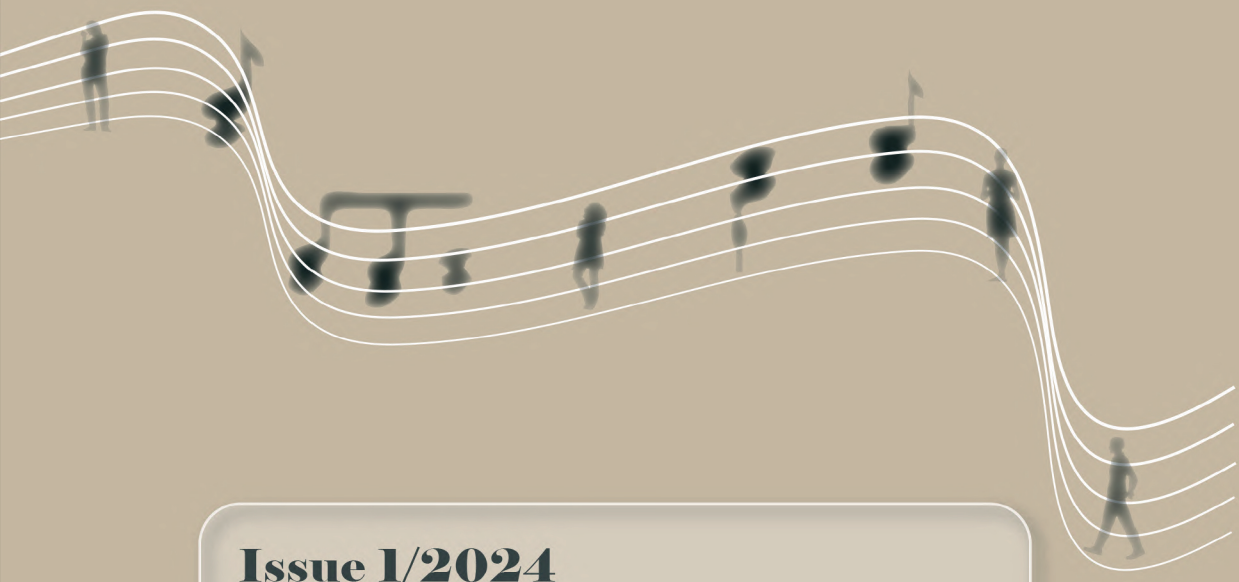
AJEE

PEER REVIEWED JOURNAL

ACCESS TO JUSTICE IN EASTERN EUROPE



Issue 1/2024

ACCESS TO JUSTICE IN EASTERN EUROPE

Founded by the East European Law Research Center

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

For further information on our activities and services, please visit our website http://ajee-journal.com
To submit your manuscript, please follow the instructions in our Guide. Papers and abstracts should be submitted online to one of the following email addresses: info@ajee-journal.com, editor@ajee-journal.com, assistant@ajee-journal.com

ISSN 2663-0575
EELRC
Publishing House VD 'Dakor'
Publishing House 'Academic Insights Press'

Access to Justice in Eastern Europe

Issue 7(1) February 2024

TABLE OF CONTENTS

EDITOR-IN-CHIEF'S NOTE

RESEARCH ARTICLES

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

Journal homepage http://ajee-journal.com

Editor-in-Chief's Note

ABOUT ISSUE 1 OF 2024

In my introductory remarks, I kindly direct the attention of our esteemed audience to several notably significant articles from Ukraine published in this issue while also highlighting some new features of the Journal.

We are in the process of updating our issue listings, and this particular edition is denoted as Volume 7, Issue 1 since the Journal's foundation in 2018.

Additionally, I am excited to share the vision behind our new cover. Thanks to our talented graphic designer, we can now thoughtfully capture the essence and significance of music and culture in society, reflecting their impact on everyday life and academic research.

The intersection of culture and music can profoundly impact scientific development, especially in the context of law. It is well-known how paintings and visual arts may impact humans and reflect ideas of justice at particular stages of humanity's evolution.

I want to draw attention to music as a catalyst for social change, facilitating legal activism and instigating changes. Throughout history, music has been a powerful tool for social and legal activism. Songs can bring attention to legal issues, advocate for change, and mobilise public opinion.

Our cover features a brilliant concept for developing the country and society, brought to life by law student and renowned Ukrainian poet Pavlo Chubynskyi. These words lie at the heart of the Ukrainian people, expressing their unstoppable desire for independence and freedom. The music for the anthem was created by Mykhailo Verbytskyi, an exceptional composer and one of the founders of modern Ukrainian music.

The potential influence of culture on science, particularly music's impact on shaping public opinion and legal doctrine, is not thoroughly researched. Therefore, during times of crisis, these generalised symbols fall into the minds as guiding posts and reflections of the people's aspirations and inclinations.

Shifting the focus to several notable articles, let us begin with 'Personal Status Of War-related Migrants: What is Relevant to Determine the Applicable Law?' by **Iryna Dikovska**, which explores the crucial aspect of determining the applicable law for a personal statute. This determination holds significance in regulating family and inheritance relations with a foreign element, along with addressing civil status issues. The author aims to analyse the impact of the actual circumstances of war-related migrants' lives, such as their migrant status and the duration of their stay in a particular country, on determining the law applicable to their status.

The author concludes that a person's migration status does not affect the determination of the law applicable to their personal status. When a conflict-of-laws rule requires an analysis of a migrant's life circumstances, factors such as employment opportunities, language knowledge, family or business ties, and the desire to stay in a particular country may be considered. For certain war-related migrants affected by conflict due to war, the law governing their personal status can be determined through the Convention Relating to the Status of Refugees of July 28 1951. It is noted that these individuals do not need formal refugee status but must meet the refugee criteria outlined in the Convention. Additionally, the law applicable to the personal status of individuals with subsidiary or temporary protection may also be determined based on the Convention. When using the Convention to determine the law applicable to personal status, adopting a broad understanding of the concept is advisable. The realistic intention of a migrant to stay in the country they fled can be a significant factor indicating domicile in that country. In the absence of a choice of law made by the parties in a specific relationship, the issues covered by the personal statute of a war-related migrant, not meeting the refugee criteria, may be governed by the law of the state to which the migrant has the closest connection when the relevant issue is brought before the court. These conclusions offer insights into the legal complexities surrounding familial, inheritance, and civil status matters for war-related migrants.

Another insightful article is 'Criminal Law Protection of the Ukrainian External Voting to the State Authorities in Post-War Conditions (A Case Study of Poland)' written by **Oksana Kaluzhna** and **Lidiia Paliukh**, explores the feasibility of conducting elections for Ukrainian state authorities in foreign electoral districts, particularly in light of the conditions arising from the full-scale invasion of Ukraine by the Russian Federation in February 2022. The study, with a special emphasis on the Republic of Poland as a case study, aims to provide insights applicable to other countries hosting a significant number of Ukrainian citizens.

The research highlights the substantial number of Ukrainians residing abroad, especially refugees, with Poland hosting over 1.5 million Ukrainian refugees. Acknowledging the challenges posed by the diaspora's size, the article argues for effective mechanisms for organising external voting, which is essential to ensure the democratic participation of this substantial portion of the electorate.

The final article I would like to bring to your attention is 'The Implementation of the Consensual Tenet in Modern Civil Procedure: A Comparative Analysis of Court-Connected Settlement Procedures Applied in Australia, Lithuania, and Ukraine' co-authored by **Tetiana Tsuvina**, **Sascha Ferz**, **Agnė Tvaronavičienė**, and **Paula Riener** who investigate the evolving landscape of civil procedure, moving from adversarial models to cooperative and consensual approaches. The primary focus is on the practical implementation of mutual cooperation and consensuality principles in civil procedure, specifically examining court-connected settlement procedures in Austria, Lithuania, and Ukraine.

The comparative analysis leads the authors to conclude that ideas of a socially oriented and consensual civil procedure are manifested in these countries through the introduction of settlement-oriented methods like court conciliation and court mediation. Despite a common understanding of these amicable procedures, the research identifies essential differences in the theoretical understanding of the concept and its implementation across jurisdictions. The article serves as a valuable example and study to assist dispute resolution practitioners and researchers in gaining a nuanced understanding of implementing court-connected settlement-oriented procedures in diverse legal contexts.

In this issue of AJEE, we present additional compelling and noteworthy articles and notes that merit the attention of our readers. I want to convey my sincere appreciation to all the contributing authors and the peer reviewers who have played a crucial role in maintaining the excellence of our content and have shared their valuable results with us.

Simultaneously, I would like to express gratitude to our dedicated team, comprising managing editors, language editors, and assistant editors. Let us take pride in our collaborative efforts, recognising that this essential work contributes significantly to the evolution of legal and social sciences.

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

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

PERSONAL STATUS OF WAR-RELATED MIGRANTS. WHAT IS RELEVANT TO DETERMINE THE APPLICABLE LAW?

Iryna Dikovska*

ABSTRACT

Background: *Determining the law applicable to a personal statute is important for regulating family and inheritance relations with a foreign element and civil status issues. Its determination may depend on the circumstances of the individual's life. This article aims to analyse the extent to which the actual circumstances of war-related migrants' lives (e.g. their migrant status, length of stay in a particular country) affect the determination of the law applicable to their personal status.*
Methods: *To achieve the research objectives, comparative, historical and analytical methods were employed. The paper relies on the preparatory materials to the Convention Relating to the Status of Refugees of 28 July 1951, as well as on the relevant works on the interpretation of the provisions of the Convention, personal statute, understanding of the concept of 'habitual residence' and the relationship between private international law and migration law. It compares the approaches of national laws to determine the law applicable to a personal statute. To clarify the concept of 'refugee's domicile', the English doctrine is employed. In addition, certain provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights are analysed to examine the issue of which State's law applies to rights related to marriage.*
Results and conclusions: *It has been found that migration status does not affect the determination of the law applicable to a personal statute. If a conflict-of-laws rule is formulated in a way that requires an analysis of the circumstances of a migrant's life, factors may include employment opportunities, knowledge of the language, family or business ties and his or her wish to stay in that country. The law applicable to the personal status of some war-related migrants may be determined based on the Convention Relating to the Status of Refugees of 28 July 1951. For this purpose, they do not need refugee status. However, they must meet the refugee criteria mentioned in the Convention. Thus, the law applicable to the personal status of persons with subsidiary or temporary protection may also be determined based on the Convention. When determining the law applicable to personal status based on the Convention, it is advisable to use a broad understanding of the concept of 'personal status'.*

If a migrant's intention to stay in the country to which he or she fled is realistic, it can be considered a factor, indicating that he or she has a domicile in that country. In the absence of a choice of law made by the parties of a particular relationship, the issues covered by the personal statute of a war-related migrant who does not meet the refugee criteria mentioned in the Convention can be governed by the law of the state with which such a migrant has the closest connection at the time when the relevant issue is brought before the court.

1 INTRODUCTION

At the close of 2022, the global count of refugees, including individuals in refugee-like situations and others in need of international protection, reached 34.6 million refugees.[1] A significant number of this population has fled armed conflict,[2] and during their journey, they encounter several legal challenges, particularly relating to their personal status.

Personal status can have a narrow (substantive) and a broad (formal) meaning.[3] In a former sense, it covers a certain range of issues or legal categories.[4] In a latter sense, it includes connecting factors that provide for the application of the law of the state of nationality of a particular natural person or the law of his or her habitual residence.[5] Some authors distinguish between the concepts of personal status and personal law. Following this approach, a personal status is understood as 'a set of legal matters relating to the natural person'.[6] In other words, it 'describes that person's position in the legal order'.[7] Unlike a personal statute, a personal law '... refers to a body of rules'.[8] The scope of issues covered by a personal statute (or scope of personal law) can also be understood differently. In this regard, a distinction is made between extensive and narrow models. The extensive model implies that personal statute covers (or personal law applies to) the civil status and legal capacity of natural persons, as well as family and succession relations.[9] The narrow model means that personal statute covers (or personal law applies to) only the civil status of individuals.[10] In this article, the term 'personal status' is understood substantively, i.e. as a range of issues that are closely related to a person (civil status, family and inheritance relations).

1 United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2022* (UNHCR 2023) 14 <https://www.unhcr.org/global-trends-report-2022> accessed 26 October 2023.
2 ibid.
3 Marie-Luisa Loheide, *Status Privatus und Status Politus im Internationalen Migrationsrecht* (Verlag Ernst und Werner Gieseking 2022) 68.
4 ibid.
5 S Lorenz, 'EGBGB Art 5 Personalstatut' in W Hau and R Poseck (eds), *Beck'sche Online-Kommentare* (68th edn, CN Beck 2023) <https://beck-online.beck.de/Bcid/Y-400-W-BECKOKBGB-G-EGBGB-A-5> accessed 26 October 2023.
6 Alfonso Luis Calvo Caravaca and others, 'Natural Person' in AL Calvo Caravaca and J Carrascosa González (eds), *European Private International Law* (Granada 2022) 71.
7 Anatol Dutta, 'Personal Status' in J Basedow and others (eds), *Encyclopedia of Private International Law*, vol 2 (Edward Elgar Pub 2017) 1346.
8 G Tedeschi, '"Personal Status" and "Statut Personnel"' (1969) 15(3) McGill Law Journal 452.
9 Calvo Caravaca and others (n 6) 73-4.
10 ibid 74-5.

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

If migration is of a cross-border nature, regulation of issues related to the personal status of migrants will require the determination of applicable law. The content of rules defining the law applicable to a personal statute of international treaties, the EU law and national legislation of certain states indicates that the applicable law depends on the circumstances of the migrant's life.

Art. 12 of the Convention Relating to the Status of Refugees of 28 July 1951 (hereinafter - Convention),[11] which defines the law applicable to the personal status of refugees, is usually indicative here (since it can be applied if a person can be considered as a 'refugee'). In other cases, the determination of applicable law may depend on whether the war-related migrant has habitual residence in a particular country (see e.g. Art. 26 of the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (hereinafter – Regulation 2016/1103),[12] Art. 8 of the Council Regulation (EU) № 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter – Regulation 1259/2010), [13] Art. 21 (1) of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter – Regulation 650/2012)[14]).

Therefore, this paper aims to analyse the extent to which the circumstances of life of war-related migrants affect the determination of the law applicable to their personal status. To achieve this goal, Part II sheds some light on what migration statuses war-related migrants may obtain in the country to which they have fled. Since Art. 12 of the Convention contains a special conflict-of-laws rule that determines the law applicable to the personal law of refugees, Part II of this paper also focuses on whether this article should apply only to persons with refugee status or it can also be applied when it comes to determining the law applicable to the personal law of a migrant with a migration status other than refugee status. Part III of this paper deals with the circle of issues that should be governed by the law chosen based on Art. 12 of the Convention, i.e., the scope of the personal statute. It also explains how the 'law of the country of domicile' and the 'law of the country of residence' to which Art. 12 of the Convention refers can be determined. Part IV of this paper explores how the

11 Convention Relating to the Status of Refugees (adopted 28 July1951) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees> accessed 26 October 2023.

12 Council Regulation (EU) 2016/1103 of 24 June 2016 [2016] OJ L 183 <http://data.europa.eu/eli/reg/2016/1103/oj> accessed 26 October 2023.

13 Council Regulation (EU) 1259/2010 of 20 December 2010 [2010] OJ L 343 <http://data.europa.eu/eli/reg/2010/1259/oj> accessed 26 October 2023

14 Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 [2012] OJ L 201 <http://data.europa.eu/eli/reg/2012/650/oj> accessed 26 October 2023.

law applicable to the personal status of migrants not covered by Art. 12 of the Convention can be defined. The paper relies on the preparatory materials to the Convention and on the relevant works on interpreting the provisions of the Convention, personal statute, understanding of the concept of 'habitual residence' and the relationship between private international law and migration law. It compares the approaches of national laws to determine the law applicable to a personal statute. To clarify the concept of 'refugee's domicile', the English doctrine is employed.

2 MIGRANT STATUS OF WAR-RELATED MIGRANTS AND CONFLICT-OF-LAWS RULES APPLICABLE TO THEIR PERSONAL STATUS

People fleeing the war can acquire different migrant statuses, or they may be waiting for a status in the country to which they flee. Their migrant status may not change at all for some time if, for example, they have the right to enter the state to which they fled without a visa and stay there for a certain period of time without obtaining any special permission.

The law applicable to the personal status of persons considered as 'refugees' is determined according to Art. 12 of the Convention. Its application may result in the determination of the law applicable to the personal status of a migrant differently than if it were defined on the basis of the national law of a particular country. This will occur when a national conflict-of-laws rule determines the law applicable to a refugee's personal status not as the law of the country in which he or she is domiciled (as provided for in Art. 12 of the Convention) but in some other way (e.g., Art. 5 of the Introductory Act to the German Civil Code will result in the application of the law of the country of person's nationality).

In the case of a person with a refugee status, the answer to the question of which conflict-of-laws rule applies to determine the law applicable to his or her personal status depends on how a legal system of a particular state corelate the rules of international treaties and national law. In this regard, it should be noted that today, many states legally or recognise the priority of international law over domestic law,[15] although doing so in different ways.[16] If the personal statute is understood to cover family and inheritance law, the question may arise as to which conflict of laws should be used to determine the law applicable to the relevant relationship: the rules of EU regulations or the rules of the Convention. Taking into account the fact that war-related migrants usually flee to the EU from third countries, the

15 C Economides, 'The Relationship between International and Domestic Law: Report' (1993) 6 Science and Technique of Democracy <https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(1993)006-e> accessed 26 October 2023.

16 ibid, pars 3.2-3.5. In particular, there are states that prioritize international treaties over: - legislation in general, including the respective constitutions; - statutes (while some states provide for such priority only in relation to certain international treaties, for example, those relating to human rights). In some states, international treaties have equal legal force to laws. However, in these states, the priority of international treaties is recognized in fact, as actions are taken to prevent conflicts between the norms of international treaties and national legislation. In some states, some international treaties may have the same legal force as acts of the executive branch, thus ranking lower than the laws of that state.

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

Convention will take precedence over the provisions of the relevant EU regulations under Art. 351 of the Treaty on the Functioning of the EU[17] and the provisions of the relevant regulations (see e.g. Art. 19 (1) of Regulation 1259/2010, Art. 62 (1) of Regulation 2016/1103, Art. 75 (1) of Regulation 650/2012).

In addition, it should be noted that some states have made reservations regarding the application of Art. 12 of the Convention. (e.g. Sweden has made a reservation according to which 'to the effect that the Convention shall not modify the rule of Swedish private international law, as now in force, under which the personal status of a refugee is governed by the law of his country of nationality'.[18] Under the reservation made by Israel, Art. 12 of the Convention shall not apply to it. Spain has reserved 'its position on the application of Art. 12 (1) of the Convention'.[19]

In the case of a person who has a status other than refugee status, the answer to the question regarding the applicability of Art. 12 of the Convention will depend, among other things, on whether the concept of 'refugee' as used in the Convention can be extended to them.

In this regard, it should be noted that in addition to refugee status (as defined in Art. 1 of the Convention and Art. 1 of its Protocol), war-related migrants may acquire, for example, temporary protection status under the national legislation of a particular country that implements the EU Temporary Protection Directive.[20] They can also obtain subsidiary protection status, provided by national legislation of a particular country, based on Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and the content of the protection granted (recast).[21] War-related migrants can also acquire other statuses provided for by the national legislation of a particular country (for example, the right to asylum under Art. 16 of the Basic Law of the Federal Republic of Germany). They can also be waiting to receive one of these statuses.

From the point of view of private international law, it is important to ask whether a person's migration status affects the determination of the law applicable to his or her personal status. It should be noted that the legislation of some countries allows determining the law

17 Treaty on the Functioning of the European Union of 13 December 2007 (consolidated version) [2016] OJ C 202 <https://eur-lex.europa.eu/EN/legal-content/summary/treaty-on-the-functioning-of-the-european-union.html> accessed 26 October 2023.

18 'States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protokol' (*United Nations High Commissioner for Refugees (UNHCR)*, 2023) <https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention> accessed 26 October 2023.

19 ibid.

20 The acts of national legislation implementing the Directive in certain countries can be found here: 'National Legislation Implementing the EU Temporary Protection Directive in Selected EU Member States' (*European Union Agency for Fundamental Rights (FRA)*, 3 August 2022) <http://fra.europa.eu/en/publication/2022/national-legislation-implementing-eu-temporary-protection-directive-selected-eu> accessed 26 October 2023.

21 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 [2011] OJ L 337 <http://data.europa.eu/eli/dir/2011/95/oj> accessed 26 October 2023.

applicable to the personal statute with uncertain migration status based on Art. 12 of the Convention. An example is Art. 28 (4) of the Act of Czech Republic on Private International Law, which provides that: 'If someone is an applicant for granting international protection, an asylum seeker or a beneficiary of a subsidiary protection or is homeless under another law or international agreement, the personal status of such a person shall be governed by provisions of international agreements stipulating the legal status of refugees and the legal status of stateless persons.'[22]

At the same time, the question concerning the possibility of application of Art. 12 of the Convention to persons without refugee status in other countries is not so clear. This is, in particular, the case of Germany. To settle this uncertainty, it was suggested to determine the law applicable to the personal status of persons with subsidiary protection or the right to asylum in Germany based on the Convention to equalise these persons' rights with those of refugees.[23] According to another viewpoint, Art. 12 of the Convention refers to refugees in a narrow sense and should not be extended to persons with other statuses.[24]

Besides, there is no consensus on what conflict-of-laws rules should be applicable to determine the personal status of persons with temporary protection. It can be assumed that some authors will argue that the law applicable to the personal status of such persons should be determined based on Art. 12 of the Convention since it has already been offered to apply this Convention not only to persons with refugee status but also for those who have subsidiary protection status.[25] At the same time, it can be predicted that there will be authors who will deny the application of Art. 12 of the Convention to persons with temporary protection, since the point of view according to which this article concerns only refugees already exists.[26]

In this regard, it is worth noting that the term 'refugee' in the Convention can be understood differently. According to a 'narrow' approach, this concept covers leaders of certain social groups who are subjected to personal persecution or only political activists.[27] The broad approach covers the so-called 'ordinary people' who are persecuted as representatives of a certain group or political activists as well as representatives of persecuted groups and victims of conflict and social violence.[28]

22 Unofficial translation by Petr Bříza and Ondřej Trubač, 'Attorneys at Law' in J Basedow and others (eds), *Encyclopedia of Private International Law*, vol 4 (Edward Elgar Pub 2017) 3110.

