itself. In the context of property law in general, its legal protection is crucial for the owner to use and dispose of his property.*

Results and Conclusions: *With the knowledge that the institution of property law is one of the main institutions of civil law, and is the fundamental institution of real law, we have analysed this law institution as a constitutional principle, regulated by special laws in Kosovo. Additionally, given the importance of the property institution, Kosovo has adopted laws that protect property rights, enjoying civil legal protection, criminal legal protection, and international protection. These laws should be in accordance with the country's Constitution, with international human rights instruments, as well as with EU legislation.*

1 INTRODUCTION

The aim of this paper is to precisely analyse the right of ownership from the perspective of legal and civil-legal protection with instruments of national law, as well as to analyse and elaborate on a significant area of real-property law and the legal system in Kosovo. The right of ownership as the principal institution of real-property law deserves adequate legal and institutional protection. Providing this protection requires legislation, professional institutions, and general social mobilisation. The purpose of this paper is to highlight the shortcomings of the current system in Kosovo and to show what actions to take to improve this legal situation.

The approach toward the topic related to the field of property law and its protection has not received sufficient attention from different authors in the country, especially in scientific works or in the community of judges. Such studies are scarce, focusing mainly on addressing the conceptual and terminological aspects of property law and its different types. We believe that these treatments have not fulfilled the scientific requirement for empirical study in this field as they have not considered the aspect of its protection. Due to these facts and the ongoing changes in domestic property law legislation, we are determined to address this issue.

1 PROBLEMS OF DEFINING AND UNDERSTANDING OF PROPERTY RIGHTS

1.1 Definition of property rights under civil laws and codes

The right to property as a subjective and absolute right, belonging to the category of copyright norms, is a constitutional category that includes an important part of the Republic of Kosovo's Constitution[4] and is further regulated by special laws. Ownership is fair and disposed of in an absolute way.

The right to property in Kosovo is regulated by the Constitution and special laws in the field of property.[5] In a general sense, the right to data is related to the internal links regarding the control, enjoyment, and transfer of transmitted property values of certain materials. In a narrow sense, owners have the right to control their property and decide how it will be used. Property rights in Kosovo are regulated by the Kosovo Law on Property and Other Property Rights.[6] According to this Law, the right of ownership is defined as:

> *"Ownership is the comprehensive right over a thing. The owner of a thing may, unless it is not contrary to the law or the rights of third parties, deal with the thing in any manner he sees fit, in particular, possess and use it, dispose of it and exclude others from any interference. Intellectual property is subject to special rules."*[7]

The legal formulation consists of two parts: the concept of property rights and the restriction of these rights.[8]

Property law represents one of the most legal institutions in civil law in general, particularly the most important legal institution of real law. This scientific legal definition explicitly points to the great importance of property law within almost every country's civil legal system as an early legal institution and, as such, acquires a concise definition in Roman law, in that period's context. Even though Roman jurists did not define real law, classical jurists understood the basic idea that property should be defined as complete authority over things, known as *plena in re potestas*.

The term "proprietas," or property, etymologically means what belongs to someone. It emerged relatively later. However, attempts to define the meaning of property existed earlier and dated back to *jus civile* ancient law by Roman jurists, who stated that the rights to use, enjoy, and dispose of things are the content of the property rights (*jus utendi, fruendi, and abutendi*). Analysing this from a modern perspective shows that the owners under the right of property receive primarily these three sets of authorisations: jus utendi, jus fruendi, and jus abutendi.[9] Examining these rights implies the absolute power of the owner over the property. The right of ownership represents a social relationship to the property. The holder of such a legal-social relationship has the full rights to use, enjoy,

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4 Constitution of the Republic of Kosovo K-09042008 of 9 April 2008 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 9 June 2023.

5 About property law in Kosovo in general see more in these articles: Marco Roccia, 'Reforming Property law in Kosovo: A Clash of Legal Orders' (2015) 23 (4) European Review 566, doi: 10.1017/S1062798715000307; Maj Grasten and Luca J Uberti, 'The Politics of Law in a Post-Conflict un Protectorate: Privatisation and Property Rights in Kosovo (1999–2008)' (2017) 20 (1) Journal of International Relations and Development 162, doi: 10.1057/jird.2015.4.

6 Law of the Republic of Kosovo No 03/L-154 'On Property and other Real Rights' of 25 June 2009 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2643> accessed 9 June 2023.

7 ibid, art 18.

8 Jean Carbonnier, *Droit civil* (2e edn, Presses Universitaires de France 2017) t 1, 46.

9 Puhan Ivo, *E drejta romake* (Universiteti i Prishtinës 1989).

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derive benefits, and dispose of his property. Nowadays, in contemporary law and legal science, most countries have the right of ownership defined by their laws. The right of ownership means a real right that contains wider authorisations when using and disposing of an item.[10]

The right of ownership is a real right that grants its holder (owner) the fullest authority over any private legal power over his property, which the legal order allows and the state guarantees. The importance of property as a legal institution is also widely acknowledged in contemporary literature. Ownership, among other real rights, grants the holder (owner) the right to exercise control over things in a potentially unlimited manner.[11]

As noted above, most countries with positive laws have regulated property rights; in Kosovo, this issue is regulated by law. This legal definition of ownership generally corresponds to the provisions of the laws from contemporary countries, especially those belonging to the continental system, to some extent influenced by the civil codes of France, Germany, Italy, Switzerland, and others.

The content of ownership under Kosovo Property Law and other Real Rights, in the sense of legal regulation and in the sense of authorisations granted to the owner,[12] interferes with the content of some civil codes and positive laws. However, it can be compared with the definitions of some civil codes, such as the Albanian Civil Code[13] and North Macedonian law on Property Law and other Real Rights.[14]

According to Article 149 of the Civil Code of Albania, ownership is the right to enjoy and possess objects freely within the limits established by law.[15] The definition of ownership's content in the Albanian Civil Code allows us to easily conclude that Albania began building a proper legal-civil system quite early, but the period of dictatorship destroyed the entire previous system.

Even the countries in the region neighbouring Kosovo, including Macedonia,[16] have left the socialist system of government and accepted the democratic system with their post-communist laws, accepting the spirit and principles of the French, German, Italian, and other civil codes. From the study of the definition of ownership, according to the legal definitions provided by different countries, and concretely from the aforementioned countries, it is indeed clear that while wording may differ, the content is similar. The content of the definition of ownership is approximated amid positive laws, but is also consistent with the wording that Roman jurisprudents made of property law, except that the issue now arises in completely different economic and social circumstances.

The Universal Declaration of Human Rights, namely Article 17, states:

10 Gams Andrija, *Bazat e së drejtës reale* (Universiteti i Prishtinës 1978).

11 Francesco Galgano, *E drejta private* (Luarasi 2006).

12 Law No 03/L-154 (n 6).

13 Civil Code of the Republic of Albania No 7850/1994 of 29 July 1994 (amended by Law No 113/2016 of 3 November 2016) <https://www.wipo.int/wipolex/en/legislation/details/20976> accessed 9 June 2023.

14 Law of the Republic of Macedonia No 07-762/1 'On Ownership and other Real Estate Rights' of 20 February 2001 <https://www.slvesnik.com.mk/Issues/9B34D7ACD289420FBAF034D79CEF86B9.pdf> accessed 9 June 2023.

15 Civil Code (n 13) art 149.

16 The international recognition of North Macedonia's independence from Yugoslavia in 1991 has been opposed by Greece because of the flag and the name "Macedonia" (considered symbols of the Greeks). Relations with Greece were finally normalized in 1995, but problems with the name Macedonia still exist. The change in the political status of Kosovo, the implementation of the Ohrid Agreement, which marked the end of the Albanian war in 2001, as well as the low economic development continue to be a matter of discussion for this country.

> *"Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property."*[17]

So, the Declaration refers more generally to property, so it should be understood as an individual and the community's property, considering the type of property. At the same time, it prohibits arbitrary deprivation of this right.

However, neither the International Convention on Political and Civil Rights nor the International Convention on Economic, Social and Cultural Rights,[18] which turned the Universal Declaration into a legally-binding bond, do not touch on the issue of property protection. They could not achieve a picture at the time when the European Convention on Human Rights was being drafted. The wording that was finally adopted in the first Protocol defines that right of the state, giving a wide power to interfere with this right. The right is regulated by Protocol No. 1 of the European Convention on Human Rights, approved in 1952. According to this article:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*[19]

1.2 Understanding and methods of protection of property

In the complexity of property rights problems, property rights protection is one of the most current, interesting, and equally-important topics, both theoretically and practically. It remains alive and recent as the subjective right of an individual enjoys legal protection. The protection of property in different legal orders is not the same. In contrast to the past, especially the order established in monistic countries, today, the protection of property is particularly important in countries with democratic regimes. It is considered the basic condition for establishing and guaranteeing a better status in the personal economy of the subjects, both on national and international levels.[20]

Protection of property is one of the most important rights. The legal system must address the protection of property rights of someone else besides only the owner. Whereas, in the Constitution of the Republic of Kosovo, protection of property states:

> *"The right to own property is guaranteed. Use of property is regulated by law in accordance with the public interest. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public*

17 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 9 June 2023. The Universal Declaration of Human Rights is a universal international legal act. All member states of the UN undertake actions or the issuance of internal legal acts that will be done by its others.

18 International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) <https://undocs.org/en/A/RES/2200(XXI)> accessed 9 June 2023.

19 Article 1 of Protocol no. 1 of the European Convention on Human Rights. See, Council of Europe, *European Convention of Human Rights: as amended by Protocols Nos 11, 14 and 15; supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECtHR 2013) <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/convention> accessed 9 June 2023.

20 Erarbër Madhi, *Mbrojtja e pronësisë dhe jurisprudenca* (Triptik 2008).

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> *purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated. Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court."*[21]

This right, as will be discussed in further detail below, is also guaranteed by international law.

As is well known, in the conduct of civil proceedings and their dynamics, the parties bear more responsibility (especially regarding act procedures) than in the development and dynamics of criminal proceedings, as this is more often carried out in an ex officio manner. In terms of these principles in practice, the reality in Kosovo is that the property protection situation is inadequate; it is alarming and reflects the inadequate functioning of the legal system and the irresponsibility of administrative bodies, both at local and central levels.

One of the problems with the inability to protect property rights is the fact that cadastral offices often lack documentation from earlier time periods, this documentation has often been destroyed or lost. Though there are also cases in which former Serbian authorities have worked with these administrative bodies while leaving Kosovo. During 1999, they took many cadastral books with them. As a result, there are problems identifying the property rights of individuals, and, in this case, citizens are often required to protect this right through the courts. Ownership infringement means any intrusion on the thing by a third party, a foreigner, creating a situation that does not comply with the owner's rights to own, enjoy, and dispose of his belongings.[22]

Considering that ownership is one of the main foundations on which a state and society are built, and the right to have private property in a democratic society is one of the fundamental human rights and freedoms, the protection of the right is one of the primary tasks that the state must fulfil in today's modern societies.

2 PROTECTION OF PROPERTY RIGHTS IN KOSOVO

The right of protection of personal and property values exists for every individual and depends on his degree of professional development and the current economic development level. This right existed in older economic systems in countries where the state was not well-developed; individuals exercised it by using self-defence to preserve their created wealth and personal integrity. Ownership is the broader power vested in the owner of an item.[23] In one social study, the individual who claimed to have a right, then was deprived of that right, chose the means of realising or defending the right he had. The measures he took to protect property rights were not initially purely civil law measures. Some civil law institutions and remedies commonly originate with those of criminal law.[24]

The protection of subjects' rights concerning property gradually takes a certain form. They are protected by certain remedies that are sanctioned by the given legal system. This system allows civil legal science to recognise remedies, and judicial practices to apply remedies that are elaborated and preferred by a legal system or other legal systems' doctrine. When discussing civil legal protection, some authors thought it necessary to express the subject's abilities, his individuality, and the individuality of the property. Certain rights, such as ownership and possession, can only be acquired and protected in relation to specific

21 Constitution (n 4) art 46.

22 Ardian Nuni dhe Luan Hasneziri, *Leksione te pronesise dhe te trashegimise* (Tirnae 2008) 76.

23 Petar Klarić i Martin Vedriš, *Građansko pravo* (14 izd, Narodne novine 2014).

24 Ejup Statovci, *Leksione mbi teorinë e së drejtës* (Universiteti i Prishtinës 1978).

individualized items. The legal ownership relationship shares common elements with the general legal-civil relationship. On the other hand, it has special characteristics that make it distinct. These features are the rich, the absolute, the real character, as well as the enduring, continuous, permanent nature.

Furthermore, the absolute and real nature results in another characteristic of ownership, the pursuit of the possession by the owner against any person who illegally possesses it, albeit in good faith. Civil-legal protection equips the owner with the appropriate means to safeguard his property rights against any infringements committed by others. The legal remedy used to achieve such protection is the lawsuit, which can generally be of real or compelling nature. Obligation lawsuits fall under the category of civil law while ownership primarily deals with real lawsuits. The need for protection for the owner arises when his control over the property is wholly or partially contested by others. When the rights of the owner are disputed with a third party, in whole or in part, and the third party claims the full or partial (servitude) real right over the thing, the law affords the owner the means of protecting his property. That is the claim for restitution of a third party's claim over all property, as well as the denial of a third party's claim for possession of a partial real property right.

Modern legal systems regulate the protection of subjective civil rights of various subjects by law. The regular protection of subjective civil rights primarily occurs through the judicial authorities in civil proceedings. Of course, they are also protected in administrative and criminal proceedings. Depending on the proceedings' subject, the defence can occur not only during the proceedings at the trial of the opposing parties, but also in the extrajudicial, executive, and bankruptcy proceedings. Another specific way to protect subjective civil rights is the necessary self-help, which the law exclusively allows. It is recognised in the justice system as a special form of protection for subjective civil rights and serves the subject's self-defence rights regarding possession in cases where judicial intervention is delayed. Subjective civil rights are not primarily protected by the courts (the principle of formalism).[25] Whether an individual's subjective civil rights will be upheld based on the civil legal system's guarantee, by remedies or not, depends on the holder of such a right himself, based on his attitude and initiative. He shall decide for himself whether to exercise the power of defence of his subjective rights.

The principle of disposition that applies in civil law provides the right holder with the opportunity to choose and determine the course of action he wishes to pursue. If the holder decides to initiate the protection of his rights, the state and legal system offer an appropriate type of legal protection. Thus, the state has established the mechanism for the realisation of subjective civil law by creating courts that provide this protection in relevant proceedings. Property safeguards vary, but in this case, the property protection remedies recognised by the owner under civil law will be addressed. The main remedies for the protection of property rights include the restitution lawsuit, the pauliana (denial) lawsuit, and the lawsuit filed by the owner, the possessor, for new work and potential damage.[26] All forms of property, according to the law, enjoy protection as individual rights. Based on the authorisations granted to the property rights holder to retain his owned property, the owner can file a lawsuit to request the return of the individually-designated possession from the possessor.[27]

25 Ivo (n 9).

26 More details about a way of protecting property rights as restitution may be found here: Jose-Maria Arraiza and Massimo Moratti, 'Getting the Property Questions Right: Legal Policy Dilemmas in Post-Conflict Property Restitution in Kosovo' (1999–2009) (2009) 21 (3) International Journal of Refugee Law 421, doi: 10.1093/ijrl/eep012.

27 Law No 03/L-154 (n 6).

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3.1 Actio rei vindicatio

This lawsuit is filed by the non-possessory owner against the non-owner, respectively, the claimant is the owner of the possession and the defendant is the possessor of that thing. The plaintiff must present evidence and argue that he is the owner of the thing for which he seeks its return. The request should include the return of the individually-designated item, eventual indemnity for damage to the item, and return of the benefits (the quantity of benefits depends on whether the possessor is in good faith or not). In response, the defendant should submit objections that demonstrate he has any real right according to which he is authorised to possess the thing for a certain period, or show he has a binding right towards the plaintiff which authorises him to possess the thing for a certain period, or he has paid the rent for a longer time.[28]

Given that the right of ownership is not obsolete, the right to file this claim is also not obsolete. The protection of property using a claim for restitution and denial is also referred to as real legal protection due to its real character, which aims to recognise and sanction a real property right. The restitution lawsuit has a cognitive and binding nature. At the same time, it is the lawsuit of the non-proprietor against the unauthorised possessor for the item's return from their unlawful possession. The most important and the primary civil remedy for property protection is the re-infringement lawsuit. The same opinion is shared by Ardian Nuni, a researcher in civil matters. He states:

> *"The claim for the search of the property is the main claim provided for in the Civil Code for the Protection of Property."*[29]

Thus, Article 296 of the Civil Code of Albania[30] provides that the owner has the right to bring action against demand to his property from any possessor or holder. This right belongs also to any joint owner of the joint property so it will be delivered to all joint owners. The lawsuit for the property search is one of the oldest lawsuits for the protection of property rights, and it received comprehensive treatment in Roman law, where it was known as *"action rivendicatio."* In Roman law, this lawsuit was the most important solution for property protection.[31]

The object of the search in the restitution lawsuit is the defendant's obligation to recognise the owner of the disputed object and return possession of his property. The reinstatement lawsuit, in the opinion of Ardian Nuni and Luan Hasneziri, is a non-prescriptive lawsuit and can be filed at any time by the owner of the item.[32] There are several cases when a reinstatement lawsuit can be filed. Firstly, when the defendant has wrongfully possessed the item, as well as held it, without any legal title or cause.

Another case occurs when the defendant is legally in possession of the item but refuses to return it to the owner, although he is obliged to do so. One additional example of these cases happens when the legal action that allows the defendant to acquire possession of the object is found invalid or declared invalid. Also, this claim takes place in cases when the possession was taken away from the owner and passed on to another person based on an unlawful administrative act, or when the owner took possession of the item by passing it on to another person based on an illegal administrative act.

28 Ruzhdi Berisha dhe Atdhe Berisha, 'E drejta civile (pjesa e përgjithshme, e drejta sendore, familjare dhe trashigimore) dhe shembuj të parashtresave dhe vendimeve të gjykatës' në *Doracaku për përgatitjen e provimit të jurisprudencës* (bot i 3të, Prishtinë 2008) 407.

29 Nuni and Hasneziri (n 22) 79.

30 Civil Code (n 13) art 296.

31 Ejup Statovci, *Mbrojtja e pronësisë: studim komparativ* (ribot, Enti i Teksteve 2009).

32 Nuni and Hasneziri (n 22) 81.

The object of the reinstatement lawsuit should only be movable or immovable, individually-designated and non-designated material objects, as it is not known whether they are the same or belonging to parties. In this case, the owner can be sued with another lawsuit, such as the lawsuit for unjust enrichment, etc. The claim's request must contain a detailed description of the item that is being sought to be reinstated, since the object of the claim is the individually determined item.[33]

3.2 Actio publiciana (the lawsuit from the alleged property right)

This lawsuit, also known as the *publiciana lawsuit*, stems from Roman law. It serves to resolve a dispute between two parties over possession of a thing, wherein neither party can argue that they are entitled to the item, but it is given to the possessor on a better basis for possession. The plaintiff in this dispute must argue the legality of the possession and the legal basis of possession, known as "titulus," on which the possession was acquired based on valid legal work that gave the acquired ownership right. The question arises as to why the plaintiff has not acquired the right of ownership. In most cases, the person who has acquired the item does not have the right to dispose of it, and therefore, the possessor was unaware of the illegality of his possession; in this case, he is considered a bona fide acquirer.

If two persons are considered the alleged owner, the stronger legal basis lies with the person who has acquired the item based on legal work with a lien, as opposed to those without a lien. If the legal grounds are of the same priority, the person who possesses the property where the item is located has the stronger claim. The plaintiff is the previous possessor who also legally acquired the individually-designated thing based on a valid legal basis while the defendant is the current possessor.

The claim in this lawsuit is for the delivery of the individually-assigned item, the return of the benefits, as well as eventual compensation if the item was damaged. Concerning the objections, the defendant should primarily argue that he is the owner of the item so that this lawsuit can affect anyone except the owner of the thing. The defendant can also object that there is a stronger basis for possession, at least equal to that of the plaintiff.[34] The right to file this lawsuit is also not obsolete.

3.3 Actio nagatoria (negative lawsuit due to obstruction of ownership)

The second civil-legal solution available to the owner for the protection of the property rights, recognised by Kosovo law, is the lawsuit for termination of the infringement, otherwise known as the denial lawsuit. This type of lawsuit is also recognised in Roman law and is one of the oldest lawsuits for property protection, known as *actio negatoria.* The purpose of the denial lawsuit is, on the one hand, to establish the plaintiff's right of ownership and, on the other hand, to refute the defendant's claim of any right to intervene, thereby, denial of the right claimed by the defendant. It is named a denial lawsuit precisely for this reason. This type of lawsuit safeguards both movable and immovable property.

33 Valentina Kondili, *E drejta civile: Pjesa e Posacme: Pronësia, të drejtat reale të përkohshme dhe trashëgimia* (Shtypshkronja Geer 2008) vël 2. More about resolution of property disputes may be found here: Leopold von Carlowitz, 'Resolution of Property Disputes in Bosnia and Kosovo: The Contribution to Peacebuilding' (2005) 12 (4) International Peacekeeping 547, doi: 10.1080/13533310500201969.

34 Berisha dhe Berisha (n 28) 408.

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The object of the claim request in the denial lawsuit obligates the defendant to recognise the plaintiff as the rightful owner of the property in question during the trial, particularly when the defendant denies this right to the plaintiff. The defendant should cease the infringement of ownership over the plaintiff's property, committing to not repeat the infringement in the future, as well as compensate the plaintiff for the damage caused when the property infringement was caused by a damage.

So, through the denial lawsuit *(negatore),* the owner-possessor seeks protection against disturbances unrelated to the actual taking of the item. The concern must be directed against the rights of the property right holder. Any unauthorized use of the object is not allowed. Concerns can be raised in relation to both aerospace and underground real estate, affecting the regular use of space. The purpose of the denial lawsuit is to stop and remove the obstruction, respectively, to return it to its previous state and to deter future disturbance.

This type of lawsuit is brought about when the item has not been recovered, but the alleged owner or legitimate owner is being disturbed or hindered in the exercise of their property rights in any way, by a third party, without any valid reason. In these cases, the plaintiff is the legitimate owner, or alleged owner, of the immovable or movable property. Accordingly, the defendant is the person who commits the property disturbance, or the person who orders the other to carry out such actions. The claim seeks the cessation of further property concerns and obstruction of ownership.