23 P Mankowski, 'Die Reaktion des Internationalen Privatrechts auf neue Erscheinungsformen der Migration' (2017) 1 IPRax 40.

24 Stefan Arnold, 'Der Flüchtlingsbegriff der Genfer Flüchtlingskonvention in Kontext des Internationalen Privatrechts' in Ch Budzikiewicz und andere (hrsg), *Migration und IPR* (Nomos 2018) 46.

25 Mankowski (n 23).

26 Arnold (n 24) 46.

27 Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protokol' in A Zimmermann, J Dörschner and F Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protokol: A Commentary* (OUP 2011) 51.

28 ibid.

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

Regardless of which approach is employed, key characteristics of 'refugee' are listed in Art. 1 of the Convention. That is, 'refugees' in the meaning of the Convention are always persons who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and is unable or, owing to such fear, is unwilling to avail [themself] of the protection of that country; or who, not having a nationality and being outside the country of [their] former habitual residence, is unable or, owing to such fear, is unwilling to return to it'.

Thus, the migration status of a person is not important for the application of Art. 12 of the Convention. The essential is whether a person is subjected to persecution referred to in Art. 1 of the Convention in the country of his or her nationality or former habitual residence. In other words, Art. 12 can be applied not only to persons with refugee status but also to persons with other migration statuses whose situation meets the characteristics specified in Art. 1 of the Convention.

To that end, it should be mentioned that some authors emphasise that in the situation with Ukrainian refugees, it is not so important to interpret Art. 12 of the Convention as to think about the relevance of its application to them (as it will mean that Ukrainian law will not govern the personal status of Ukrainian citizens although they are not fleeing persecution in their country and many of them want to return to Ukraine[29]). Indeed, as long as Ukrainian refugees are not persecuted on the basis of race, religion, citizenship, membership in a particular social group or political opinion in Ukraine, there are no grounds for determining the law applicable under Art. 12 of the Convention.

3 PERSONAL STATUS ISSUES OF MIGRANTS COVERED BY THE CONVENTION

For migrants who fall under the conventional concept of 'refugee', it will be relevant to define it. As follows from a Study of Statelessness, which is called 'precursor to the formulation of the 1951 Refugee Convention'[30] the drafters of the Convention intended to cover issues of '(a) A person's capacity (age of attaining majority, capacity of the married woman etc.); (b) His family rights (marriage, divorce, recognition and adoption of children etc.); (c) The matrimonial regime in so far as this is not considered a part of the law of contracts; (d) Succession and inheritance in regard to movable and some cases to immovable property"[31] with the term 'personal status'.

29 Sabine Corneloup, 'Migrants in Transit or Under Temporary Protection: How Can Private International Law Deal with Provisional Presence? ' (2023) 87(1) RabelsZ 60.

30 Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019) 11.

31 UN Economic and Social Council, *A Study of Statelessness,* United Nations, August 1949, Lake Success – New York E/1112;E/1112/Add.1 (UN Ad Hoc Committee on Refugees and Stateless Persons 1949) <https://www.refworld.org/docid/3ae68c2d0.html> accessed 26 October 2023.

However, in practice, different Contracting States have various understandings of the issues covered by the 'personal statute' referred to in Art. 12 of the Convention. The differences arise, for example, as to whether inheritance issues are covered by it.[32]

It should also be noted here that there are differences in whether the concept of 'personal statute' in Art. 12 of the Convention should be interpreted autonomously or whether the Contracting States have the right to interpret it differently.[33] One doctrinal proposal is that 'personal refugee status' should encompass the elements listed in a Statelessness Study; the extension of the scope of Art. 12 to matters not listed in the Study should be left to the discretion of the States Parties.[34]

The answer to the question regarding the circle of issues, covered by 'personal status' mentioned in Art. 12 of the Convention, depends on the method of interpretation of international treaties used and the extent to which the chosen method allows the use of preparatory materials. However, in any case, it is necessary to keep in mind the reasons for the creation of this article, which were to exclude the application of the law of refugee's nationality[35] (which usually means the law of a state from which the person is fleeing). Therefore, a broad understanding of personal status in Art. 12 of the Convention (i.e., the inclusion of all the issues mentioned in the Stateless Study) is justified, as it minimises the possibility of applying the law of the state from which the person fled to the issues covered by the personal statute.

Another important question in the application of Art. 12 (1) of the Convention is the interpretation of the terms 'country of domicile' and 'country of residence'. The drafters of the Convention did not have a consensus on how the concept of domicile should be understood, but all agreed that the term was vague.[36] In addition, it was noted that it is difficult to define this concept specifically for refugees since it tends to be related to what a person considers his or her home,[37] which in the case of refugees can be challenging.

In this regard, it is worth noting that in English law (which traditionally operates with the concept of domicile), it is believed that the key to determining the domicile of a refugee should be whether he or she intends to return to the country from which he or she fled if the situation in that country changes. However, the possibility of change should not be highly unlikely. Conversely, the intention to remain in the country of fleeing, even after changes in the refugee's home country, may be a ground for considering the country of fleeing as the place of domicile.[38]

32 Loheide (n 3) 69.
33 ibid.
34 ibid 72.
35 Axel Metzger, 'Juridical Status, Article 12' in A Zimmermann, J Dörschner and F Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protokol: A Commentary* (OUP 2011) 875.
36 James C Hathaway, *The Rights of Refugees under International Law* (CUP 2018) 214.
37 ibid.
38 Dicey, Morris and Collins, *The Conflicts of Laws*, vol 1 (16th edn, Sweet and Maxwell 2022) 224.

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

At the same time, the above position of English law is only one of the possible ones. The truth is that the drafters of the Convention could not decide on how this term should be understood, and therefore, it was suggested that it should be determined by the country's courts that receive the refugee.[39] However, the intention of a migrant to stay in the country that granted him or her refuge seems to be an important factor in determining whether he or she has a domicile in that country if this intention is realistic. The realism of this intention will depend on whether the actual circumstances of the migrant's life allow them to stay in the respective country (for example, whether they meet the requirements of migration legislation that allow them to stay for a longer period in a particular country).

If the refugee's situation is such that his or her domicile cannot be determined, according to Art. 12 (1) of the Convention, his or her personal status should be submitted to the country of his 'residence'. In certain situations, however, this criterion is also not easy to use, as some refugees may be interpreted as not having a 'residence' (e.g., those in transit camps).[40]

It is believed that in this case, the law of the country of transit should be applied since the main purpose of Art. 12 of the Convention is to prevent the subordination of personal statute issues to the law of the country from which the person fled.[41] This idea deserves support since persons fleeing war may indeed not have a 'residence' in the sense of the state in which they are actually located and in which they need to settle the issue covered by the personal statute. In such a case, determining the state in which such a person has a residence as the state of his or her actual stay allows us to determine the applicable law and, therefore, to resolve the issue that needs to be resolved.

However, when determining the law applicable to the personal status of refugees, it is necessary to recall Art. 5 of the Convention,[42] which is understood as allowing recourse to other conflict-of-laws rules not provided for in the Convention when they are more favourable to refugees,[43] as well as Art. 12 (2) of the Convention which enshrines the more general provision of Art. 5[44] that obliges Contracting states to respect the rights acquired by a refugee and related to his or her personal status, in particular, rights related to marriage.

39 Hathaway (n 36) 216.

40 ibid.

41 ibid.

42 According to Art. 5 of the Convention: "Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention".

43 There are cases when national courts have applied the law of the country of nationality rather than the law of the country of domicile of refugees, as it allowed to protect the rights covered by the personal statute. For example, in one case, the Belgian court did not apply Belgian law (the law of the refugees' country of domicile), but the law of their country of nationality, because, unlike Belgian law, it allowed them to register the surname of their newborn child in Belgium in accordance with their national law and traditions, which would not have been possible under Belgian law. Although the judge did not refer to private international law. The case is summarized in Jinske Verhellen, 'Cross-Border Portability of Refugees' Personal Status' (2017) 31(4) Journal of Refugee Studies 437.

44 ibid 438.

At the same time, the wording of Art. 12 (2)[45] allows for a derogation from this obligation if these rights violate their public policy.[46]

Art. 12 (2) of the Convention resonates with Arts. 8 and 12 of the European Convention on Human Rights (hereinafter - the European Convention).[47] The first of which provides for the right to respect for private and family life while at the same time stipulating exceptions when the state may interfere with the exercise of this right. In particular, when the interference is "in accordance with the law and is necessary for a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (Art. 8 (2) of the European Convention).

The second enshrines the right to marriage "according to the national laws governing the exercise of this right" (Art. 12 of the European Convention). The wording of Art. 12 of the European Convention, in fact, refers to the law applicable to the personal statute if the right to marriage is considered as its component. These articles of the European Convention have been subject to interpretation by the European Court of Human Rights.

For example, in the case *Z.H. and R.H. v. Switzerland of 8 December 2015* (No. 60119/12)[48] two Afghan nationals entered a religious marriage in Iran. At the time of the marriage, the wife was 14 years old, and the husband was 18. Their asylum application in Switzerland was rejected because the Federal Office for Migration considered Italy to be the responsible state under the responsible state under Regulation No. 343/2003/EC (the "Dublin Regulation"). After the husband was expelled to Italy and the wife remained in Switzerland, where she, as a juvenile, was granted legal guardianship, the husband decided to appeal the rejection of his application and to obtain the right to asylum in Switzerland for family reunification. The appeal was rejected by the Federal Administrative Court, as it did not consider the couple to be a family and found the marriage to a 14-year-old underage to be a violation of Afghan law and incompatible with Swiss public policy. The couple turned to the European Court of Human Rights, claiming, among other things, that the failure to recognise their marriage and the husband's expulsion to Italy had led to, inter alia, a violation of Art. 8 of the European Convention. However, the court did not find a violation of Art. 8 because it cannot be considered as obliging the recognition of a marriage entered into by a 14-year-old child. In addition, the court considered that the obligation to recognise such a marriage

45 Article 12(2) of the Convention provides that: "Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee".

46 Verhellen (n 43) 438.

47 Council of Europe, *European Convention on Human Rights: as amended by Protocols nos 11, 14 and 15, supplemented by Protocols nos 1, 4, 6, 7, 12, 13 and 16* (ECHR 2021) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 26 October 2023.

48 *ZH and RH v Switzerland* App no 60119/12 (ECtHR, 8 December 2015) <https://hudoc.echr.coe.int/eng?i=001-159050> accessed 12 December 2023.

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

could not follow from Art. 12 of the European Convention, which refers to national law governing the exercise of the right to marriage.[49]

The specific feature of this case is that the marriage was contrary to both the national law of each of the persons who entered into it and the public policy of the state in which they wanted to recognise it. However, even if the marriage did not violate their national law, it can be assumed that the court would still not consider it a violation of Art. 8 to refuse to recognise a marriage that is contrary to the public policy of the state where recognition is sought. (However, the marriage of these Afghan nationals was nevertheless recognised in Switzerland when the wife reached the age of 17, and both spouses were granted asylum in Switzerland).

4 LAW APPLICABLE TO A PERSONAL STATUS OF WAR-RELATED MIGRANTS NOT COVERED BY THE CONVENTION

The law governing the personal status (or certain issues covered by this concept) of war-related migrants who do not meet the refugee criteria within the meaning of the Convention may be determined on the basis of other international treaties (e.g., bilateral legal assistance treaties), the EU law, and national conflict-of-laws rules. It is not possible to dwell on the analysis of all the conflict-of- laws rules that could hypothetically serve as a basis for determining the applicable law to the personal status of war-related migrants in this paper so that we will focus on only some of them. In this regard, it should be mentioned that some conflict-of-laws rules subordinate the personal status (or certain issues covered by it) to the law of the country of the nationality of the person concerned (e.g. Art. 21 (1) of the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters from 24 May 1993). Therefore, in some cases, the migration (including one from war) will not affect the law applicable to the personal statute as long as the person retains the nationality of the country of origin.

It will be more complicated to determine the law applicable to the personal status of war-related migrants in situations where the conflict-of-laws provision is formulated in such a way that its application requires analysis of not only a person's nationality but also other circumstances of his or her life. This is, for example, the case when a conflict-of-laws provision provides for the application of the law of the state of a person's habitual residence.

The situation is further complicated by the fact that some war-related migrants may be in transit for a long time (e.g. those who, having left their country of origin, are forced to stay

49 This certainly does not mean that national law cannot impose restrictions on marriage, however, "the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired". Case of *B and L v the United Kingdom* App no 36536/02 (ECtHR, 13 September 2005) para 34 <https://hudoc.echr.coe.int/eng?i=001-70136> accessed 12 December 2023.

In addition, these restrictions must "meet the standards of accessibility and clarity required by the Convention". Case of *Frasik v Poland* App no 22933/02 (ECtHR, 05 January 2010) para 89 <https://hudoc.echr.coe.int/eng?i=001-96453> accessed 12 December 2023.

in a country other than their desired destination for some reason[50]). It was suggested that in the absence of a choice made by the person or persons concerned, the life situations of such migrants should be governed by the law of the country of their final destination, except in situations where the migrant is more closely connected to some other country.[51] The suggestion regarding determining the law applicable to the personal status of migrants under temporary protection is the same.[52] The only difference is that for a transit migrant, the country of destination is always a country other than the country of origin, while for a migrant with temporary protection, the country of destination and the country of origin are the same since most of them intend to return to it.[53]

The idea that the persons concerned should have the right to choose the law applicable to their relations deserves full support since the possibility of such a choice is consistent with the private law nature of the relations covered by the concept of personal statute. The appropriateness of applying the law of the state of the migrant's final destination to such relations (in the absence of a choice of law by the persons concerned) raises certain doubts since such a country cannot always be determined with certainty. In our opinion, in the absence of a choice of law made by the parties concerned, the issues covered by the personal statute of a migrant in transit should be governed by the law of the state with which such a migrant has the closest connection at the time when the relevant issue is brought before the court. A migrant's real prospects for integration into such a country (ability to find a job, language skills, family or business ties) can be a determining factor for finding such a country.

With regard to migrants with temporary protection, it is worth noting that even those authors who believe that most such immigrants wish to return home recognise that the situation may change over time.[54] This is confirmed by surveys of Ukrainian refugees (most of whom have temporary protection status) at the beginning of the war and now. In 2022, most Ukrainians who fled the war wanted to return to Ukraine.[55] However, the situation is changing over time, and the longer the war lasts, the more Ukrainians do not want to return to Ukraine.[56] Moreover, as of March 2023, the share of Ukrainian refugees who found work in a country that granted them temporary protection in some of these countries was 50% or more.[57]

50 The reasons and examples of such migration are described in Corneloup (n 29) 50-3.

51 ibid 75.

52 ibid 72.

53 ibid 70.

54 ibid 63.

55 Herbert Brücker and others, 'Ukrainian Refugees in Germany: Evidence from a Large Representative Survey' (2023) 48 Comparative Population Studies 407; Anastasija Zanuda, 'Will Ukrainians Return Home' (*BBC News Ukraina*, 25 July 2022) <https://www.bbc.com/ukrainian/features-62249591> accessed 26 October 2023.

56 Herbert Brücker and others, 'Ukrainian Refugees: Nearly Half Intend to Stay in Germany for the Long Term' (2023) 28 DIW Weekly Report 204; 'How Many Ukrainians Plan to Stay in Poland: A Study' (*Gremi Personal*, April 2023) <https://gremi-personal.com.ua/skilki-bizhenciv-ne-povernutsja-v-ukrainu-doslidzhennja/> accessed 26 October 2023.

57 Vasco Botelho and Hannah Hägele, 'Integrating Ukrainian Refugees into the Euro Area Labour Market' (*European Central Bank, Eurosystem*, 1 March 2023) <https://www.ecb.europa.eu/press/blog/date/2023/html/ecb.blog.230301~3bb24371c8.en.html> accessed 26 October 2023.

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

That is why one can only partially agree with the opinion that temporary protection lacks a close and stable link to the state of protection, and therefore, a person with temporary protection does not have habitual residence in the state of protection, as defined by for example, the Regulation 650/2012.[58]

In our opinion, much depends on the time at which the habitual residence of a migrant enjoying temporary protection is examined. This is because their connection with the country that provides temporary protection will differ one or two months after entering it and after two years of staying there. The longer a migrant stays in the country of temporary protection, the stronger his or her ties to that country.

At the same time, one should agree with the opinion that the determination of habitual residence should not be dependent on the migration status of a person, which may be taken into account in determining habitual residence along with other circumstances of the case.[59] This is because migration status can alter as the living conditions of migrants change. Some of them may stay in the host country because they have found a job, started studying, or created a family with a person who has habitual residence in the host country. However, regardless of the grounds for staying, after the expiry of temporary protection, the nature of war-related migrant's residence will remain temporary for several years. In our opinion, this temporariness does not affect the determination of the law applicable to personal status if other circumstances of the case indicate that the person has a stable connection with the host state and the prospect of obtaining the right to permanent residence there.

5 CONCLUSIONS

The law applicable to the personal status of a war-related migrant is determined on the basis of Art. 12 of the Convention if he or she meets the refugee characteristics defined by this Convention. However, not only persons with refugee status but also holders of other migration statuses may satisfy refugee criteria set out by the Convention. In this sense, migration status does not affect the determination of the law applicable to a personal statute.

58 Corneloup (n 29) 63.

The term "habitual residence" is not defined in the Regulation 650/2012 and therefore requires interpretation, which should be done independently. Eva Lein, 'Art 4 EuErbVO (Allgemeine Zuständigkeit)' in A Dutta and J Weber (eds), *Internationales Erbrecht: EuErbVO, Erbrechtliche Staatsverträge, EGBGB, IntErbRVG, IntErbStR, IntSchenkungsR* (CH BECK 2016) 108. The interpretation of the concept of "habitual residence" in the EU law may differ depending on the category of cases it relates to. Paul Lagarde, 'Article 21 General Rule' in U Bergquist and others, *EU Regulation on Succession and Wills: Commentary* (Verlag Dr Otto Schmidt KG 2015) 122. That is why paragraphs 23 and 24 of the Preamble to the Regulation 650/2012 provide for certain areas of analysis of the circumstances of the case to be carried out by the law enforcement authority in succession matters. It is widely believed that the state of the deceased's habitual residence is the state where the center of his or her vital interests is located. This will usually be the state where most of the property is located and where the deceased's main creditors are based. Paul Lagarde, 'Introduction' in U Bergquist and others, *EU Regulation on Succession and Wills: Commentary* (Verlag Dr Otto Schmidt KG 2015) 30.

59 Corneloup (n 29) 70.

If the law applicable to the personal status of a war-related migrant is determined based on Art. 12 of the Convention, a broad understanding of personal status is justified, as it allows to exclude more issues from the scope of the law of the state from which the migrant fled.

Whether a war-related migrant has a domicile in the country of destination, in the meaning of Art. 12 of the Convention, depends on whether the migrant intends to stay in that country after the end of the war in the country from which he or she fled and whether such a stay is realistic. The law of migrant's residence in the meaning of Art. 12 of the Convention is the law of the state of his or her actual stay. If a connecting factor that determines the law applicable to a personal statute is formulated in a way that requires an analysis of the circumstances of the migrant's life, they may include employment opportunities, knowledge of the language, family or business ties and his or her wish to stay in that country. The non-permanence of a person's migration status does not affect the law applicable to the personal status of a war-related migrant.

REFERENCES

1. Arnold S, 'Der Flüchtlingsbegriff der Genfer Flüchtlingskonvention in Kontext des Internationalen Privatrechts' in Budzikiewicz Ch und andere (hrsg), *Migration und IPR* (Nomos 2018) 25.
2. Botelho V and Hägele H, 'Integrating Ukrainian Refugees into the Euro Area Labour Market' (*European Central Bank, Eurosystem*, 1 March 2023) <https://www.ecb.europa.eu/press/blog/date/2023/html/ecb.blog.230301~3bb24371c8.en.html> accessed 26 October 2023.
3. Bříza P and Trubač O, 'Attorneys at Law' in Basedow J and others (eds), *Encyclopedia of Private International Law*, vol 4 (Edward Elgar Publishing 2017) 3110.
4. Brücker H and others, 'Ukrainian Refugees in Germany: Evidence from a Large Representative Survey' (2023) 48 Comparative Population Studies 395, doi:10.12765/CPoS-2023-16.
5. Brücker H and others, 'Ukrainian Refugees: Nearly Half Intend to Stay in Germany for the Long Term' (2023) 28 DIW Weekly Report 204.
6. Calvo Caravaca AL and others, 'Natural Person' in Calvo Caravaca AL and Carrascosa González J (eds), *European Private International Law* (Granada 2022) 69.
7. Corneloup S, 'Migrants in Transit or Under Temporary Protection: How Can Private International Law Deal with Provisional Presence?' (2023) 87(1) RabelsZ 46.
8. Dicey, Morris and Collins, *The Conflicts of Laws*, vol 1 (16th edn, Sweet and Maxwell 2022).
9. Dutta A, 'Personal Status' in Basedow J and others (eds), *Encyclopedia of Private International Law*, vol 2 (Edward Elgar Pub 2017) 1346.
10. Economides C, 'The Relationship Between International and Domestic Law: Report' (1993) 6 Science and Technique of Democracy <https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(1993)006-e> accessed 26 October 2023.

11. Einarsen T, 'Drafting History of the 1951 Convention and the 1967 Protokol' in Zimmermann A, Dörschner J and Machts F (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protokol: A Commentary* (OUP 2011) 40.
12. Foster M and Lambert H, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019).
13. Hathaway JC, *The Rights of Refugees under International Law* (CUP 2018).
14. Lagarde P, 'Article 21 General Rule' in U Bergquist and others, *EU Regulation on Succession and Wills: Commentary* (Verlag Dr Otto Schmidt KG 2015) 120.
15. Lagarde P, 'Introduction' in U Bergquist and others, *EU Regulation on Succession and Wills: Commentary* (Verlag Dr Otto Schmidt KG 2015) 20.
16. Lein E, 'Art 4 EuErbVO (Allgemeine Zuständigkeit)' in Dutta A and Weber J (eds), *Internationales Erbrecht: EuErbVO, Erbrechtliche Staatsverträge, EGBGB, IntErbRVG, IntErbStR, IntSchenkungsR* (CH BECK 2016) 108.
17. Loheide ML, *Status Privatus und Status Politus im Internationalen Migrationsrecht* (Verlag Ernst und Werner Gieseking 2022).
18. Lorenz S, 'EGBGB Art 5 Personalstatut' in Hau W and Poseck R (eds), *Beck'sche Online-Kommentare* (68th edn, CN Beck 2023) <https://beck-online.beck.de/Bcid/Y-400-W-BECKOKBGB-G-EGBGB-A-5> accessed 26 October 2023.
19. Mankowski P, 'Die Reaktion des Internationalen Privatrechts auf neue Erscheinungsformen der Migration' (2017) 1 IPRax 40.
20. Metzger A, 'Juridical Status, Article 12' in Zimmermann A, Dörschner J and Machts F (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protokol: A Commentary* (OUP 2011) 863.
21. Tedeschi G, '"Personal Status" and "Statut Personnel"' (1969) 15(3) McGill Law Journal 452.
22. Verhellen J, 'Cross-Border Portability of Refugees' Personal Status' (2017) 31(4) Journal of Refugee Studies 427, doi:10.1093/jrs/fex026.

AUTHORS INFORMATION

Iryna Dikovska
Dr.Sc. (Law), Full Professor of Civil Law Department, Taras Shevchenko National University of Kyiv, Kyiv, Ukraine; Max Planck Institute for Comparative and Private International Law Hamburg Scholarship Recepient, Hamburg, Germany
irinadikovska@hotmail.com
https://orcid.org/0000-0002-0728-3934
Corresponding author, responsible for writing, reviewing and editing of this article.

Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations.

ACKNOWLEDGEMENTS

The author is grateful to the Max Planck Institute for Comparative and International Private Law for hospitality and financial support, which allowed her to compose this paper as a visiting researcher of the Institute.

ABOUT THIS ARTICLE

Cite this article

Dikovska I, 'Personal Status of War-Related Migrants. What Is Relevant to Determine the Applicable Law?' (2024) 7(1) Access to Justice in Eastern Europe 10-25 <https://doi.org/10.33327/AJEE-18-7.1-a000113>

Submitted on 14 Nov 2023 / Approved 07 Dec 2023
Published Online 17 Jan 2024 / Last Published 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000113

Managing editor – Mag. Yuliia Hartman**. English Editor** – Julie Bold.

Keywords: *personal status, law applicable to personal status, war-related migrants, Convention Relating to the Status of Refugees, domicile, refugee.*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

THE IMPLEMENTATION OF CONSENSUAL TENET IN MODERN CIVIL PROCEDURE: COMPARATIVE ANALYSIS OF COURT-CONNECTED SETTLEMENT PROCEDURES APPLIED IN AUSTRIA, LITHUANIA, AND UKRAINE

Tetiana Tsuvina*, Sascha Ferz, Agnė Tvaronavičienė and Paula Riener

ABSTRACT

Background: *In this article, the co-authors continue exploring the observable changes in the orientation of civil procedure, moving from competitive and adversarial models towards more cooperative and consensual approaches. Specifically, this work aims to disclose the peculiarities of practically implementing the principles of mutual cooperation and consensuality in civil procedure. The research delves into court-connected settlement procedures in three European countries: Austria, Lithuania, and Ukraine. Through a comparative analysis of the legal regulations and practices in the selected countries, the article evaluates the impact of the application of settlement-oriented procedures on fostering a more amicable resolution of civil disputes.*

Methods: *Research commenced with a review of the existing scientific literature, a brief historical analysis, and a document analysis concerning the legal framework of settlement-oriented procedures applied in the civil process in selected countries. This work is the continuation of the previous research of the co-authors, aiming to explore how the identified global trend of the drift towards a consensual tenet in the civil procedure was reflected in the selected countries' legal legislation and practice. The Austrian, Lithuanian, and Ukrainian legal frameworks of court-connected settlement-oriented procedures were compared to acknowledge the existing variety and specifics of national approaches towards consensuality in the civil procedure in different jurisdictions.*

Results and Conclusions: *The ideas of a more socially oriented and consensual civil procedure are implemented in the civil procedure of Austria, Lithuania, and Ukraine through the introduction of settlement-oriented methods of dispute resolution, such as court conciliation and court mediation. Despite the wide common understanding of these amicable procedures, essential differences in the theoretical understanding of the concept and its implementation in the analysed jurisdiction were identified. This research assists dispute resolution practitioners and researchers interested in better understanding the implementation of court-connected settlement-oriented procedures in different jurisdictions.*

1 INTRODUCTION

Amicable dispute resolution has become a trend in civil procedure in the last two decades. The classical understanding of competition-based dispute resolution in courts is changing rapidly toward a modern approach, including settlement-oriented options for the disputants. In most countries, the modernisation of civil procedure brought into practice the legal framework of such settlement procedures as in-court conciliation, in-court and court-connected mediation, and amicable conciliation processes. Thus, 'all over the world, "court-connected" programs and their mediation and conciliation elements differ'.[1] This leads to the need for a deeper look into the national legal framework and practice of selected countries to acknowledge the existing variety and specifics of national approaches towards consensuality in the civil procedure in different jurisdictions.

This research focuses on court-connected settlement procedures applied in civil process, where the implementation of principles involving mutual cooperation and consensuality is paramount. This small-scale study aims to disclose the peculiarities and specifics of implementing the social civil process ideas regarding court assistance in consensual settlement. The selected countries for examination are Austria, Lithuania, and Ukraine. The study seeks to unravel how settlement-oriented court-connected procedures operate in these countries, exploring their peculiarities, similarities, and differences.

The deliberate choice to focus on Austria, Lithuania, and Ukraine is influenced by the significant impact of famous Austrian lawyer F. Klein, the father of the concept of the social civil procedure. His ideas not only served as a base for the Austrian civil procedure but also influenced the legal doctrine and legislation of other European countries considerably. Lithuania, in particular, exemplifies this influence through its modern civil procedure. By grounding its modern Code of Civil Procedure in the ideas of F. Klein's doctrine on Social Civil procedure, the Lithuanian legislator sought to reassess the role of the court in the process, to give it not solely the role of a completely passive arbiter, but rather the role of a certain defender of public interests.[2] The Lithuanian Code of Civil Procedure aimed to achieve a reasonable combination of securing the interests of society and the state on the one hand and the interests of private individuals on the other.[3] So, the Austrian school of social civil procedure had a significant impact on Lithuanian civil procedure.

Nevertheless, current changes in Lithuanian civil procedure law concerning the wider promotion of court mediation and applications of mediation as a mandatory pre-litigation procedure in family disputes show that this country is active in further development of socially oriented civil procedure and applies measures that go beyond the experience and practice of its predecessors.

1 Tetiana Tsuvina, Sascha Ferz, Agnė Tvaronavičienė and Paula Riener, 'The Implementation of Consensual Tenet in Modern Civil Procedure: A European Approach of Court-Related Amicable Dispute Resolution Procedures' (2023) 6(1) Access to Justice in Eastern Europe 221, doi:10.33327/AJEE-18-6.1-a000124.

2 Virgilijus Valančius, 'Lietuvos civilinio proceso kodeksas: pirmųjų metų patirtis' (2005) 69(61) Jurisprudencija 55.

3 Vigita Vėbraitė, 'Šalių sutaikymas civiliniame procese' (DPhil thesis, Vilnius University 2009) 35.

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

The third country chosen for the comparison is Ukraine, a country rapidly advancing in the legal field, characterised by its ability to effectively adopt successful foreign practices and properly incorporate them into its national law, thereby creating prerequisites for the effective application of legal innovations. However, the ongoing Europeanisation process of this country also poses several challenges. The desire to enjoy a modern civil process often falters when faced with difficulties in implementing innovations. It is recognised that some socially useful initiatives focused on creating public welfare do not always receive support from the public and legal system entities. This applies to the settlement procedure with the participation of a judge, which is used not very often in practice. Such a comparison illustrates how the changes in civil procedure paradigm reflect the practice, focusing on the implementation of court conciliation and mediation consepts. It underscores the variety of possible directions of social civil process development, which grounds that every national system should constantly search, responsibly choose, and effectively implement the measures for assistance in settling.

2 THEORETICAL BACKGROUND CHANGES IN PERCEPTION OF ADR: THE SHIFT FROM THE ALTERNATIVE TO LITIGATION TOWARDS BECOMING AN INTEGRAL PART OF THE MODERN CIVIL PROCEDURE

Although alternative dispute resolution (further – ADR) is a well-known and globally used concept, recently its interpretation as an 'alternative' to litigation has been criticised in literature.[4] Some scholars have proposed alternative terms such as 'appropriate',[5] 'amicable'[6] or 'additional'[7] dispute resolution rather than 'alternative'. In some sources, we can even find the proposition to replace ADR with EDR, i.e. 'effective dispute resolution'.[8] This pluralism of views reflects the diversity of dispute resolution areas, emphasising only one essential feature of a particular group of dispute resolution methods in the abovementioned terms. For example, 'alternative' underscores the distinctions between ADR and classical litigation,

4 Masood Ahmed, 'Moving on from a Judicial Preference for Mediation to Embed Appropriate Dispute Resolution' (2019) 70(3) Northern Ireland Legal Quarterly 331, doi:10.53386/nilq.v70i3.137; Laurence Boulle and Rachael Field, *Australian Dispute Resolution: Law and Practice* (LexisNexis Butterworths 2016) 36-7.

5 Ahmed (n 4); Mariana Hernandez-Crespo Gonstea, 'Remedy without Diagnosis: How to Optimize Results by Leveraging the Appropriate Dispute Resolution and Shared Decision-Making Process' (2020) 88(6) Fordham Law Review 2165; Dorothy W Nelson, 'Which Way to True Justice?: Appropriate Dispute Resolution (ADR) and Adversarial Legalism' (2004) 83(1) Nebraska Law Review 167.

6 Adriana Deac, 'General Terms of the Amicable Settlement of Disputes Between Consumers and Traders' (2015) 4(1) Perspectives of Business Law Journal 88; Sascha Ferz, 'Amicable Dispute Resolution at Court: Conciliation Hearings, The Austrian and German Perspectives' (2022) 8(1) International Comparative Jurisprudence 106, doi:10.13165/j.icj.2022.06.008; Tsuvina and others (n 1) 221.

7 John Doyle, 'Diminished Responsibility? The Changing Role of the State' (1997) 2(1) Flinders Journal of Law Reform 33; Mavis Maclean, 'Family Mediation: Alternative or Additional Dispute Resolution?' (2010) 32(2) The Journal of Social Welfare & Family Law 105, doi:10.1080/09649069.2010.506306.

8 William L Ury, Jeanne M Brett and Stephen B Goldberg, 'Designing an Effective Dispute Resolution System' (1988) 4(4) Negotiation Journal 413, doi:10.1111/j.1571-9979.1988.tb00484.x.

'amicable' accentuates the conciliatory tenet of such procedures, and 'appropriate' highlights the procedures which best suit a particular type of case and parties, etc.

For many years, legal discourse on ADR was built around the dichotomy of ADR *versus* litigation. In such a paradigm, the court was typically introduced as a not-so-effective type of dispute resolution, i.e. more costly, timely, and burdened with formalities than ADR.[9] This perspective embedded scepticism about ADR among lawyers educated in the adversarial system of civil litigation. Simultaneously, it could foster a false expectation of ADR as a panacea of dispute resolution area. Nevertheless, we do not follow this antagonistic view.

It seems that a more productive way of introducing a dispute resolution system is a procedural pluralism,[10] which provokes us to interpret different ADR procedures, often considered 'in the shadow of the law', as equal forums for resolving disputes.[11] This approach suggests introducing different dispute resolution methods as parts of one dispute resolution system (DRS).[12] This means 'the use of the word 'alternative' as a description for DR has long been inaccurate'.[13] Such a system was introduced in literature in different ways – as 'spectrum' or 'matrix'.[14] In general, it covers negotiation, mediation, conciliation, arbitration, and litigation. However, such a spectrum can vary according to the national peculiarities of the DR in different countries.[15]

One of the key points is that in the procedural pluralism paradigm, courts also can be seen as multifunctional 'arenas in which various kinds of dispute […] processing take place',[16] (including negotiation, mediation, conciliation, etc.). It means the court is seen as a forum for other DR methods by integrating them into the litigation. Such interaction between classical litigation and other DR methods can be seen, for example, in practices of mandatory mediation, which is highly discussed now,[17] when mediation becomes the prerequisite of the trial, as well as in the current practice of in-court or court-related

9 Adrian Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Justice' in A Zukerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999) 2, doi:10.1093/acprof:oso/9780198298335.003.0001.

10 Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 13(19) Journal of Legal Pluralism 1, doi:10.1080/07329113.1981.10756257.

11 ibid 2.

12 Boulle and Field (n 4) 33; Shauhin A Talesh, 'How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws' (2012) 46(3) Law and Society Review 463, doi:10.1111/j.1540-5893.2012.00503.x; Ury, Brett and Goldberg (n 8).

13 Boulle and Field (n 4) 38.

14 Boulle and Field (n 4) 40-2; Jean-Marie Kamatali, 'Transplanting an ADR-Centric Model of Dispute Resolution from the Anglo-American Legal System to the Civil Law System: Challenges, Limitations, and Proposals' (2022) 37(3) Ohio State Journal on Dispute Resolution 316.

15 Boulle and Field (n 4) 41.

16 Galanter (n 10) 3.

17 Dorcas Quek Anderson, 'Mandatory Mediation: An Oxymoron - Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) Cardozo Journal of Conflict Resolution 479; CH van Rhee, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4(4) Access to Justice in Eastern Europe 7, doi:10.33327/AJEE-18-4.4-a000082.

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

mediation. The more sophisticated view of courts as providers of complex DR systems was already introduced by F. Sander in his 'multi-door courthouse' concept years ago.[18]

As we can see, DR design is considered a set of measures to construct an effective DR system. In this context, the state becomes one of the stakeholders of such a system due to its vested interest in the efficacy of all justice sectors. This is supported by the increasing value of the consensual tenet in civil procedure seen in the civil procedural codes of many European countries and from the pan-European perspective.[19] For example, ELI/UNIDROIT Model European Rules of Civil Procedure (ELI/UNIDROIT Rules) recognise the settlement principle as a prominent principle of modern civil procedure. According to this principle, parties, their lawyers, and judges are encouraged to cooperate in seeking the parties' consensual dispute resolution during a trial. This includes using amicable dispute resolution methods.[20]

Current trends in emerging dispute resolution mechanisms underscore the growing importance of settlement-oriented procedures. For example, the Civil Resolution Tribunal (CRT) in British Columbia (Canada) in 2016 marked a pivotal development as the first online court for most small claims categories, including those up to CAD 5,000, personal injury disputes arising from road traffic accidents, and condominium disputes.[21] The idea of this online court as a complex DR system is to provide dispute settlement at the earliest stage and only resort to a trial if it fails. This DR system consists of four blocks: 1) providing legal information on the dispute through the information platform 'Solution Explorer';[22] 2) negotiations, when the parties use the online negotiation procedure to resolve the dispute by themselves; 3) facilitation, which is applied if the negotiations are unsuccessful and presupposes the active assistance of a third neutral party (usually a professional mediator); 4) court proceedings, as *ultima ratio* method.[23] Settlement-oriented procedures have also been integrated into innovative online dispute resolution systems recently introduced in Australia (New South Wales and Victoria)[24] and the United Kingdom.[25]

18 Frank EA Sander, 'Varieties of Dispute Processing' (The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St Paul, Minn, 7-9 April 1976) 111.

19 Tsuvina and others (n 1) 204-10.

20 European Law Institute (ELI) and International Institute for the Unification of Private Law (UNIDROIT), *ELI/UNIDROIT Model European Rules of Civil Procedure: From Transnational Principles to European Rules of Civil Procedure* (OUP 2021).

21 See: *Civil Resolution Tribunal* <https://civilresolutionbc.ca> accessed 20 June 2023.

22 ibid, 'Solution Explorer'.

23 Orna Rabinovich-Einy and Ethan Katsh, 'The New New Courts' (2017) 67(1) American University Law Review 190-1; Shannon Salter and Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2016-2017) 3 McGill Journal of Dispute Resolution 113; Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) Windsor Yearbook of Access to Justice 120-1, doi:10.22329/wyaj.v34i1.5008; Amy J Schmitz, 'Expanding Access to Remedies through E-Court Initiatives' (2019) 67(1) Buffalo Law Review 126-30; Vivi Tan, 'Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice' (2019) 24(1) Deakin Law Review 116-8, doi:10.21153/dlr2019vol24no1art873.

24 Tan (n 23) 122-8.

25 Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (Civil Justice Council 2015) 6-7.

In this context, it is especially important to recognise that these court practices contribute to shaping an image of a new court and justice in civil cases, affecting the understanding of the international standard of access to justice. DR design of such courts is built on the model '*dispute avoidance – dispute containment – dispute resolution*': a) *dispute avoidance*, which corresponds to the first informational stage; b) *dispute containment*, which is the focus of the second, facilitative stage, during which the parties try to resolve the dispute through direct negotiations or consensual procedures involving a third neutral party, in particular, mediation, conciliation, etc.; c) *dispute resolution*, which takes place in an adversarial form of proceedings.[26] Of significance is that the accent of this system should be on the first two stages, which make sense from the perspective of conflict management.

Integrating different DR methods into formal justice indicates the hybridisation of formal and informal justice processes. It creates a new architecture of the civil DR system based on several fundamental provisions. Firstly, the consensual tenet of civil procedure should be at the heart of the civil procedure and the DR system. This approach allows for a dispute settlement at the earliest stages because negotiations, mediation, and other conciliation procedures are built into the DR system. Secondly, such a system is designed to be user-friendly, placing the disputing parties, their interests, and convenience at the centre of the DR system. Thirdly, DR systems in court are more effective for the state as they can save state resources by orienting the parties towards resolving disputes as early as possible. Fourthly, using such systems is also more effective for the involved parties. It is cost-effective, allowing parties the possibility to represent their interests independently in the early stages without a professional representative, thereby avoiding unnecessary expenditure of time and money on a timely litigation process. Crucially, this approach ensures equal access to justice for all in an attempt to ensure 'win-win' outcomes for the parties.

To sum up, many ADR methods recently became an integral part of modern civil procedure and cannot be titled as a contradiction for litigation anymore. Diverse legal frameworks and practices of different countries have already proved that hybridisation of the DR has great potential to build a more collaborative and disputants' interests-oriented process, which also serves as a means to manage the courts' workload and foster access to justice.

3 THE COURT-CONNECTED SETTLEMENT PROCEDURES, APPLIED IN AUSTRIA, LITHUANIA, AND UKRAINE

With some minor exceptions, Austrian, Lithuanian, and Ukrainian civil procedure legislation envisage the possibility of the parties ending court proceedings by reaching an agreement in most civil cases. How does the court support and foster settlements during the civil procedure in these three states? What types of court-connected settlement-oriented procedures are applied in these countries? These questions will be answered in the following based on an analysis of national legal regulations and practices in the selected countries.

26 ibid 17-8.

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

3.1. Court-Connected Settlement Procedures in Austria

3.1.1. Origins of the Settlement-Oriented Legal Regulation in Austrian Civil Justice

The history of civil procedure in Austria can be traced back to the ideas of F. Klein, known as 'the intellectual father of the Austrian Code of Civil Procedure' (Austrian CCP).[27] In 1890/91, Klein spearheaded a comprehensive reform with the publication of his series of essays titled 'Pro Futuro,'[28] ultimately leading to a reform of the Austrian Code of Civil Procedure of 1895. This code remains the primary legal source for civil procedure today, replacing the relevant provisions of the General Court Rules of 1781.[29]

Several theories in Austrian jurisprudential literature formulate the purpose and essence of civil litigation. Known theories are, for example, the liberalist litigation purpose theory,[30] the purely ideological litigation purpose theory of Marxism and National Socialism,[31] the theory of the legal peace purpose,[32] sociological litigation purpose theories[33] as well as the theory of F. Klein, which will be discussed in more detail below. In each case, the individual theories are to be viewed only in the light of 'the historical background of the respective state, the specific applicable procedural law of the country, the litigation theorists themselves, and often only as a reaction to other litigation purpose theories.'[34]

F. Klein's work assumed that civil proceedings, as an institute of public law, should not serve the interests of private individuals alone. Instead, they should be regarded as a burden on society as a whole – a social evil that impairs the economic cycle. They, therefore, must be eliminated as simply, quickly, and inexpensively as possible.[35] At the same time, the establishment of truth should in no way be neglected.[36] Accordingly, law enforcement is to be considered a community interest. To this end, judges strive to ensure the correctness and, above all, the comprehensibility of decisions. Moreover, they aim to terminate the proceedings economically and with minimal consequences to end the legal dispute.[37] In this

27 Walter H Rechberger und Daphne-Ariane Simotta, *Grundriss des österreichischen Zivilprozessrechts: Erkenntnisverfahren* (9 Aufl, MANZ Verlag 2017) 3.