4 CONCLUSIONS

Recalling that the institution of property law is one of the main institutions of civil law and the fundamental institution of real law, we understand that this law institution is a constitutional principle and is regulated by special laws in Kosovo.

Property rights have acquired an international status as they are protected by international conventions, such as the Universal Declaration of Human Rights, adopted by the United Nations Assembly, and the European Convention for the Protection of Human Rights, including Protocol No. 1 as the most important international act of legal regulation of the protection of property rights. These international documents define property rights as human rights, and in this way, protect them.

Since Kosovo's declaration of independence, the laws on the protection of property rights were adopted, which allow civil legal protection, criminal legal protection, and international protection.

In terms of the civil-legal aspect, well-known legal actions, such as *actio rei vindicatio*, *actio publiciana* (lawsuit from the alleged right of ownership), and *actio nagatoria* (lawsuit due to the impediment of ownership) are recognised, dating back to Roman law, whereby these lawsuits provide the right to file a claim in civil law proceedings to obtain the protection of property rights.

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Opinion Article

A CROSS-COUNTRY EXAMINATION: ADMINISTRATIVE LITIGATION IN CHINA AND ROMANIA*

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Summary: 1. Introduction. – 2. Brief History of Administrative Litigation in Romania and China. – 3. Similarities and Differences Between Administrative Litigation Regulation in China and Romania. – 4. Conclusions.

Keywords: comparative administrative law, administrative litigation, administrative act, China, Romania.

ABSTRACT

Background: *In this article, we have analysed the way in which the balance between public interest and private interest is achieved in administrative litigation in Romania and China. The research aims to highlight the distinct ways of solving the specific problems of this legal institution by the legislator and capitalise on the positive aspects.*

Methods: *The article uses the historical method of analysing the evolution of administrative litigation in the two countries diachronically and the comparative method that explains the*

1 * The article was made as part of the research fellow internship granted by *The Europe-Asia Research Institute* of the Faculty of Law and Political Science of Aix-Marseille University, France, between January 1 - May 31, 2023, with the theme "Comparative study of administrative litigation law between Romania and China".

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similarities and differences existing at the regulatory level in the two systems. The comparison will be based on the law that regulates administrative litigation in each state and on doctrinal and jurisprudential interpretations.

Results and Conclusions: *Despite adopting the first administrative litigation law in China in 1989, and Romania in 1990 after the r evolution of 1989 and the return to democracy, both countries have made remarkable progress in the last decades. This progress provides assurance for the protection of fundamental human rights in the adoption of administrative decisions and their subsequent judicial control.*

1 INTRODUCTION

Throughout history, how a nation is governed has consistently sparked lively disputes. In the past, citizens were subjected to various forms of abuses by absolutist monarchies, prompting Henry David Thoreau to famously proclaim, '*The best government is that which does not govern at all*'.[2]

The evolution and modernisation of states have required the recognition and protection of human rights over time. Currently, the balance between the public interest that corresponds to the achievement of the nation's desires and the private interest that requires the protection of citizens' rights is still being sought in the legislation, doctrine and jurisprudence of states. Courts often play a pivotal role in establishing this balance, with administrative litigation serving as one of the fundamental pillars underpinning any democracy.

Administrative litigation is regulated under the influence of the dynamics needs of society, aligning with the axiom captured by Petre Țuțea that 'everything flows or, more precisely, everything transforms, under the rule of the *laws of movement*'.[3] Unfortunately, the ideal of rare law, as mentioned by Courvoisier,[4] is increasingly distant.

The administrative litigation (contentious) institution comprises all the legal rules governing the settlement of disputes in which at least one of the parties is a public authority. Such litigation arises from the violation of an individual's rights or legitimate interests through an administrative act or the failure to resolve a submitted application within a legal term.[5]

Originating in France, the institution found its roots in the Law of August 16-24, 1790, which enshrined that 'ordinary courts cannot intervene in the activity of the administration, under penalty of forfeiture' (Art. 13).[6] Subsequently, administrative jurisdictions were created through various regulations.

The way in which administrative litigation is regulated in a state reflects the degree of democratisation of that country and the extent to which legal guarantees are made available to the citizen to be able to defend himself from the abuses of public authorities.

The significant number of administrative litigation underlines the litigants' awareness of the protection procedures provided by the legislation against the excesses of public authorities[7]

2 Henry David Thoreau, *Nesupunerea civică și alte scrieri* (Herald 2021) 90.

3 Petre Țuțea, *Proiectul de tratat. Eros* (Pronto 1992) 41.

4 Claude Courvoisier, 'Idealul legii rare' (2003) 4 Revista de Drept Public 27.

5 Cătălin-Silviu Săraru, 'Administrative litigation systems in Europe' (2017) 7 (1) Juridical Tribune - Tribuna Juridica 227.

6 Loi des 16-24 août 1790 sur l'organisation judiciaire <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000704777> accessed 1 March 2023.

7 Verginia Vedinaş, *Tratat teoretic și practic de drept administrativ*, vol 2 (Universul Juridic 2018) 152.

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and pleads for the increased specialisation of judges and lawyers in this matter, and emphasises the importance of establishing a special administrative litigation course within the faculties of law.

All over the world, the regulation of administrative litigation plays a crucial role in striking a balance between private interests and the public interest within evolving societies. By analysing the administrative litigation in China and Romania, we can shed light on the distinct approaches taken by legislators to address the specific problems of this legal institution and capitalise on its positive aspects. The approach will focus both on that *jus commune* focused on the similarities between the two systems[8] and the existing differences.

The analysis from the perspective of comparative law has the advantage of creating a global framework , but, most importantly, facilitates the normative evolution in the sense that the legislator can identify the best solutions to fit its own legal system.[9]

However, this comparative research faces several difficulties. Firstly, there is a lack of comprehensive research, which hinders a thorough examination of the subject. Additionally, resulting there are numerous discrepancies in legal terminology resulting from different historical developments. Furthermore, the language barrier remains a significant problem.[10]

2 BRIEF HISTORY OF ADMINISTRATIVE LITIGATION IN ROMANIA AND CHINA

Chinese law has historically been influenced by a variety of legal systems, including the Romano-Germanic legal system, the Anglo-Saxon legal system, and traditional Chinese legal practices. However, the Romano-Germanic legal system was the dominant influence on Chinese law in the modern era, especially in civil law.

During the late Qing Dynasty and the beginning of the Republic of China, many Chinese jurists and reformers sought inspiration from European legal systems as models for legal reform. German law, in particular, emerged as a useful model for reforming the Chinese legal system. This influence is evident in the development of the first Chinese Civil Code in the early 20th century, which drew heavily from the German Civil Code.[11]

Since the establishment of the People's Republic of China in 1949, the Chinese legal system has continued to be predominantly influenced by the Romano-Germanic legal tradition, particularly in civil and commercial law. However, the Chinese legal system also incorporates elements of traditional Chinese legal practices and, to a lesser extent, the Anglo-Saxon legal system.

Regarding the evolution of administrative law, we note that there was no regulation of administrative litigation initially. Disputes between citizens and the government were resolved through administrative procedures or by filing petitions addressed to the government. Legislation and administrative rules have long been excluded from the court's purview, which stops Chinese courts from examining and influencing any policies through

8 Jakub Handrlica, Vladimír Sharp and Kamila Balounová, 'The Administrative Law of the Czech Republic and the Public Law of Ukraine: A study in International Administrative Law' (2022) 12 (2) Juridical Tribune - Tribuna Juridica 196, doi: 10.24818/TBJ/2022/12/2.03.

9 Nicolae-Alexandru Ceslea, 'The Communication of Administrative Decisions and the Course of the Time Limits for Challenging Them. Comparative Law Solutions and Perspectives of Evolution in Romanian Law' (2021) 11 (1) Juridical Tribune - Tribuna Juridica 95.

10 Robert Siuciński, 'Administrative Procedure as a Key Factor in Development of Control over Administrative Power - a European Perspective' (2020) 10 (3) Juridical Tribune - Tribuna Juridica 428 est seq.

11 Ching-lin Hsia and others (trs), The Civil Code of the Republic of China (Kelly & Walsh 1930-1931).

adjudicative activities, let alone deciding core political questions.[12] In 1989, the Chinese government passed the first Law on Administrative Disputes, which established a formal administrative litigation system that allowed citizens to challenge administrative decisions in court and provided for the possibility of compensation to citizens for damages caused by illegal administrative acts.

Since adopting the Law on Administrative Disputes, the Chinese legal system has continued to develop and refine its administrative litigation procedures. In 2014, the Standing Committee of the National People's Assembly adopted an amendment to the Administrative Litigation Law that expanded the scope of administrative litigation and made it easier for citizens to file administrative lawsuits. The amendment also provided provisions for expedited procedures in certain cases and granted the courts the authority to review administrative normative documents. These legislative changes are arguably significant, and represent symbolic steps towards the rule of law and a higher level of judicialisation.[13] As Professor Hu Jianmiao remarked, 'the changes in the scope of administrative litigation could serve as the barometer of the advancement of the rule of law in China'.[14] Subsequent changes in the law created the conditions for administrative litigation to become an increasingly important means of resolving disputes between citizens and the government in China. However, the Chinese government still exercises significant control over the legal system, and many critics argue that administrative litigation remains subject to political influence and pressure.[15]

The administrative legal regime of the People's Republic of China (PRC) is a fascinating field of research for any comparative legal study due to its unique characteristics and distinct flavour.[16]

In Romania, the establishment of administrative litigation can be traced back to Law No. 167/1864 *for the establishment of the State Council*,[17] which created the State Council in the United Principalities of Moldova and Wallachia. Modelled on the French model, the State Council had legislative (preparation of draft laws), administrative (administrative advice and disciplinary forum for civil servants), and administrative litigation powers .

However, adopting the 1866 Constitution, Article 131 abolished the Council of State and established the obligation to adopt an ordinary law apportioning its powers.

Subsequently, the 1923 Constitution and then the Administrative Litigation Law of December 23, 1925 assigned the adjudication of administrative litigation disputes to the judiciary, respectively, the Courts of Appeal and the Court of Cassation. This established a comprehensive administrative litigation system with full jurisdiction, empowering the court to cancel the harmful administrative act and grant compensation to the injured person.

From 1948, with the establishment of the communist regime, until the adoption of the Constitution of 1965, the courts could not control the legality of administrative acts except

12 Shiling Xiao and Yang Lin, 'Judicial Review of Administrative Rules in China: Incremental Expansion of Judicial Power' (2022) 17 (2) Journal of Comparative Law 389.

13 ibid.

14 Jianmiao Hu, 'Changes and Trends of Scope of Administrative Litigation in China: Designation, Limitation, Recovery and Expansion' (2005) 5 Tribune of Political Science and Law 3.

15 Wei Cui, Jie Cheng and Dominika Wiesner, 'Judicial Review of Government Actions in China' (2019) 1 China Perspectives 36, doi: 10.4000/chinaperspectives.8703.

16 Muruga P Ramaswamy, 'The Impact of the New Chinese Foreign Investment Law 2019 on the Administrative Legal System Governing Foreign Investments and Implications for the Investment Relations with Lusophone Market' (2019) 9 (2) Juridical Tribune - Tribuna Juridica 330.

17 Law of Romania no 167/1864 For the Establishment of the State Council 'Pentru infiintiarea unui consiliu de statu' of 11 February 1864 <https://legislatie.just.ro/Public/DetaliiDocument/19659> accessed 1 March 2023.

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in cases expressly provided by law. Later, based on the provisions of the 1965 Constitution, Law No. 1/1967 *regarding the adjudication by the courts of the claims of those injured in their rights by illegal administrative acts.*[18] According to the provisions of Art. 1 of Law No. 1/1967, the person injured in his right by an illegal administrative act could ask the competent court, under the law, to cancel the act or oblige the administrative body summoned to court to take the appropriate measure to remove the violation of his right, as well as to repair the damage. Also, the unjustified refusal to satisfy a request regarding a right and the failure to resolve such a request within the term provided by law was considered an illegal administrative act.

After the Revolution of 1989 and the return to democracy, the *Administrative Litigation Law* No. 29/1990[19] instituted a subjective dispute with full jurisdiction. In the reparation of the damage, it was expressly provided for the first time that the court would also be able to decide on moral damages.

Another element of novelty brought by Law No. 29/1990 was the establishment of administrative litigation sections at the Supreme Court of Justice and the courts.

The legal action was conditional on exercising the preliminary procedure of the administrative appeal by offering the possibility to the issuing or hierarchically superior administrative authority to revoke or modify the allegedly illegal administrative act.

Later, Law No. 554/2004[20] was enacted to provide a more comprehensive framework for administrative litigation, adapting to the evolution of society. This law regulates *subjective litigation*, where a subjective right or a legitimate private interest is infringed upon, and *objective litigation*, which addresses the violation of legitimate public interest. Law No. 554/2004 expands the scope of the persons eligible to initiative objective litigation, extending beyond the prefect (regulated by the 1991 Constitution) to include the People's Advocate, the National Agency of Public Servants, the Public Ministry, and any subject of public law as stipulated in Art. 1 para. (8).

Law No. 554/2004 recognised the possibility of addressing the administrative litigation court and the injured third party in a right or a legitimate interest through an individual administrative act addressed to another subject of law. The law expressly provides that administrative contracts, assimilated to administrative acts in the sense of the law, can be appealed to the administrative court.

The law also regulates various aspects such as the exception of illegality, actions against Government ordinances, the conditions for attacking normative administrative acts in administrative litigation, the nature of procedural terms, the procedure for the execution of

18 Law of Romania no 1/1967 Regarding the Adjudication by the Courts of the Claims of Those Injured in their Rights by Illegal Administrative Acts 'Privind judecarea de către tribunale a cererilor celor vătămaţi în drepturile lor prin acte administrative ilegale' of 26 July 1967 <https://legislatie.just.ro/Public/DetaliiDocument/22106> accessed 1 March 2023.

19 Law of Romania no 29/1990 On Administrative Litigation 'Legea contenciosului administrativ' of 7 November 1990 (updated until 24 July 1997) <https://legislatie.just.ro/Public/DetaliiDocument/793> accessed 1 March 2023.
For an analysis of the provisions of this law in doctrine, see Alexandru Negoiță, 'Legea contenciosului administrativ' (1991) 6 Dreptul 3; Alexandru Negoiță, 'Legea contenciosului administrative: aspecte de drept procesual' (1991) 7/8 Dreptul 12; Dumitru Brezoianu, Contenciosul administrativ (Metropol 1995) 75; Valentin I Prisăcaru, Contenciosul administrativ român (2nd edn, All Beck 1998) 163-248.

20 Law of Romania no 554/2004 On Administrative Litigation 'Contenciosului administrativ' of 2 December 2004 <https://legislatie.just.ro/Public/DetaliiDocument/57426> accessed 1 March 2023.
For an analysis of the provisions of this law in doctrine, see Alexandru Negoiță, 'Legea contenciosului administrativ' (1991) 6 Dreptul 3; Alexandru Negoiță, 'Legea contenciosului administrative: aspecte de drept procesual' (1991) 7/8 Dreptul 12; Dumitru Brezoianu, Contenciosul administrativ (Metropol 1995) 75; Valentin I Prisăcaru, Contenciosul administrativ român (2nd edn, All Beck 1998) 163-248.

final court decisions in administrative litigation, as well as other aspects that will be further analysed.

The evolution of society determined that, over time, this law underwent numerous amendments brought by the legislator or imposed by the decisions of the Constitutional Court by which exceptions of unconstitutionality were admitted.

3 SIMILARITIES AND DIFFERENCES BETWEEN ADMINISTRATIVE LITIGATION REGULATION IN CHINA AND ROMANIA

First of all, it is important to note that both countries have a law that regulates the general administrative litigation procedure - the Administrative Litigation Law of the People's Republic of China (ALL PRC)[21] from 1989 with subsequent amendments, respectively in Romania the Administrative Litigation Law (ALL R)[22] adopted in 2004, with subsequent amendments.

Both laws regulate the judicial control of administrative decisions, giving the possibility to citizens, legal entities and other organisations whose rights or legitimacy have been violated by administrative acts to bring actions against the issuing public authorities and the officials who contributed to the issuance of the acts.

In both countries, administrative disputes are settled by administrative sections established within the courts - the people's courts in China and tribunals in Romania (Art. 4 of ALL PRC and Art. 2 (1) letter g) ALL R).

In Romania, administrative litigation courts are represented according to the provisions of Art . 2 para. (1) letter g) from Law No . 554/2004 by the Administrative and Fiscal Litigation Section of the High Court of Cassation and Justice, the administrative and fiscal litigation sections of the appeal courts and the administrative and fiscal litigation sections of the tribunals.

Regarding the establishment of material competence, as stated in the provisions of Art. 10 para. (1) from Law No. 554/2004, disputes regarding administrative acts issued or concluded by local and county public authorities, as well as those regarding taxes and duties, contributions, customs debts and their accessories of up to 3,000,000 lei are handled by the administrative-fiscal litigation sections of the tribunals. On the other hand, disputes concerning administrative acts issued or concluded by the central public authorities, as well as those regarding fees and taxes, contributions, customs debts, as well as their accessories greater than 3,000,000 lei, fall under the jurisdiction of the administrative-fiscal litigation sections of the appeal courts, unless otherwise provided by a special organic law. The interpretation of this regulation results in establishing the jurisdiction of the administrative litigation court according to the following rules:[23]

1. When the object of the administrative act concerns fees, taxes, contributions, customs debts, and their accessories - the competence of the administrative court is established according to the value (value criterion). Thus, administrative acts concerning such matters with a value of up to 3,000,000 lei are resolved in substance by the administrative-fiscal

21 Law of the People's Republic of China On Administrative Litigation of 4 April 1989 <https://www.chinafile.com/ngo/laws-regulations/administrative-litigation-law-of-peoples-republic-of-china-2015-amended-version> accessed 1 March 2023.

22 Law no 554/2004 (n 20).

23 Cătălin-Silviu Săraru, *Tratat de contencios administrativ* (Universul Juridic 2022) 345-6.

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litigation sections of the tribunals, and those with a value greater than 3,000, 000 lei are settled on the merits by the administrative and fiscal litigation sections of the appeal courts.

2. When the object of the administrative act does not concern fees and taxes, contributions, customs debts, as well as their accessories - the jurisdiction of the administrative litigation court is established 'depending on the central or local rank of the defendant public authority' (criterion of the positioning of the issuing authority in the system of public authorities). Thus, disputes regarding administrative acts issued by local public authorities are resolved in substance by the administrative-fiscal litigation sections of the tribunals, and those regarding administrative acts issued by central public authorities are resolved in substance by the administrative and fiscal litigation sections of the courts of appeal.

Appeals against judgements rendered by the administrative-fiscal litigation sections of the tribunals are heard by the administrative and fiscal litigation sections of the appeal courts. Similarly, appeals against judgements pronounced by the administrative and fiscal litigation sections of the appeal courts are judged by the section of administrative and fiscal litigation of the High Court of Cassation and Justice unless a special organic law states otherwise (Art. 10 para. (2) from Law no. 554/2004) .

In China, the basic people's courts serve as the courts of first instance for administrative cases (Art . 14 ALL PRC). However, an Intermediate People's Court[24] assumes jurisdiction over the following administrative cases as a court of first instance:

1) a case filed against an administrative action taken by a department of the State Council or by a people's government at or above the county level.

2) a case handled by Customs.

3) a major or complicated case within its territorial jurisdiction.

4) other cases under the jurisdiction of an Intermediate People's Court as prescribed by the law (Art. 15 ALL PRC).

Unlike in Romania, where the court of first instance in the matter of administrative litigation can usually only be the administrative litigation section of the tribunal or the court of appeal, China allows the Higher People's Court[25] to act as the court of first instance over major and complicated administrative cases within its territorial jurisdiction (Art. 16 ALL PRC). Also, the Supreme People's Court holds jurisdiction as a court of first instance over major and complicated administrative cases nationwide (Art. 17 ALL PRC).

In China, the competent court to judge the dispute has greater freedom of action than the Romania court. Thus, in China, if a lower-level people's court deems it necessary for a higher-level people's court to handle an administrative case over which the people's court at a lower level has jurisdiction as a court of first instance or to designate jurisdiction over the case, it may report the case to the higher-level people's court for decision (Art. 24 para. 2 ALL PRC). In contrast, in Romania, the dispute can only be resolved by a higher court if an appeal is filed .

Regarding the establishment of territorial competence, in Romania, according to the provisions of Art . 10 para. (3) from Law No . 554/2004, 'the claimant, a natural or legal

24 The Intermediate People's Courts are responsible for adjudicating administrative litigation cases at the level of cities and special administrative regions. They usually act as appellate courts for cases tried by lower-level People's Courts.

25 The High People's Courts are higher-level regional courts that hear administrative litigation cases at the level of provinces, autonomous regions and municipalities directly subordinated to the central government. Each province and autonomous region has its own Higher People's Court.

person under private law, applies exclusively to the court of his domicile or headquarters. The plaintiff's public authority, public institution or similar to them applies exclusively to the court at the defendant's domicile or headquarters' .

In China, the jurisdiction of an administrative case is determined by the location of the administrative agency that took the original administrative action (Art . 18 ALL PRC). However, it is stated that a complaint against an administrative compulsory measure that restricts personal freedom falls under the jurisdiction of the people's court at the place where the defendant or the plaintiff is located (Art . 19 ALL PRC), and the administrative litigation involving real property shall be under the jurisdiction of the people's court at the place where the real property is located (Art . 20 ALL PRC).

In both systems, judicial review concerns the legality of the administrative act, not its appropriateness (Art . 6 of ALL PRC and Art . 1 ALL R).

The administrative litigation law in Romania identifies the parties who have active procedural status in these processes (the person injured in a right or legitimate interest by an administrative act, the third party injured by an administrative act addressed to another subject of law, the People's Advocate, the Public Ministry, the Prefect, the issuing public authority in the situation where the act can no longer be revoked, the National Agency of Public Servants, any subject of public law under the law).[26] In China, in most cases, the plaintiffs are the private parties involved in an administrative, legal relationship. In other words, they are those persons whose rights have been directly affected or infringed by administrative action or omission.[27]

In China, the Administrative Litigation Law identifies the categories of administrative acts that can be the subject of administrative litigation: (1) A complaint against any administrative punishment, such as administrative detention, suspension or revocation of a license or permit, ordered suspension of production or business, confiscation of illegal income, confiscation of illegal property, a fine, or a warning. (2) A complaint against any administrative compulsory measure, such as restriction of personal freedom or seizure, impoundment, or freezing of property, or administrative enforcement. (3) A complaint against an administrative agency's denial of, or failure to respond within the statutory period to, an application for administrative licensing or any other administrative licensing decision made by the administrative agency . However, it is mentioned that 'in addition to those as set out in the preceding paragraph, the people's courts shall accept administrative cases which may be filed as prescribed by laws and regulations' (Art . 12, last paragraph of ALL PRC).

Both laws explicitly establish administrative acts that are exempt from the control of administrative litigation courts. In Romania, the following are exempted from the control of administrative litigation courts: administrative acts of public authorities that concern their relations with the Parliament (for example, the act by which the President of Romania appoints the Government, based on the vote of confidence granted by the Parliament), command acts of a character military (acts specific to the military organization that presuppose the right of commanders to give orders to subordinates in aspects related to troop leadership, in peacetime or war or, as the case may be, when performing military service) and administrative acts for the modification or abolition of which is provided for by law organic, another judicial procedure (these are the regulations that provide for the jurisdiction of common law courts for disputes that have as their object various administrative acts - thus, for example, according to the law, the complaint against the

26 Cătălin-Silviu Săraru, *Le droit administratif en Roumanie* (L'Harmattan 2022) 238-45.

27 Liu Jianlong, 'Administrative litigation in China: Parties and Their Rights and Obligations' (2011) 4 (2) NUJS Law Review 208.

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report of the finding of the contravention and the application of the sanction is will submit to the court - common law court).

In China, the scope of administrative acts that cannot be subject to the control of administrative litigation courts is broader , including, according to Art. 13 ALL PRC: (1) a ctions taken by the state in national defence and foreign affairs, among others; (2) a dministrative regulations and rules or decisions and orders with general binding force developed and issued by administrative agencies; (3) d ecisions of administrative agencies on the rewards or punishments for their employees or the appointment or removal from office of their employees; (4) a dministrative action taken by an administrative agency as a final adjudication according to the law. Notably, in China, the normative administrative acts issued by administrative agencies, acts regarding disciplinary liability, and the appointment or revocation of officials cannot be contested in administrative litigation.[28] In Romania, these documents can be challenged without any restrictions.

In 2014, China made significant amendments to its Administrative Litigation Law. Following the 2014 amendment, Article 53 expressly entitles people to challenge and empowers the courts to review the lawfulness of normative documents (*guifanxing wenjian*) promulgated by certain administrative authorities. This article will refer to those documents as administrative normative documents, the most numerous administrative rules in China. This empowerment marks a step towards expanding judicial power, enhancing judicial supervision over administrative rulemaking, and improving public accountability and the rule of law[29]. Prior to the 2014 amendment, there were debates surrounding the possibility of reviewing abstract administrative actions, including regulatory documents. S ome scholars argued that courts and judges were incompetent to review abstract administrative actions. The arguments mainly focused on the following points. First, abstract administrative actions were viewed as collective products of discussions and government conferences. It was believed that t he head of the government could not decide to issue it by themselves without any discussion with other administrative officials, especially roughly same-level officials. Hence, theoretically, since abstract administrative actions are decided by a group of people, it was improper for one judge or several judges to reverse them, or even review them. Second, judges were considered to lack the expertise needed to review abstract administrative actions compared to the expertise of the officers in the governments. Lastly, since reviewing specific administrative actions was already challenging for courts, it was deemed even more difficult for them to review abstract administrative actions. This debate ended after the revised of the ALL PRC was passed.[30]

In both laws, the defendant is the public authority that issued the act, regardless of whether it has a legal personality (Art. 26 ALL PRC and Art. 1(1) ALL R).

Both laws recognise the possibility of the third party, who has been harmed by an administrative act intended for another subject of law, to address the administrative litigation court (Art . 29 ALL PRC and Art. 1(2) ALL R).

China's Administrative Litigation Law provides an exhaustive review of the evidence that can be used in administrative litigation. Article 33 of the law specifies that that evidence includes: (1) documentary evidence; (2) physical evidence; (3) audio and video recordings; (4) electronic data; (5) witness testimony; (6) statement of a party; (7) opinion of a forensic identification or evaluation expert; and (8) survey transcripts and on-site disposition

28 Ji Weidong, 'The Judicial Reform in China: The Status Quo and Future Directions' (2013) 20 (1) Indiana Journal of Global Legal Studies 196, doi: 10.2979/indjglolegstu.20.1.185.

29 Xiao and Lin (n 12) 373.

30 Wang Jing, 'Judicial Review of Regulatory Documents in Administrative Litigation in China' (2021) 16 (2) University of Pennsylvania Asian Law Review 346.

transcripts. In Romania, the law does not expressly mention the means of evidence, thus, in principle, allowing the admission of evidence in line with the Code of Civil Procedure.

In Romania, the Administrative Litigation Law establishes the obligation for the issuing public authority to communicate the contested act accompanied by the entire documentation that was the basis of its issuance, as well as any other works necessary for the resolution of the case. The court can ask the issuer for any additional work necessary to resolve the case (Art. 13 para. (1) from Law No. 554/2004). This regulation takes into account the fact that, in practice, most of the documents that serve as evidence are in the possession of the defendant's public authority, which holds the entire administrative file based on which it issued the act or the unjustified refusal and therefore through the court the public authority may be obliged to their communication[31]. In jurisprudence, it was shown that the legislator instituted this measure for reasons related to the speed of the process and the good administration of the act of justice to protect the individual in the litigation with the public administration.[32] Also, in China, the Administrative Litigation Law expressly states that the defendant shall have the burden of proof for the administrative action taken and provide evidence for handling the administrative action and regulatory documents based on which the administrative action was taken (Art . 34 ALL PRC). The plaintiff can ask the court to subpoena some documents kept by state bodies that they cannot collect independently (Art. 41 ALL PRC). Although, in both systems, in the case where the plaintiff requests compensation, they must prove the damage suffered by the implementation of the administrative act.

In Chinese administrative litigation, unlike in Romania , the judge has a more pronounced active role, having the power to request a party to provide evidence or additional evidence (Art. 39 ALL PRC).

In China, filing an administrative appeal before administrative litigation is optional. The plaintiff is generally free to file an administrative complaint to request the revocation of the harmful act or to go directly to the people's court (Art . 44 ALL PRC). Suppose the aggrieved person exercises the administrative appeal by requesting a reconsideration decision. In that case, the aggrieved person may file a complaint with a people's court within 15 days of receiving the written reconsideration decision. The public authority is obligated to respond to the re-examination request within two months (Art . 47 ALL PRC). If the aggrieved person chooses to go directly to the administrative litigation court, the complaint shall be filed within six months from the day on which they knew or should have known that the administrative decision was made, except in cases where any law provides otherwise (Art. 46 para. (1) ALL PRC). However, a people's court shall not accept a complaint involving real property filed more than 20 years after the alleged administrative action was taken or a complaint involving any other dispute filed more than five years after the alleged administrative action was taken (Art. 46 para, (2) ALL PRC).

In Romania, the Administrative Litigation Law establishes the obligation to exercise an administrative appeal before initiating a legal action in the administrative litigation court. This appeal can be made either gracefully to the issuing authority of the act or hierarchically to the authority hierarchically superior to the issuing one (Art. 7 ALL R). The public authority has an obligation to respond within 30 days to the administrative appeal. If t he person is dissatisfied with the response, they will be able, within 6 months from the date of communication, to request the administrative litigation court to cancel the harmful act

31 Anton Trăilescu și Alin Trăilescu, *Legea contenciosului administrative: Comentarii și explicații* (4th edn, CH Beck 2018) 213.

32 See Decision no 4261/2008 (High Court of Cassation and Justice of Romania Administrative and Fiscal Litigation Section, 21 November 2008) <https://www.scj.ro/en/736/Search-jurisprudence> accessed 1 March 2023.

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(Art. 11(1) ALL R). For well-grounded reasons, in the case of the individual administrative act, the request can be submitted beyond the 6-month deadline but by no later than one year from the date of communication of the act (Art. 11(2) ALL R). Normative administrative acts may be challenged at any time at the administrative court.

In both systems, the requests addressed to the court are generally judged in open session, except those involving any state secret or individual privacy or as otherwise provided for by any law.

Both systems ensure the objectivity of judicial activity, allowing the recusal of judges when there are suspicions of personal interest (Art. 54 ALL PRC and Art. 44 of the Romanian Civil Procedure Code).

In both countries, the introduction of the action in administrative litigation does not determine the legal suspension of the contested administrative act. Suspension can only operate on request and under certain conditions . Thus, in China, the suspension of the execution of the administrative act may be ordered by the court if:

1) The defendant deems it necessary to suspend execution.

2) The plaintiff or an interested party files a motion for suspending execution, and the court deems that the execution of the alleged administrative action will result in irreparable losses and that its suspension will not damage the national interest or public interest.

3) The court deems that the execution of the alleged administrative action will cause any major damage to the national interest or public interest.

4) Suspension is required by any law or regulation.

In Romania, Law No. 554/2004 enshrines the possibility of the court to order the suspension of the execution of the administrative act in well-justified cases and for the prevention of imminent damage. This can be done upon the request of the injured person made either with the introduction of the preliminary administrative complaint (Art. 14 of Law No. 554/2004) or together with the main action or a separate action until the resolution of the action is reached (Art. 15 of Law No. 554/2004).[33]

The suspension of the execution of the administrative act is an exception to the rule of ex officio execution of the administrative act,[34] it can only be ordered under the conditions expressly provided by law, the exceptions being of strict interpretation and application[35] (*exceptio est strictissimae interpretationis*).

The object of the request for suspension submitted to the court is always an administrative act; if it is requested to suspend another document having the legal nature of an administrative operation (references, notices, certificates, etc.), the action to suspend it will be rejected as inadmissible.[36]

The measure of suspending the execution of the administrative act pronounced by the court decision is ordered until the judgment of the substantive court, thus having a limited duration in time. However, the institution of the suspension of the execution of the administrative act plays a crucial role in the administrative litigation processes because it is an effective means

33 For a detailed research of this legal institution, see Cătălin-Silviu Săraru, 'Suspendarea prin hotărâre judecătorească a executării actului administrativ' (2019) 3 Dreptul 116.

34 See Decision no 44/2006 'Referitoare la excepţia de neconstituţionalitate a dispoziţiilor art 14 alin (1), (2) şi (4) din Legea contenciosului administrativ nr 554/2004' (Constitutional Court of Romania, 24 January 2006) <https://legislatie.just.ro/Public/DetaliiDocument/69301> accessed 1 March 2023.

35 Vedinaş (n 7) 286.

36 ibid 288.

of protection established by law, which aims to prevent the occurrence of damage through the execution of an administrative act on which there are doubts of legality.

Unlike Romanian legislation, the Administrative Litigation Law in China establishes the possibility for the court to order, in certain cases, anticipated execution of the payment obligations by administrative agencies, which serves to protect fundamental human rights. Thus, if an administrative agency fails to pay and fulfil its payment obligations, according to the law, any consolation money, minimum subsistence, or social insurance benefits for work-related injury or medical treatment, a people's court may enter a ruling to grant advance enforcement if the plaintiff files such a motion, the rights and obligations between the parties are clear. A denial of advance enforcement will seriously affect the subsistence of the plaintiff (Art. 57 ALL PRC).

In principle, **mediation in administrative disputes** is not allowed in both legislation.

Mediation is regulated in Romania by Law No. 192/2006.[37] This law defines mediation as a way of resolving conflicts amicably, with the help of a third person specialised as a mediator, under conditions of neutrality, impartiality, confidentiality and with the free consent of the parties (Art. 1 para. (1) from Law No. 192/2006).

According to the provisions of Art. 2 para. (4) from Law No. 192/2006, strictly personal rights cannot be the subject of mediation, such as those regarding the status of the person, as well as any other rights that the parties, according to the law, cannot dispose of by convention or in any other way allowed by law. Or, in the administrative dispute, the issuing authority and the injured person cannot rule by convention on the legality of the contested administrative act. The doctrine showed that the public interest and the legality of administrative acts cannot be negotiated. Compromise solutions are incompatible with the precision and rigour that public authorities must demonstrate in carrying out their activities.[38]

Mediation in administrative litigation may be used with regard to the civil side of the administrative litigation process respectively, to determine the amount and methods of payment of compensation for the material and moral damages requested by the injured party as a result of the annulment of the harmful administrative act by the court of judgment.

Also, mediation can be used in administrative litigation in cases where it is expressly mentioned by law. Such a case is represented by the possibility of resorting to mediation in the procedure for forced execution of administrative-fiscal acts (see Art. 230[1] of the Fiscal Procedure Code and the Order of the President of the National Fiscal Administration Authority No. 1757/2019 *for the approval of the procedure of mediation, as well as the documents that the debtors present, to support the economic and financial situation)*.[39]

In China, the Administrative Litigation Law states that in the trial of an administrative case, a people's court may not conduct mediation unless the case involves administrative compensation or indemnity or an administrative agency's exercise of discretionary power prescribed by any law or regulation. Mediation shall be conducted under the principle of free

37 Law of Romania no 192/2006 On Mediation and the Organization of the Mediator Profession 'Privind medierea și organizarea profesiei de mediator' of 16 May 2006 <https://legislatie.just.ro/Public/DetaliiDocument/71928> accessed 1 March 2023.

38 Verginia Vedinaș și Vasile Cătălin Gentimir, 'Poate fi utilizată procedura medierii în litigiile generate de activitatea administrației publice? Aspecte rezultate din activitatea Curții de Conturi a României' (2017) 1 Dreptul 152.

39 Order of the President of the National Fiscal Administration Authority no 1.757 'Pentru aprobarea Procedurii de mediere, precum și a documentelor pe care debitorii le prezintă în vederea susținerii situației economice și financiare' of 28 June 2019 <https://legislatie.just.ro/Public/DetaliiDocument/215678> accessed 1 March 2023.

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will and legality, without detriment to the national interest, public interest, or lawful rights and interests of others (Art. 60 ALL PRC).

In China, the defendant's non-presentation of the defence does not affect the judgment of the case by the People's Court (Art. 67 ALL PRC). In Romania, the judge will order according to the provisions of Art. 201 para. (1) of the Code of Civil Procedure, the communication of the summons request to the defendant, noting that they have the obligation to file a response, under the penalty provided by law, within 25 days from the communication of the request. The mandatory nature of the meeting is also specified by Art. 17 para. (1) from Law No. 554/2004. Failure to file a response within the time limit set by the law entails forfeiture of the defendant's right to propose evidence and to invoke exceptions, apart from those of public order, if the law does not provide otherwise (Art. 208 para. (2) of the Code of Civil Procedure).

In Romania, the court has a wide margin of appreciation of the illegality that is the basis of the pronouncement of the decision to cancel the administrative act, not being limited to the aspects that the court can investigate and that fall under the dome of legality. In China, the court can annul the administrative act where the alleged administrative action falls under any of the following circumstances, according to Art. 70 ALL PRC:

1) Insufficiency in primary evidence.

2) Erroneous application of any law or regulation.

3) Violation of statutory procedures.

4) Overstepping of power.

5) Abuse of power.

6) Evident inappropriateness.

Both systems give priority to the public interest in the adjudication of administrative disputes. The Administrative Litigation Law of China expressly states that the court can find the illegality of the administrative act but will not be able to annul it if the annulment will cause any significant damage to the national interest or public interest (Art. 74 ALL PRC). In Romania, although the priority of the public interest is a corollary of the entire administrative law, the Administrative Litigation Law seeks to find more of a balance between the public interest and the private interest, shown in Art . 28 (1) that '*The provisions of this law are supplemented by the provisions of the Civil Code and those of the Civil Procedure Code, to the extent that they are not incompatible with the specific power relations between the public authorities, on the one hand, and the persons injured in their rights or their legitimate interests, on the other hand*'.

Due to the importance they have for the fundamental rights of citizens, administrative disputes require speedy judgment. Unfortunately , following the amendment in 2018 of the Administrative Litigation Law in Romania, the emergency trial was abandoned, especially for these disputes. We assert the urgent adjudication of the requests addressed to the administrative litigation court was justified due to the dual nature of administrative acts , which involve both the pursuit of the general interests of a community and the protection of the individual interests of its members.[40]

Therefore, the expeditiousness of judging the causes of administrative litigation is imposed by the fact that, on the one hand, it is necessary to urgently repair the dysfunctions within

40 Antonie Iorgovan si altii, Legea contenciosului administrativ: *Legea nr 554/2004 (cu modificările şi completările la zi): comentariu şi jurisprudenţă* (Universul Juridic 2008) 294-9.

the public authority due to non-compliance with legal powers and, on the other hand, the operation of the public authority unilaterally by issuing illegal administrative acts can cause serious damage to the rights and legitimate interests of citizens. Indeed, even in the old regulation, the legislator did not establish guarantees to ensure compliance with the principle of urgent adjudication of administrative disputes established by Art. 17 para. (1) from Law No. 554/2004, rendering the principle ineffective in practice. As a result, the new regulation should have established guarantees of compliance with this principle in the form of sanctions instead of completely removing it from the adjudication of administrative litigation requests.[41]

Under the empire of the old regulation, even if the request was resolved urgently and with priority, this did not affect the procedural guarantees of constitutional rank.[42] Thus, the trial of the request was done with the summons of the parties who could, in this way, exercise their right to defence guaranteed by Art. 24 of the revised Constitution, and the litigation court could administer, upon request or ex officio, any evidence it considers necessary, conclusive and useful to realise the parties' right to a fair trial guaranteed by Art. 21 para. (3) of the Constitution.

In China, we note that the administrative litigation process's speed is guaranteed by the Administrative Litigation Law expressly providing that 'a people's court of first instance shall enter a judgment within six months from the day when a complaint is docketed. Any extension of the aforesaid period as needed under special circumstances shall be subject to the approval of a Higher People's Court. Where a Higher People's Court trying a case as a court of first instance needs to extend the aforesaid period, the extension shall be subject to the approval of the Supreme People's Court' (Art. 81 ALL PRC).

Unlike the administrative litigation procedure in Romania, in China, it is possible to use a simplified procedure with a much shorter trial period. Thus, A rticle 82 ALL PRC shows that in trying the following administrative cases, a people's court of first instance may apply the summary procedure if it deems that the facts are clear, the rights and obligations between the parties are clear, and the dispute is minor:

1) The alleged administrative action was taken on the spot according to the law.

2) The amount involved in the case is not more than 2,000 yuan.

3) The case involves the disclosure of open government information.

For administrative cases other than those mentioned in the preceding paragraph, the summary procedure may be applied with the consent of all parties.

The process in which the simplified procedure is applied is judged by a single judge within 45 days from the date of registration of the complaint (Art. 83 ALL PRC).

In both systems, against the decision of the administrative court that ruled in the first instance, only one way of appeal can be exercised at the higher court in the degree - in Romania, the exceptional way of recourse and in China, the ordinary way of appeal. In both countries, the right of appeal can be exercised within 15 days of the decision's communication (Art. 20(1) ALL R and Art. 85 ALL PRC). Unlike Romanian law, the speedy trial of the

41 For a discussion of specific principles at the international level, see Cristina Elena Popa (Tache), 'Administrative Review and Reform Movements from the Perspective of International Investment Law' in J Cazala and V Zivkovic (eds), *Administrative Law and Public Administration in the Global Social System: Contributions to the 3rd International Conference 'Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective', Bucharest, 9 October 2020* (ADJURIS 2021) 212.

42 Cătălin-Silviu Săraru, *Drept administrative. Probleme fundamentale ale dreptului public* (CH Beck 2016) 532.

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appeal is ensured by the provision that 'a people's court trying an appeal case shall enter a final judgment within three months of receipt of a written appeal. Any extension of the aforesaid period as needed under special circumstances shall be subject to the approval of a Higher People's Court. Where a Higher People's Court trying an appeal case needs to extend the aforementioned period, the extension shall be subject to the approval of the Supreme People's Court' (Art. 88 ALL PRC).

In both systems, it is possible to request the review of the administrative litigation decision if it is erroneous due to the discovery of new evidence, the court ruled on things that were not requested, the legal instrument based on which the original judgment or ruling is entered has been revoked or modified, the judge was definitively convicted of a crime related to the case being tried, etc. (Art. 91 ALL PRC and Art. 509 of the Civil Procedure Code of Romania).

Concerning the execution of the judgments issued by the administrative litigation courts, both systems recognise that the obligations to make included in these judgments involving the personal fact of the debtor public authority (for example, the obligation to issue or modify an individual administrative act) do not can be enforced directly. Other persons cannot fulfil these obligations, and it is not possible to ask the court for the authorisation of the creditor to execute the obligation instead of the public authority as in common law.

The execution of these judgments cannot be carried out through the bailiff under the conditions of the common law regulation of the Code of Civil Procedure because they cannot compel the public authority to execute an obligation to which belongs to its exclusive competence.[43] To determine the public authority to enforce the court decision establishing these obligations, both procedures provide a system of fines and penalties applicable to the public authority and its leader (Art. 96 ALL PRC and Art. 24 ALL R).

In both countries, it is recognised that administrative litigation laws are special laws derogate from common law provisions and are supplemented by the provisions of the Code of Administrative Procedure to the extent that the latter are compatible with the specifics of public power relations (Art. 101 ALL PRC and Art. 28(1) ALL R).

4 CONCLUSIONS

The two systems of administrative litigation present many aspects resolved by the legislator in a similar way. Thus, both are states with administrative jurisdictions included in the judicial system; in both systems, the judicial review concerns the legality of the administrative act, not its appropriateness; the defendant is the public authority that issued the act, regardless of whether it has a legal personality or not; both laws recognise the possibility of the third party injured by an administrative act intended for another subject of law to address the administrative litigation court; provision of the contested administrative act and other evidence by the defendant public authority; the prohibition of principle to use mediation in administrative

43 Anton Trăilescu și Alin Trăilescu, *Legea contenciosului administrative: Comentarii și explicații* (5th edn, CH Beck 2021) 319.
Jurisprudence states that "From the normative content of art. 24 para. (1) from Law no 554/2004, it is noted that the obligations whose non-execution leads to the application of the fine sanction, are obligations to "do", that is, obligations to issue an administrative act, to modify such an act, to issue a certificate or a registered or to carry out an administrative operation, obligations that cannot be enforced by force, due to their specificity, also taking into account the issuer of the act who always has the quality of public authority" – see Decision no 3470/2014 (High Court of Cassation and Justice of Romania Administrative and Fiscal Litigation Section, 25 September 2014) <https://www.scj.ro/en/736/Search-jurisprudence> accessed 1 March 2023.

disputes; both systems give priority to the public interest in judging administrative disputes; in both states, against the decision of the administrative court that judged the merits of the dispute, only one appeal can be exercised to the higher court in the degree, etc.