28 Franz Klein, *Pro futuro: Betrachtungen über Probleme der Civilproceßreform in Oesterreich* (Deuticke 1891).

29 Peter G Mayr, 'Das streitige Verfahren (Zivilprozessrecht)' in H Barta (hrsg), *Zivilprozessrecht* (WUV Universitätsverlag 2004) 1081.

30 The civil process as an institution for the enforcement of individual interests. Hans Walter Fasching, *Lehrbuch des österreichischen Zivilprozessrechts: Lehr- und Handbuch für Studium und Praxis* (MANZ Verlag 1990) 35.

31 ibid 35-6. The purpose of civil proceedings is to implement the law for socialist legality or the people's community, thus putting individual protection aside.

32 ibid 36. The focus is on legal peace.

33 E.g. the civil process as a role play to reduce antagonisms and to legitimize decisions.

34 Fasching (n 30) 35-6.

35 Georg E Kodek und Peter G Mayr, *Zivilprozessrecht* (5 Aufl, Facultas 2021) 34; Mayr (n 29) 1081; Martin Trenker, *Einvernehmliche Parteidisposition im Zivilprozess: Parteiautonomie im streitigen Erkenntnisverfahren* (MANZ Verlag 2020) 64-5.

36 Oskar J Ballon, *Einführung in das österreichische Zivilprozessrecht: Streitiges Verfahren* (12 Aufl, Leykam Buchverlagsgesellschaft 2009) 20-1.

37 Kodek and Mayr (n 35) 46; Fasching (n 30) 36-8.

sense, the civil process represents a state welfare institution with the judge as the 'professional representative of the common interest.'[38] This approach by F. Klein led to the idea of social civil procedure.[39] According to this, civil proceedings should not only be understood as a means of enforcing individual interests but should rather ensure individuals' peaceful and orderly coexistence in a society.[40] Klein thus created the first process model, in which the protection of the individual and the community interest is balanced excellently.[41]

Today, the idea developed by F. Klein concerning social civil procedure is deeply anchored in Austrian jurisprudence. On the one hand, this was done by means of legislation through the drafting of corresponding norms.[42] Examples of this are the obligation of completeness in party submissions, the power of judges to conduct proceedings, the short time limits, and the prohibition of novelty in appellate proceedings.[43] On the other hand, social civil procedure was also pursued through the interpretation of jurisdiction and the application of case law to actual individual cases.[44] Civil proceedings are thus also intended to resolve private conflicts to establish orderly coexistence and a functioning social system. If the causes of the conflicts behind the legal disputes are not eliminated, the following legal action is probably already on the way. The civil process should, therefore, also give the disputing parties the opportunity for rational dialogue to bring about an amicable settlement of the conflict if possible. To this end, the legislator forced several possibilities in the Austrian private law system.[45]

According to H.W. Fasching, the purpose of civil procedure in the modern welfare state of the present can be classified as follows: civil proceedings must protect and guarantee the private legal order of the state legal community by establishing lasting legal peace through which the justified private legal claims of each individual are taken into account and realised as quickly and inexpensively as possible with the fully responsible participation of those affected. The formulation of such litigation purpose has implications for the CCP, and the degree to which it conforms to these determines how adept and effective it is. Consequences, according to Fasching's litigation purpose, are the institutional safeguarding of legal certainty and legal peace,[46] access to justice for everyone, ensuring uniform application of the law for similar cases, providing clear, quick, cheap, and

38 Ballon (n 36) 20-1; Mayr (n 29) 1081.

39 Ballon (n 36) 20-1.

40 Alexander Meisinger, *System der Konfliktbereinigung: Alternative, komplementäre und angemessene Streitbeilegung* (MANZ Verlag 2021) 1.

41 Rechberger and Simotta (n 27) 9-10.

42 Meisinger (n 40) 1.

43 Ballon (n 36) 21.

44 Meisinger (n 40) 1.

45 Kodek and Mayr (n 35) 34-5.

46 Code of Civil Procedure of Austria 'Zivilprozessordnung – ZPO' (as amended of 2023, current version) art 501 para 1 <https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699> accessed 20 June 2023.

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

understandable procedures, and the responsible participation of parties by guaranteeing the right to be heard and protecting individual privacy.[47]

3.1.2. Court Conciliation

In the case of Austria, the possibility of amicable dispute resolution is not directly enshrined in law but is, nevertheless, provided for as one of the leading principles of civil procedure. The procedural principles are guidelines from which the Austrian CCP proceeds in structuring the proceedings. Only rarely are they explicitly mentioned in the law. One of these procedural principles pursues promoting an amicable dispute resolution. An appropriate example of this principle can be found in the provisions on court settlement (Art. 204 Austrian CCP) regarding suitable institutions for out-of-court conflict resolution, in particular, mediation.[48] Thus, in civil cases, where settlement is possible, judges may encourage parties to a dispute to settle in several ways. Article 204 of the Austrian CCP proclaims that:

> '1. At the oral hearing, the court may, in any situation of the case, on the application or of its own motion, attempt an amicable settlement of the legal dispute or bring about a compromise on individual points in dispute. In this context, reference shall also be made, if this appears expedient, to institutions that are suitable for the amicable settlement of conflicts. If a settlement is reached, its content shall be recorded in the minutes of the hearing upon request.
> 2. For the purpose of attempting or recording a settlement, the parties may, if they agree, be referred to a commissioned or requested judge….'[49]

On the one hand, this legal provision implies classical court conciliation, which is an integral part of the civil procedure and may be applied in all cases and committed by the trial judge. Accordingly, the trial judge may bring an amicable dispute settlement in the form of a judicial settlement. This settlement is considered a procedural contract and must be drawn up in the form of a court record.[50] The record may be prepared by the trial judge, a requested judge or a bailiff.[51] On the other hand, this legal article also leads to the understanding that the Austrian court may encourage the parties to a civil dispute to seek amicable solutions outside the court as part of conciliation efforts (e.g., the judge refers the parties to specific institutions dealing with the settlement of conflicts, such as state-recognized conciliation boards, counselling services or mediators).

47 Fasching (n 30) 36-8.
48 Kodek and Mayr (n 35) 64, 65, 73.
49 Code of Civil Procedure of Austria (n 46) art 204.
50 Jürgen Schmidt, 'Bestehende und neue Formen der Konfliktlösung' in A Deixler-Hübner und M Schauer (hrsg), *Alternative Formen der Konfliktbereinigung: ADR, Richtlinie, Schlichungswesen, Mediation & Einigungsverfahren* (MANZ Verlag 2016) 183-4.
51 Klaus Gossi, 'Gerichtlicher Vergleich' (*Lexis 360®*, September 2023) <https://360.lexisnexis.at/d/lexisbriefings/gerichtlicher_vergleich/h_80001_2338982765791970208_a9099951de> accessed 18 April 2023.

Furthermore, Article 204 of the Austrian CCP also serves as the legal basis for the court-connected settlement procedure envisaged by the Austrian project[52] around the so-called 'conciliation judges' acting in 'conciliation hearings'.[53] For almost a decade now, judges trained as mediators, or judges who have completed additional training in conflict resolution and settlement (a modular program of 100 hours, including a theory and a practical part), have been working in Austrian courts. Their role is to facilitate settlements in conflict disputes pending in court, primarily in civil, family, or tenancy law cases.[54] With the parties' consent, the trial judge can refer conflictual cases, in which mediating appears more practical than judging, to a specially trained colleague judge.

Within an average of half a day, or two sessions of approximately two hours each, this judge assists the parties in working out an amicable solution using the methods of conflict management.[55] Conciliation judges have no decision-making authority and solely assist parties in resolving the conflict, fostering a court proceeding conducted amicably and in a future-oriented manner.[56] The essential point is that, in cases where the conflict has little to do with the subject matter of the legal dispute, the court proceeding is the wrong choice. In contrast, in the conciliation hearing, akin to mediation, the parties are guided to recognise each other's needs behind the conflict to shift away from their often rigid positions and standpoints and move towards a common goal. The conciliation judge does not give legal information or advice, and unlike court proceedings, a conciliation hearing is never conducted from the judge's table. The parties should be able to meet each other at eye level.[57]

A conciliation hearing will be successful if and as long as the parties are constructively interested in and work to solve the problem. Therefore, it can be terminated at any time by the parties, and the conciliation judge.[58] If no progress is observed in the conciliation hearing, it must consequently be terminated.[59] At the end of the conciliation process, an agreement can be reached regarding further proceedings before the conciliation judge, and this agreement will be informally documented for the parties, again similarly to mediation, often through a flipchart protocol.[60] In cases where no agreement or only a partial settlement is reached, the court proceedings continue seamlessly. If the parties require more time to

52 'Gerichtliche Einigungsverfahren' (*Österreichischer Verein für Co-Mediation*, 20 November 2017) <https://co-mediation.or.at/gerichtliche-einigungsverfahren/> accessed 26 June 2023.

53 Angelika Eisenreich-Graf und Ulrike Rill, 'Das Einigungsverfahren: die gerichtliche Streitbeilegung als Chance für die Zukunft' (2019) 4 RZ Österreichische Richterzeitung 55; Martin Moritz, 'Mediation und Vergleich im verwaltungsgerichtlichen Verfahren: Widerspruch oder Chance?' (2021) 11 RZ Österreichische Richterzeitung 245.

54 Eisenreich-Graf and Rill (n 53); Meisinger (n 40) 103-6.

55 Eisenreich-Graf and Rill (n 53); Meisinger (no 40) 104-5; Konstanze Thau, 'Gerichtsinternes Einigungsverfahren: ein Jahresrückblick Pilotprojekt zu einer alternativen Streitbeilegung' (2016) 3 Interdisziplinäre Zeitschrift für Familienrecht 140.

56 Moritz (n 53).

57 Ferz (n 6).

58 Eisenreich-Graf and Rill (n 53).

59 Ferz (n 6).

60 ibid.

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

deal with the conflict on their own, they can be referred to mediators outside the court or other experts at their discretion.[61]

As far as the costs for the conciliation proceedings are concerned, these are already covered by the court fees (legal costs), thus eliminating any additional costs for the parties.[62] As already mentioned, an entry is also made in the schedule of responsibility for conciliation proceedings, but, at present, there is no case-related discharge for the conciliation judges when they are used. The only purpose of the record is to provide transparency for all parties involved.[63]

Another unique example of the procedural principle of promoting an amicable dispute resolution in the Austrian CCP is the attempt at reconciliation provided for in matrimonial proceedings (Art. 460 para. 7 Austrian CCP).[64] In cases of marital disputes, judges are granted a more active and settlement-oriented role. The Austrian CCP states in Art. 460 para. 7 that 'In proceedings for divorce, the court shall, at the beginning of the oral proceedings, first try to reconcile the spouses (attempt at reconciliation) and work towards reconciliation at every stage of the proceedings, as far as possible'.[65] Such kind of court conciliation is possible not only in the first instance court but also in appeal proceedings.

The civil process is also intended to help resolve private conflicts to avoid further litigation. Therefore, the opportunity for dialogue and rational discourse should also be given at an early stage of the legal process. Thus, the Austrian legislator has provided for oral proceedings between the parties and an attempt at settlement in the preparatory hearing (Art. 258 para. 1 clause 4).[66] Art. 258 para. 1 clause 4 of the Austrian CCP proclaims, ' The preparatory hearing as part of the oral proceedings shall serve the following purposes: […] 4. The making of an attempt at a settlement and, in the event of its failure, the discussion of the further progress of the proceedings and the announcement of the programme of the proceedings […]'. Accordingly, attempting a settlement is one of the purposes of the preparatory hearings.[67] This brings the Austrian example close to Lithuania, where court conciliation is also established in a laconic way. Also, similar to Lithuania, if the case is settled at the first oral hearing, the flat fees are reduced according to note 4b of tariff post 1 of the Austrian Court Fees Act. Interestingly, in Austria, this also applies if the case is settled at the beginning of the second hearing as a consequence of mediation initiated at the latest during the first oral hearing. Proof of the mediation must be provided in writing.[68]

61 Eisenreich-Graf and Rill (n 53).
62 ibid; Schmidt (n 50) 201; Thau (n 55).
63 Ferz (n 6).
64 Kodek and Mayr (n 35) 73.
65 Code of Civil Procedure of Austria (n 46) art 460 para 7.
66 Kodek and Mayr (n 35) 34-5.
67 Code of Civil Procedure of Austria (n 46) art 258 para 1 subpara 4.
68 Court Fees Act of Austria 'Gerichtsgebührengesetz – GGG' (as amended of 2023, current version) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002667&FassungVom=2023-07-17> accessed 20 June 2023.

At this point, statistical data on court conciliation in Austria should also be discussed. However, due to the empirical scarcity of the Austrian judiciary, it is not possible to draw on current data comprehensively. Nevertheless, a performance report of the Austrian Federal Ministry from 2014 provides figures on the termination of civil court proceedings conducted that year. Thematically interesting is the distribution between the termination of proceedings by judgement and the termination of proceedings by settlement at that time. In a nationwide comparison, the number of proceedings before the local and regional courts that ended with a settlement was one-third lower than the number of proceedings that ended with a judgement in 2014. However, looking only at proceedings before the regional courts, including labour and social law proceedings, even 20% more proceedings ended with a settlement than by judgement. Thus, as the practice in 2014 has already shown, the court settlement is a non-negligible instrument for conflict resolution within the Austrian courts.[69] Concerning the conciliation judge procedures applicable in the project status, there are also no official statistics that can be referred to at this point. However, based on the personal statements of the judges involved, it can be assumed that the case numbers are rather low.

To sum up, the Austrian model of court conciliation corresponds to all the criteria set up for classical court conciliation. The Austrian court conciliation procedure is oriented towards a settlement. It may be conducted by the judge, who has been appointed as the trial judge, or by the requested judge in agreement with the parties. In the event of an unsuccessful assisted dialogue, the trial judge proceeds with the trial. Judges are not specifically trained as conciliators; but some passed training to develop their qualifications.

3.2. Court-Connected Settlement Procedures in Lithuania

3.2.1. Origins of the Settlement-Oriented Legal Regulation in Lithuanian Civil Justice

After the restoration of its independence in 1990, the Republic of Lithuania faced a clear need to renew the legal system and, most importantly, legislation. The previous Code of the Civil Procedure was inherited from the Soviet occupation period and did not correspond to new political and economic realities.[70] It was decided to prepare a completely new Code of Civil Procedure of the Republic of Lithuania (Lithuanian CCP)[71] as only such a granted a consistent transition to a modern civil procedure typical for progressive democratic states. This included choosing the concept of social civil procedure, which was grounded by the ideas of F. Klein, and following the example of the Austrian CCP as a classical outcome of this concept.[72] In line with all other important conceptual changes, the new Lithuanian CCP introduced measures fostering amicable settlements into the legal system.

69 Schmidt (n 50) 176-8.

70 Vytautas Nekrošius, 'Naujasis civilinio proceso kodeksas ir bendrojo proceso pirmosios instancijos teisme reformos pagrindiniai bruožai' (2002) 44 Teisė 102.

71 Code of Civil Procedure of the Republic of Lithuania No IX-743 'Civilinio proceso kodeksas' of 28 February 2002 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.162435/asr> accessed 20 June 2023.

72 Nekrošius (n 70) 102.

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

Dramatical political changes and a sudden transition to a democratic regime in a few years dramatically raised the courts' workload. According to R. Simaitis, this fated the growing importance of restoring legal (formal) and social (material) peace between the parties. Undoubtedly, it led to the change of the role of the judge, adding additional functions and fostering the social value of peace.[73] Such transformation was quite the opposite of the previous Lithuanian Soviet Socialist Republic Code of Civil Procedure, where the court had no rights or powers to encourage parties to settle. The 'authoritarian' model of directive dispute resolution was predominant, all powers vested in the hands of judges, and there was no space for 'cooperative' procedures and active involvement of the parties.[74] Hence, the concept of the social civil procedure brought into the Lithuanian legal system a clear understanding of the need for a more active judiciary, including a set of measures oriented towards fostering more amicable resolution of disputes.

Progressive ideas of academicians about more socially oriented processes were reflected in the text of the new Lithuanian CCP. In general, the Lithuanian CCP aims *inter alia* on restoring judicial peace between the parties to a dispute (Art. 2 Lithuanian CCP). In Lithuanian legal science, judicial peace differs from social peace. Judicial peace refers to the final court decision, which is no longer an object of appeal. Meanwhile, social peace means reconciliation in the restoration of relationships by mutually agreed and accepted conditions. V. Vėbraitė explains that such wording of the aim of the Lithuanian CCP does not mean that the restoration of social peace is not important. Articles of Lithuanian CCP prove that civil procedure in Lithuania is oriented towards reconciliation of the parties, and determining the truth and passing a court judgement is necessary only when there are no further possibilities of reconciling the parties.[75] Reimbursement of the 75 percent of court fees in case of reaching a settlement may be mentioned. This legal rule in doctrine is qualified as the preventive aim of the civil procedure, encouraging them to settle rather than proceed with litigation.[76]

Knowing the origins of the Lithuanian CCP it is natural to find several legal norms oriented toward settlements. The court is granted an active role in those cases when settlement agreements are likely to be reached. Judges were even obliged to take measures for settlements.[77] In line with economic incentives to settle (reimbursement of the bigger part of court fees), currently, Lithuanian CCP envisages two court-connected settlement procedures, which are accessible for all parties to the civil disputes free of charge: court-connected conciliation and court-connected mediation.

73 Rimantas Simaitis, 'Teisminis sutaikymas' (2004) 52 Teisė 92.
74 ibid 93.
75 Vigita Vėbraitė, 'Šalių sutaikymas kaip civilinio proceso tikslas ir jo galimybės Lietuvoje' (2008) 69 Teisė 109.
76 Nekrošius (n 70) 108.
77 Simaitis (n 73) 93.

3.2.2. Court Conciliation

As mentioned above, the Lithuanian CCP, which entered into force on 1 January 2003, brought a new attitude towards settlements in the civil process. For the first time in Lithuania, this law introduced the court conciliation. This novelty, after a few years, inspired even further attempts to promote settlements in civil cases through court-connected mediation (see sub-chapter 4.2.2.).

As in Austria, Lithuanian judges are encouraged to take conciliation measures in all civil cases. In family matters, the court has a duty to be more active and undertake measures to reconcile the parties and protect the rights and interests of the children (Art. 376 para. 2 Lithuanian CCP). In Lithuania, as in Ukraine, the conciliatory activities of the judges are, in fact, concentrated in the preparatory stage of the process. Even organising the preparatory hearing is related to the chance to settle. If the judge does not believe that settlement is possible and there are no other preconditions for organising preparatory hearing, he or she can even skip this stage of the process: 'The court shall hold a preparatory hearing if it considers that a settlement can be reached in the case, or if the law obliges the court to take steps to reconcile the parties, or if this will lead to a better and more thorough preparation for the trial' (Art.228 para. 1 Lithuanian CCP).

It must be emphasised that during the Covid pandemic preparatory hearings normally were absent. After the pandemic, this situation remained the same. It seems that it is quite easier for the parties and courts to prepare for the hearing by document exchange. Judges already mentioned that the absence of a preparatory hearing is not useful for settlements in court conciliation or in recommending court-connected mediation.[78] The lack of a real in-person meeting is one of the obstacles to judges being more active in conciliation or recommending court mediation.

Lithuanian CCP states, 'The court shall take steps to reconcile the parties' (Art. 213 para. 1 Lithuanian CCP). This is the only procedural rule regarding the court conciliation process. Court conciliation usually takes place in the court hall; there is no standard structure of this process as it depends on the conciliation judge (same person as a trial judge) and what practice they apply. In academia, there were attempts to suggest certain structure for the court-connected conciliation,[79] it was never embodied neither in legislation nor in any other recommendatory methodological materials for the conciliators. If the judge's attempts to reconcile parties prove ineffective, the court hearing continues as normal.

The Lithuanian model of court conciliation provides the conciliator role for a judge appointed to examine the case. There are no qualification requirements to take this role, as it is presumed that all judges can reconcile parties in civil cases. Naturally, the results of court conciliations differ very much. Those judges who gain knowledge and developed skills in conflict resolution achieve far more compared with those who implement the duty to

78 Vygantė Milašiūtė ir kita, *Privalomosios mediacijos šeimos ginčuose teisinio reguliavimo poveikio ex post vertinimas, 2023* (STRATA 2023) 1 priedas.

79 Simaitis (n 73) 99.

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

reconcile only by a formal question for the parties: is there any possibility of settling? This presumption is mostly based on the results of private communication with the judges, as no research in this field has been done recently. In 2004, it was announced that about 80 percent of settlements in court were reached by private negotiation processes, and only 20 percent with the help of judges' conciliators.[80] But no relevant data is available to prove the growing number of successful court-connected conciliation numbers.

3.2.3. Court Mediation

Despite the fact that today, in Lithuania measuring in numbers, out-of-court mediation prevails, for the first time in the Lithuanian legal system, this amicable dispute resolution was introduced in 2005 through a court-connected mediation pilot project. This pilot project was inspired by the good practice of the province of Quebec in Canada[81]. It was implemented inside the court system by several enthusiastic judges and academicians on the grounds of the decree of the Judicial Council.[82] Such inspiration may be grounded by the disclosed benefits of the settlements and the need for more active assistance for the parties in their negotiations. In a few years, this initiative exceeded the limit of the pilot project, and court-connected mediation is available in all Lithuanian courts both in civil (from 2011) and administrative (from 2019) disputes and has already become an integral part of the civil and administrative procedure.