On the other hand, there are also issues resolved differently by the legislators in the two systems. Thus, the scope of administrative acts that cannot be subject to the control of administrative litigation courts is wider in China; China's Administrative Litigation Law provides an exhaustive review of the evidence that can be used in administrative litigation; the administrative appeal before exercising the action in administrative litigation is optional in China, while in Romania it is mandatory; in Romania, in principle, any normative administrative act can be challenged at any time at the administrative court, while in China, although the legislator has shown a great openness in the last decade, there are still some aspects of interpretation discussed in doctrine and in jurisprudence; the speed of the administrative litigation process is ensured in China by imposing by law a maximum duration of the substantive litigation of 6 months and the appeal litigation of 3 months, while in Romania such terms are not fixed, which unfortunately leads to a very long process time, etc.

The regulation of administrative litigation must provide specialised courts with clear rules of procedure capable of establishing the procedural rights of the litigating parties, with the ultimate aim of protecting the substantial rights violated by illegal administrative acts.[44]

In both systems, a vital tool that can increase the speed and ease of administration of evidence in administrative litigation is the computerisation of the courts. By creating an online file system, both parties could submit and consult all the documents electronically using personalised access codes. Additionally, the utilisation of videoconferencing technology for hearing witnesses' testimonies and expert hearings can further streamline the process.

Finally, we emphasise the remarkable progress that administrative litigation systems have achieved in recent decades, which currently provides a guarantee for the protection of fundamental human rights in the adoption of administrative decisions and in their judicial control.

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44 Verginia Vedinaş, Liliana Vişan şi Diana-Iuliana Pasăre, 'Argumentare juridică europeană în favoarea necesității modificării Legii contenciosului administrative: Succintă prezentare a Legii nr 262/2007' (2007) 3 Revista de Drept Public 77-8.

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Opinion Article

«NE BIS IN IDEM» PRINCIPLE IN CRIMINAL PROCEEDINGS – COMPARATIVE ANALYSIS WITH INTERNATIONAL INSTRUMENTS AND KOSOVO LEGISLATION

Orhan M. Çeku[1] and Arian Kadriu[2]

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Keywords: "Ne bis in idem,", criminal justice, international standards of criminal procedure, fairness of punishment

ABSTRACT

Background: *Criminal procedure law consists of legal principles, such as a fair and impartial trial and within a reasonable time, presumption of innocence, the principle "in dubio pro reo," independence of the court, equality of parties, the principle "ne bis in idem"[3] etc. Among*

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Principles are rules, which are defined by the Criminal Procedure Code. For these principles in more detail, see: Code of the Republic of Kosovo No 08/L-032 'Criminal Procedure Code' of 14 July 2022 [2022] OG 24, arts 3, 4, 5.

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the main principles recognised by International Conventions, the Constitutions of States, and Criminal Procedure Laws is the principle, "The right not to be tried twice for the same offence," or as it is also known, "ne bis in idem." The principle "in bis in idem" is used in Kosovo's criminal proceedings, and recognition of this principle by international convention, including its recognition by the Law of the European Union, is analysed in this paper.

The legislation of Kosovo was established with the influence and assistance of the international community, which had an administration mandate until 17 February 2008, the date on which Kosovo declared its independence and, hence, separated from the former Yugoslavia. The new state is not a member of the UN but is officially recognised by more than 100 countries. In 2010, the International Court of Justice issued the Advisory Opinion which concluded, "The declaration of independence in respect of Kosovo on 17 February 2008 had not violated general international law."[4]

The purpose of this paper is to emphasise the importance of this principle when dealing with criminal cases before regular courts, the legal security that this principle provides to society, and the implementation of international legal instruments in the national law.

***Methods:** The paper uses methods of analysis and synthesis, the descriptive method, as well as the method of doctrinal interpretation of legal norms of criminal proceedings.*

***Results and conclusions:** This principle has been accepted by international instruments and by Kosovo's constitutional and legal system. The application of this principle in the criminal justice system in Kosovo forms legal certainty for citizens and constitutes protection of the rights and legitimate interests of persons involved in criminal proceedings. Kosovo has applied international standards in the implementation of criminal legislation and has directly incorporated international human rights instruments into its constitutional system (International Covenant on Civil and Political Rights adopted by the UN in 1966, ensued by the European Convention for the Protection of Human Rights and Fundamental Freedoms).*

1 INTRODUCTION

The effectiveness of the legal system in preventing and combating crime depends on the legal norms of the criminal justice. The criminal law consists of material norms and criminal procedure law. The Tort Law is primarily shaped by the Criminal Code[5] as the basic law, which incriminates human actions as illegal acts and foresees criminal sanctions and other special laws governing specific areas (Juvenile Justice Code[6], Law on Criminal Liability of Legal Persons[7], Law on Prevention and Combating Cybercrime[8], etc.). While it is formal, procedural law is regulated by the norms of the Criminal Procedure Code (hereinafter referred to as CPC).[9] Criminal proceedings are the set of legal norms collected in the CPC that foresee the progress of actions to be taken by state bodies (Police, State Prosecutor, and

4 For Advisory Opinion of International Court of Justice, see more: *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion of 22 July 2010) [2010] ICJ Rep 403 <https://www.icj-cij.org/case/141> accessed 10 May 2023.

5 Code of the Republic of Kosovo No 06/L-074 'Criminal Code of the Republic of Kosovo' of 23 November 2018 [2019] OG 2.

6 Code of the Republic of Kosovo No 06/L-006 'Juvenile Justice Code' [2018] OG 17.

7 Law of the Republic of Kosovo No 04/L-030 'On Liability of Legal Persons for Criminal Offences' [2011] OG 16.

8 Law of the Republic of Kosovo No 03/L-166 'On Prevention and Fight of the Cyber Crime' [2010] OG 74.

9 Code No 06/L-074 (n 5).

Courts) for the application of the Tort Law. These listed actions relate to the initiation of investigations by the state prosecutor and continue through to the final ruling rendered by the national courts.

Implementation of the law on criminal procedure is based on the basic principles of the trial, such as a fair and impartial trial and within a reasonable time, presumption of innocence, the principle "in dubio pro reo," independence of the court, equality of parties, etc. Among the main principles recognised by International Conventions, the Constitutions of States, and the Law on Criminal Procedure, is the principle, "*Not to be punished twice for the same criminal offence*" or as it is also known, *"ne bis in idem."*

The principle of ne bis in idem, otherwise known in English as the term, double jeopardy, is a constitutional and procedural right in the constitutions or the domestic legislations of many states. The purpose of a provision is to protect the individual against the arbitrary power of a state and to prevent a state from prosecuting someone for the same offence twice. In addition to being held as a constitutional right and a human right, ne bis in idem is sometimes viewed as a procedural defence to a criminal charge that bars its prosecution.[10]

Several research questions are addressed in this paper, including: How is this principle regulated by international conventions and national law? In which cases should this principle be implemented? Are there cases in which the criminal procedure established by a final decision can be reviewed?

2 "NE BIS IN IDEM" PRINCIPLE IN THE INTERNATIONAL CONVENTIONS

The *ne bis in idem principle* also found strong support from international conventions approved by the UN and the Council of Europe and has also been widely applied in EU law.

This principle is strongly enshrined in the UN International Covenant on Civil and Political Rights, 1966, Article 14, paragraph 7. According to this Covenant:

> *"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."*[11]

Member States of the UN must incorporate this principle into their domestic legislation.

The International Covenant on Civil and Political Rights, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, are applicable directly to Kosovo's legislation and constitutional system. Although Kosovo is not a member of the UN and the Council of Europe, and has not signed this Convention, it is directly incorporated into their legislation by constitution. According to the Constitution:

> *"Human rights and freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly implemented in the Republic of Kosovo and have priority, in case of conflict, over provisions of laws and other acts of public institutions:*
>
> *(1) Universal Declaration of Human Rights;*

10 'Article 8: Ne Bis in Idem (Double Jeopardy): Commentary' in VM O'Connor and others (eds), *Model Codes for Post-Conflict Criminal Justice, vol 1 Model Criminal Codes* (US Institute of Peace Press 2007) pt 1, s 4, 51.

11 International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) art 14/7 <https://undocs.org/en/A/RES/2200(XXI)> accessed 10 May 2023.

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> *(2) The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;*
>
> *(3) International Covenant on Civil and Political Rights and its Protocols; ……….].”*[12]

This principle is also included in the European Convention for the Protection of Fundamental Rights and Freedoms, respectively in Protocol No. 7, adopted in 1984 (Article 4). The Convention provides that States may not deviate from a guarantee not to be tried or convicted in the same matter, nor in exceptional circumstances. According to this Protocol:

> *“1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
>
> *2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*
>
> *3. No derogation from this Article shall be made under Article15 of the Convention”.*[13]

All Council of Europe members are obliged to respect this principle by incorporating it into their national law. A deterrence of this principle may result in submission of the case to the European Court of Human Rights, and States may be penalised for failing to respect it.

Another important part of the conventions, approved by the Council of Europe, is the European Convention on the International Validity of Criminal Judgments (European Treaty Series – No. 70, The Hague, 28.V.1970). This convention was adopted in 1970 and, in Article 53, the first paragraph details this principle.

> *“1. A person in respect of whom a European criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:*
>
> *a. if he was acquitted;*
>
> *b. if the sanction imposed:*
>
> *i) has been completely enforced or is being enforced, or*
>
> ii) ha*s been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or*
>
> *iii can no longer be enforced because of lapse of time;*
>
> *c. if the court convicted the offender without imposing a sanction.”*[14]

This principle is also included in two other international instruments: the Geneva Convention relative to the Treatment of Prisoners of War, dated 12 August 1949, and the Statute of the International Criminal Court. These two conventions relate to the development of war or any armed conflict.

According to the Geneva Convention relative to the Treatment of Prisoners of War:

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12 Constitution of the Republic of Kosovo K-09042008 of 9 April 2008 (as amended of 30 September 2020) art 22 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 10 May 2023.

13 Council of Europe, *European Convention of Human Rights: as amended by Protocols Nos 11, 14 and 15, supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECtHR 2014) Protocol No 7, art 4 <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c> accessed 2 December 2022.

14 European Convention on the International Validity of Criminal Judgments (adopted 28 May 1970 Hague) art 53/1 <https://rm.coe.int/1680072d3b > accessed 10 May 2023.

> *"No prisoner of war may be punished more than once for the same act or on the same charge."*[15]

The signatory States must apply the provisions of this Convention, even if any of the parties involved in the war or other armed conflict do not accept the state of war.[16]

The principle has also been accepted by the Statute of the International Criminal Court. The acceptance of this principle by the Rome Statute constitutes a significant achievement in the treatment of war crimes and the development in international criminal law. The Rome Statute provides for this principle in Article 20 as follows:

> "*1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.*
>
> *2. No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court.*
>
> *3. No person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*
>
> (a) Were for the purpose of shielding the person concerned from criminal respons*ibility for crimes within the jurisdiction of the Court; or*
>
> *(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."*[17]

At the international level, as can be seen, numerous important international instruments have been approved, giving important treatment to this principle.

This principle has been addressed by the European Court of Human Rights (hereinafter referred to as ECHR) in the cases known as Blokker v. Netherlands, Kurdov and Ivanov v. Bulgaria, Sergey Zolotukhin v. Russia, R.T. v. Switzerland, Storbrdten v. Norway, Manasson v. Sweden, Franz Fischer v. Austria, Gradinger v. Austria, Oliveira v. Switzerland. We analysed the cases of Blokker v. Netherlands and Franz Fischer v. Austria as the case studies in this paper.

On the 11th of July 2000, in the first case studied (Blokker v. Netherlands, case no. 45282/99), the ECHR rendered a decision declaring the request of H.P. Blokker against the Netherlands as inadmissible. The court concluded that the imposition of an administrative measure on the user of alcohol did not constitute a new criminal case, and that the state of the Netherlands had not violated human rights in such a case, thus, the request was rejected as inadmissible.[18] In this specific case, the Court has created a case law which is valid in the application of the principle, ne bis in idem. According to this decision, the application of additional administrative measures that were not imposed through the court process did not equate to a double jeopardy for the case.

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15 Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949 Geneva) art 86 <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war> accessed 18 February 2023.

16 ibid, arts 1, 2.

17 Rome Statute of the International Criminal Court (adopted 17 July 1998) art 20 <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court> accessed 10 May 2023.

18 *Blokker v the Netherlands* App no 45282/99 (ECtHR, 7 November 2000) <https://hudoc.echr.coe.int/eng?i=001-5526> accessed 10 May 2023.

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In the case of Franz Fischer v. Austria, the Court declared admissible the request of the party against Austria on the violation of Article 4 of Protocol 7 of the ECHR.[19] On the 29th of August, 2001, in application no. 37950/97, the ECHR fined the state of Austria concerning the ascertained violation. The appellant alleged that he was convicted twice of driving under the influence of alcohol, first by the District Administrative Authority that ordered him to pay a fine of 22,010 Austrian shillings (ATS) with twenty days imprisonment in absentia. The final sentence included a fine of 9,000 ATS with nine days imprisonment in absentia imposed for driving under the influence of alcohol.

The second conviction came by the Regional Court according to the Criminal Code, which fined the applicant for causing death by negligence while intoxicated due to alcohol consumption with six (6) months of imprisonment. The convicted party filed an appeal to the Court of Appeal, which was rejected; however, the sentence was reduced from six (6) months to five (5) months of imprisonment. According to the applicant, the sentence by the criminal courts violated Article 4 of Protocol No. 7, considering that the sentence was not limited to Article 80 of the Criminal Code, but extended to Article 81 § 2. With this decision, the ECHR recalled that the purpose of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been terminated with a final ruling.[20] In this case, two sentences of imprisonment were imposed by two different state authorities, the Administrative Authority and the Regional Court, for the same legal issue. For this reason, the ECHR decided this case enacted the clause.

Such decisions serve to sublimate case law in respect with the basic principles of justice and criminal justice principles, in particular.

3 EU LAW CONCERNING THE PRINCIPLE "NE BIS IN IDEM"

The legal principle of ne bis in idem limits the possibility that a defendant will be repeatedly prosecuted for the same act, work, or facts. Although few would dispute its importance with the regulation of transnational justice, there is still no universally-accepted rule or provision in bis in idem; although, to some extent, it is recognised and respected in Europe through Article 54 of the Convention on the Implementation of the Schengen Agreement (CISA; integrated into EU law by the Treaty of Amsterdam) and Article 4 of the 7th Protocol to the European Convention on Human Rights. The relevant case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) has implications for the criminal and administrative law systems in European states, as well as for the interpretation and application of the principle in some areas of EU law.[21]

> *The ne bis in idem principle is included in many national, European and international legal instruments. Within the European Union's area of Freedom, Security and Justice, the main legal sources are Articles 54 to 58 of the Convention Implementing the Schengen Agreement ("CISA") and Article 50 of the Charter of Fundamental Rights of the European Union ("Charter"). In general, the objective of the ne bis in idem principle is to ensure that no one is prosecuted for the same acts in several Member States on account of the fact that he exercises his right to freedom of movement.*[22]

19 *Franz Fischer v Austria* App no 37950/97 (ECtHR, 29 May 2001) <https://hudoc.echr.coe.int/fre-press?i=001-59475> accessed 10 May 2023.

20 ibid.

21 Bas van Bockel, *The Ne Bis in Idem Principle in EU Law* (European Monograph Series, Kluwer Law International 2010).

22 ibid.

The principle is also included as grounds for refusal in several EU instruments on judicial cooperation in criminal matters, including mutual recognition instruments, such as the Framework Decision 2002/584/JHA on the European Arrest Warrant ("FD EAW") and the Directive 2014/41/EU on the European Investigation Order in criminal matters.[23]

Article 54 of the Schengen Agreement conceives the principle "ne bis in idem" as applicable between EU member States. This article states, "*A person whose judgment has been finally settled in a Contracting Party may not be prosecuted in another Contracting Party for the same acts, provided that, if a sentence had been imposed, it has been executed, it is actually in the process of implementation or can no longer be implemented under the laws of the penal Contracting Party.*"[24] The principle is also defined in Article 50 of the Charter of Fundamental Rights of the European Union, stating, *"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."*[25] The implementation of this principle is an example of the harmonisation of legislation in EU's criminal law.

Incorporation of the principle into the framework of EU law enabled the ECJ to adhere to interpretation by means of preliminary decisions under Article 35 of the UNION, and thereby ensures a consistent application of the principle in all member States.

> *"In addition to answering some specific questions, the Court has given basic instructions on the interpretation of the principle. The Court has consistently ruled that Articles 54-58 CISA are based on the concept of mutual recognition: on its landmark decision on the Gözütok and Brügge issues. 187/01 and 385/01, Gözütok and Brügge, the decision of..., made clear that where further prosecution is (definitively) prohibited under the national law of a Member State, when a decision has been taken, this shall apply to the whole Union."*[26]

Therefore, the Schengen Agreement has also been strengthened by the European Union Court of Justice's decisions, and the case law that recognises this principle has already been established. This is the first time that this principle finds unified application within several States, integrating in a supranational mechanism such as the EU. Regarding approximation of legislation in the field of criminal law, it is one of the most significant achievements made within the EU. With criminal law as one of the most important areas of justice generally, the importance of the principle's unification within the EU can be seen.

4 "NE BIS IN IDEM" PRINCIPLE IN CRIMINAL PROCEEDINGS IN KOSOVO

Criminal procedure law is regulated by law (in Kosovo, with the Criminal Procedure Code) and is based on fundamental principles, such as a fair and impartial trial, within a reasonable time, presumption of innocence, and the principle "*in dubio pro reo,*" independence of the court, equality of parties, etc. One of the main principles that finds wide application in

23 CJEU, *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union* (Eurojust 2017) 2, doi: 10.2812/828017.

24 Martin Wasmeier, '3. The principle of *ne bis in idem*' (2006) 77 (1-2) Revue internationale de droit pénal 121, doi: 10.3917/ridp.771.0121.

25 Charter of Fundamental Rights of the European Union (2012/C 326/02) art 50 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> accessed 10 May 2023.

26 Cases C-187/01 and 385/01, *Gözütok and Brügge*, judgment of 11.2.2003, [2003] E.C.R. I-1345<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=48044&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=365772>.

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criminal procedure law is the principle, *"The right not to be tried twice for the same offence,"* also known as, *"ne bis in idem" (double jeopardy)*.[27]

Under this principle, a person cannot be prosecuted more than once for the same crime. Its report is twofold: on one hand, to provide judicial protection to persons against the ius puniendi of the state, as they have been subjected to a criminal prosecution (as part of the principles of fair trial and equality) and, on the other hand, to guarantee legal security and compliance with "res judicata."[28]

The principle, in bis in idem, according to which a physical person cannot be tried twice for the same case (the synonymous name for this is res judicata – a matter judged). It is a legal aphorism deriving from ancient Roman sources and expresses the rule that no new criminal process can be conducted against the same person for an act that has been subject to final judgment. The Rule is a consequence of so-called material omnipotence and represents a negative procedural assumption (procedural obstacle) for the development of a new process on the same issue.[29]

The Constitution of the Republic of Kosovo[30] provides for the principle in bis in idem in the second chapter, namely *"Fundamental rights and freedoms,"*[31] i.e., the principle is expressed and is recognised as a human right. Therefore, not only is it a principle in criminal procedure, but is also categorised in the range of fundamental human rights. According to the Constitution:

> *"No one can be tried more than once for the same offence."*[32]

Although the article is concise, the Constitution has laid out the foundations of its application in criminal case law. This principle means that no one can be prosecuted, nor punished, for the offence for which he is acquitted or tried by final court ruling, or for which the indictment was rejected by a final ruling, or for which the procedure was terminated by a final ruling. This article, due to its short length, provides opportunities for challenges, because it does not precisely mention (as is customary in other constitutions) the cases according to which this prohibition occurs. There is no provision given in the constitutional text that this problem will be regulated more closely by law to precisely emphasise cases of no trial for the same criminal offence.[33]

The Constitution does not provide for cases where the same case for criminal offences may be reopened. This is regulated by the Kosovo CPC. In principle, the same case cannot be reopened unless new evidence or facts have been discovered which were not known at the time of the trial, or if there were significant violations in the preliminary procedure that could have influenced its performance.

The Constitution prohibits prosecution and punishment in the same matter, generally providing for this prohibition. This is general and applies to everyone, because in Article 34, it demonstrates its breadth by using the word "nobody." It does not state precisely in which cases the Constitution defines the right of each person not to be tried twice for the same criminal act, but this situation is resolved by the provisions of the criminal law, so that it regulates cases when prosecution and punishment for the same issue are forbidden; the same

27 Code No 08/L-032 (n 3) arts 3, 4, 5.

28 Opinion of Advocate-General Ruiz-Jarabo Colomer in Cases C-187/01 and C-385/01 (delivered on 19 September 2002) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62001CC0187&from=FI> accessed 10 May 2023.

29 Ejup Sahiti, Rexhep Murati dhe Xhevdet Elshani, *Komentar Kodi i Procedurës Penale* (GIZ 2014) 60.

30 Constitution K-09042008 (n 12).

31 ibid, ch 2.

32 ibid, art 34.

33 Enver Hasani dhe Ivan Čukalović, *Komentar Kushtetuta e Republikës së Kosovës*, bot 1 (GIZ 2013) 115.

person cannot be punished twice for the same offence. With the determination that the court decision cannot be changed to the detriment of the defendant while using an extraordinary legal remedy, the Constitution accepts the principle of prohibition as *"reformatio in peius."* This right is guaranteed by Article 34. The Constitution is an absolute protected right and is not subject to avoidance at any cost, that is, even during times of emergency (see Article 56, paragraph 2).[34] This principle defines a constitutional human right in Kosovo.

4.1 Regulation of the principle with the Criminal Code of the Republic of Kosovo

This principle is of practical importance in the sense that, at the same time, two criminal proceedings cannot be conducted on the same issue. The importance of this principle contributes primarily to the realisation of citizens' legal security as well as to the legality of criminal law.[35]

"Ne bis in idem" is well specified in the Kosovo CPC. The code provides for the range of basic principles to follow during the development of all phases of the criminal procedure. According to Article 4:

> *"No one may be prosecuted and convicted of a criminal offence for which he has been acquitted or for which he has been convicted by a final court decision, respectively if the criminal proceedings against him have been terminated by a final decision of a court or the indictment has been rejected by a final court decision. A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code."*[36]

In practice, it is not always easy to prove the identity of the act to determine whether it is the same act or not. Sometimes, provided criteria is sufficient for the place, time, and manner of execution to prove the compliance of the act with the final decision and the act for which the new procedure is being conducted. However, sometimes for procedural necessity, there is compliance of the act even when it is not related to the same occurrence. For example, when a person has been judged for the main offence (theft), he cannot be sued for any other concrete offence (such as causing damage to the item).[37]

Concerning the report of the indictment and the judgment, it is defined as: identity of the act expresses the rule that between the factual description of the act in the indictment and the factual description of the act in the enacting clause of judgment, there must definitively be compliance. Divergences between the act's factual description in the indictment and the enacting clause of judgment may lead to skipping the indictment or the incomplete resolution of the indictment, which is an essential violation of criminal procedure of absolute character.[38]

In the principle, "ne bis in idem," identifying the factual description of the act should not exist from the final judgment. Neither should the factual description of the act for which the new process is conducted or intended to be conducted be identified as this is an obstacle to the conduct of the new procedure. A review of the criminal procedure may be required if, despite the existence of the identity of the act, the new procedure has been conducted under certain legal conditions (Article 423, paragraph 1, under paragraph 1.4.). In accordance with

34 ibid 116.

35 Ismet Salihu, *Leksikon i së Drejtës Penale* (Printing Press 2022) 514.

36 Code No 08/L-032 (n 3) art 4.

37 Sahiti, Murati dhe Elshani (n 29) 60.

38 ibid.

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the principle of ne bis in idem as stated in Article 4, paragraph 1: "*No one may be prosecuted or punished for a criminal offence for which he has been tried in a meritorious manner, the existence of a meritorious judgment in a final form (whether it is about a judgement to release or punish) is an obstacle to a further trial of that criminal case.*" This circumstance should be considered by both the state prosecutor when pressing charges and the court when conducting proceedings and making a decision. The principle also applies to a case where a criminal proceeding has ceased for a criminal case according to a final decision.[39]

No one may be subject to trial for a criminal offence for which he has previously been acquitted or sentenced by a final decision (ne bis in idem – res judicata) in accordance with the law and criminal procedure of a State. However, where there is evidence for new facts, the criminal process may be reviewed in accordance with the law.[40]

The principle, in ne bis in idem, is of relative importance. Consequently, this principle does not apply in the procedures of extraordinary legal remedies in cases where final form judgments may be met, and where criminal proceedings may be conducted.[41]

Paragraph 2 of Article 4 provides for the possibility of amending the final court decision with extraordinary legal remedies only in favour of the convicted person. Based on this paragraph, the general rule emerges, stating that, except for cases where the Code foresees otherwise, the final court decision may be amended only in favour of the convicted person. The effect in favour of the convicted person is expressed even when the Supreme Court finds that the request submitted for the protection of legality to the prejudice of the defendant is founded, but in that case, it only finds the violation of the law without affecting the final decision (Article 438, paragraph 2).[42]

This article then relates to Article 419, paragraphs 1 and 2. According to the Criminal Procedure Code of Kosovo, "*Criminal proceedings terminated by a final ruling or a final judgment may be reopened upon the request of authorized persons only in instances and under conditions provided for by the present Code. The request for reopening of the criminal proceedings is filed with the Basic Court that rendered the decision.*"[43]

1. C*riminal proceedings terminated by a final judgment may only be reopened if*

1.1. it is proven that the judgment rests on a forged document or a false statement of a witness, expert witness or interpreter;

1.2. it is proven *that the judgment ensued from a criminal offence committed by a judge or a person who undertook investigative actions;*

1.3. new facts are discovered or new evidence is produced which, alone or in connection with previous evidence, appears likely to justify the acquittal of the convicted person or his conviction under a less severe criminal provision;

1.4. a person was tried more than once for the same offence or several persons were convicted of the same offence which could have been committed only by a single person or only by some of them; or

1.5. in the case of conviction for a continuous criminal offence, or some other criminal offences which under the law include several acts of the same kind or different kinds, new facts are

39 ibid 61.

40 Ejup Sahiti dhe Ismail Zejneli, *E drejta e procedurës penale e Republikës së Maqedonisë* (Universiteti i Evropes Juglindore në Tetovë 2017) 40.

41 Salihu (n 35) 514.

42 Sahiti, Murati dhe Elshani (n 29) 61.

43 Code No 08/L-032 (n 3) art 419/1.

discovered or new evidence is produced which indicates that the convicted person did not commit an act included in the criminal offence, of which he was convicted and the existence of these facts would have critically influenced the determination of punishment.[44]

There is an exception to the above-mentioned rule under Article 423, paragraph 2 of the CPC.

> *"Criminal proceedings terminated by a final judgment may be reopened only in favour of the defendant, except that if it is proven that the circumstances under paragraph 1.1 and 1.2 of the present Article have been a result of a criminal offence committed by the defendant or a person acting on his behalf against a witness, expert witness, interpreter, state prosecutor, judge or those close to such persons, criminal proceedings terminated by a final judgment may be reopened against the defendant. The reopening of criminal proceedings to the detriment of the defendant is only permissible within five (5) years of the time the final judgment was rendered."* [45]

So, the Code taken in full envisages that the review of the criminal procedure cannot be done to the defendants unless there are circumstances in which, if they were known at the time of the final ruling, would have been different. These situations must make the competent court judgment impartial and non-objective.

4.2 Respecting the Principle of ne bis in idem in Kosovo in the Trial of War Crimes

The Republic of Kosovo is a post-armed conflict society (referring to the war of 1998-1999), and as such, has faced the trial of war crimes. Initially, in the International Criminal Tribunal for the former Yugoslavia (ICTY), several cases of war crimes were tried for the citizens of Kosovo, and no new criminal processes have been developed for these decisions.

It should also be mentioned that post-war Kosovo was placed under the administration of the United Nations, under the "UNMIK"[46] mission. During the UNMIK Interim Administration, the hybrid judicial system was established in Kosovo. In this hybrid system, cases were tried by a mixture of judges, i.e., international and local judges. The ne bis in idem principle has been respected in all judgment cases.

The system of UNMIK courts ended with the Declaration of Independence of Kosovo on 17 February 2008. After the Declaration of Independence, special importance was given to the "EULEX" mission.[47]

"*EULEX's current mandate has been launched to cover the period until 14 June 2023 based on Council Decision CFSP 2021/904***.** *Within its mandate, the Mission undertakes monitoring activities and has limited executive functions. EULEX continues to support the Kosovo Specialist Chambers and Specialist Prosecutor's Office in line with relevant Kosovo legislation.*"[48]

44 ibid, art 423/1.

45 ibid, art 423/2.

46 United Nations Interim Administration Mission in Kosovo (UNMIK) was established by the Security Council in its Resolution 1244 (1999). See, United Nations Resolution 1244 (adopted 10 June 1999) <https://unmik.unmissions.org/united-nations-resolution-1244> accessed 10 May 2023.

47 The European Union Rule of Law Mission in Kosovo (EULEX) was launched in 2008 as the largest civilian mission under the Common Security and Defence Policy of the European Union. EULEX's overall mission is to support relevant rule of law institutions in Kosovo on their path towards increased effectiveness, sustainability, multi-ethnicity and accountability, free from political interference and in full compliance with international human rights standards and best European practices.

48 'What is EULEX?' (*EULEX Kosovo*, 2023) <https://www.eulex-kosovo.eu/?page=2,16> accessed 10 May 2023.

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To clarify the allegations of war crimes and crimes against humanity, Kosovo established "*The Kosovo Specialist Chambers and Specialist Prosecutor's Office*."[49] The establishment of this special court was made possible with the approval of constitutional amendments, namely amendment no. 24.[50]

The Kosovo Specialist Chambers and Specialist Prosecutor's Office were established pursuant to the international agreement ratified by the Kosovo Assembly, a Constitutional Amendment, and the Law on Kosovo Specialist Chambers and Specialist Prosecutor's Office. These authorities are temporary, holding a specific mandate and jurisdiction over crimes against humanity, war crimes, and other crimes under Kosovo law that were commenced or committed in Kosovo between 1 January 1998 and 31 December 2000, either by or against citizens of Kosovo or the Federal Republic of Yugoslavia. The Kosovo Specialist Chambers and the Specialist Prosecutor's Office have a seat in The Hague, the Netherlands. The staff, Judges, Specialist Prosecutor, and the Registrar are all international. This judicial system constitutes a special structure in the Kosovo justice system. It was established by the institutions of Kosovo and is considered part of the legislation of Kosovo, but its seat is not located in Kosovo. The professional and administrative staff are internationally located. To establish this judicial structure, Kosovo adopted Law No.05/L-053 on the Specialist Chambers and the Specialist Prosecutor's Office. This law, pursuant to Article 17, provides for the principle of ne bis in idem.

> *"In accordance with Article 34 of the Constitution of the Republic of Kosovo, a. no person shall be tried before another court of Kosovo for acts for which he or she has already been tried by the Specialist Chambers; b. no person shall be tried before the Specialist Chambers for acts which he or she has been tried by a court of Kosovo; c. no person shall be tried before the Specialist Chambers for acts which he or she has already been tried by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY")."*[51]

The Republic of Kosovo, on a constitutional and legal basis, is part of the group of democratic states that respect international standards of justice.

5 CONCLUSIONS

The principle, "*The right not to be tried twice for the same criminal offence,*" commonly known as "*ne bis in idem,*" is among the fundamental principles of criminal proceedings. It also expresses the constitutional right of citizens and constitutes a fundamental right guaranteed by the Constitution. The principle was first incorporated into the International Covenant on Civil and Political Rights in 1966, then became an imperative norm of the signatory countries of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely Protocol No. 7 adopted in 1984 (Article 4, Paragraph 2). These international instruments underline the necessity of applying this principle to the national legislation of the UN and Council of Europe member states. The Republic of

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49 This court was established under the influence of the international community after the approval of Dick Marty's report in the General Assembly of the Council of Europe. See, Dick Marty, Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo: Report Doc 12462 of 07 January 2011 <https://pace.coe.int/en/files/12608/html> accessed 10 May 2023.

50 Decision of the Assembly of the Republic of Kosovo No 05-D-139 'Amendment of the Constitution of the Republic of Kosovo: Amendment no 24' of 3 August 2015 [2015] OG 2.

51 Law of the Republic of Kosovo No 05/L-053 'On Specialist Chambers and Specialist Prosecutor's Office' of 3 August 2015 [2015] OG 27, art 17.

Kosovo, although not a member of the UN and Council of Europe, has directly incorporated these international instruments into its legislation. Within the framework of the Council of Europe, the European Convention on the International Validity of Criminal Judgments has been approved, also regulating this principle. In both international humanitarian law and international criminal law, there are two international instruments that recognize the principle ne bis in idem: the Geneva Convention relative to the Treatment of Prisoners of War dated 12 August 1949, and the Statute of the International Criminal Court. These instruments are applied under circumstances of war and for trial of war crimes.

The most significant progress at the international level while implementing this principle has been made by the European Union. Ne bis in idem has become the obligatory norm within the EU countries through Article 54 of the Convention on the Implementation of the Schengen Agreement (CISA; integrated into EU law by the Treaty of Amsterdam).

In the Republic of Kosovo, it is the constitutional principle provided for by the Constitution of the Republic of Kosovo. While the Criminal Procedure Code has been extensively elaborated and has foreseen cases when the procedure can be opened after the final ruling, these cases are only available where new facts are discovered in connection with the original evidence, or if the ruling was made under the influence of other factors that constitute elements of the criminal offence.

The application of this principle forms legal security for citizens and sets out a stable and respectable legal order. This principle is important to fair and just execution of the law.

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Opinion Article

ALBANIAN CIVIL CODE 1929 AS PART OF THE EUROPEAN FAMILY OF CIVIL LAW

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Summary: 1. Introduction. – 2. The Adoption of the Civil Code of 1929 and its Affiliation According to Historical - Legal Studies. – 3. Description of Main Features of Different Civil Law Systems According to Most Prominent Authors of Western Countries. – 4. Civil Code of the Republic of Albania of 1994 – The Issue. – 5. Conclusion.

Keywords: civil code, civil law, civil-legal relations, legislative unity, Albania

ABSTRACT

Background: *The Civil Code would dictate the affiliation of Albanian civil law to the Romano-Germanic family, finally separating it from Ottoman law. This Code, to this day, preserves its contemporary character, individuality, and integrity, not only because it is based on the idea of protecting basic human rights and freedoms, as well as the democratic model of society that inspired it, which always remain valid, but also that it continues as a working tool for specialists in this field. Undoubtedly, foreign rights, especially French, Italian, and to some extent, German and Swiss, would inspire the Albanian legislator to sanction in its*

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provisions the equality of all citizens, the emancipation of land ownership, and the freedom to engage in economic activities.

Methods: *The methodology used during the drafting of this paper is mainly based on Albanian and foreign doctrinal views, focusing in particular on the Italian and European doctrines, due to this doctrine and this legislation being referred to by our legislator at the time of drafting the Civil Code. Also, among the methods used in this paper are the analysis and comparative methods.*

Results and Conclusions: *The acceptance of foreign law in the Civil Code of Zog, more than "a matter of quality", was a "matter of power", because foreign rights, especially French and Italian, which found their sanction in this Code, they were rights belonging to the spiritual influence of modern civilization, and above all, to that of the "Italian Renaissance" and the "French Revolution."*

1 INTRODUCTION

The Civil Code of the Kingdom of Albania entered into force on 1 April, 1929[3]. This major achievement made it possible for the 1929 Albanian Civil Code to rank among the advanced civil codes of the time and, historically, Albanian Civil Law was included in the European family of Civil Law. This family of Civil Law is classified by two main groups, or schools, that of Latin and that of Germanic countries.

The 1929 Albanian Civil Code adoption and entry into force placed the Albanian Civil Law into the grouping of Latin (Romanistic) countries, in which the civil codes were based on the French Civil Code of 1804, known as the Code of Napoleon Bonaparte, due to his special support for this undertaking and his desire to be remembered as a great lawmaker. Napoleon referred to the Code as the greatest achievement of all his victories.

States in a developed legal system went through from partial regulation of civil law with special laws to the complete regulation of civil law through Civil Codes. Civil Codes legally regulate the civil law institutions and, in this way, enable the implementation of civil law more easily. All civil legal norms are in one legal text and their implementer retains all the necessary civil and legal norms in the same place. The Civil Code has realised the legislative unity in the civil law field[4]; in this regard, it brought Albania a unique right in terms of time and place and a uniform right under the influence and spirit of the European world. In Albania, this Code represents the monumental act in terms of time, and is concurrently conceived as a contemporary legal act. It should be highlighted that the Civil Code regulated civil-legal relations in a highly legal relationship.

3 *Kodi Civil i Vitit 1929: i kohës së Zogut* (Alb Juris 2010) 28.

4 Florjan Kalaja, 'Refleksione në 90 vjetorin e Kodit Civil të vitit 1929' (90 vjetori i Kodit të Parë Civil Shqiptar (1929) në 106 vjetorine Ditës Kombëtare të Drejtësisë. Përqasje historike dhe aktuale. Baltasar Benussi – Themeluesi i doktrinës së tëdrejtës civile në Shqipëri: simpoziumit, datë 08.05.2019) <https://www.academia.edu/44462608/Refleksione_n%C3%AB_90_vjetorin_e_Kodit_Civil_t%C3%AB_vitit_1929> aksesuar më 14 qershor 2023.

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2 THE ADOPTION OF THE CIVIL CODE OF 1929 AND ITS AFFILIATION ACCORDING TO HISTORICAL - LEGAL STUDIES

Albania's secession from the Ottoman tradition of feudal systems emanated in the years following the Declaration of Independence, but marks a qualitative step in the late 20s and early 30s of the last century. This step was made with the adoption of the Constitution of the Kingdom of Albania and, especially with the adoption of the Civil Code on 1 April, 1929.[5]

The Civil Code was based on the best achievements of the Civil Codes of France, Italy, Switzerland, and more. It was inspired by other Western countries' legal projects in that time, such as the "Joint Franco-Italian Project on Obligations."[6] This major initiative for the profound reform of the constitutional, legal, and institutional framework in our country emerged from the long-governing Ottoman rule and from foreign invasions during World War I, which inherited a great economic, social, educational, and cultural backwardness. It was difficult to achieve, not to mention that it was considered impossible to many people. Ottoman laws were applied in almost the entire territory of Albania together with the common law, in this country where a large part of population built and adapted their relations according to the norms of common law. Civil law through unification was a challenging mission.

The role and persistence of some prominent jurists for the preparation of the first Civil Code in the history of the Albanian state is well-known and highly-appreciated. The idea of creating and operating with a modern civil code in Albania was put forward for the first time in 1920. Additionally, opting for the western model to draft the civil code, which would be better suited to the conditions of the country's interests, was seen to many people as a novelty, as a sudden turning point, and was considered a risk to fail. It could not be merely a mechanical imitation or copy of any Western model. Certainly, it needed to be based on similar Franco-Italian codes, but more importantly, the country's traditions, the existing legal situation, and the Albanian mentality in the establishment of these new civil law institutions had to be considered.[7]

While referring to the writings of the time, we are acquainted with the arguments as to why the French Civil Code was considered the most suitable to the country's conditions, used in conjunction with the Italian Civil Code, and taking a few subjects from the Swiss Code. The French model was chosen as the most appropriate model; with the spreading teachings of French history and culture, the republican spirit for the creation and consolidation of state institutions, and the freedom to use French jurisprudence were considered advantages as the teaching of the French language and the preparation of jurists of French culture became widespread at the time.

A meaningful indication of this great change is the immediate repeal of the laws inherited from the long-standing Ottoman rule belonging to the feudal system, such as:

> 'Meghalaya, the Code of Lands, the provisions of Vesaja Feraiz, and all other provisions of Sharia and ecclesiastical matters pertaining to family law and other civil laws and generally all laws and regulations that are in conflict with the new Civil Code,'[8]

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5 Ardian Emini, Berat Aqifi and Minerva Dermaku, 'The Basis for Changing the Maintenance (ASSISTANCE) Measure for Children – the Case of Separation of Parents in the Republic of Kosovo' (2022) 12 (3) The Lawyer Quarterly 290.

6 Xavier Blanc-Jouvan, 'Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration' (*Cornell Law School Berger International Speaker Papers: Conferences, Lectures, and Workshops,* 27 September 2004) <https://scholarship.law.cornell.edu/biss_papers/3> accessed 14 June 2023.

7 Kalaja (n 4).

8 Abdulla Aliu, *E drejta civile: Pjesa e përgjithshme* (Universiteti I Prishtinës "Hasan Prishtina" 2013) 71.

as well as the anticipation of the provision, according to which:

> *'Rules of the new Civil Code established on the interest of public order and good customs are applied from their entry into force for all the facts for which the new code has no exceptions. Therefore, with the entry into force of the new code, the rules of the previous laws could no longer be applied, which according to the new code, are against public order or good customs.'*[9]

3 DESCRIPTION OF MAIN FEATURES OF DIFFERENT CIVIL LAW SYSTEMS ACCORDING TO MOST PROMINENT AUTHORS OF WESTERN COUNTRIES

To better understand Albanian civil law's affiliation in different historical periods, referring to the codes and laws adopted and implemented according to the changes imposed by the political regimes of those periods, but especially to determine the affiliation of the Civil Code of the Republic of Albania in force, I think it is necessary to refer to the studies of Western countries' most prominent authors on comparative civil law.

There are authors who have historically and currently made different classifications of legal families. In 1950, Arminjon, Nolde, and Wolff classified all modern legal systems into seven families: French, German, Scandinavian, English, Russian, Islamic, and Hindu[10]. Professor Malmstrom offers the following groupings: the European-American (Western) legal family[11], which, in his view, includes the Romanistic, Germanic, Latin American, Nordic, and *common law* systems, the socialist legal system, the Asian non-communist systems, and the African systems.

Rene David, defined two criteria for legal families' classification in 1950: the ideological criterion (product of theology, philosophy or political, economic or social structure) and the criterion of legal technique[12]. While the differences of legal techniques were of secondary importance, the principled basis of distinction lies in the philosophical basis or the concept of justice. According to this principle, he distinguishes five legal families: Western systems, socialist systems, Islamic law, Hindu law, and Chinese law.[13] After creating these, this author modified his position, defining three main legal families: the Romanistic-Germanic family, the Common Law family, and the Socialist family by identifying some groups of other systems, such as: Hebrew (Jewish) law, Hindu, Far East, etc.[14]

Zwegert and Kotz, make this classification for legal families or systems: Romanistic, Germanic, Anglo-American, Nordic, Socialist, Far East, Islamic, and Hindu.[15] These authors identify five elements that form the legal style of any legal system: historical background and development, the predominant and characteristic way of thinking about legal issues, distinct institutions, the type of law sources known and the way they treat them, and the ideology. With the legal ideology, the fifth element in their analysis, these authors understand the "political and economic doctrines, or religious belief" of the system in question.

9 ibid.

10 Pierre Arminjon, Baron Boris Nolde and Martin Wolff, *Traité de Droit Comparé*, t 1 (Librairie Génerale de Droit et de Jurisprudence 1950) 13.

11 Craig M Lawson, 'The Family Affinities of Common-Law and Civil-Law Legal Systems' (1982) 1 (6) Hastings International and Comparative Law Review 85.

12 René David, *Traité élémentaire de droit civil comparé: introduction à l'étude des droits étrangers et à la méthode comparative* (R Pichon; R Durand-Auzias 1950).

13 ibid 255.

14 René David, *Les grands systèmes de droit contemporains: (Droit comparé)* (Dalloz 1964).

15 Konrad Zweigert and Hein Koetz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) pt 1.

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They conclude,

> *"The legal ideologies of the Anglo-Saxon, Germanic, Romanistic and Nordic families are essentially similar and it is because of other elements in their styles that they have become distinct...".* [16]

4 CIVIL CODE OF THE REPUBLIC OF ALBANIA OF 1994 – THE ISSUE

The civil legislation adopted by the Albanian state during the years ruled by the communist dictatorship interrupted the precious tradition created over a decade prior through the interpretation and implementation of the Civil Code of 1929. It was based on the Soviet law system, called socialist law, which essentially represented no particular novelty but was an amalgam that stood between the Germanic school's positivism and a particular sociological and ideological current called Marxism-Leninism.