According to I. Saudargaitė, court-connected mediation 'was introduced into the Lithuanian legal system by applying a mixed approach (a different approach as compared to the one adopted in most countries of civil tradition): it was implemented by attempting to apply it from court-to-court (so-called "pragmatic approach") jointly with the adoption of the legal regulation of this ADR procedure (so-called "legislatic approach")'.[83] This has fated extremely close relations between court-connected mediation and courts. Even today, such an approach results in the specific position of the judges in the national list of mediators. Judges are enrolled in this list according to different rules to compare with other mediators.[84]

The parties may initiate court-connected mediation, and the judge can recommend parties to a dispute to mediate. At the beginning of the application court-connected mediation in Lithuania was completely voluntary. In 2019, judges were also granted the discretion to refer parties to a dispute to mandatory court-connected mediation (Art. 231[1] para. 1 Lithuanian CCP).

80 ibid 105.

81 Natalija Kaminskienė, 'Teisminė mediacija Lietuvoje. Quo vadis?' (2010) 9(1) Socialinis darbas 58.

82 Resolution of the Council of the Judiciary of the Republic of Lithuania No 13P-348 'On the Trial Project of Judicial Mediation' of 20 May 2005 <https://www.teismai.lt/data/public/uploads/2005/05/20050520-348.doc> accessed 20 June 2023.

83 Ieva Saudargaitė, 'Judicial mediation in civil disputes in Lithuania' (DPhil thesis, Mykolo Romerio universitetas 2015) 210.

84 Law of the Republic of Lithuania No X-1702 'On Mediation' of 15 July <https://e-<seimas.lrs.lt/portal/legalAct/lt/TAD/a1214b42d40911eb9787d6479a2b2829?jfwid=13yl78zgim> accessed 20 June 2023. According to Art 6 para 4 of Law on Mediation, judges, who have gained no less than 3 year working experience, are not required to pass mediator's qualification exam and for them enough to have 16 hours initial mediation training (regular requirement – 40 hours).

Today, the general principle is that court mediation is voluntary. Still, in cases where judges see the clear perspective of settlement, they might use their discretion to order parties to mediate mandatory.

Judges or private mediators serve as mediators in civil cases. Both should be enrolled on the Lithuanian list of mediators.[85] Statistics show that judge mediators mediate the bigger part of court mediation processes, and only in rare situations are private mediators invited to help.[86] Judges (if he or she is a mediator) can mediate even in the cases where they are commissioned. Also, the judge can refer parties who are willing to mediate to another judge mediator. In case there is no judge available or willing to mediate, the judge who is examining the case can request a private mediator appointment with the State Guaranteed Legal Aid Service (Art. 231[1] para 2 of Lithuanian CCP). After getting such a request, this institution appoints one of the private mediators', who are listed in the Lithuanian list of mediators and are in contractual relations with an appointing body. The court order to start the court mediation procedure postpones the proceedings and sets a precise time for the next hearing. Court mediation should be finished by that date, but this time limit may be extended upon the mediator's request (Art. 231[1] para. 3 Lithuanian CCP). After the appointment, the mediator continues the process following the general concept and structure of mediation. During the court mediation period, 'the appointed mediator shall have access to the civil file, or, at the mediator's request, the civil file shall be handed over to him or her for signature' (Art. 231[1] para. 3 Lithuanian CCP).

The process of the mediation, from the appointment of the mediator to the termination of it, is not regulated in detail. The procedural part of court mediation is mostly regulated by the Rules of Court Mediation.[87] Mediators must secure implementation of basic mediation principles (voluntariness, confidentiality, mutual respect, neutrality and impartiality of the mediator, cooperation, professionalism of the mediator and honesty (clause 6) and may arrange the process as they see is suitable, including decisions in regard of the forms of mediation. They can have common sessions, caucuses, organise distance mediation, etc. (clause 20). The court mediation process may be terminated: 1) after the signing of a settlement agreement; 2) when any party to the dispute withdraws from the process; 3) after the end of the term established in the court order; 4) after the mediator terminates the court mediation process (if it is clear that settlement cannot be reached, of the settlement will be unenforceable or illegal, etc. (clause 27).

In case of the settlement, the judge, who performs in both capacities (as judge and mediator), may approve the agreement. If the judge is appointed only as a mediator, the parties must submit the settlement agreement to the judge, primarily commissioned to hear

85 'The List of Mediators of the Republic of Lithuania' (*Lietuvos elektroninių paslaugų portale*, 2003) <https://e.teismas.lt/lt/public/teismin%C4%97-mediacija/> accessed 20 June 2023.

86 National Courts Administration, *Annual Report of Lithuanian Courts 2021* (Lietuvos teismai 2022) 2 <https://www.teismai.lt/data/public/uploads/2022/03/teismai2022.pdf> accessed 20 June 2023.

87 Resolution of the Council of the Judiciary of the Republic of Lithuania No 13P-125-(7.1.2) 'Rules on Court mediation' of 30 November 2018 <https://www.e-tar.lt/portal/lt/legalAct/70208500f79411e880d0fe0db08fac89/asr > accessed 20 June 2023.

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

the case. Court approval provides the settlement agreement with *res judicata* power, which is included in the court decision text. At the same time, it finishes court proceedings. The judge mediator cannot take part in the substantive proceedings. This means that if a judge was mediating the case, where he was primarily assigned as a judge, in case of not settling, he or she must be changed with another judge, who will step into the process and examine the case regularly.

Statistical data shows that court-connected mediation is still rarely used in practice. According to the data provided by the National Administration of Courts, the number of civil cases transferred to court-connected mediation in 2022 was 597, 5 percent more than recorded in 2021 (574 cases). 516 cases were mediated in courts in 2020, and 533 cases in 2019. In 2022, the success rate of mediation in civil cases in Lithuania reached 45 percent. In 2022, as in previous years, the largest number of civil cases referred to court-connected mediation were related to family matters, the law of obligations and cases arising from real estate legal relations. Relatively low numbers of court-connected mediation and the tendency to remain at the same level without any sufficient growth inspires discussion in the judiciary and beyond about the constant need to develop this institute.[88]

3.2.4. Benefits for the Judges who Conciliate or Mediate

In Lithuania court conciliation is a duty of the judges in all courts and all judges are in fact conciliators. Remarkably, judges do not receive any additional salary for doing it. This scenario varies slightly for judges who function as court mediators. Those judges may serve as court mediators, albeit without a right to mediate in out-of-court processes, and their involvement is entirely voluntary. Those, who are willing to be court mediators, must be enrolled in the Lithuanian List of Mediators. In their case, it is required only to have not less than three years of working as a judge experience and take a 16-hours introductory course on mediation. In regard of additional payments, it should be stated that judge mediators are not getting any additional money for being court mediators. But they workload (number of cases) is reduced if they perform court mediations.[89]

Lithuanian judge mediators express their dissatisfaction with such arrangements, emphasising that mediation demands more effort and time than handling ordinary cases.[90]

88 National Court Administration, *Annual Report of Judicial Mediation Commission 2022* (Lietuvos teismai 2023) <https://www.teismai.lt/data/public/uploads/2023/04/teismines-mediacijos-komisijos-2022-m.-veiklos-ataskaita.pdf> accessed 20 June 2023.

89 Resolution of the Council of the Judiciary of the Republic of Lithuania No 13P-79-(7.1.2) 'On approval of the description of the procedure for calculating workload in the courts' of 29 May 2015 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/276081500e1b11e5b0d3e1beb7dd5516/asr> accessed 20 June 2023. According to the ruling the court mediation is granted coefficient of complexity 0,5. The most complicated cases in courts of 1st instance are granted 1,7 coefficient. These cases are related to insolvency procedure. In fact 0,5 coefficient shows, that Council of judges treat performance of court mediation as simple case. The lower coefficient 0,4 is granted only for cases in enforcement procedure and court order issuing cases.

90 Agnė Tvaronavičienė and others, 'Towards More Sustainable Dispute Resolution in Courts: Empirical Study on Challenges of the Court-Connected Mediation in Lithuania' (2021) 8(3) Entrepreneurship and Sustainability Issues 645, doi:10.9770/jesi.2021.8.3(40).

In addition, being a court mediator or good conciliator can positively impact one's career in the court system. According to judges, being a court mediator add some points in evaluation of the judge. This is reflected in legal regulation as well.[91]

To sum up, Lithuania's parties involved in a civil dispute have two court-connected options promoting settlement. In every civil case, the court must 1) offer the parties the possibility of agreeing on terms suitable for both parties and the conclusion of an amicable settlement and 2) notify the parties of the possibility of resolving the dispute through judicial mediation. The desired result of both these procedures is a settlement agreement, which, after court approval, gains *res judicata* effect. Court conciliation may be performed in all cases and is carried out by the judge, who is examining the case, during the preparatory hearing. Court mediation is more intensive interruption by the neutral third party. It can be done in all stages of civil procedure. As mediators here, in most cases, they serve trained judge-mediators or private mediators outside of the court system.

3.3. Court-Connected Settlement Procedures in Ukraine

3.3.1. Origins of the Settlement-Oriented Legal Regulation in Ukrainian Civil Justice

As historically different territories of modern Ukraine were parts of the Russian Empire and the Austro-Hungarian Empire, both the 1864 Russian Empire Statute of Civil Procedure and the 1895 Austrian Code of Civil Procedure were in force in different lands.[92] Both codes were prominent examples of civil procedural codifications of the 19th century. However, later, during the Soviet period, all achievements in civil procedure area were abandoned, and the so-called 'principle of socialistic legality', according to which all state authorities and citizens were obliged to comply with the requirements of the legislation, which primarily served the interests of the state instead of human rights and freedoms, became prevailing over any considerations in civil procedure.[93] The abovementioned has factually cut off the Ukrainian civil procedure from the European tradition in the civil justice area for a long period.

91 Resolution of the Council of the Judiciary of the Republic of Lithuania No 13P-135-(7.1.2) 'On approval of the description of the procedure for evaluation of the activities of judges' of 13 October 2014 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/c42840b0646e11e48710f0162bf7b9c5/asr> accessed 20 June 2023. According to the ruling, the evaluation system is created and based on general evaluation and some additional activities of the judges, which gains him or her additional evaluation points. Mediation is one such activity in line with others, including many cases, which were ended by the settlement. Para. 10.5. of this ruling envisages the possibility of gaining up to 5 additional points for the performed court mediations (evaluating the number of mediated cases and their results). The same point may be gain for the settlement agreements number in investigated cases and other additional activities.

92 Iryna Izarova, 'Judicial Reform of 1864 on the Territory of the Ukrainian Provinces of the Russian Empire and Its Importance for the Development of Civil Proceedings in Ukraine' (2014) 2(4) Russian Law Journal 114, doi:10.52783/rlj.v2i4.250; VV Komarov, *Civil Procedural Legislation in the Dynamics of Development and Practice of the Supreme Court of Ukraine* (Pravo 2012) 13-4.

93 Komarov (n 92) 16-8.

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

Only after gaining independence in 1991 and ratifying the European Convention on Human Rights in 1997 did Ukraine prove its commitment to European legal values, reflected in the Civil Procedure Code of Ukraine in 2004.[94] However, at that time, neither legislators nor legal practitioners paid enough attention to the peaceful settlement of disputes in civil procedure. Later, with the donor community's support, the interest in this issue increased. It resulted in the introduction of several pilot projects within the justice sector aimed at the implementation of amicable dispute resolution procedures into civil procedure. The most relevant in this regard was the judicial mediation pilot project with the European Commission and the Council of Europe[95] and a project implementing the special procedure for settling a dispute with the participation of a judge supported by the Canadian National Judicial Institute.[96]

The latter procedure was enshrined in the national civil procedural legislation in 2017 through the adoption of the new edition of the Civil Procedural Code, strengthening the consensual tenet in civil procedure as a part of Ukrainian reforms aimed at the adaptation to the legislation to the EU law.[97] The Civil Procedural Code of Ukraine (Ukrainian CPC) enshrines that the court *inter alia* shall: 'promote the settlement of a dispute by reaching an agreement between the parties' (Art. 12 para. 5 clause 2 Ukrainian CPC). In first-instance courts, the parties during the preparatory hearing are asked about their wish to settle the dispute using ADR methods, in particular, mediation, arbitration, or settlement of the dispute with the participation of a judge (Art. 197 para. 2 clause 2 Ukrainian CPC). Mediation and arbitration, in this case, are purely out-of-court processes, which can be chosen by the parties voluntarily and carried on outside the court. If parties decide to mediate, the court suspends proceedings (Art. 251 para. 1 clause 4-1 Ukrainian CPC), and parties can go to a mediator outside the court.[98] If parties decide to refer their case to

94 Code of Civil Procedure of Ukraine No 1618-IV of 18 March 2004 <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 20 June 2023.

95 Grants of the European Commission and the Council of Europe 'The procedure for selection and appointment of judges, their preparation, bringing to disciplinary responsibility, distribution of cases and alternative dispute resolution' in 2006-2007 and 'Transparency and effectiveness of the justice system in Ukraine' in 2008-2011.

96 Project 'Education of Judges for Economic Growth' with the support of the Canadian National Judicial Institute. About projects see more detail: T Tsuvina and A Serhieieva, 'Comprehensive Analysis of the Current Situation, Barriers and Possibilities of Mediation Development: with Recommendations for the Promotion and Implementation of Mediation in Ukraine' (2019) 24-5; Tetiana Tsuvina and Tetiana Vakhonieva, 'Law of Ukraine "On Mediation": Main Achievements and Further Steps of Developing Mediation in Ukraine' (2022) 5(1) Access to Justice in Eastern Europe 142, doi:10.33327/AJEE-18-5.1-%20n000104.

97 Iryna Izarova, 'Civil Procedure Reform During the Period of Ukraine's Independence: New Goals and Principles' in Yu Prytika and I Izarova (eds), *Access to Justice in Conditions of Sustainable Development: to the 30th Anniversary of Ukraine's Independence* (Dakor 2021) 32.

98 About Ukrainian model of mediation and its integration into the court proceedings see: Oleksandr Drozdov, Oleh Rozhnov and Valeriy Mamnitskyi, 'Mediation and Court in Ukraine: Perspectives on Interaction and Mutual Understanding' (2021) 4(3) Access to Justice in Eastern Europe 181, doi:10.33327/AJEE-18-4.3-n000082;Vytautas Nekrošius, Vigita Vėbraitė, Iryna Izarova and Yurii Prytyka, 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 Teise 8, doi:10.15388/teise.2020.116.1; Yurii Prytyka, Iryna Izarova, Serhii Kravtsov, 'Towards Effective Dispute Resolution: A Long Way of Mediation Development in Ukraine' (2020) 29(1) Asia Life Sciences 389; Tsuvina and Vakhonieva (n 96); Tsuvina and Serhieieva (n 96), etc.

arbitration, their written arbitration agreement is considered as a ground to close the proceeding (Art. 255 para. 1 clause 8 Ukrainian CPC). The court connected the settlement option – settlement of a dispute with the participation of a judge. This method is regulated in a more detailed way, and Ukrainian scientific literature is often characterised as a type of court conciliation.[99]

3.3.2. Settlement of a Dispute with the Participation of a Judge

The Ukrainian model of court conciliation is unique in several aspects. In most countries, despite proclaiming to have settlement-friendly civil procedures, laws pay little attention to the court conciliation process. For example, in Lithuania, it is merely stated that the court shall take steps to reconcile the parties (Art. 231 para. 1 Lithuanian CCP). In contrast, the Ukrainian CPC dedicates a separate chapter to the settlement of a dispute with the participation of a judge. The uniqueness of the Ukrainian court conciliation model lies, firstly, in the clear notion that this procedure is distinct from the court hearing and can only proceed with the agreement of the disputing parties.

It should be noted that this process is time-restricted (maximum 30 days, with no possibilities of extension) and may be carried on only before the commencement of the proceedings on merits. All civil case judges should be prepared to apply this procedure, as the conciliator is the judge who was primary assigned to trial a case. Also, such a process may be carried out only if no third parties with stated independent claims are involved (Art. 201 para. 2 Ukrainian CPC). This settlement procedure starts by issuing the court's ruling, which suspends the proceedings.

It should also be noted that parties to a dispute can utilise this settlement procedure with the participation of a judge only once, as the repeated settlement of the dispute with the participation of a judge is not allowed. Ukrainian legislation in the field of settlement procedure with the participation of a judge emphasises the possible forms of the meetings, permitting both joint and separate meetings. Joint meetings involve all parties, their representatives and judges, while separate meetings are organised with a judge and each party separately (Art. 203 Ukrainian CPC).

Judges who fulfil this settlement procedure must explain the purpose, procedure, parties' rights and obligations in the settlement process (Art. 203 Ukrainian CPC). While this legal norm allows us to predict that there is a certain standard procedure which judges must follow, there is no available data about any additional documents that may reveal the key aspects of this settlement procedure. The lack of procedural rules and the absence of specific judges' training in the conciliation field causes situations where every judge follows his model of conciliation.

99 A Kotsiuruba, 'Conciliation Procedures In Civil Proceedings In Ukraine' (2020) 2(113) Bulletin of Taras Shevchenko National University of Kyiv Legal Studies 28, doi:10.17721/1728-2195/2020/2.113-6; Tetiana Tsuvina, 'Implementation of the Institute of Court Mediation as A Promising Direction of Reforming the Civil Procedural Legislation of Ukraine' (Ukraine on the Way to Europe: Reform of Civil Procedural Legislation: International scientific and practical conference, Kyiv, 07 July 2017) 195.

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

The Ukrainian CPC delineates the rights of judges in the settlement procedure. There is a clear distinction between what can be done by the judge during joint meetings and what can be done during separate meetings. During the joint meetings, the powers of the judge are limited to clarifying the grounds and subject matter of the claim, the grounds for objections, explaining the standard of proof in such cases, inviting parties to make proposals for peaceful settlement of disputes, and taking other actions aimed at peaceful settlement of the dispute by the parties. The judge may also suggest to the parties a possible peaceful dispute settlement (Art. 203 para. 4 Ukrainian CPC), emphasising the judge's role as a legal advisor. During closed meetings, judges are allowed to share even more of their knowledge by informing the party of case law in similar disputes and offering the parties and (or) their representatives possible ways of peaceful dispute settlement (Art. 203 para. 5 Ukrainian CPC).

This legal framework indicates that while the legislator expects the judge conciliator to play an active role, the focus is exclusively on sharing legal knowledge rather than using the conciliator's soft skills. The Ukrainian CPC explicitly prohibits judges from providing legal advice, recommendations, or assessment of evidence in the case (Art. 203 para. 6 Ukrainian CPC).

In summary, judges possess the right to share their legal knowledge and experience but are prohibited from offering legal advice. The practical implementation of this legal norm poses challenges, as distinguishing between providing information and delivering legal advice can be elusive. The Ukrainian settlement involving a judge procedure is confidential. No minutes are kept or voiced, nor are video records or photos taken during the process (Art. 203 paras. 7 and 9 Ukrainian CPC).

Termination of this settlement procedure can occur for four reasons 1) upon the submission of an application by a party to terminate the dispute settlement with the participation of a judge; 2) when the stipulated period for settling a dispute with a judge expires; 3) at the judge's initiative in case of delay in dispute settlement by any of the parties; 4) in case of concluding a settlement agreement by the parties and applying to the court with a statement of its approval or the claimant's application to the court to leave the claim without consideration, or in case the claimant refuses the claim or the defendant recognises the claim. Ukrainian legal regulation envisages the rule related to the case transferal to the other judge in case of an unsuccessful settlement procedure (Art. 204 paras. 1 and 4 Ukrainian CPC), highlighting the Ukrainian legislators' concern for the judge's impartiality.

As mentioned before, all judges working within the civil justice system are obliged to be prepared to assist parties in settlement procedures. Notably, considering the specific skills and knowledge required for this task, Ukrainian judges do not undergo any special education about soft conflict management skills and conciliation procedures. The National School of Judges has developed a two-day training on the settlement of a dispute with the participation of a judge. It has three modules ('Dispute settlement with the participation of a judge: historical excursion, international practice, difference from mediation. Principles and advantages of the procedure'; 'Psychological aspects of the dispute settlement with the

participation of a judge'; 'Procedure and conditions of the Dispute settlement with the participation of a judge in civil proceedings').[100] However, it is not obligatory for the judges to participate in such training.

A settlement procedure with the participation of a judge is seen as an option for the parties and requires additional time from the judge's side. All judges, however, are expected to provide such assistance to the parties regularly and are not encouraged to do it or promote it through additional payments, reduced workload or any other benefits.

Statistical data shows that this procedure is not very popular in practice. In particular, in 2019, there were 50 rulings on conducting this procedure and 102 rulings on its closure (taking into account settlement procedures started in 2018, including 12 cases which were reconciled and 32 cases transferred to another judge for further consideration); in 2020, there were 77 rulings on conducting of this procedure and 78 rulings on its closure (including 22 cases which were reconciled, and 55 cases, which were transferred to another judge for further consideration); in 2021, there were 66 rulings on conducting of this procedure and 66 rulings on its closure (including 12 cases which were reconciled, and 47 cases transferred to another judge for further consideration) were issued; in 2022, 22 rulings on conducting of this procedure and 28 rulings on its closure (including 3 cases which were reconciled, and 22 cases transferred to another judge for further consideration) were issued. The relatively low number of procedures prompts discussion about new approaches in this regard. One of the options can be introducing judicial mediation or providing special education for judges in conflict management skills to enhance the effectiveness of the existing amicable dispute resolution procedure.

In summary, parties involved in civil disputes in Ukraine can enter into specific settlement procedure with the participation of a judge, blending elements of both court conciliation and court mediation methods. This procedure can be viewed as an example of a court-amicable conciliation process. Notably, it differs from the classical court conciliation as the judge conciliator in Ukraine lacks the authority to continue the trial in the capacity of a judge if the conciliation procedure proves unsuccessful. Moreover, this settlement procedure is confidential, with the conciliator acting impartially and independently, aligning it with court mediation.