The legal framework consisted of the Law on the General Part of the Civil Code, the Law on Legal Actions and Obligations, the Decree on Property, the Decree on Inheritance, etc. This legal framework was cut off at the extreme and subject to the dogmas of communist ideology after the Civil Code's adoption which entered into force on 1 January, 1982. Albania was in a period of considerable crisis during the dictatorial regime when the concept of private property was completely eliminated and the whole economic and social system was concentrated in the hands of the state. Legal principles were replaced by the so-called principles of the state party's managing role, of the struggle of classes, of the mass line, and the like.[17]

In the Civil Code of 1981's structure, like previous civilian legislation, preserved, in a mutilated form, institutes and norms borrowed primarily from the Soviet law. In the beginning of 1990s, after the change of the political system along with the constitutional changes, the preparation of the new legal framework of the new democratic state, based on the protection of fundamental human rights and freedoms and the rule of law, arose as a necessity and immediate requirement. In this context, the main requirement of the time was the preparation and adoption of a new Civil Code.

It was decided that the initial reference material to use during the preparation of the new code was the Civil Code of 1929, based on the civil codes of France, Italy, Switzerland, etc.[18] during that time, as well as to observe, to consider, and to reflect the changes and developments that were made to these codes in the respective countries up to that present time. The drafted Civil Code was presented to the Assembly and approved shortly after by Law No. 7850, dated 29 July 1994, and entered into force on 1 November, 1994.[19]

Meanwhile, other developed countries' experiences shows us quite the opposite, i.e., the preparation of a new code requires time and intensive work, not only to prepare it on a high level, but also for testing by case law. An example is the process of preparing the draft Civil Code of the Netherlands, which started in 1947 by a commission headed by Professor E. M. Meijers, and followed after his death in 1954 by Professors J. Drion, F.J. de Jong, J. Eggens, and G. De Grooth. The first two books of the New Civil Code entered into force in

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16 Mary Ann Glendon, Michael W Gordon and Christopher Osakwe, *Comparative Legal Traditions: Text, Materials, and Cases on the Civil and Common Law Traditions, with Special Reference to French, German, English, and European Law* (2nd edn, West Pub Co 1994) 100.

17 Juliana Latifi, 'Albanian Civil Law and the Influence of Foreign Laws' in S Farran, J Gallen and C Rautenbach (eds), *The Diffusion of Law: The Movement of Laws and Norms Around the World* (Juris Diversitas 2015) doi: 10.4324/9781315615493.

18 ibid.

19 *Kodi Civil i Republikës së Shqipërisë Miratuar: me ligjin nr 7850, datë 29.7.1994; ndryshuar* (Qendrës së Botimeve Zyrtare 2014).

1970 (Law on Persons and Family) and in 1976 (Law on Legal Entities). Because the Dutch Government decided that the core of the new Code, which contained the right of ownership and the right of obligations, would enter into force on 1 January, 1992, the programme of the revision was close to achieving its goal: to replace the existing 150-year-old Civil and Commercial Code with a new 'consolidated' Code including civil law, commercial law, and consumer law, many parts of private law legislation that were adopted outside the Codes, and to codify the results of a large and significant amount of (*judge-made law*) law created by judges (Jurisprudence). Therefore, the Dutch Civil Code was adopted piece by piece after a long, scientific and responsible work, and has been tested over the years by case law.[20]

Taking this example, I do not think that the duration for the preparation and adoption of the new Albanian Civil Code should have lasted several dozens of years, because in our country, 'time would not wait', but want to draw attention to the fact that the preparation of new laws, especially of the Codes, requires the necessary time, dedication, and serious work with high-level professionalism, as well as scientific debate, inclusiveness, and transparency. Unfortunately, in Albania, the preparation of new laws in various fields, even changes to codes, continues to occur without preceding in-depth studies or serious evaluations of issues performed by the interpretation and implementation in practice.

It is worth mentioning, for the better, that to-date, not many hasty changes have been made to the Civil Code, thus serving the purpose of maintaining a fair relationship between statics and dynamics in the adoption of legal acts according to their hierarchical scale. On the other hand, the study and discussion materials in support of additions and changes, in particular the relations presented in the Albanian Parliament, appear shallow and, as such, do not serve to the process of interpretation and practical application of legal provisions, jurisprudence, and doctrine.

Following the adoption of the Civil Code, some authors have published texts and articles in which they make general positive evaluations, perhaps in some cases they were even slightly exaggerated, considering it as a contemporary civil code with a clear style and perfect legal terminology, understandable almost to any reader and not only to those with legal training. In the meantime, there are other authors who, in addition to evaluations, also make a series of remarks and criticisms not only to the Code's structure and internal organization, but also to its contents, and in some cases, for failing to entirely avoid some concepts and adjustments inherited from the so-called socialist law. In this aspect, remarks and criticisms have been made about adjustments considered inappropriate and unnecessary, such as the legal status of the agricultural family and co-ownership of its members as considered an unnecessary relic from the past, or for antiquated adjustments contrary to the reality of any contract, e.g., a supply contract.[21]

There were also remarks on inconsistencies in the internal organization of sections and chapters, on the terminology used, on the accuracy and coherence in constructing and applying definitions, in construction and formulation of special provisions, etc.[22] Referring to the structure and content of the Civil Code in force and all other legal framework complementary to it, it is necessary to conclude this Code, as well as our entire civil law, have followed the Romanistic or Germanic models, or has adopted a western system mixed with institutes and norms borrowed from both models. This would not be considered an easy undertaking, not only for our country, but also for the developed western countries with rich doctrine and jurisprudence.

20 Jan M van Dunné, '"Lawyer's paradise" or "paradise lost"? The Dutch civil code of 1992 as an exponent of the 19th century legislative tradition' en R Beauthier et I Rorive (eds), *Le Code Napoléon, un ancêtre vénéré ? : Mélanges offerts à Jacques Vanderlinden* (Bruylant 2004) 337.

21 Latifi (n 17).

22 ibid.

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Unlike the Civil Code of 1929, which published a "Coordination Table between the Albanian Civil Code and Foreign Codes" at the end of the text, in the Civil Code in force, we do not find such a mechanism that would help us in terms of in-depth studies.

The French Civil Code of 1804 follows the structure of the Justinian Institutes and incorporates in its substantive provisions the results of the intellectual, political, and social revolution. It represents a new way of thinking about man, law, and governance. The French Civil Code's three ideological pillars are private property, freedom of contract, and patriarchal family. In these three spheres, the state's primary role was to protect private property, execute legally-formed contracts, and ensure the autonomy of the patriarchal family.[23] The principles inherited from the institutional system include three groups of provisions regulating the subjects of civil law, objects, and the rights deriving from objects, as well as procedures for the protection of rights.

The Code consists of three main parts: I. Issues of status of subjects and family law; II. Rights over objects (property, servitudes, and other real rights) and; III. Law on obligations and contracts, inheritance, etc.[24] The French Civil Code as a popular, modest, and understandable code, convenient with easy-to-understand language, a beautiful style, and clear systematics, guided by the principles of equality of arms, protection of private property, the prohibition of abuse with civil rights, and the autonomy of the will of the parties in civil legal relations[25].

Authors emphasise that

> 'the Founding Forefathers of the French Civil Code, like those of the Constitution of the United States of America, have recognized the fact that the lawmaker cannot provide for all possible applications of fundamental principles.'[26]

The drafters recognised the option of general rules' flexibility rather than that of detailed provisions. In this regard, they referred to the words of one of the drafters of the code, Portalis, who spoke out on avoiding the dangerous ambition to regulating and predicting everything. The Latin (Romanistic) system represented in modern times by the French Civil Code has been followed by countries, such as Italy, the Netherlands, Belgium, Luxembourg, Spain, Portugal, and other countries in different continents, like Louisiana of the USA and the Quebec province in Canada.

On the other hand, according to these authors, the Germanic system is based on the German Civil Code adopted on 18 August, 1896 and entered into force on 1 January, 1900. This Code as being built in a heavy style, dominated by the doctrinal approach based primarily on the Pandekists theory, characterized by a sophisticated, accurate, and systematized legal terminology, but unsuitable for an ordinary citizen to understand.[27]

B.G.B. is considered a masterpiece of German legal science with a highly professional style and perfect and precise systematisation. The German Civil Code (Pandektenrecht) Pandekists system, inspired by Justinian Digest and developed in modern times (usus modernus pandectarum), consists of six books: I. The General Part; II. Property Right (Ownership); III. Obligations; IV. Family Law; V. Inheritance Law; and VI. The Right to

23 Blanc-Jouvan (n 6).

24 Code Civil des Français (promulgué le 21 mars 1804, telle que modifiée du 21 mai 2023) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721> consulté le 14 juin 2023.

25 Jean Carbonnier, 'Le Code civil' in Pierre Nora (dir), *Les Lieux de Mémoire, t 2 La Nation : 2 Le territoire - L'Etat - Le patrimoine* (Gallimard 1986) 309.

26 Shael Herman, 'From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture' (1984) 3 University of Illinois Law Review 597.

27 Frederic William Maitland, 'The Making of the German Civil Code', in HAL Fisher (ed), *The Collected Papers of Frederic William Maitland,* vol 3 (CUP 1911) 480.

Work.[28] The German Civil Code model has impacted the codifications of German traditional countries, such as the Novels of the Austrian Civil Code of 1914. It has also been adopted by other countries, such as Switzerland, Poland, in the Civil Code of Greece of 1940, etc., but also in countries from other continents, such as Japan, Brazil, Mexico, and more.

It is also noteworthy that authors identify that, although the German and French Civil Codes differ in form, style, and structure, their similarities should not be overlooked. Firstly, the two have resolutely pursued both *jus commune* and their respective national rights. In both codes, the influence of the Romanistic *jus commune* prevails in the Law of Obligations and in the general structure of the system while the sources of national law have had more influence on the right of property and the Law on Inheritance.

Ideologically, both codes are based on 19th century liberalism, influenced by an individual's autonomy and laissez-faire economy, protection of private property and freedom of contract, and the like.[29] We should also bear in mind that the division between the two systems, the Romanistic (Latin) and the German system, is more doctrinal than of practical character. Moreover, the conclusions as to whether civil legislations, in particular Western countries' civil codes, belong to one system or the other are not exhaustive. For this reason, we will review the Dutch Civil Code[30] as an example, which is classified by the above authors as being influenced by the French Civil Code.

On the contrary, the commentators of the Dutch Civil Code have stated,

> *"Dutch private law no longer belongs to the group inspired by the French law system, but rather to the German group. There may be some truths as to this, such as the systematic approach, abstract language and a number of more technical details attracting attention. However, in terms of important innovations, some of which have been mentioned above, foreign influences are more balanced."*[31]

B. Wessels further discusses inspirational, concrete cases from Franco-Belgian law, from *common law*, and German law, the Hague and Vienna Conventions on Uniform Sales (Uniform Sales Acts) in 1964 and 1980, and refers to the well-known authors, Kotz and Zweigert, whose work has been quoted above.[32]

With this brief summary of opinions, expressed by competent authors, about some of the common features, characteristics, and differences between the French and German civil law systems, regulated by the two respective civil codes, both belonging to the continental European civil law family and the Dutch Civil Code, my intention is simply and exclusively to promote in-depth studies of Western countries' codes, doctrine, and jurisprudence in order to better understand the positive achievements of the Albanian Civil Code along with its deficiencies and shortcomings, and to suggest serious initiatives that will improve the Code and all other complementary legislation in the future. I further consider it necessary to reflect on some of my findings and opinions about shortcomings observed in the process of interpretation and implementation of the applicable Civil Code provisions.

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28 Bürgerliches Gesetzbuch (BGB) vom 18 August 1896 (geändert vom 14 März 2023) <https://www.gesetze-im-internet.de/bgb/BJNR001950896.html> abgerufen am 14 Juni 2023.

29 Arthur Taylor von Mehren and James Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (2nd edn, Little Brown & Co Law & Business 1977) 245.

30 Dutch Civil Code (Civil Code of the Netherlands) <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 14 June 2023.

31 Mariana Pargendler, 'The Rise and Decline of Legal Families' (2012) 60 (4) The American Journal of Comparative Law 1043, doi: 10.5131/AJCL.2012.0010.

32 Bob Wessels, 'Civil Code Revision in the Netherlands: System, Contents and Future' (2009) 41 (2) Netherlands International Law Review 163, doi: 10.1017/S0165070X0000317X.

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1. In the current Albanian Civil Code, it can be seen that, unlike other Western tradition codes, the problem of interpretation of legal provisions was not regulated, which should be considered a shortcoming. While referring to the Albanian Civil Code of 1929, we encountered the following wording:

> *"In application, laws cannot be given any other meaning, except the one that is clear from the meaning of words, by taking into consideration their connection (connexion), as well as the purpose of the lawmaker. When a dispute cannot be settled by a specific provision of law, the provisions governing case studies or analogous matters are taken into account; and when despite all this, the case remains obscure, the resolution is made according to general principles."*[33]

Pursuant to article 4 of the French Civil Code, a judge cannot refuse to decide a case simply because the law is unclear or there are shortcomings; he must come up with a decision, however, which must be based on general principles and the spirit of the law. The Austrian Civil Code directs the judge to look at the *"Principles of natural law."* The Spanish Civil Code refers to the *"General principles of law;"* the Italian Civil Code refers to *"Those principles coming out from the legal order of the state."* The Swiss Civil Code provides, among others, that if a judge cannot find a rule in law, he must decide in accordance with the common law, and if the judge fails to do so, he must decide "*According to the rule he would adapt as a lawmaker,*" given the adopted legal doctrine and judicial tradition.

2. In some Western countries' civil codes, the regulation of legal relations has historically and currently been included in separate parts, whereas in other countries, as well as in our country, it is considered not just regarding legal-civil relations, but relations belonging to other laws' branches, such as family law, the right to work, commercial law, administrative law, etc. Therefore, it is included in special codes, such as family code, labour code, commercial code, laws regulating administrative relations, copyright, etc. For example, in the Italian Civil Code, along with the regulation of the status of persons as subjects of civil law, the first book also includes the regulation of family relations, and the fifth book regulates labour relations.[34] The Dutch Civil Code,[35] considered one of the most modern codes, has a structure and content defined in nine books (parts) as follows:

I. The Law of Persons and the Family Law (including the right of marital property);

II. Legal Entities (general part, associations, limited liability corporations, foundations);

III. Property Rights in General (i.e., provisions applicable to all subsequent books);

IV. Inheritance Law;

V. Property and Real Rights;

VI. General Part of the Law on Obligations;

VII. Special Contracts;

VIII. Transport Law;

IX. Intellectual Property Law.

This system has been preserved to this day, with the exception of book 9, which has been removed. This wide and developed field has been included in special laws for industrial

33 'Kodit Civil i Mbretërisë Shqiptare, miratuar më 1 prill të vitit 1929' në *Kodi Civil i vitit 1929* (Alb Juris 2010) 37.

34 Codice Civile Italiano 16 marzo 1942 n 262 (1942) 79 Gazzetta Ufficiale <https://www.codice-civile-online.it/regio-decreto-16-marzo-1942-xx-n-262/approvazione-del-testo-del-codice-civile> accesso 14 giugno 2023.

35 Dutch Civil Code (n 30).

and intellectual property, patents, trademarks, copyrights, trade names, designs and models, etc. The quoted text above provides complete arguments for this position. The same position has been maintained by our lawmakers towards intellectual property, adopting new contemporary laws in line with the requirements of approximation with EU legislation. In a general overview referring to the structure of the Dutch Civil Code, the impression emerges that, more or less, with minor changes, the same structure has also been adapted to our Civil Code, with the exception of parts included in other Codes or laws. However, this issue requires in-depth studies.

We must delve deeper into the content of each and every part, title, or chapter of the code to conclude what the shortcomings, contradictions, uncertainties, and ambiguities are. Given the content of the second book of the Dutch Civil Code, entitled "Legal entities (general part, associations, limited liability corporations, foundations)," part seven "Special contracts," and the general position on inclusion of provisions in a single code, governing civil and commercial legal relations, we believe the solution recognised by our lawmakers to regulate trade relations from civil legal relations is a fair position for our country. Though between the provisions in force of these two separate branches of our law, civil and commercial, across different legal texts, ambiguities, contradictions, and overlaps emerge in terms of subjects, character, and content of specific contracts, issues of conclusion, interpretation, implementation, renunciation, resolution, validity or invalidity, and more. According to the legislation of Kosovo, commercial law is a separate branch of law, but in commercial legislation, commercial contracts are not specifically regulated, but are included in the Civil Code regardless of which are considered contracts of a purely civil nature and which are commercial contracts.

3. We must establish an appropriate relation between the Civil Code as the main source of civil law and other laws governing specific areas of civil law, which are complementary to the Civil Code, as these complementary laws regulate specific areas of socio-economic relations as referred to in article 116 of the Constitution of the Republic of Albania. These are at the same level with the codes in the hierarchy of normative acts. The Civil Code, as the main source of civil law, has a static character, while other complementary legislation, which regulates more extensively and complexly the legal relations in specific areas, is more dynamic. In the legislative process, the relation between the statics of the Code and the dynamics of other complementary legislation is difficult and complex.

4. In our Civil Code, along with the right of ownership and possession as real rights, there are a number of other real rights regulated, theoretically-named as real minor rights (*minor rights in rem*), such as usufruct, servitudes, right of use, and housing, but the real minor right of surfaces (*superficies)* is not regulated, which is the special real right over everything built by a person who is not an owner on and/or beneath the land surface owned by another person. This right is regulated by the Italian Civil Code and, in more detail, is regulated by the Dutch Civil Code.

According to the principle of Roman law *superficie solo cedit*, everything that is planted on the land of another person, or that is built on or beneath the land of another person, becomes the property of the land's owner. In Roman law, by accepting the principle of *superficie solo cedit, acessio* was accepted as a way of gaining ownership, while the right of surface (*superficie) as a minor right in rem* was not accepted. Both in Roman law and in our civil law to this day, the rule is accepted that everything built on the land or beneath the land by a third person belongs to the land's owner, adding, merging and embodying in one aspect alone, the land and everything built on and/or beneath it. Given the above, the question arises that while Italian, Dutch, and some Nordic civil law have renounced this Roman law's rule, accepting the minor real right of surface would it not be possible, appropriate, or useful

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for this right to be regulated in our Civil Code, too. Relevant arguments are given in the Italian legal literature.[36]

5. Referring to the structure and content of the Dutch Civil Code, it is concluded that concerning the real rights and rights of obligations, general parts are provided (the third book and the sixth book), containing general provisions applicable respectively to the special parts, which provide for provisions specifically regulating inheritance, ownership, and other real rights in the fourth and fifth books, as well as special contracts and, especially, transport in the seventh and eighth books. Unlike the Dutch Civil Code, in the German Civil Code (B.G.B.), the general part covers the entire code.

Given the similarities and differences of the Albanian Civil Code with the civil codes of Western countries, it may be possible to draw complete and accurate conclusions concerning the application of general parts' provisions and the respective detailed provisions of special parts, directed towards proper application in each and every case of the general rule and the exceptions to it. Referring to the Albanian Civil Code[37] in the first part, "General Part," the third title, the second chapter, and the regulating provisions, in general, the invalidity of legal actions are provided, while in the third part of the Code, "Inheritance," the third title, articles 403-409, given under the title "Invalidity of the will," provide for special cases when the will is invalid. Being used in all cases, the term "is invalid" concludes that in all these cases, we deal with absolute invalidity (nullity) of the will as a unilateral legal action, while if we are referring to the provisions of the general part for the invalidity of legal actions, we will notice that, according to these provisions, in some cases we will find ourselves before absolute invalidity. In other cases before relative invalidity, i.e., the will can be declared invalid on the request of the interested person who is legitimised to file a lawsuit.

Complying with the position that special provisions are regulated differently from the general provisions constitutes an exception to the rule provided in the general provision, it is then concluded that in all the cases above, we will find ourselves before absolute invalidity of the will and that this special part of the code does not provide for any case of relative invalidity of the will. Then, the expression used in the following article 410 would not make sense, according to which, "*When the will is declared invalid, the legal heirs are called to the inheritance, except when ....*" and article 411, which provides for a three-year prescription period of the lawsuit for the invalidity of a will, would not be necessary because according to the general rule, lawsuits for establishing the absolute invalidity of a legal action, such as the will, are not prescriptible. This is an obvious case indicating that various provisions of the Civil Code allowed inaccuracies, uncertainties, gaps, and alogisms, which are difficult to regulate by case law and to treat correctly by legal doctrine.

5 CONCLUSIONS

The data presented have been contrasted and compared with the civil codes, doctrines, and jurisprudence of Western countries, in particular, with studies in the framework of endeavours to draft a unified civil code for the European Union countries.

Given the similarities and differences of the Albanian Civil Code with Western countries' civil codes, it may be possible to draw complete and accurate conclusions concerning the application of the provisions of the general parts and the respective detailed provisions of the special parts, directed towards proper application in each and every case of the general rule and the exceptions to it.

36 Francesko Galgano, *Diritto privato* (6a ed, CEDAM 1990) 123.

37 Kodi Civil i Republikës së Shqipërisë Miratuar (n 19).

The acceptance of foreign law in the Civil Code of Zog, more than 'a matter of quality,' was a 'matter of power,' because foreign rights, especially French and Italian, that found their sanction in this Code, were rights belonging to the spiritual influence of modern civilization, and, above all, to that of the 'Italian Renaissance' and the 'French Revolution.'

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ДЗЕРКАЛЬНЕ ВІДОБРАЖЕННЯ РОСІЙСЬКОЇ АГРЕСІЇ В УКРАЇНІ НА ЗАХІДНИХ БАЛКАНАХ: ПРОВОКУВАННЯ НОВИХ КОНФЛІКТІВ ЯК ВІДВОЛІКАННЯ УВАГИ

Юдіта Краснікі, Лабінот Хайдарі, Альбан Малікі та Кімберлі ДеГрофф Мадсен

АНОТАЦІЯ

Передумови дослідження. Регіон Західних Балкан тривалий час зазнавав значного тиску Росії та Заходу. Події у світі, зокрема і затяжний процес вступу до ЄС і НАТО країн регіону, час від часу викликали напруженість між західнобалканськими державами, що збільшувало ймовірність впливу Росії, який особливо зріс після агресії в Україні.

У пропонованій статті проаналізовано зростання напруженості між Росією та Україною та її пряма кореляція з посилення напруженості на Західних Балканах через методи гібридної війни. За визначенням Жиглея та Сивака, термін "гібридна війна" означає «уривчасте та ситуативне поєднання різних методів і теорії війни, їхня інтеграція в різні сфери, особливо політичну, релігійну, ідейно-етичну, економічну й інформаційну».

Чим вищий рівень агресії Росії в Україні, тим більший тиск на Сербію з метою посилення напруженості на Західних Балканах. Цей тиск надходить через прямі погрози, медійну пропаганду, вплив на паралельні структури та фінансову підтримку організацій громадянського суспільства (ОГС), за допомогою яких Росія через Сербію, як свого найближчого союзника, посилює свій вплив на Балканах. Ця стратегія впливу дуже важлива для РФ для підривання потужності і впливу Заходу та НАТО в державах колишньої Югославії, особливо в контексті відкритих конфліктів, які глобально відволікають увагу від можливого падіння влади в Україні.

Методи. За допомогою дискурсивного та тематичного аналізу у дослідженні проаналізовано місцеві, регіональні та міжнародні ЗМІ, дані та публікації міжнародних організацій, пресрелізи міжнародних і регіональних інституцій, висновки видатних науковців і керівників щодо поточної ситуації на Західних Балканах та інтерв'ю з представниками ОГС й установ у Косово.

Результати та висновки. Російська агресія в Україні, тиск РФ для посилення напруженості на Західних Балканах були проаналізовані в контексті однополярного впливу Заходу та спроби Росії повернутися до багатополярності. Серед іншого, зроблено висновок про наявність російського впливу в Західних Балкан, що прагне дестабілізувати регіон, активізуючи пасивні конфлікти з минулого або намагаючись спровокувати нові конфлікти, щоб відвернути увагу міжнародної спільноти від російських зусиль, спрямованих на повалення влади в Україні, які не привели до тих результатів, на які очікувала Росія. Це можливо зробити за допомогою Сербії, найближчого союзника Росії. За підсумками дослідження зроблено висновок, що необхідно ухвалити рішення для

запобігання російському впливу та будь-яким майбутнім конфліктам між країнами. Балканські держави мають прискорити інтеграцію країн Західних Балкан до НАТО та ЄС.

***Ключові слова**: Західні Балкани, війна в Україні, вплив Росії, геополітика, конфлікт, великі держави.*

РОЛЬ ПРИНЦИПУ ПРАВОВОЇ ВИЗНАЧЕНОСТІ У ЗАБЕЗПЕЧЕННІ ДОСТУПУ ДО СУДУ В УКРАЇНІ ПІД ЧАС ВІЙНИ

Ганна Остапенко

АНОТАЦІЯ

Передумови дослідження. У статті подано аналіз упровадження принципу правової визначеності та доступу до правосуддя в Україні. Обидва аспекти розглянуто у зв'язку з принципом правової держави; їхню координацію показано у випадках, коли застосування принципу правової держави необхідне для усунення прогалин у неідеальній судовій системі, що стикається з викликами війни, яка триває й досі.

Методи. Для представлення основних підходів до принципу правової визначеності та доступу до правосуддя використано методи правового мислення та аналізу. Додатково, за допомогою порівняльного методу встановлюється їхнє значення та вплив на правову практику. Метод аналогії застосовуємо для передбачення можливих рішень з метою поліпшення доступу до правосуддя в Україні.

Результати та висновки. Правова визначеність є складовою правової держави, вона забезпечує передбачуваність у правовому регулюванні, ясність правових норм і вимагає належного способу виконання правових актів, а також забороняє ретроспективність. Вона ставить під сумнів повагу до законних очікувань і не забезпечує стабільність правового регулювання. Підвищення ефективності застосування права на доступ до правосуддя корисне для правової визначеності, і навпаки. Бувають випадки порушення правової визначеності через прогалини в законодавстві, нечіткість правових норм або суперечливість законодавчих положень. Проте якщо право на доступ до суду буде повністю гарантовано, то порушені права позивача можна відновити.

Підкреслено, що res judicata, вимога до правової визначеності є вимогою, яка також загальна для доступу до правосуддя.

***Ключові слова**: правова визначеність, верховенство права, доступ до правосуддя, доступ до суду, законні очікування.*

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ПРОКУРАТУРА УКРАЇНИ В УМОВАХ ВОЄННОГО СТАНУ: ВИКЛИКИ, ТЕНДЕНЦІЇ, СТАТИСТИЧНІ ДАНІ

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АНОТАЦІЯ

Передумови дослідження. Уведення воєнного стану на території України у зв'язку з повномасштабним вторгнення Російської Федерації 24 лютого 2022 р. призвело до зміщення акцентів у діяльності всіх органів державної влади та установ. Маємо констатувати, що всі вони швидко адаптувалися до викликів війни та забезпечили своє безперебійне функціонування. До таких установ належать інститут правосуддя та прокуратура, яка є невід'ємним елементом реалізації правосуддя.

Під час війни Україна набула нового досвіду в питаннях організації системи правосуддя та її функціонування й розвитку. Безсумнівно, він буде корисним усім, хто цікавиться системою правосуддя, зокрема прокуратурою, для вивчення її реагування на надзвичайні умови війни.

Публікація містить результати системного аналізу показників діяльності прокуратури України в контексті подій, зумовлених розгортанням війни, що триває вже не один рік. Зазначений часовий проміжок дає змогу авторам виокремити характерні тенденції та дійти певних висновків.

Подано показники ефективності чотирьох регіональних прокуратур, що представляють північ, південь, схід і захід України; за основу взято східну та західну прокуратури. Зазначений підхід обумовлений різними рівнями інтенсивності військової агресії щодо різних регіонів. Це дає змогу відстежити відповідні співвідношення «територіального чинника» й ефективності діяльності прокуратури.

Дослідження базується на статистичних показниках та звітах Офісу Генерального прокурора, даних Київської, Одеської, Львівської та Харківської обласних прокуратур, а також матеріалах від Кваліфікаційно-дисциплінарної комісії прокурорів.

Методи. Автори використовували такі методи: систематичний, статистичний, історичний, порівняльний, вибіркового аналізу й узагальнення інформації, що забезпечує об'єктивність і складність дослідження. Для коректної аргументації були застосовані фактичні статистичні й емпіричні дані висновків.

Результати та висновки. Зроблено висновок, що діяльність прокуратури України в умовах воєнного стану значною мірою визначається територіальним чинником. Водночас повномасштабна війна стала каталізатором полярних явищ у середовищі прокурорів, серед яких як посилення громадянської позиції у протистоянні агресору, так і професійні та поведінкові деструкції, що фіксуються дисциплінарним органом в контексті завершення кар'єри прокурора.

Ключові слова: *прокуратура, прокурор, функції прокуратури, війна, прокуратура у воєнний час, правосуддя, Україна.*

ДОДАТКОВА ОСВІТА НЕПОВНОЛІТНІХ ЗАСУДЖЕНИХ В УВ'ЯЗНЕННІ: РЕФОРМАЦІЙНИЙ І ВИПРАВДУВАЛЬНИЙ ПІДХОДИ В ТЕОРІЇ СИСТЕМ НІКОЛАСА ЛУМАНА

Вольфганг Шторк

АНОТАЦІЯ

Передумови дослідження. Для задоволення вимог сучасного суспільства німецьке законодавство у частині кримінальної відповідальності неповнолітніх потребує необхідної реформи. Відповідно до цього у статті запропоновано повторне введення безстрокового покарання як необхідного інструменту загальної соціальної користі для врегулювання цієї проблеми в реформі та для протидії чинній дотепер системі визначеного строку покарання.

Конкретну систему покарання розуміють як поточний керівний принцип та норму, які застосовують і нині. Згідно з теорією гнучких систем Нікласа Люманна, це суперечить різноманітності суспільств й унікальній індивідуальності кожного члена в них. У цій перспективі індивіди мають право на захист своїх прав і визначення своїх норм, якщо вони не порушують закон або не вчиняють злочину.

Методи. Дискусія щодо невизначеного строку покарання завершилася наприкінці 1990-х рр., тому наукових досліджень із зазначеного питання бракує. Однак, ураховуючи трансформацію суспільства та розвиток молодого покоління, повторне введення невизначеного строку покарання фахівці вважають за доцільне. Теорія гнучких систем Нікласа Лумана з 1980-х рр. добре підходить для підтримки повторного введення безстрокового покарання. Ґрунтуючись на огляді відповідної літератури, де показано збільшення жорсткості німецького законодавства щодо порушень неповнолітніх, пропонована стаття використовує аналітичний підхід, що підтримується соціальними, правовими та політичними дослідженнями. Він забезпечує рамки, що з'ясовують причини та відповідну форму для повторного запровадження безстрокового покарання як корисного методу посилення ресоціалізації серед молоді. Ця рамка передбачає практичні кроки, такі як поєднання освіти, професійної підготовки та соціальної освіти, що спрямовані на впровадження реабілітаційного підходу в систему ювенальної юстиції.

Результати та висновки. У випадках, коли невизначене покарання дозволяє застосовувати більш індивідуалізований підхід, варто встановлювати індивідуально-орієнтоване мінімальне покарання при збереженні максимальної тривалості. Це узгоджується з теорією гнучких систем Лумана і є актуальним для життя сучасного молодого покоління. Такий підхід пропонує більші переваги, наголошуючи на інтеграції освіти у в'язниці, покаранні за ресоціалізацію, що перевищує можливості поточного визначеного покарання в ювенальному кримінальному праві.

Фактичний рівень рецидиву в середньому становить від 25 % до 30 % залежно від вироку.

Орієнтований на освіту підхід, адаптований до неповнолітнього правопорушника, у поєднанні з реалістичною, орієнтованою на майбутнє системою освіти під час виконання

вироку та після нього, надає процесу ресоціалізації важливості, а молоді – більше шансів на успіх. Хоча дослідження на цю тему і перебувають на початковій стадії, усе ж можемо стверджувати, що зазначений підхід є першим кроком у започаткуванні необхідної реформи законодавства щодо порушень закону неповнолітніми.

Ключові слова: *ювенальне кримінальне право; невизначене покарання; визначити покарання; реформа кримінальної юстиції; теорія систем Лумана.*

КРИПТОВАЛЮТА В ДЕКЛАРАЦІЯХ ДЕРЖАВНИХ ПОСАДОВЦІВ ЯК ІНСТРУМЕНТ ДЛЯ ВІДМИВАННЯ ГРОШЕЙ: ТЕНДЕНЦІЇ ТА ДОСВІД ПРОТИДІЇ НА ПРИКЛАДІ УКРАЇНИ

Сергій Грицай

АНОТАЦІЯ

Передумови дослідження. Проведено дослідження кампанії 2020 р. щодо декларування доходів держслужбовців в Україні. 23 червня 2022 р. країна стала кандидатом на вступ до Європейського Союзу за умови збільшення зусиль у боротьбі з корупцією. Упродовж періоду дослідження виявлено, що 652 українських посадовців задекларували 46 351 біткоїн, що на 1 квітня 2021 р. еквівалентне 2 млрд 564 млн дол. США або 2 млрд 348 млн євро. На тлі зазначеного подано характеристику чинного антикорупційного законодавства та діяльності державного апарату боротьби з корупцією.

Методи. Для досягнення об'єктивних наукових результатів використано методи аналізу та синтезу для розуміння та побудови логічного ланцюжка ідей. Також було застосовано статистичний метод для підтвердження авторських позицій реальними даними щодо ситуації, яка сформувалася на практиці.

Результати та висновки. Пропоноване дослідження виявило потенційну загрозу відмивання грошей держслужбовцями шляхом декларування криптовалют до їхньої легалізації на тлі повної відсутності або недосконалості чинних законів. Встановлено, що цей фактор набув найгострішої форми увечері, напередодні запланованої державної легалізації криптовалют.

Це підкреслює необхідність ужиття державами запобіжних заходів для усунення таких ризиків перед легалізацією криптовалют та запобігання "тихих амністій" щодо нелегального капіталу, переведеного у криптовалюту, або, іншими словами, "відмивання" заздалегідь майбутніх нелегальних надходжень шляхом декларування неіснуючої криптовалюти.

Ключові слова: *відмивання грошей, декларування доходів, корупція, державні службовці, криптовалюта, біткоін.*

ПРАВО ДІТЕЙ-БІЖЕНЦІВ НА ОСВІТУ. ОСВІТА СИРІЙСЬКИХ БІЖЕНЦІВ У ЙОРДАНІЇ: РЕАЛЬНІСТЬ І ПЕРСПЕКТИВИ

Майя Хатер

АНОТАЦІЯ

Передумови дослідження. Кількість сирійських біженців зросла через погіршення політичної, економічної та гуманітарної ситуації в країні. З огляду на це в пошуках безпеки та стабільності вони розійшлися по різних частинах світу, зокрема у країни, що межують із Сирією, та в інші держави Близького Сходу, Північної Африки і Європи.

З початком спалаху політичного насильства в Сирії у 2011 р. величезна кількість сирійців, приблизно одна третина біженців, які втекли зі своєї країни, тобто близько 1 млн 300 тис., щоб урятуватися від однієї з найбільш руйнівних громадянських війн, прибули до Йорданії. Ці біженці розподілені в таборах Заатарі, Азрак, Ракбан та в еміратсько-йорданських, деякі проживають в мухафазах (провінціях) Ірбід, Мафрак, Амман і Зарка. Понад половина із цих біженців – діти.

Міжнародні звіти розкрили трагічні ситуації, що виникають унаслідок затяжного перебування біженців за межами своєї країни, у яких сирійським біженцям, включно з дітьми, часто відмовляли в доступі до основних послуг або вони мали складнощі зі здійсненням своїх прав. Зокрема, напружена ситуація склалася із правом дітей на освіту, що є фундаментальним правом, гарантованим міжнародними статутами та конвенціями.

Пропоноване дослідження особливу увагу приділяє стану освіти сирійських біженців у Йорданії, висвітлюючи перешкоди та складні умови навчання, з якими стикаються багато дітей, й ураховуючи досягнення й успіхи, досягнуті в цьому контексті, які слід зберегти й узагальнити. У роботі також ідентифіковано складнощі, з якими зіштовхується держава Йорданія, у спробі подолати виклики. Зауважено, що необхідно працювати над проблемами, щоб у підсумку поліпшити ситуацію з освітою сирійських дітей-біженців та надати їм надію на краще майбутнє.

Методи. У дослідженні використано метод описового аналізу, що ґрунтується на ретельному описі та глибокому аналізі теми дослідження через збір докладних даних, пов'язаних з проблематикою роботи; проведено також аналіз текстів законів і відповідної інформації та подано їхнє чітке тлумачення.

Результати та висновки. Автори дослідження прийшли до висновку про важливість зусиль, які докладає уряд Йорданії за підтримки донорів і гуманітарних організацій стосовно допомоги сирійським студентам в отриманні якісної освіти та внеску країни у стабільне збільшення відсотка дітей, які навчаються.

З іншого боку, дослідження виявило багато викликів і перешкод, що ускладнюють освіту сирійських біженців у Йорданії, як-от дитяча праця та ранні шлюби, відсутність відповідної освітньої інфраструктури у зв'язку з нестачею необхідних фінансових ресурсів, відсутність міжнародного фінансування, обмежена доступність шкіл, нестача кваліфікованих кадрів для роботи з дітьми-біженцями та відсутність необхідних

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документів для зарахування до закладів освіти. Однак, незважаючи на всі виклики та складнощі, пов'язані з освітою сирійських біженців у Йорданії, залишається можливість ефективно подолати перешкоди, розвивати освітню ситуацію, досягати збільшення показників адаптації до освітніх систем та поліпшувати якість наданої освіти цим учням. Це сприятиме реалізації їхніх мрій та амбіцій і допоможе їм відновити своє суспільство та, водночас, і суспільство, що їх прихистило. Завершується робота пропозиціями відповідних рішень і рекомендацій з метою підтримки сирійських дітей-біженців в отриманні права на освіту у Йорданії.

Ключові слова: *права дитини, права людини, захист біженців, права дітей-біженців.*

ЗАХИСТ ПРАВ ДИТИНИ У КРИМІНАЛЬНОМУ ПРАВІ ЗА ДОПОМОГОЮ КРИМІНАЛЬНОГО ЗАКОНОДАВСТВА СЛОВАЧЧИНИ ТА ПРАВА ЄВРОПЕЙСЬКОГО СОЮЗУ

Адріан Вашко та Ярослав Клатік

АНОТАЦІЯ

Передумови дослідження. Дослідження зосереджено на актуальних проблемах кримінально-правового захисту дітей за допомогою кримінального права у Словацькій Республіці та Європейському Союзі. Автори надають визначення терміна «дитина» в чинному законодавстві, детально розглядають правове регулювання позиції дитини як жертви, а саме як особливо вразливої жертви в кримінальному праві.

Приділено увагу процесу віктимізації у зв’язку зі специфікою дитини.

Правове регулювання кримінального права у Словацькій Республіці, як і в Європейському Союзі, відображає необхідність особливого підходу до захисту дітей та молоді, а також адекватних правових інструментів, що поступово створюються й упроваджуються.

Методи. Для обробки даних досліджень використовували правове порівняння, змістовний і функціональний аналіз нормативно-правових актів, аналіз судових рішень, історичний аналіз і порівняння.

Результати та висновки. Сучасне кримінально-правове регулювання статусу та захисту дітей і молоді у Словацькій Республіці вимагає регулювання, щоб ефективно реагувати на нові загрози та ризики, насамперед пов’язані зі зростанням злочинної діяльності щодо дітей у віртуальному світі. З'ясовано, що постійно з'являються нові форми злочинної діяльності з використанням комп'ютерних технологій і соціальних мереж, і їхня кількість збільшується. Профілактика й освіта є незамінними аспектами захисту дітей та молоді від таких злочинів. Доведено, що ефективніше мати хорошу профілактику системи, ніж боротися з наслідками. На основі нашого дослідження ми рекомендуємо розробити і

запровадити в навчання дітей шкільного віку тему, зосереджену на запобіганні злочинам сексуального характеру. Водночас ми пропонуємо здійснювати постійну підготовку фахівців та збільшити кількість спеціалізованих робочих місць у правоохоронних органах Словацької Республіки.

Ключові слова: *кримінальне право, кримінальний кодекс, кримінальне правопорушення, дитина, потерпілий.*

ЧИ МОЖУТЬ СУРОВІ ЗАКОНИ ПРО ІНТЕЛЕКТУАЛЬНУ ВЛАСНІСТЬ СПРИЯТИ РОЗВИТКУ СЕКТОРА ЕНЕРГЕТИКИ: ВИПАДОК ? ДОСВІД САУДІВСЬКОЇ АРАВІЇ

Саад Нассер Аль-Кахтан

АНОТАЦІЯ

Передумови дослідження. Саудівська Аравія є світовим лідером у виробництві кам'яновугільних палив і спирається переважно на це джерело енергії для свого валового внутрішнього продукту (ВВП). Однак після кризи на ринку нафти у 2014 р. країна встановила "Візію 2030", маючи на меті перехід до економіки, що не залежить від нафти. За цією програмою Саудівська Аравія планує збільшити виробництво електроенергії із чистих джерел енергії на 30 %. У пропонованій статті досліджено ефективність суворих прав на інтелектуальну власність з метою розвитку сектора відновлювальної енергії (ВЕ).

Методи. Автором детально розглянуто ефективність суворих прав на інтелектуальну власність для стимулювання інновацій у секторі відновлювальної енергії, як показано у "Візії 2030" Саудівської Аравії. У статті здійснено порівняння з Європейським Союзом і Китаєм щодо того, наскільки суворі права на інтелектуальну власність поліпшують інновації. Автор використовує індуктивний дослідницький підхід, що базується на якісних даних, критично аналізує правові акти та політику в багатьох країнах, таких як Саудівська Аравія, Китай та ЄС.

Результати та висновки. У дослідженні встановлено, що для розвитку інновацій у секторі відновлювальної енергії більш ефективними є фінансові стимули. З огляду на це, країни, що розвиваються, користуються фінансовими стимулами для збільшення інновацій, оскільки багато розвинених країн ухвалили суворий закон щодо захисту інтелектуальної власності після того, як їхні ринки набули високого рівня розвитку.

Ключові слова: *інтелектуальна власність, відновлювана енергетика, зелений тариф, стандарт портфеля відновлюваних джерел енергії.*

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ЗАСТОСУВАННЯ СИСТЕМ ШТУЧНОГО ІНТЕЛЕКТУ У КРИМІНАЛЬНОМУ ПРОЦЕСІ: КЛЮЧОВІ НАПРЯМИ, ОСНОВНІ ПРАВОВІ ПРИНЦИПИ ТА ПРОБЛЕМИ ВЗАЄМОВІДНОСИН СПІВВІДНОШЕННЯ ? З ОСНОВНИМИ ПРАВАМИ ЛЮДИНИ

Оксана Капліна, Ануш Туманянц, Ірина Крицька та Олена Верхогляд-Герасименко

АНОТАЦІЯ

Передумови дослідження. Цифрові технології є важливим чинником розвитку суспільства в різних сферах, зачіпаючи не тільки традиційні сфери, такі як медицина, виробництво й освіта, а й правові відносини, включно з кримінальним провадженням. Ідеться не просто про використання технологій, пов'язаних із відеоконференціями, автоматизованим розподілом, цифровими доказами тощо. Розвиток постійно і швидко рухається вперед, і зараз ми стикаємося з проблемами, пов'язаними з використання технологій штучного інтелекту (ШІ) в кримінальному провадженні. Такі зміни також зумовлюють нові загрози та виклики – ми маємо на увазі виклики щодо дотримання фундаментальних прав і свобод людини в контексті технологічного розвитку. Крім того, з'являються питання і щодо забезпечення реалізації основних правових принципів, таких як презумпція невинуватості, відсутність дискримінації та захист права на приватне життя. Ці занепокоєння виникають у процесі застосування ШІ в системі кримінального судочинства.

Методи. Загальнофілософську основу пропонованого дослідження сформували аксіологічні та герменевтичні підходи, що дало змогу провести ціннісний аналіз фундаментальної людини, фундаментальних прав людини та змін у їхньому сприйнятті в контексті застосування ШІ, а також застосувати поглиблене вивчення та тлумачення правових текстів. У процесі побудови системи основних засад використання систем ШІ в кримінальному судочинстві застосовано системно-структурний та логічний методи дослідження. З допомогою порівняльно-правового методу здійснено порівняння правового регулювання та правозастосовної практики в різних правових системах. Метод правового моделювання було застосовано, щоб окреслити основні сфери можливого застосування систем ШІ у кримінальному провадженні.