However, this process is distinctive due to the judge's qualifications. All Ukrainian judges in civil cases can attempt to reconcile their parties to a dispute, and no specific training is mandatory for them. While the settlement procedure is regulated in detail, there is a notable lack of clarity regarding the procedural steps and the overall structure that judges should adhere to. Furthermore, there are no clear boundaries for judges when sharing their legal knowledge and experience with the parties in a dispute.

100 'Settlement of a Dispute with the Participation of a Judge in Civil Proceedings' (*National School of Judges*, 23 June 2020) <http://www.nsj.gov.ua/ua/news/vreguluvannya-sporiv-za-uchastu-suddi-v-tsivilnomu-sudochinstvi-/> accessed 20 June 2023.

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

In Ukraine, mediation is possible during the court proceedings, but it should be carried out outside the court by private mediators. Judges are not allowed to provide out-of-court mediation services.

3.4. Comparison of the Court-Connected Settlement-Oriented Procedures in Austria, Lithuania, and Ukraine

After analysing the individual court-based and settlement-oriented models employed in Austria, Lithuania, and Ukraine, it is evident that distinct models are used in all three countries.

It should be mentioned that the promotion of amicable settlement is not listed as one of the goals of the civil procedure in any of the three countries. Nevertheless, in all three countries, judges are, in one way or another, encouraged to undertake measures to reconcile the parties or at least make attempts to do it. In Ukraine, judges have such a duty, while In Lithuania, it is the duty of the judge to reconcile parties only in family cases. In other civil cases, attempts to reconcile are at the discretion of a judge. In Austria, this idea flows from the approach that a court trial is an *ultima ratio, and* Austrian judges, similar to those in Lithuania, are obliged to try to reconcile the parties in matrimonial matters.

Despite these differences, all three countries implement court-connected settlement procedures, which, although varying, share some similarities. For example, in all the countries analysed, court-connected settlement procedures are made available for disputants at no additional costs.

In Austria, in addition to the standard procedure, a new approach to supporting parties' amicable negotiations is being tested through the conciliation hearing. Disputants in civil cases can take advantage of the traditional judge-assisted judicial settlement negotiation, which each judge conducts during the trial. The judge encourages the parties to reconsider their position and potentially reach a settlement, which can be documented by the judge immediately. In addition, the parties may be encouraged to explore a second procedural avenue - the conciliation hearing, but by another judge not authorised to make decisions. In this process, a type of conciliation with elements of mediation aimed at interests takes place. The main difference between these two models is undoubtedly reflected in the division of functions between the judges. In the first case, the judge with authority to make decisions conducts the conciliation attempt personally, while in the second procedure, a separate judge, not involved in the actual court proceedings, conducts the mediative conciliation, resembling judicial mediation more than the first, the classic model of judicial conciliation.

In the case of Lithuania, the courts offer the disputing parties classical conciliation, akin to the Austrian model. This ADR method is available in all cases and performed by the same trial judge. While in Austria and Lithuania, judges are encouraged to attempt to reconcile parties in all civil cases, in family disputes, as mentioned earlier, they are even obliged to do it and must be more active in conciliation.

Austrian courts do not provide court mediation; instead, the parties to a dispute may be referred to out-of-court mediation services. The same rule regarding mediation is followed by Ukraine. In comparison, in Lithuania, parties to a dispute may mediate on a voluntary and sometimes even mandatory basis. Court mediation is most often performed by a trained judge mediator. Such court mediation procedures are confidential, and the judge-mediators act here as impartial and neutral. In case of unsuccessful court mediation, the judge-mediators are not allowed to continue their activities in the capacity of the trial judge in this case, and another judge must be appointed. Generally, this mediation model is closely connected with the court. Still, if no judge-mediator is available and willing to mediate, the commissioned judge may refer the case to the State Guaranteed Legal Aid Service to appoint an out-of-court mediator.

In the case of Ukraine, parties to a dispute have the option to choose the settlement procedure with the participation of the judge. The Ukrainian model has elements of both court conciliation and court mediation. It might be presented as an example of an amicable conciliation process. The main peculiarity is that all civil case judges may serve in their cases as judge-conciliators and do not need any specific qualification to do it. Thus, if such a procedure fails, the judge-conciliator cannot continue to hear a case as a trial judge. A new judge must be appointed. It is clear that this model is also close to the court mediation concept.

A settlement procedure in Ukraine may be applied until the start of the trial on the merits. Court conciliation formally may be applied only during the preparatory stage of the civil procedure in Lithuania. Still, in the case of court mediation, the Lithuanian legal regulation is very flexible. It allows the court to enter mediation and postpone the case trial in all stages of the civil procedure. In Austria, both forms of court conciliation are admissible at any stage of civil proceedings.

In all three countries, the main assistant to the parties in settlement procedures is the judge. Still, in Austria, it may be the commissioned or referred judge. In Lithuania, in case of court conciliation, it is always the commissioned judge; in case of court mediation – the commissioned judge (if he or she has the status of court mediator), referred judge (most commonly) or out-of-court mediator. In Ukraine, in the case of the application of conciliation procedure with a judge, a commissioned judge takes the role of a conciliator. Thus, in the case the conciliation fails, this judge is not allowed to proceed with the trial and pass a judgement. The same rule is applied in Lithuania regarding court mediation. If the commissioned judge takes the role of a court mediator in case of a non-settlement, he or she cannot proceed with this case. Another judge has to be appointed.

Regarding the qualifications of the judges who act as conciliators or mediators in the court-connected settlement procedures, only Lithuanian judges' court mediators have to fulfil specific requirements. Judge mediators should be trained (16 hours of training) and enlisted in the Lithuanian list of mediators.

In Austria and Ukraine, such additional activities of the judges do not grant them any additional bonuses. In Lithuania, judges and mediators get minor work reductions and may gain additional points in their further careers in the court system.

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

4 CONCLUSIONS

This article is an organic extension of the research on the trends of strengthening the consensual approach in civil procedure in European countries, which was initiated in the previous publication of the authors.[101] In democratic states, civil procedure is designed to protect and guarantee the legal order by establishing a lasting legal peace as quickly and inexpensively as possible, with the active and responsible participation of those affected. This grants access to justice for everyone and ensures clear, quick, cheap, and understandable procedures while guaranteeing the right to be heard for every party in dispute.

Notably, a lot of ADR methods have recently become an integral part of modern civil procedure, no longer viewed as contradictory to litigation. Diverse legal frameworks and practices of different countries have already proved that the hybridisation of dispute resolution has great potential to build a more collaborative and disputants' interests-oriented process, which also manages the courts' workload and fosters access to justice.

The analysis of civil procedure legislation in Austria, Lithuania, and Ukraine revealed a growing tendency towards strengthening consensuality in civil proceedings, which is increasingly noticeable in the European region. These three countries are actively developing their civil procedure, deeply rooted in the ideas of famous Austrian legal theorist F. Klein, and are committed to implementing the concept of social civil procedure.

Austria's model of court conciliation fully corresponds to the concept of classical court conciliation and contributes to orienting the civil procedure towards a settlement without diminishing focus on the judicial decision-making task. The conciliation proceedings may be conducted either by the judge appointed as trial judge or by the requested judge in agreement with the parties. In the event of an unsuccessful assisted dialogue, the trial judge proceeds with the trial. Judges are not specifically trained as conciliators, but some have undergone training to enhance their qualifications.

The Lithuanian civil procedure presents disputants with two court-connected settlement options. In every civil case, the court offers the possibility to agree on terms suitable for both parties and the conclusion of an amicable settlement. It notifies them about the potential of resolving the dispute through judicial mediation. Court conciliation, conducted by the judge examining the case, is available for all cases and takes place during the preparatory hearing. On the other hand, court mediation is a more intensive interruption by the neutral third party and necessitates specific preparation and training.

The Ukrainian model offers disputing parties the possibility of entering into a specific settlement procedure with the participation of a judge. This procedure has elements of both court conciliation and court mediation. A judge conciliator conducts the process, and in the event of an unsuccessful conciliation, they do not have a right to proceed with the trial in their capacity as a judge. All Ukrainian judges handling civil cases can attempt to

101 Tsuvina and others (n 1).

reconcile their parties to a dispute, and no specific training is obligatory for them. Additionally, in Ukraine, mediation is possible during court proceedings and is carried out outside the court by private mediators.

It seems that the experience of Austria and Lithuania in introducing conciliation in civil procedure could be useful for Ukraine. First, there is a clear need for ongoing and specialised training for judges in effective communication skills and conciliation conducting. This would improve the efficiency of the Ukrainian settlement procedure with the participation of a judge and contribute to an improved culture of dispute resolution in general. At the same time, it is worth noting that this procedure can only be carried out in the court of first instance during the preparatory proceedings under Ukrainian law. In our opinion, this is not effective enough, taking into account that the judge has an obligation to facilitate the settlement of the dispute in every stage of the proceedings. Such a restriction does not contribute to the usage of the full potential of this procedure.

In addition, we observe a tendency to strengthen the conciliatory functions of a judge in Austria and Lithuania, primarily in family cases, recognising the special nature and importance of this category of cases for the applicant. This aspect should also be considered during the improvement of procedural legislation in Ukraine. At the same time, given that some judges in Ukraine have already been trained as mediators, a model similar to Lithuania could be adopted to grant such judges the authority to conduct mediation.

Of course, given the absence of an effective scheme of interaction between courts and the mediation community in Ukraine, there is currently an urgent need to create a viable model of court-connected mediation. Still, judicial mediation can also be useful in this regard. Special attention should also be paid to improving the procedural rules to provide the judges with effective instruments that can increase the consensual tenet in civil procedure. There are several important points in this regard relevant for all jurisdictions: a) judges should have the right to refer parties to a mandatory court-connected mediation; b) courts should have the Rules of court-connected and/or judicial mediation and registers of mediators involved in such mediation; c) settlement agreements resulting from conciliation and court-connected or judicial mediation should have a *res judicata* effect; d) there should be effective system of court fees reducing in case of dispute settlement via mediation or conciliation.

The comparison results show that Austria, Lithuania, and Ukraine have quite different court-based and settlement-oriented models. In all countries analysed, though, court-connected settlement procedures are made available to disputants at no additional costs and are supported by the judiciary, even if demand for these procedures tends to be low. However, the offered procedures differ in many aspects, including the role of judges, the qualifications required for conducting settlement-oriented procedures, the possibilities to involve out-of-court conciliators or mediators, the stage of the procedure, and the time at which it can be adopted. This leads us to conclude that despite the same purpose, settlement-oriented procedures must be selected and implemented under the state's existing system and dispute-resolution culture.

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

REFERENCES

1. Ahmed M, 'Moving on from a Judicial Preference for Mediation to Embed Appropriate Dispute Resolution' (2019) 70(3) Northern Ireland Legal Quarterly 331, doi:10.53386/nilq.v70i3.137.
2. Ballon OJ, *Einführung in das österreichische Zivilprozessrecht: Streitiges Verfahren* (12 Aufl, Leykam Buchverlagsgesellschaft 2009).
3. Boulle L and Field R, *Australian Dispute Resolution: Law and Practice* (LexisNexis Butterworths 2016).
4. Deac A, 'General Terms of the Amicable Settlement of Disputes Between Consumers and Traders' (2015) 4(1) Perspectives of Business Law Journal 88.
5. Doyle J, 'Diminished Responsibility? The Changing Role of the State' (1997) 2(1) Flinders Journal of Law Reform 31.
6. Drozdov O, Rozhnov O and Mamnitskyi V, 'Mediation and Court in Ukraine: Perspectives on Interaction and Mutual Understanding' (2021) 4(3) Access to Justice in Eastern Europe 181, doi:10.33327/AJEE-18-4.3-n000082.
7. Eisenreich-Graf A und Rill U, 'Das Einigungsverfahren: die gerichtliche Streitbeilegung als Chance für die Zukunft' (2019) 4 RZ Österreichische Richterzeitung 55.
8. Fasching HW, *Lehrbuch des österreichischen Zivilprozessrechts: Lehr- und Handbuch für Studium und Praxis* (MANZ Verlag 1990).
9. Ferz S, 'Amicable Dispute Resolution at Court: Conciliation Hearings, The Austrian and German Perspectives' (2022) 8(1) International Comparative Jurisprudence 106, doi:10.13165/j.icj.2022.06.008.
10. Galanter M, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 13(19) Journal of Legal Pluralism 1, doi:10.1080/07329113.1981.10756257.
11. Gonstea MHC, 'Remedy without Diagnosis: How to Optimize Results by Leveraging the Appropriate Dispute Resolution and Shared Decision-Making Process' (2020) 88(6) Fordham Law Review 2165.
12. Gossi K, 'Gerichtlicher Vergleich' (*Lexis 360®*, September 2023) <https://360.lexisnexis.at/d/lexisbriefings/gerichtlicher_vergleich/h_80001_2338982765791970208_a9099951de> accessed 18 April 2023.
13. Izarova I, 'Civil Procedure Reform During the Period of Ukraine's Independence: New Goals and Principles' in Yu Prytika and I Izarova (eds), *Access to Justice in Conditions of Sustainable Development: to the 30th Anniversary of Ukraine's Independence* (Dakor 2021) 32.
14. Izarova I, 'Judicial Reform of 1864 on the Territory of the Ukrainian Provinces of the Russian Empire and Its Importance for the Development of Civil Proceedings in Ukraine' (2014) 2(4) Russian Law Journal 114, doi:10.52783/rlj.v2i4.250.

15. Kamatali JM, 'Transplanting an ADR-Centric Model of Dispute Resolution from the Anglo-American Legal System to the Civil Law System: Challenges, Limitations, and Proposals' (2022) 37(3) Ohio State Journal on Dispute Resolution 293.
16. Kaminskienė N, 'Teisminė mediacija Lietuvoje. Quo vadis?' (2010) 9(1) Socialinis darbas 54.
17. Klein F, *Pro futuro: Betrachtungen über Probleme der Civilproceßreform in Oesterreich* (Deuticke 1891).
18. Kodek GE und Mayr PG, *Zivilprozessrecht* (5 Aufl, Facultas 2021).
19. Komarov VV, *Civil Procedural Legislation in the Dynamics of Development and Practice of the Supreme Court of Ukraine* (Pravo 2012).
20. Kotsiuruba A, 'Conciliation Procedures In Civil Proceedings In Ukraine' (2020) 2(113) Bulletin of Taras Shevchenko National University of Kyiv Legal Studies 28, doi:10.17721/1728-2195/2020/2.113-6.
21. Maclean M, 'Family Mediation: Alternative or Additional Dispute Resolution?' (2010) 32(2) The Journal of Social Welfare & Family Law 105, doi:10.1080/09649069.2010.506306.
22. Mayr PG, 'Das streitige Verfahren (Zivilprozessrecht)' in H Barta (hrsg), *Zivilprozessrecht* (WUV Universitätsverlag 2004) 1079.
23. Meisinger A, *System der Konfliktbereinigung: Alternative, komplementäre und angemessene Streitbeilegung* (MANZ Verlag 2021).
24. Milašiūtė V ir kita, *Privalomosios mediacijos šeimos ginčuose teisinio reguliavimo poveikio ex post vertinimas, 2023* (STRATA 2023).
25. Moritz M, 'Mediation und Vergleich im verwaltungsgerichtlichen Verfahren: Widerspruch oder Chance?' (2021) 11 RZ Österreichische Richterzeitung 245.
26. Nekrošius V, 'Naujasis civilinio proceso kodeksas ir bendrojo proceso pirmosios instancijos teisme reformos pagrindiniai bruožai' (2002) 44 Teisė 102.
27. Nekrošius V, Vėbraitė V, Izarova I and Prytyka Yu, 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 Teise 8, doi:10.15388/teise.2020.116.1.
28. Nelson DW, 'Which Way to True Justice?: Appropriate Dispute Resolution (ADR) and Adversarial Legalism' (2004) 83(1) Nebraska Law Review 167.
29. Prytyka Yu, Izarova I, Kravtsov S, 'Towards Effective Dispute Resolution: A Long Way of Mediation Development in Ukraine' (2020) 29(1) Asia Life Sciences 389.
30. Quek AD, 'Mandatory Mediation: An Oxymoron - Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) Cardozo Journal of Conflict Resolution 479.
31. Rabinovich-Einy O and Katsh E, 'The New New Courts' (2017) 67(1) American University Law Review 165.

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

32. Rechberger WH und Simotta DA, *Grundriss des österreichischen Zivilprozessrechts: Erkenntnisverfahren* (9 Aufl, MANZ Verlag 2017).

33. Rhee CH van, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4(4) Access to Justice in Eastern Europe 7, doi:10.33327/AJEE-18-4.4-a000082.

34. Salter Sh, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) Windsor Yearbook of Access to Justice 112, doi:10.22329/wyaj.v34i1.5008.

35. Salter Sh and Thompson D, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2016-2017) 3 McGill Journal of Dispute Resolution 113.

36. Sander FEA, 'Varieties of Dispute Processing' (The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St Paul, Minn, 7-9 April 1976) 111.

37. Saudargaitė I, 'Judicial mediation in civil disputes in Lithuania' (DPhil thesis, Mykolo Romerio universitetas 2015).

38. Schmidt J, 'Bestehende und neue Formen der Konfliktlösung' in A Deixler-Hübner und M Schauer (hrsg), *Alternative Formen der Konfliktbereinigung: ADR, Richtlinie, Schlichungswesen, Mediation & Einigungsverfahren* (MANZ Verlag 2016).

39. Schmitz AJ, 'Expanding Access to Remedies through E-Court Initiatives' (2019) 67(1) Buffalo Law Review 89.

40. Simaitis R, 'Teisminis sutaikymas' (2004) 52 Teisė 92.

41. Talesh SA, 'How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws' (2012) 46(3) Law and Society Review 463, doi:10.1111/j.1540-5893.2012.00503.x.

42. Tan V, 'Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice' (2019) 24(1) Deakin Law Review 101, doi:10.21153/dlr2019vol24no1art873.

43. Thau K, 'Gerichtsinternes Einigungsverfahren: ein Jahresrückblick Pilotprojekt zu einer alternativen Streitbeilegung' (2016) 3 Interdisziplinäre Zeitschrift für Familienrecht 140.

44. Trenker M, *Einvernehmliche Parteidisposition im Zivilprozess: Parteiautonomie im streitigen Erkenntnisverfahren* (MANZ Verlag 2020).

45. Tsuvina T and Serhieieva A, 'Comprehensive Analysis of the Current Situation, Barriers and Possibilities of Mediation Development: with Recommendations for the Promotion and Implementation of Mediation in Ukraine' (2019).

46. Tsuvina T and Vakhonieva T, 'Law of Ukraine "On Mediation": Main Achievements and Further Steps of Developing Mediation in Ukraine' (2022) 5(1) Access to Justice in Eastern Europe 142, doi:10.33327/AJEE-18-5.1-%20n000104.

47. Tsuvina T, 'Implementation of the Institute of Court Mediation as A Promising Direction of Reforming the Civil Procedural Legislation of Ukraine' (Ukraine on the Way to Europe: Reform of Civil Procedural Legislation: International scientific and practical conference, Kyiv, 07 July 2017) 195.

48. Tsuvina T, Ferz S, Tvaronavičienė A and Riener P, 'The Implementation of Consensual Tenet in Modern Civil Procedure: A European Approach of Court-Related Amicable Dispute Resolution Procedures' (2023) 6(1) Access to Justice in Eastern Europe 198, doi:10.33327/AJEE-18-6.1-a000124.

49. Tvaronavičienė A and others, 'Towards More Sustainable Dispute Resolution in Courts: Empirical Study on Challenges of the Court-Connected Mediation in Lithuania' (2021) 8(3) Entrepreneurship and Sustainability Issues 633, doi:10.9770/jesi.2021.8.3(40).

50. Ury WL, Brett JM and Goldberg SB, 'Designing an Effective Dispute Resolution System' (1988) 4(4) Negotiation Journal 413, doi:10.1111/j.1571-9979.1988.tb00484.x.

51. Valančius V, 'Lietuvos civilinio proceso kodeksas: pirmųjų metų patirtis' (2005) 69(61) Jurisprudencija 55.

52. Vėbraitė V, 'Šalių sutaikymas civiliniame procese' (DPhil thesis, Vilnius University 2009).

53. Vėbraitė V, 'Šalių sutaikymas kaip civilinio proceso tikslas ir jo galimybės Lietuvoje' (2008) 69 Teisė 106.

54. Zuckerman A, 'Justice in Crisis: Comparative Dimensions of Civil Justice' in A Zukerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999) 2, doi:10.1093/acprof:oso/9780198298335.003.0001.

AUTHORS INFORMATION

Tetiana Tsuvina
Dr. Sc. (Law), Head of the Department of Civil Procedure, Arbitration and International Private Law, Head of the Mediation and ADR Center at Yaroslav Mudryi National Law University, Kharkiv, Ukraine; Visiting Researcher at Karl Franzens-University, Graz, Austria.
t.a.tsuvina@nlu.edu.ua
https://orcid.org/0000-0002-5351-1475

Corresponding author, responsible for the concept creation, research methodology, writing and supervising. **Competing interests:** Although the author serves as one of the managing editors of AJEE, which may cause a potential conflict or the perception of bias, the final decisions for the publication of this note, including the choice of peer reviewers, were handled by the other managing editors and the editorial board members. **Disclaimer:** The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations. **Translation:** The text of the article was written by authors in English.

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

Sascha Ferz
Univ.-Prof. Mag. Dr., Professor for Alternative Dispute Resolution at the Institute of Legal Foundations and Head of the interdepartmental Centre for Social Competence at the Karl-Franzens-University, Graz, Austria.
sascha.ferz@uni-graz.at
https://orcid.org/0000-0002-8450-4497
Co-author, responsible for the conceptualization, writing and data collection. **Competing interests:** No competing interests were announced. **Disclaimer:** The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

Agnė Tvaronavičienė
PhD (Law), Head of Mediation and Sustainable Conflict Resolution Laboratory, full time professor at Mykolas Romeris University, Vilnius, Lithuania.
a.tvaronaviciene@mruni.eu
https://orcid.org/0000-0002-5489-5570
Coauthor, responsible for the writing and data collection. **Competing interests:** No competing interests were declared. **Disclaimer:** The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

Paula Riener
Mag., University Assistant at the Institute of Legal Foundations (Alternative Dispute Resolution) at the Karl-Franzens-University, Graz, Austria.
paula.riener@uni-graz.at
https://orcid.org/0000-0002-0276-9476
Coauthor, responsible for the writing and data collection. **Competing interests:** No competing interests were declared. **Disclaimer:** The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

ADDITIONAL INFORMATION

Tetiana Tsuvina's input for the research was supported by the European Federation of Academies of Sciences and Humanities (ALLEA) and by the Austrian Academy of Science within the project JESH-Ukraine. The theses explained here represent the ideas of the authors and do not necessarily reflect the views of the ALLEA or the Austrian Academy of Science.

Agnė Tvaronavičienė's input for this article was financed by the project "The Portrait of a Judge" – a multi-dimensional model of competencies to be measured during the procedures of selection, evaluation and promotion of judges". Project number: 2018-1-0662. Grant provider: 100 % EEA and Norway Grants Fund for Regional Cooperation.

ABOUT THIS ARTICLE

Cite this article
Tsuvina T, Ferz S, Tvaronavičienė A and Riener P, 'The Implementation of Consensual Tenet in Modern Civil Procedure: Comparative Analysis of Court-Connected Settlement Procedures Applied in Austria, Lithuania, and Ukraine' (2024) 7(1) Access to Justice in Eastern Europe 26-57 <https://doi.org/10.33327/AJEE-18-7.1-a000109>

Submitted on 22 Aug 2023 / Revised 23 Nov 2023 / Approved 1 Dec 2023
Published ONLINE: 20 Dec 2023 / Last Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000109

Managing editor – Mag. Polina Siedova. **English Editor** – Jules Bold.

Keywords: *settlement, civil procedure, mediation, conciliation, court conciliation, court mediation, alternative dispute resolution.*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

CRIMINAL LAW PROTECTION OF THE UKRAINIAN EXTERNAL VOTING TO THE STATE AUTHORITIES IN POST-WAR CONDITIONS (A CASE STUDY OF POLAND)

Oksana Kaluzhna* and Lidiia Paliukh

ABSTRACT

Background. *The article explores the potential of conducting elections for state authorities of Ukraine in the foreign electoral district (external voting) in the conditions caused by the full-scale invasion of Ukraine by the Russian Federation on 24 February 2022. According to the United Nations High Commissioner for Refugees (UNHCR), with the caveat that the real numbers may be higher due to not all migrants from Ukraine being able to register as refugees, 6.2 million Ukrainians currently reside abroad, with 5.8 million of them situated in Europe. The Republic of Poland hosts the largest number of Ukrainian refugees with temporary protection status, exceeding 1.5 million. Therefore, the research focused on the case of the Republic of Poland, expecting that its findings could be extrapolated to other states where a significant number of Ukrainian citizens reside.*

Considering that about 20% of Ukrainian citizens reside abroad, including both refugees and those who permanently lived abroad until 24 February 2023, Ukraine must devise effective mechanisms for organising external voting; otherwise, if measures are not taken, less than 0.5% of voters abroad will be able to vote. In particular, it is necessary to develop models ensuring the criminal legal protection of external voting, as election abuses can affect voting outcomes significantly, distort the process, and even lead to the usurpation of power.

Methods. *Throughout the research, various methods, including logical (analysis, synthesis, generalisation, extrapolation, analogy, modelling, hypothesis), historical, systemic-structural, comparative-legal, and dogmatic methods, have been used. Logical methods played a crucial role in analysing the operation of the Criminal Code of Ukraine, the Code of Ukraine on Administrative Offenses, regarding possible electoral offences committed outside Ukraine during Ukrainian elections held abroad. The historical method was utilised to analyse the experience of the Ukrainian parliamentary elections in 2019. The system-structural method has been applied to formulate proposals for ensuring the legal protection of elections to state*

authorities outside of Ukraine. The comparative legal method was applied when comparing provisions in the criminal legislation of Ukraine and the Republic of Poland, specifically those pertaining to liability for election offences. The dogmatic method has been used in the interpretation of the norms of the Penal Code of the Republic of Poland establishing liability for election offences, in the understanding of the norms of the Criminal Code of Ukraine, the Code of Ukraine on Administrative Offenses regarding their application to election offences committed outside Ukraine.

The article delves into two primary aspects. Firstly, it examines the jurisdiction under which criminal liability for election offences in Ukrainian external voting is imposed, explicitly identifying the relevant legislation of the involved state. Secondly, it addresses the problems of applying the principles of the operation of the Criminal Code of Ukraine in space concerning the prosecution of electoral criminal offences, including foreigners.

Result and conclusions. *The authors substantiate the necessity of creating supplementary election precincts within the territory of the Republic of Poland, designated for conducting Ukrainian elections beyond the premises of diplomatic institutions of Ukraine and equating them in terms of legal status to the premises of diplomatic institutions of Ukraine. The latter is possible by concluding a bilateral agreement between Ukraine and the Republic of Poland on assistance in conducting Ukrainian external voting on the territory of the Republic of Poland.*

1 INTRODUCTION

War is an immense tragedy in the life of the people and the country. The war profoundly impacts the organisation of most social relations in the state. This requires an immediate and appropriate reaction in effecting necessary changes to legal regulation. Russian Federation's full-scale invasion of Ukraine on 24 February 2022, has presented many challenges to the country. One pressing issue is the need to ensure active voting rights of Ukrainian citizens residing abroad in the upcoming parliamentary or presidential elections. If the elections in the foreign electoral district are held on the premises of diplomatic missions and consular institutions of Ukraine, as usually happens, not everyone will be able to vote. It is evident that this arrangement may only accommodate a fraction, likely less than 1%, of Ukrainians living abroad. Consequently, there is a critical need to develop effective mechanisms for overcoming this challenge.

According to the Ptukha Institute of Demographics and Social Research of the NAS of Ukraine, relying on data from the State Border Guard Service of Ukraine, the estimated number of Ukrainians residing abroad as of March 2023 stood at approximately 5 million people. This number includes persons who departed both during the ongoing war and in the period shortly before it started.[1]

1 'It Became Known How Many Ukrainians Left and Stayed Abroad' (*Tvoie Misto [Your City: Lviv Now]*, 12 March 2023) <https://tvoemisto.tv/news/stalo_vidomo_skilky_ukraintsiv_vyihaly_ta_zalyshylysya_za_kordonom_145039.html> accessed 25 September 2023.

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

The Republic of Poland has emerged as hosting the largest number of refugees from Ukraine, making it a focal point for research. The findings of this research, conducted within the Republic of Poland, can be extrapolated to any other state with a significant number of Ukrainians.

According to Polish mass media based on statistics from the Ministry of Internal Affairs and Administration, in February 2023, about 1.3 million citizens of Ukraine permanently lived in Poland, and 1.5 million applied for a PESEL number.[2]

According to the study 'Media Consumption and Public Activism of Ukrainians Who Found Temporary Refuge in Poland' conducted by the Kyiv International Institute of Sociology from 26 October– 30 November 2022, in the Republic of Poland, the majority of survey respondents (82%) expressed a desire to participate in national elections if they were to be held in Ukraine during the respondents' stay in Poland.[3] This research was commissioned by the Civil Network OPORA and received support from the International Foundation for Electoral Systems (IFES). The data indicates a strong inclination among the majority of Ukrainian refugees in Poland to actively engage in the democratic process. Compared to the turnout in the most recent national elections in Ukraine (parliamentary elections in July 2019), respondents are now more eager to participate in the elections. At the same time, supporters of voting in person hope for the opening of a sufficient number of election precincts in Poland to avoid large crowds. During in-depth interviews, participants repeatedly expressed their fear of possible queues in front of consulates, as evidenced by previous experience.[4]

Therefore, it is important to ensure Ukrainians in Poland (as well as in other states) have the opportunity to be broadly involved in Ukraine's political life, notably by enabling them to exercise their electoral rights effectively.

Along with the development of more efficient models for organising elections abroad, a related and independent set of issues is ensuring the legal protection of the elections through criminal law. It is evident that varying degrees of electoral misconduct during the elections can impact outcomes and significantly distort them, particularly given the substantial number of Ukrainian citizens residing abroad. Therefore, it is extremely important to analyse the real possibility of bringing offenders to justice, outline clear algorithms (models) of law enforcement activities in this regard, identify gaps in legal regulation, and improve legislation. This constitutes an essential aspect of early and thorough preparation for the

2 Nazarij Soroka, 'How Many Ukrainians Live in Poland on a Permanent Basis Today' (*Channe 24 Zakordon,* 2 February 2023) <https://zakordon.24tv.ua/skilki-ukrayintsiv-sogodni-zhivut-polshhi-postiyniy-osnovi_n2262234> accessed 25 September 2023.

3 OPORA NGO, *Media Consumption and Public Activity of Ukrainians Who Found Temporary Shelter from the War in Poland: Report on the Diary Study and In-Depth Interviews, November 2022* (Kyiv International Institute of Sociology 2022) 16.

4 ibid, 96.

forthcoming elections. Ukraine's readiness for this challenge reflects the state's ability to work proactively to address anticipated issues, prevent confusion and disorder, and uphold its international image of the state and trust in its institutions.

The objectives of this article are to answer the following questions:

- In which state's legislation is an individual subject to criminal liability for election offences committed outside of Ukraine, particularly in a foreign electoral district?
- How does the Criminal Code of Ukraine (hereinafter referred to as the CC of Ukraine) apply to election offences during elections to the state authorities of Ukraine committed on the territory of election precincts located in the premises of diplomatic institutions of Ukraine?
- Where on the territory of Poland, in accordance with the current election legislation of Ukraine, can election precincts be organised?
- What criminal election offences (due to their nature (mechanism)) can be committed outside Ukraine (in particular, on the territory of foreign election precincts, and what - outside the election precincts)?
- Does the CC of Ukraine apply to criminal election offences committed outside Ukraine's diplomatic mission or consular institution of Ukraine, which can potentially be committed outside the election precinct?
- How must be qualified the actions of foreign citizens, stateless persons which contain signs of criminal election offenses committed in the Republic of Poland outside the territory of diplomatic missions and consular institutions of Ukraine? Does the CC of Ukraine apply to them?
- To which criminal election offences does the real principle of the operation of the CC of Ukraine apply?
- Which criminal election offences do not apply to the real principle of operation of the CC of Ukraine?
- Is it possible to apply other principles of the operation of CC of Ukraine to criminal election offences committed on the territory of the Republic of Poland?
- Is it necessary to create election precincts on the territory of the Republic of Poland for holding elections to the state authorities of Ukraine in addition to the premises of diplomatic institutions? What legal status might they have?
- What additional legislation must be adopted to facilitate elections for state authorities of Ukraine in places or premises for voting beyond the diplomatic institutions of Ukraine?
- What challenges exist in holding accountable administrative election offences committed in a foreign electoral district?

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

2 THE OPERATION OF THE CRIMINAL LAW WITH REGARD TO CRIMINAL ELECTION OFFENCES COMMITTED ON THE TERRITORY OF THE REPUBLIC OF POLAND

2.1. The criminal legislation of which state must be applied to the election offences committed regarding the elections to the state authorities of Ukraine abroad?

Let us commence by acknowledging that, in the course of this research, we have frequently encountered opinions, notably from legal experts, that the prosecution and investigation of criminal and administrative election offences committed on the territory of Poland during the elections to the state authorities of Ukraine will be conducted under Polish legislation and the Polish police.

Such opinions, even among specialists knowledgeable in electoral matters, underscore the significance of developing accurate perceptions concerning the application of Polish and Ukrainian criminal law to Ukrainian elections in Poland. Our assessment reveals that these conjectures are based on the first misleading impression (*prima facie*), suggesting that election offences during the Ukrainian elections in the Republic of Poland will be prosecuted under the laws of Poland and investigated by Polish authorities. However, this is not the case.

The present Criminal Code of Poland of 1997 (Kodeks karny) includes section XXXI in the Special Part, titled 'Offenses against elections and referendums' (Art. 248 - 251).[5] It is essential to emphasise that the Penal Code of the Republic of Poland cannot be applied to criminal election offences. The reason for this lies in the fact that the criminal offences outlined in Chapter XXXI of the Criminal Code of the Republic of Poland have another object - public relations regarding the conduct of elections to the parliament (the lower – Sejm and the upper – Senate), President of the Republic of Poland, elections to the Parliament of the European Union, elections of local self-government bodies, and a referendum. The operation of Section XXXI of the Polish Criminal Code is clearly outlined in Part 1 of Art. 248 of the Criminal Code of Poland.

This approach taken by the Criminal Code of Poland (as well as the criminal legislation of any state) is entirely logical and predictable, as it aligns with the principle of state sovereignty and the principle of non-intervention (non-interference in domestic affairs of the state) as outlined in Art. 7, Art. 2 of the UN Charter.[6] These principles assert that no state or group of states possesses the right to interfere in the internal affairs of another state. Therefore, a foreign state hosting elections for the state authorities of another foreign state (Ukraine) lacks the authority to organise and hold elections for the state authorities of that

5 Penal Code of the Republic of Poland of 6 June 1997 'Kodeks karny' [1997] DzU 88/553.

6 United Nations Charter (signed 26 June 1945) <https://www.un.org/en/about-us/un-charter> accessed 25 September 2023.

foreign state (Ukraine). Similarly, it does not have the authority to impose criminal and administrative liability for election offences regarding the elections of the authorities of a foreign state (Ukrainian elections).

The logical consequence of these two conceptual foundations is that each state independently:

- organises elections abroad for its state authorities (external voting)
- establishes criminal and administrative liability for election offences during external voting and prosecutes them. The foreign state on whose territory external voting is held must assist it based on international treaties and in accordance with the procedure of international legal assistance in civil and criminal cases. It is worth noting that the elections abroad (external voting) are organised by the authorised authorities of Ukraine, specifically the precinct election commissions.

As per Part 1, 3 Art. 26 of the Electoral Code of Ukraine (hereinafter referred to as the EC of Ukraine),[7] a single nationwide constituency encompasses the entire Ukraine along with the foreign constituency. The latter includes all foreign election precincts established under the provisions of the EC of Ukraine. These foreign election precincts are designated for the preparation and conduct of voting in national elections (Art. 31 of the EC of Ukraine) – for the President of Ukraine and Members of Parliament of Ukraine. The foreign election precinct is intended for the organisation and voting of voters residing or present on the territory of a foreign country on the day of voting.

A foreign election precinct has its index number, address of the voting premises, and address of the premises of the precinct election commission of a foreign election precinct. Foreign election precincts shall be established by the Central Election Commission at Ukraine's diplomatic institutions abroad or military units (formations) deployed outside Ukraine. A foreign election precinct shall have its voting premises located at a diplomatic institution of Ukraine or the location of a military unit (formation) deployed outside Ukraine.

According to Part 4 of Art. 5 of the Law of Ukraine 'On Diplomatic Service',[8] the out-of-country diplomatic institutions of Ukraine include:

- The Embassy of Ukraine;
- The Embassy of Ukraine with the residence of the Ambassador Extraordinary and Plenipotentiary of Ukraine in Kyiv;
- Permanent Mission of Ukraine to the International Organization;
- Delegation of Ukraine to an international organisation;
- Mission of Ukraine to an international organisation;
- Consular institution of Ukraine (Consulate General of Ukraine, Consulate of Ukraine, Vice Consulate of Ukraine and Consular Agency of Ukraine.

7 Electoral Code of Ukraine no 396-IX of 19 December 2019 [2020] Vidomosti of the Verkhovna Rada of Ukraine 7-9/48.

8 Law of Ukraine no 2449-VIII of 7 June 2018 'On Diplomatic Service' [2018] Vidomosti of the Verkhovna Rada of Ukraine 26/219.

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

At the same time, not all types of diplomatic institutions can organise elections (election precincts) for public authorities of Ukraine based on their main purpose and diplomatic functions (representation and protection of the interests of Ukraine either in the host state or with an international organisation). Thus, among the institutions listed in Part 4 of Art. 5 of the Law of Ukraine 'On Diplomatic Service', elections to the state authorities of Ukraine shall not be organised by: a) the Embassy of Ukraine with the residence of the Ambassador Extraordinary and Plenipotentiary of Ukraine in Kyiv; b) the Permanent Mission of Ukraine to an international organisation; c) the Delegation of Ukraine to an international organisation; d) the Mission of Ukraine to an international organisation.

According to the Central Election Commission Resolution No. 118 of 25 June 2020, a total of 102 foreign election precincts were formed on a permanent basis, with 100 located in foreign diplomatic institutions and 2 in military units (formations) stationed outside Ukraine.[9]

It is important to clarify that according to Part 7 of Art. 7 of the EC of Ukraine, citizens of Ukraine living abroad are considered not to belong to any territorial community and are ineligible to participate in local elections. Therefore, current Ukrainian legislation does not provide the option of establishing election precincts beyond the territory and premises of diplomatic institutions of Ukraine and military units (formations) deployed outside Ukraine.

Given the established context that criminal-law protection of the elections abroad (external voting) and prosecution of election offenders are carried out by Ukraine, and elections (external voting) to the state authorities of Ukraine on the territory of a foreign state are held in the premises and territory of diplomatic institutions of Ukraine, where, accordingly, foreign election precincts are formed, it becomes essential to find out exactly how Ukrainian legislation on liability for criminal election offences operates on the territory of Poland (as well as any other foreign state).

Hence, the conclusion is as follows: the peculiarities of the application of the CC of Ukraine regarding election offences on the territory of the Republic of Poland will depend on where exactly the offence was committed — within a diplomatic institution or beyond it.

2.2. How do the Criminal Code of Ukraine and the Code of Ukraine on Administrative Offenses apply to the election offences for public authorities of Ukraine, committed in the territory of foreign election precincts located in the premises of Ukrainian diplomatic institutions abroad?

According to Part 3 of Art. 31 of the EC of Ukraine, a foreign election precincts shall have a voting room in the premises of a foreign diplomatic institution of Ukraine or in the place of deployment of a military unit (formation) outside Ukraine.

9 Resolution of the Central Election Commission no 118 of 25 June 2020 'On the Formation of Foreign Polling Stations on a Permanent Basis' <https://zakon.rada.gov.ua/laws/show/v0118359-20#top> accessed 25 September 2023.

From the perspective of the criminal law of Ukraine and the law of Ukraine on administrative offences, this specific provision should not pose problems in bringing offenders to criminal and/ or administrative responsibility by Ukraine.

According to Art. 6 of the CC of Ukraine, the territorial principle of the criminal law shall be applied to offences committed on their territory — persons committing criminal offences on the territory of Ukraine shall be brought to criminal liability.[10]

The operation of the legislation of Ukraine on administrative liability in space is regulated in Art. 8 of the Code of Ukraine on Administrative Offenses.[11] In particular, a person committing an administrative offence shall be brought to liability under the law acting at the time and place of the offence commission. Proceedings in cases of administrative offences shall be conducted on the basis of the law operating during and at the place of settlement of the case on the offence (Parts 1, 3 of Art. 8 of the Code of Ukraine on Administrative Offenses). Therefore, the legislation of Ukraine on administrative liability applies to administrative offences committed in the premises and on the territory of diplomatic missions and consular offices of Ukraine abroad.

The premises and territory of diplomatic missions and consular institutions are considered objects that are not part of the territory of Ukraine. However, they fall under the jurisdiction of Ukraine (Part 2 of Art. 4 of the Criminal Procedural Code of Ukraine (hereinafter referred to as the CPC of Ukraine)).[12]

Therefore, the criminal law of Ukraine and the legislation of Ukraine on administrative responsibility apply to, respectively, criminal and administrative offences committed on the premises and the territory of diplomatic missions and consular institutions of Ukraine abroad.

The territory of Ukraine is determined by Art. 1 of the Law of Ukraine 'On State Boundary of Ukraine',[13] which defines the concept of the state boundary of Ukraine as a line and a vertical surface passing along this line, encompassing the boundaries of the territory of Ukraine including land, waters, subsoil, and airspace. At the same time, diplomatic institutions of Ukraine and military units (formations) stationed outside Ukraine are not directly qualified as the territory of Ukraine designated by the state border of Ukraine, as indicated in Art. 1 and 3 of the mentioned law

Beyond the physical territory of Ukraine, some objects, such as the territory of diplomatic missions and consular offices of Ukraine abroad, shall be subject to the jurisdiction and

10 Criminal Code of Ukraine no 2341-III of 5 April 2001 [2001] Vidomosti of the Verkhovna Rada of Ukraine 25–26/131.

11 Code of Ukraine on Administrative Offenses no 8073-X of 7 December 1984 [1984] Vidomosti of the Verkhovna Rada of Ukraine SSR 51/1122.

12 Criminal Procedural Code of Ukraine no 4651-VI of 13 April 2012 [2013] Vidomosti of the Verkhovna Rada of Ukraine 9-10–13/88.

13 Law of Ukraine no 1777-XII of 4 November 1991 'On State Boundary of Ukraine' [1992] Vidomosti of the Verkhovna Rada of Ukraine 2/5.