Результати та висновки. У статті визначено основні можливі вектори використання систем ШІ у кримінальному судочинстві й оцінено доцільність і перспективність їхнього впровадження. Крім того, зазначено, що лише використання систем ШІ в допоміжних цілях несе мінімальні ризики втручання в права і свободи людини. Натомість інші сфери впровадження ШІ можуть суттєво порушувати права та свободи, і тому використання ШІ для таких цілей має бути повністю контрольованим, перевіреним і лише допоміжним, а в деяких випадках узагалі забороненим.

Ключові слова*: права людини; кримінальне провадження; цифрові технології; штучний інтелект; прогнозоване правосуддя, Україна.*

ЗАГАЛЬНА АЛЬТЕРНАТИВНА ТА КОНТРАКТНА ЮРИСДИКЦІЯ В МОЛДОВІ ТА РУМУНІЇ НА ОСНОВІ АЛЬТЕРНАТИВНОГО ПРОЦЕСУАЛЬНОГО ПРАВА СТОРІН

Олександр Прісак

АНОТАЦІЯ

Передумови дослідження. Правовий інститут, що розмежовує повноваження судових органів щодо вирішення судових справ, відноситься до загальної юрисдикції та належить до системи судів загальної юрисдикції. Це міжгалузева установа, що об'єднує юридичні норми кількох галузей процесуального права, які взаємодіють між собою. У межах цієї юрисдикції існують різні види компетенції, серед яких альтернативна загальна компетенція і договірна загальна компетенція. Пропонована стаття має на меті висвітлити їхні особливості, види загальної компетенції, починаючи з альтернативного процесуального права, регламентованого в законодавство як Республіки Молдова, так і Румунії.

Методи. Результати дослідження отримано за допомогою застосування таких методів знання, як аналіз, синтез і порівняння. Останнє особливо сприяло висвітленню регуляторного характеру альтернативної та договірної загальної юрисдикції в Республіці Молдова і Румунії. Це передбачало вивчення аргументів щодо входження цих типів юрисдикції в альтернативне процесуальне право, визначаючи межі й умови, що регулюють їхнє здійснення, а також розкриття особливостей їхнього регулювання в кожній країні. Крім того, також було виокремлено керівні принципи альтернативної та договірної загальної підсудності.

Результати та висновки. Пропонована стаття успішно розмежувала альтернативну загальну та договірну загальну юрисдикції, визнаючи їх двома різними типами загальної юрисдикції. Нездатність визнати їхні відмінності призводила до плутанини та неправильності застосування в судовій практиці норм щодо загальної компетенції судових органів.

Були висвітлені також особливості реалізації права вибору юрисдикційного органу за положеннями щодо альтернативної загальної компетенції та договірної.

Дослідження завершується рекомендаціями щодо забезпечення правильного застосування проаналізованих видів загальної компетентності на практиці. Було доведено, що право вибору юрисдикційного органу на підставі загальної альтернативної та договірної юрисдикції належить процесуальному праву, а не матеріальному. Також подані пропозиції з удосконалення альтернативної загальної юрисдикції та договірного регулювання.

Ключові слова: *підсудність, альтернативна підсудність, договірна підсудність, юрисдикція, процесуальне право.*

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ВИКОНАННЯ РІШЕНЬ В УКРАЇНІ: ПЕРСПЕКТИВИ РОЗВИТКУ ПРАВОВОГО ІНСТИТУТУ

Марина Стефанчук

АНОТАЦІЯ

Передумови дослідження. З позиції правового аналізу розглянуто чинне законодавство у сфері правового регулювання деяких інститутів примусового виконання рішень і проєктів законів. Виявлено сучасні тенденції у розвитку законодавства в цій сфері, розглянуто проблемні аспекти, пов'язані з правовим регулюванням зведеного виконавчого провадження, та правове регулювання специфіки оскарження рішень, дій чи бездіяльності виконавців. Заявленою метою є формування стійкої системи правосуддя в Україні, що сприяє мирному та відкритому суспільству, забезпечує доступ до справедливості для всіх і створює ефективні, підзвітні інституції із широкою участю на всіх рівнях. Висвітлено наукові підходи до розв'язання цих проблем.

Методи. Для досягнення мети дослідження застосовано такі загальнонаукові й унікальні методи наукового дослідження: порівняльно-правовий, семантико-структурний, прогностичний, групування, аналізу, синтезу та узагальнення.

Результати та висновки. Двома ключовими проблемними аспектами правового регулювання зведеного виконавчого провадження є відсутність у ньому визначення терміна «*зведене виконавче провадження*» та розробленого механізму передавання виконавчого провадження, що ускладнює їхнє застосування на практиці.

Зроблено висновок, що наявні прогалини в законодавстві необхідно усувати на законодавчому рівні, а не залишати предметом судової законотворчості, оскільки судова практика є нестабільною. Крім того, законодавство має відповідати вимогам європейських інституцій у сфері виконавчого провадження, згідно з якими національне законодавство має містити чітке визначення умов виконання, а законодавчі положення щодо виконання мають бути чітко викладені, уникаючи можливості неправильного тлумачення.

Унаслідок правового аналізу законопроєктів в інституті зведеного виконавчого провадження встановлено, що недоліками правового регулювання інституту зведеного виконавчого провадження, які залишаються неусунутими, є відсутність законодавчого визначення правової категорії «зведене виконавче провадження», а також відсутність чіткої, правової визначеності щодо порядку передання виконавчого провадження щодо одного боржника, відкритого державним виконавцем і приватним виконавцем або лише приватним виконавцем. З огляду на проведений правовий аналіз, запропоновано визначення «зведеного виконавчого провадження».

Виявлено невідповідність Закону України «Про виконавче провадження» та процесуальних кодексів щодо визначення переліку суб'єктів, які мають право на оскарження, та відповідного суду для подання такої скарги. Доведено, що така правова невизначеність провокує ускладнення реалізації права зацікавленої особи на ефективний засіб правового захисту.

Здійснено правовий аналіз законопроєктів щодо удосконалення інституту оскарження рішень, дій чи бездіяльності виконавців. Зауважено, що ці документи мають на меті усунення кількох суттєвих недоліків законодавства у зазначеній сфері, а також, у перспективі, запровадження інституту досудового розгляду спорів у цій категорії справ.

Однак законопроєкти також містять деякі дискусійні питання, а також неврегульовані недоліки законодавства у сфері примусового виконання рішень щодо правової невизначеності питань судової юрисдикції стосовно оскарження рішень, дій чи бездіяльності виконавців у зведеному виконавчому провадженні. Зважаючи на зазначене, авторка пропонує конкретне бачення усунення колізій між спеціальним і процесуальним законодавством щодо регулювання особливостей оскарження рішень, дій чи бездіяльності виконавців.

Ключові слова*: доступ до правосуддя, зведене виконавче провадження, оскарження рішень, дії чи бездіяльність виконавців, правова визначеність, недоліки законодавства, судова реформа; Україна.*

РОЛЬ ГРОМАДЯНСЬКОГО СУСПІЛЬСТВА У ЗАПОБІГАННІ ТА БОРОТЬБІ З НАСИЛЬНИЦЬКИМ ЕКСТРЕМІЗМОМ І РАДИКАЛІЗАЦІЄЮ, ЩО ПРИЗВОДЯТЬ ДО ТЕРОРИЗМУ ТА ВІЙНИ

Менсут Адемі та Ветон Вула

АНОТАЦІЯ

Передумови дослідження. Громадянське суспільство, що сформоване з різних груп акторів, спільнот і соціальних формувань, зареєстрованих чи неофіційних, несе відповідальність та виконує зобов'язання у суспільному житті щодо захисту та просування цінностей і спільних цілей на благо суспільства.

Молодь, жінки та представники громад є головними дійовими особами громадянського суспільства, які спрямовують свої зусилля на запобігання та боротьбу з девіантними явищами в мирний час та особливо під час війни, завдяки їхньому впливу та здатності сприяти суспільним змінам.

Інші групи інтересів, такі як ЗМІ, правоохоронні органи, університети, дослідники та представники академічного світу, а також ті, хто бере участь у приватному секторі, можуть зробити важливий внесок у запобігання війнам і повоєнним кризовим явищам.

Спроможності громадянського суспільства у воєнних і післявоєнних країнах можна посилити шляхом обміну передовим досвідом для програм міжнародних інституцій. Країни, які пережили цю ситуацію, такі як Косово, Боснія, Герцеговина та Хорватія, виявляють і підтримують менш відомі, надійні групи, створюючи мережі та регіональні платформи для співпраці, а також залучаючи професіоналів до досліджень і науковців для

отримання результатів на основі практичних даних, та сприяють їхньому якнайшвидшому впровадженню в країнах, що перебувають у кризі.

Методи. Для пропонованої роботи було використано комбіновану методологію: від досліджень самообвинувачення та віктимізації до страху злочинності. Зокрема, метод правового аналізу застосовано для дослідження правової основи та чинного законодавства, що регулює стратегії запобігання злочинам, тероризму і радикалізму. Метод системного аналізу використовується для вивчення та аналізу положень галузевого законодавства та його місця в чинній правовій системі. Метод історичного аналізу застосовано для пояснення минулих курсів і порівняння нових курсів з історичними. Нарешті, метод аналізу дослідника використовується для з'ясування мети та завдань дослідження з реальної позиції опитування та інтерв'ю.

Результати та висновки. Стаття лише покладає початок дослідженню й аналізу ролі громадянського суспільства в запобіганні та боротьбі з екстремізмом і тероризмом, які призводять до жорстоких воєн. Майбутні тематичні дослідження та аналіз охоплюватимуть передусім країни, які постраждали від таких історичних подій: війни протягом 1990–1999 рр. у колишній Югославії, війна в Сирії, заворушення в Лівії та нинішня війна в Україні. Вони будуть частиною публікації в майбутньому.

Основні теми стосуватимуться стану країни до, під час та після війни, рівня та надзвичайної інерції, що призвели до терору та війни, наслідків після конфліктів, торгівлі людьми та викраденими матеріальними цінностями, корупції й організованої злочинності, гуманітарних проблем і біженців. і, нарешті, висвітлюватимуть роль громадянського суспільства в цій сфері, особливо з позиції прав і свобод людини.

Розуміння ролі громадянського суспільства в запобіганні, боротьбі та захисті людських цінностей є першим кроком у зусиллях щодо національних і всеохопних стратегій подолання страху перед жахливими виявами екстремізму та тероризму під час війни. Пропонована стаття має на меті показати передову практику посткризових країн щодо подолання кризи, просування передових ідей та адекватних методів досягнення успіху, а також надати різні пропозиції та опис їхнього зв'язку, характеризуючи громадянське суспільство, яке має їх дотримуватися, включно з освітніми та профілактично-реабілітаційними програмами, що матимуть позитивний вплив на громаду.

Важливо, щоб громадянське суспільство отримало критерії, політичну підтримку, фінансові ресурси та керівні принципи, щоб досягти успіху у своєму баченні діяльності, і щоб його роль стала причиною сприяти належній компанії в суспільстві. Програми запобігання, боротьби, реабілітації та ресоціалізації в конфліктних і постконфліктних повоєнних країнах є довгостроковими та складними.

Їхній успіх значною мірою залежить від просування передового досвіду й обміну здобутими напрацювання та ресурсами в різних контекстах, як на національному, так і на міжнародному рівнях.

Завдяки цій роботі ми прагнемо внести свій внесок у цей дискурс, висвітлюючи міжнародні організації, такі як ОБСЄ, ООН, МОМ та ЄС, а також роль, яку громадянське

суспільство може і відіграватиме в тому, щоб зробити громади більш безпечними та стійкими до викликів у майбутньому, після закінчення воєн, з огляду на екстремізм, спричинений війнами у XXI ст.

Ключові слова: *громадянське суспільство, запобігання, війна, екстремізм, тероризм, Косово.*

КРУГЛИЙ СТІЛ З ОБГОВОРЕННЯ ПЛАНІВ ВІДНОВЛЕННЯ УКРАЇНИ ПІСЛЯ ВІЙНИ: КЛЮЧОВИЙ ПОЛІТИЧНИЙ ДОКУМЕНТ І РЕКОМЕНДАЦІЇ

Сільвіу Нате, Ганна Харламова, Андрій Ставицький

АНОТАЦІЯ

Передумови дослідження. У роботі розглянуто результати та висновки круглого столу, що відбувся 24 травня 2023 р. в межах дослідницького проєкту. Учасники заходу обговорили основні виклики, з якими зіткнеться уряд України після війни під час відновлення економіки. Війна й очікувана перемога України мають значно змінити геополітичну й економічну ситуацію у світі та уявлення про енергію як засіб впливу й, отже, створити гарантію енергетичної незалежності для всього європейського континенту. Учені, політики, науковці та практики об'єдналися задля обговорення розв'язання проблем України після перемоги, під час фази відновлення. Учасники наголосили на необхідності інституційних змін у державі Україна, які потрібні для майбутнього вступу до ЄС та НАТО. Однак, крім економічних викликів, Україна стикнеться з комплексом значних проблем після війни: забезпечення соціальної стабільності, відновлення інфраструктури, забезпечення інтеграції військових у мирне життя, відновлення екології територій, де велися військові операції, та значна реформа судової системи.

Результати та висновки. За підсумками круглого столу було підготовлено політичний документ щодо зусиль з відновлення України. Учасники зазначили, що для створення майбутньої регіональної інфраструктури та сприяння перспективам успішного бізнесу важливо проводити практичні обговорення з урядом Румунії та приватними компаніями. Створення спільної бізнес-платформи сприятиме переходу від вираження інтересів до безпосередньої участі в процесі відновлення. Для досягнення ширших цілей відновлення важливо залучити інших західних гравців промисловості з країн, таких як Німеччина, Франція, Італія, США, Велика Британія, Польща, Норвегія та ін., з їхніми фінансовими, технологічними та виконавчими можливостями.

Ключові слова: *відбудова, правова реформа, війна, інвестиції, геополітика, Україна.*

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ПРАВО ВЛАСНОСТІ ТА ПРАВОВИЙ ЗАХИСТ У КОСОВО

Берат Акіфі, Петріт Німані та Артан Малоку

АНОТАЦІЯ

Передумови дослідження. Республіка Косово – держава, розташована в Південно-Східній Європі з частковим дипломатичним визнанням. 17 лютого 2008 р. Косово проголосило незалежність і відтоді країна отримала дипломатичне визнання 116 держав – членів ООН.

У липні 2010 р. Міжнародний суд ООН виніс консультативний висновок щодо законності проголошення незалежності Косова, що не порушувало жодних загальних принципів ні міжнародного права, ні спеціального міжнародного права. У 2022 р. Косово подало офіційну заявку на членство в Європейському Союзі.

У Республіці Косово Конституція є найвищим правовим актом. Закони й інші правові акти мають відповідати Конституції. Цивільне право не кодифіковане, а поділене на окремі закони. Право власності регулюється Законом про власність й інші речові права (Закон № 03/L-154). Права власності й інші речові права в Республіці Косово випливають із цього закону.

Пам’ятаючи про це, у статті ми висвітлимо коло проблем, пов’язаних із регулювання та захистом прав власності, включно з прогалинами в первинному та вторинному законодавстві, аналізом судової практики, діяльністю судів, державних прокурорів та адміністративних органів.

Методи. У пропонованому дослідженні проаналізовано інститут права власності. Були використані порівняльні й аналітичні методи, засновані на чинному законодавстві в Косово, інформаційні ресурси колишньої Югославії тощо. Крім того, для отримання конкретних результатів ми застосовували деякі історичні методи.

Результати та висновки. Косово успадкувало залишки правової системи колишньої Югославії; створення нової системи – це виклик сам по собі. У контексті права власності загалом її правова охорона має вирішальне значення щодо права власника користуватися і розпоряджатися своїм майном.

Зважаючи на те, що інститут майнового права є одним з основних інститутів цивільного права та фундаментальним інститутом речового права, ми проаналізували цей інститут права як конституційний принцип, що регулюється спеціальними законами в Косово. Крім того, ураховуючи важливість інституту власності, Косово ухвалило закони, які захищають права власності. Власність перебуває під цивільно-правовим, кримінально-правовим і міжнародним захистом. Зазначені закони мають відповідати Конституції країни, міжнародним документам з прав людини, а також законодавству ЄС.

Ключові слова: *право власності, цивільні кодекси, право, правова охорона, Косово.*

МІЖНАРОДНЕ ПОРІВНЯННЯ: АДМІНІСТРАТИВНЕ СУДОЧИНСТВО В КИТАЇ ТА РУМУНІЇ

Катялін-Сильвіу Сарару

АНОТАЦІЯ

Передумови дослідження. У пропонованій статті проаналізовано спосіб досягнення балансу між загальним і приватним інтересами в адміністративному судочинстві Румунії та Китаю. Дослідження спрямоване на висвітлення відмінних способів врегулювання конкретних проблем цього правового інституту законодавцем і шляхом використання позитивних аспектів.

Методи. У статті використано історичний метод аналізу еволюції адміністративного судочинства в обох країнах діахронічно та порівняльний метод, що пояснює схожості та відмінності на рівні регулювання в обох системах. Порівняння базується на законі, що регулює адміністративне судочинство в кожній державі, а також на доктринальних і судових інтерпретаціях.

Результати та висновки. Незважаючи на те, що Китай ухвалив перший закон про адміністративне судочинство у 1989 р., а Румунія – у 1990 р. після революції 1989 р. та повернення до демократії, обидві країни продемонстрували значний прогрес в останні десятиліття. Цей прогрес гарантує захист фундаментальних прав людини під час ухвалення адміністративних рішень та їхнього подальшого судового контролю.

***Ключові слова**: порівняльне адміністративне право, адміністративне судочинство, адміністративний акт, Китай, Румунія.*

ПРИНЦИП "NE BIS IN IDEM" У КРИМІНАЛЬНИХ СПРАВАХ: ПОРІВНЯЛЬНИЙ АНАЛІЗ З МІЖНАРОДНИМИ ІНСТРУМЕНТАМИ ТА ЗАКОНОДАВСТВОМ КОСОВА

Орхан Чеку та Аріан Кадріу

АНОТАЦІЯ

Передумови дослідження. Кримінальне процесуальне право побудовано на юридичних принципах, таких як справедливий і безперешкодний суд, розгляд у розумний строк, презумпція невинуватості, принцип "у сумнівних випадках діяти на користь обвинуваченого", незалежність суду, рівність сторін, принцип "не двічі за те саме" тощо. Серед основних принципів, визнаних міжнародними конвенціями, конституціями держав та кримінальним процесуальним законодавством, є принцип "право не бути засудженим двічі за те саме", або як його також називають, ne bis in idem. Принцип "ne bis in idem" використовують у кримінальних провадженнях Косова, і його визнання

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міжнародною конвенцією, включно з визнанням Законом Європейського Союзу, проаналізовано у пропонованій статті. Законодавство Косова було створено за впливу та з допомогою міжнародної спільноти, яка мала мандат адміністрування до 17 лютого 2008 р., дати, коли Косово оголосило свою незалежність і відокремилося від колишньої Югославії. Нова держава не є членом ООН, але офіційно визнана понад 100 країнами. У 2010 р. Міжнародний Суд надав Консультативний висновок, у якому стверджується, що оголошення незалежності Косова 17 лютого 2008 р. не порушило загального міжнародного права.

Мета дослідження – підкреслити важливість принципу "ne bis in idem" у роботі з кримінальними справами у звичайних судах, для правової безпеки, яку цей принцип забезпечує суспільству, та під час імплементації міжнародно-правових документів у національне законодавство.

Методи. У роботі використані методи аналізу та синтезу, описовий метод, а також метод доктринального тлумачення правових норм кримінального судочинства.

Результати та висновки. Зазначений принцип був прийнятий міжнародними документами та конституційною і правовою системою Косова. Його застосування в кримінальному судочинстві в Косово формує правову визначеність для громадян і сприяє захисту прав і законних інтересів осіб, які беруть участь у кримінальному провадженні. Косово звернулося до міжнародних стандартів у сфері реалізації кримінального законодавства і безпосередньо залучило міжнародні документи з прав людини у свою конституційну систему, серед яких Міжнародний пакт про громадянські та політичні права, прийнятий ООН у 1966 р., за яким слідує Європейська конвенція із захисту прав людини й основних свобод, та ін.

***Ключові слова**: "Ne bis in idem", кримінальне судочинство, міжнародні стандарти кримінального процесу, справедливе покарання.*

АЛБАНСЬКИЙ ЦИВІЛЬНИЙ КОДЕКС 1929 РОКУ ЯК ЧАСТИНА ЄВРОПЕЙСЬКОЇ РОДИНИ ЦИВІЛЬНОГО ПРАВА

Лірідон Даліпі та Ардіан Еміні

АНОТАЦІЯ

Передумови дослідження. Цивільний кодекс засвідчує належність албанського цивільного права до романо-германської родини, остаточно відокремлюючи його від османського права. Цей кодекс і дотепер зберігає свій сучасний характер, індивідуальність і цілісність не лише тому, що ґрунтується на ідеї захисту основних прав і свобод людини та на демократичній моделі суспільства, яка надихнула його, і які завжди залишаються актуальними, але й тому, що він продовжує існувати як чинний інструмент для фахівців у цій галузі. Безсумнівно, іноземні правові системи, особливо французька, італійська, а також певною мірою німецька і швейцарська, надихали албанського

законодавця закріплювати у своїх положеннях рівність усіх громадян, емансипацію власності на землю та свободу займатися економічною діяльністю.

Методи. Методологія, використана під час написання цієї статті, в основному базується на албанських і зарубіжних доктринальних поглядах, зосереджуючись зокрема і на італійських та європейських доктринах, оскільки саме ці доктрина та ця законодавча база були використані албанським законодавцем під час створення Цивільного кодексу. Також серед методів, що застосовуються у дослідженні, варто згадати порівняльний і метод аналізу.

Результати та висновки. Рецепція іноземного права в Цивільному кодексі Зогу, більше, ніж "питання якості", було "питанням влади", оскільки іноземні правові системи, особливо французька та італійська, які набули свого закріплення в цьому кодексі, були правами, що належали до духовного впливу сучасної цивілізації, насамперед до "італійського Відродження" та "Французької революції".

Ключові слова: *цивільний кодекс, цивільне право, цивільно-правові відносини, законодавча єдність, Албанія.*

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