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

scope of application of criminal and criminal procedural legislation of Ukraine. This is stipulated under the conditions provided for by international law and the legislation of Ukraine. This follows from the provisions of Art. 22 of the Vienna Convention on Diplomatic Relations of 18 April 1961, Art. 31 of the Vienna Convention on Consular Relations of 24 April 1963, and Part 2 of Art. 4 of the CPC of Ukraine.

According to item 1 of Art. 22 of the 1961 Vienna Convention on Diplomatic Relations,[14] the premises of a diplomatic mission shall be inviolable. The agents of the receiving State may not enter them except with the consent of the head of the mission. In accordance with Part 3 of this Article, the premises of the mission, their furnishings and other property thereon, and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

The inviolability of consular premises is limited to that part of the premises used exclusively for the purpose of the work of the consular post. The authorities of the receiving State shall not enter these premises except with the consent of the head of the consular post, or of his designee, or the head of the diplomatic mission of the sending State. Consular premises, their furnishings, the property of the consular post, and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility (Parts 2, 4 of Art. 31 of the 1964 Vienna Convention on Consular Relations).[15]

In general, these basic provisions of the legislation are sufficient for law enforcement and the conclusion that if the elections are held on the territory of the diplomatic mission or consular office of Ukraine abroad, the offences committed on the territory of the mentioned diplomatic institutions shall be subject to Ukrainian legislation, including the CC of Ukraine and the Code of Administrative Offenses.

The nuances of the territorial and extraterritorial principles of criminal law in the territory of diplomatic institutions are reflected in international judicial practice — in particular, in the legal positions set out in the decisions of the European Court of Human Rights (ECHR) and the judicial practice of certain foreign states.[16]

In the case of M. v Denmark, an individual filed a complaint to the European Court of Human Rights related to the fact that he was seeking the possibility to leave the former German Democratic Republic (GDR) and move to the Federative Republic of Germany and enter the premises of the Embassy of Denmark in (East) Berlin in 1988. Upon request of the ambassador of Denmark, the GDR police entered the embassy and detained the claimant. Eventually, he was given a suspended jail sentence after 33 days in custody. M. filed a complaint to the ECHR concerning the violation of his right to the freedom of movement.

14 Vienna Convention on Diplomatic Relations (done at Vienna 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

15 Vienna Convention on Consular Relations (done at Vienna 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.

16 ECtHR, *Guide on Article 2 of Protocol no 4 to the European Convention on Human Rights: Freedom of Movement* (CoE 2022).

He complained that he was denied the right to free movement on the territory of Denmark when the GDR police removed him from the premises of the embassy upon request of the ambassador of Denmark. The ECHR, in their decision of 14 October 1992[17] ruled that the contested act of the ambassador transferred the claimant to the jurisdiction of Denmark. As a result, Art. 2 of Protocol No. 4 did not apply to his case. Thus, the ECHR de facto recognised Denmark's jurisdiction extending to these relations, although they concluded that the territory of the diplomatic mission could not be deemed the territory of Denmark since the 'authorised representatives of the state, including diplomatic or consular agents, transferred other people or property to the jurisdiction of this state to the extent they exercised the power over them.'[18]

There are other positions on the extension of the jurisdiction of the state to the territory of diplomatic missions and consular institutions representing it. This view is that the territories of diplomatic missions and consular offices of the state they represent abroad have a special legal regime but are not under the sovereignty of the state and are not the territory of the state they represent. Thus, J. Paust says that the inviolability of the premises does not mean that they are subject to the extraterritorial principle. Actions committed in these premises stay within the territorial jurisdiction of the receiving state, and the representative office is obliged to comply with local legislation. Although the territorial jurisdiction of a foreign state remains, its capacity to enforce its laws is significantly limited but not abolished by the treaty and doctrines of customary international immunity law.[19]

In Ukraine, a similar approach is maintained by O. Dudorov and M. Khavronjuk. In particular, they insist that the territories of diplomatic missions and consular offices of Ukraine abroad have a special legal regime but are not under the sovereignty of Ukraine. According to their perspective, these territories are not considered the territory of Ukraine in the context of laws governing criminal liability.[20]

In general, this approach is based on Art. 41 of the Vienna Convention on Diplomatic Relations of 18 April 1961: 'Without prejudice to immunities and privileges, all persons enjoying such immunities and privileges are bound to respect the laws and regulations of the receiving State. … The premises of the mission shall not be used for a purpose incompatible with the functions of representation provided for in this Convention or other rules of general international law or with any special agreements concluded between the sending State and the receiving State.'fv[21]

17 *M v Denmark* App no 17392/90 (ECtHR, 14 October 1992) <https://hudoc.echr.coe.int/eng?i=001-1390> accessed 25 September 2023.

18 ECtHR, *Extra-Territorial Jurisdiction of States Parties to the European Convention on Human Rights* (Press Unit, ECtHR July 2018) <https://www.echr.coe.int/documents/d/echr/fs_extra-territorial_jurisdiction_eng> accessed 25 September 2023.

19 Jordan J Paust, 'Non-Extraterritoriality of "Special Territorial Jurisdiction" of the United States: Forgotten History and the Errors of *Erdos*' (1999) 24(1) The Yale Journal of International Law 305.

20 OO Dudorov and MI Khavronjuk, *Criminal Law* (Vaite 2014) 102.

21 Vienna Convention on Diplomatic Relations Vienna Convention on Diplomatic Relations (n 14).

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

The diplomatic mission and its personnel are by all means bound by the laws of the receiving State, general international law and legality, all while acting in the legitimate interests of the sending State. Therefore, the significance of Art. 41 of the 1961 Vienna Convention lies in its critical caveat, highlighting 'without prejudice to immunities and privileges.'[22]

The principle of extraterritoriality extends to the diplomatic institutions, representing a set of privileges stipulated by treaties between countries granted to foreign heads of state, diplomatic representatives, military units, ships, etc.[23] These privileges provide immunity from the jurisdiction of the receiving State.

S. Shherycja writes that extraterritoriality signifies that the laws of a given state do not apply to certain special territories. He proposes distinguishing between the following types of extraterritoriality (territorial immunity), including a) extraterritoriality (immunity) of the diplomatic representation of a foreign state; b) extraterritoriality of military units, aircraft and ships located in the territory of a foreign state with special permission.[24]

The principle of extraterritoriality applies to certain persons not covered by the law of the receiving state and certain places (territories).

T. Ljashhenko asserts that the functioning of diplomatic missions is organised in such a way that they resemble the concept of a state within the state (legally, this is the extraterritorial theory of the justification of diplomatic privileges and immunities). The ties between them are reduced exclusively to housekeeping needs and official contacts. That is why one of the most controversial and pressing issues related to diplomatic representation is the theoretical justification for the necessity and boundaries of diplomatic privileges and immunities.[25] These immunities and privileges derive from the principle of the sovereign equality of states. It is in its power that diplomatic representation, as a public body of the state, is exempted from the jurisdiction of the state because its immunity extends to both property and ownership.[26]

The terms 'extraterritoriality' and 'extraterritorial jurisdiction' refer to the competence of a State to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory. Such competence may be exercised by way of prescription, adjudication or enforcement. This provides the State's authority to lay down legal norms, decide competing claims, and enforce compliance with its laws.[27]

22 ibid.

23 IK Bilodid, PP Docenko and LA Jurchuk (eds), *Dictionary of the Ukrainian Language*, vol 2 (Naukova Dumka 1971) 465.

24 SI Shherycja, 'Exterritoriality as an Exception to the Territorial Principle of Effect of the Criminal Procedure Law' (2015) 5 Law and Society 200.

25 TM Ljashhenko, *Legal Status of Diplomatic Missions* (National Academy of Management 2008) 45.

26 ibid 49.

27 Menno T Kamminga, 'Extraterritoriality' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2020) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1040> accessed 25 September 2023.

Such normative prescriptions (as noted above) are Art. 22 of the Vienna Convention on Diplomatic Relations of 18 April 1961, Art. 31 of the Vienna Convention on Consular Relations of 24 April 1963 and Part 2 of Art. 4 of the CPC of Ukraine, which allows applying the criminal and criminal procedural legislation of Ukraine in proceedings for criminal offences committed on the territory of a diplomatic mission or consular office of Ukraine.

In other words, while the CC of Ukraine does not directly determine its effect on the territories of diplomatic institutions of Ukraine abroad, such as any special (clarifying) provision, the CPC of Ukraine brings some clarity to the matter. Part 2 of Art. 4 determines that the criminal procedural law of Ukraine shall apply when conducting proceedings with respect to criminal offences committed on the territory of a diplomatic mission or consular post of Ukraine abroad.

The corresponding (mirroring) provision, under the reciprocity principle of states in international relations, is Part 2 of Art. 6 of the CPC of Ukraine: criminal proceedings against a person who has diplomatic immunity may be carried out under the rules of this Code only with the consent of such a person or with the consent of the competent authority of the state (international organisation) represented by such a person, in the manner prescribed by the legislation of Ukraine and international treaties of Ukraine. The provision of Art. 6 of the CPC of Ukraine is an implemented provision of Art. 32 of the 1961 Vienna Convention on Diplomatic Relations, providing that 'the immunity from jurisdiction of diplomatic agents and of persons enjoying immunity may be waived by the sending State. Waver must always be express.'[28]

This brief insight into the academic polemics regarding the operation of the criminal and criminal procedural law of Ukraine on the territory of diplomatic and consular institutions abroad leads us to the basic conclusion: if elections to the public authorities of Ukraine in the external electoral district take place on the territory of diplomatic institutions of Ukraine abroad, there should not be conflicting interpretations regarding the extension of the Ukrainian legislation, in particular the CC of Ukraine, to the offences committed there (in view of the territorial principle of validity — Part 1 of Art. 6 of the CC of Ukraine) and the Code of Ukraine on Administrative Offenses. If any such variant readings arise, they can be refuted by the norms and doctrinal arguments mentioned above.

Hence, in our opinion, in a possible future agreement between Ukraine and the Republic of Poland to regulate the holding of elections to the public authorities of Ukraine, it is worth mentioning (declaring) the provisions on the extension of Ukrainian legislation governing the election procedure, as well as legislation on administrative offences, the CC of Ukraine, criminal procedural legislation for the premises of diplomatic missions and consular institutions of Ukraine in the Republic of Poland and the territory adjacent to them, as well as for the premises of additional election precincts where elections (voting) will be held outside diplomatic missions and consular institutions of Ukraine (if an agreement on the latter is reached).

28 Vienna Convention on Diplomatic Relations (n 14).

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

2.3. What kind of criminal election offences due to their nature (mechanism) can be committed outside Ukraine (in particular, on the territory of external election precincts, or outside election precincts)?

Our next research phase aims to identify which criminal election offences are committed (or can potentially be committed) directly at election precincts abroad (that is, on the territory of diplomatic institutions of Ukraine) and which criminal election offences can be committed outside the diplomatic institutions.

Section V of the Special Part of the Criminal Code of Ukraine establishes liability for criminal election offences, including those that may occur during elections outside Ukraine, such as at foreign election precincts within a diplomatic institution (see Fig. 1).

In particular, the following are provided for in Art. 157 ('Preclusion of the right to vote, or the right to take part in a referendum, the work of an election commission or referendum commission, or activities of an official observer'), Art. 158 ('Providing false information to the body maintaining the State Register of Voters or other unauthorised interference in the operation of the State Register of Voters'), Art. 158-1 ('Illegal use of a voting paper, a referendum ballot paper, voting by a voter or a referendum participant for more than once, theft, damage, concealment or destruction of a voting paper, a referendum ballot paper'), Art. 158-2 ('Illegal destruction or damage to election or referendum documents'), Art. 159 ('Violation of the secrecy of voting'), Art. 159-1 ('Violation of the procedure for financing a political party, election or referendum campaigning'), Art. 160 ('Bribery of a voter, referendum participant, member of an election or referendum commission').

Criminal election offences against the electoral rights of Ukrainian citizens may be committed during elections outside Ukraine, specifically in a foreign constituency outside a diplomatic institution (see Fig. 2). The same set of offences listed above, as provided in Art. 157, 168, 158-1., 159, 159-1 and 160 of the Criminal Code of Ukraine applies in this context.

2.4. Does the CC of Ukraine apply to criminal election offenses committed outside the diplomatic institutions of Ukraine?

This question is another step in the logical chain of this research and is important for clarifying the answers to the following questions:

- How does the CC of Ukraine operate regarding criminal election offences committed outside the diplomatic institution?
- In the future, the possibility of voting in non-extraterritorial premises (in other premises outside the diplomatic institutions of Ukraine) might be provided by the international treaty between Ukraine and the Republic of Poland and accordingly implemented in Ukraine's national legislation. In such a case, would these premises not be equated in terms of legal status to the premises of diplomatic institutions?

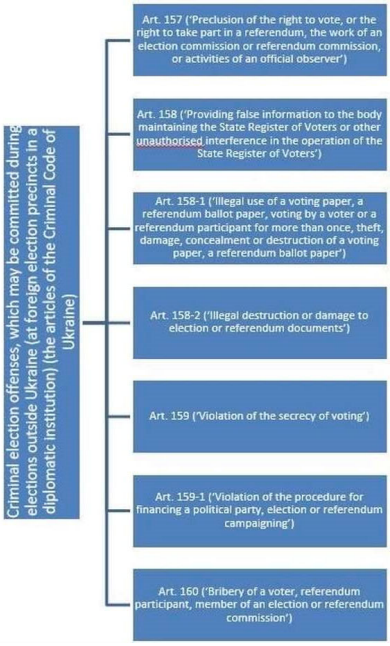


Fig. 1

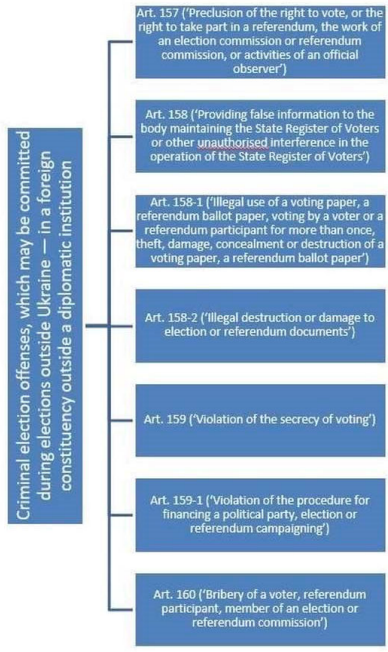


Fig. 2

In some cases, the CC of Ukraine applies to such offences since the principle of citizenship and, sometimes, the principle of reality applies.

The principle of citizenship is enshrined in Art. 7 of the CC of Ukraine. According to Part 1, citizens of Ukraine and stateless persons permanently residing in Ukraine, who have committed offences outside Ukraine, shall be criminally liable under this Code, unless otherwise provided for by the international treaties of Ukraine, ratified by the Verkhovna Rada of Ukraine. As a general rule (unless an international treaty provides for an exception), regardless of the territory (within or outside diplomatic institutions) where citizens of Ukraine and stateless persons permanently residing in Ukraine have committed a criminal offence, they will be subject to criminal liability under the CC of Ukraine. However, if they have undergone criminal punishment outside Ukraine, they may not be prosecuted for these criminal offences in Ukraine – in accordance with Part 2 of Art. 7 of the CC of Ukraine.

As part of the response to question 1.4, it is crucial to consider how to qualify the actions of foreign citizens and stateless persons who are not permanent residents of Ukraine but engage in activities that exhibit characteristics of criminal election offences and committed in Poland outside the territory of diplomatic institutions of Ukraine? Is the CC of Ukraine applicable to them?

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

Art. 8 of the CC of Ukraine provides for two principles of the criminal law operation in the space relating to acts recognised as criminal offences, in the case of their committing outside Ukraine by foreigners or stateless persons not permanently residing in Ukraine: the universal principle and the real principle. The real principle of the criminal law in the space posits that foreigners or stateless persons who do not permanently reside in Ukraine and have committed criminal offences abroad are liable in Ukraine under the CC of Ukraine in cases where they have committed grave or special grave crimes against the rights and freedoms of citizens of Ukraine or against the interests of Ukraine. Thus, the provision which provides for the principle of reality of the Criminal Code of Ukraine can be applied only to grave criminal election offences, whereas special grave crimes of this kind are absent in the CC of Ukraine.

2.5. To which criminal election offences does the real principle of operation of the Criminal Code of Ukraine apply?

Continuing with our research, the subsequent focus is to identify the grave election crimes that may be committed abroad and to which the real principle of operation of the CC of Ukraine can be applied.

Considering the criterion specified in Part 5 of Art. 12 of the CC of Ukraine, wherein 'a grave crime shall mean an action (act or omission) provided for by this Code, the commission of which shall be punishable by a fine not exceeding twenty-five thousand tax-free minimum incomes or imprisonment for a term of up to ten years - grave election crimes include:

- Parts 3 and 4 of Art. 157 of the CC of Ukraine (Part 3 — only on such a qualifying ground as the acts provided for in Part 1 or 2 of this Article committed by a group of persons upon their prior conspiracy; Part 4 — if such acts were committed by an official who is a foreigner (this can be assumed in cases provided for in Part 4 of Art. 18 of the CC of Ukraine));
- Part 2 of Art. 158 of the CC of Ukraine (unauthorised actions with the information contained in the database of the State Register of Voters, or other unauthorised interference with the database of the State Register of Voters, committed repeatedly or by a group of persons upon their prior conspiracy);
- Part 3 of Art. 158-1 of the CC of Ukraine (actions provided for in Part 1 or 2 of this Article (provision or receipt of a ballot or a ballot for voting at a referendum by a person who does not have the right to provide or receive it, or provision to a voter, a referendum participant of a completed ballot or a ballot for voting at a referendum, theft, damage, concealment or destruction of a ballot, a ballot for voting at a referendum), committed repeatedly or by a group of persons on prior conspiracy, or if such actions led to the impossibility of counting votes at election precincts or precincts of a referendum or to the invalidation of a vote at election precincts or precincts of a referendum — Part 3);

- Part 2 of Art. 158-3 of the CC of Ukraine (forgery or illegal production of electoral documentation, referendum documentation, use or storage of illegally produced or forged electoral documentation, referendum documentation, as well as the inclusion of knowingly false information in electoral documentation or referendum documentation);
- Part 3 of Art. 158-3 of the CC of Ukraine (theft, damage, concealment, destruction of the seal of the election commission, the referendum commission, the ballot box, the list of voters or referendum participants or the protocol on the counting of votes of voters or referendum participants, on the results of voting within the relevant election district at elections or referendum, on the results of elections or referendum);
- Part 4 of Art. 158-3 of the CC of Ukraine (actions provided for in Part 2, 3 of this Article, committed repeatedly or by a group of persons upon their prior conspiracy, or by an official using his/her official position, or where such actions have made it impossible to count votes at an election or referendum precinct, to establish the results of voting in the respective election or referendum district, to establish the results of the election or referendum, or before the vote at the election or referendum precinct is declared invalid;
- Part 2 of Art. 160 of the CC of Ukraine (proposing, promising or granting to a voter or referendum participant, a candidate, or a member of an election or referendum commission an improper advantage for committing or failure to commit any actions related to the direct exercise of his/her suffrage, the right to participate in a referendum);
- Part 3 of Art. 160 of the CC of Ukraine (providing voters, referendum participants, and legal entities with improper advantages, accompanied by pre-election or referendum campaigning, mentioning the name of a candidate, the name of a political party that nominated the candidate in the election, or using the image of the candidate, symbols of the political party that nominated the candidate for respective elections);
- Part 4 of Art. 160 of the CC of Ukraine (the actions provided for in Part 2 or 3 of this Article committed repeatedly or by a group of persons upon their prior conspiracy).

Other criminal offences committed outside Ukraine and outside the territory of the diplomatic mission, consular offices of Ukraine by foreigners or stateless persons who do not permanently reside in the territory of Ukraine are not subject to the real principle of the operation of the CC of Ukraine, since they do not belong to grave or special grave crimes.

2.6. Which criminal election offences do not apply to the real principle of operation of the CC of Ukraine?

This constitutes a crucial phase in our research. Addressing this question allows us to outline criminal election offences that can be committed by foreigners and stateless persons not permanently residing in Ukraine on the territory of a foreign state (Republic of Poland),

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

and for which it is generally impossible to bring to criminal responsibility under the CC of Ukraine. Furthermore, it is also impossible under the criminal law of a foreign state since it has another object of criminal law protection. Therefore, based on the provisions of the Criminal Code of Ukraine, such offences are the following:

- Parts 1, 2 of Art. 157 of the CC of Ukraine ('Preclusion of the right to vote, or the right to take part in a referendum, the work of an election commission or referendum commission, or activities of an official observer');
- Part 1 of Art. 158 of the CC of Ukraine (regarding such actions as unauthorised actions with information contained in the database of the State Register of Voters or other unauthorised interference with the database of the State Register of Voters);
- Art. 158-1 of the CC of Ukraine (regarding such actions that may be committed by foreigners or stateless persons as the providing or receiving a voting paper or a referendum ballot paper by a person who is not entitled to provide or receive it, or providing a voter, a referendum participant with a completed voting paper or referendum ballot paper (Part 1), theft, damage, concealment or destruction of a voting paper, a referendum ballot paper (Part 2);
- Part 1 of Art. 159 of the CC of Ukraine (intended violation of the secrecy of voting during the election or referendum, which resulted in the disclosure of the will of a citizen who took part in the election or referendum);
- Part 2 of Art. 159-1 of the CC of Ukraine (intended contribution to the support of a political party by a person who is not entitled to do it, or on behalf of a legal entity that is not entitled to do it, intended contribution for the benefit of a political party by an individual or on behalf of a legal entity in large amount, intended providing financial (material) support for election or referendum campaigning by an individual or on behalf of a legal entity in significant amount or by a person who is not entitled to do it, or on behalf of a legal entity who is not entitled to do it, as well as intended receipt of a contribution in favour of a political party from a person who is not entitled to make such a contribution, or in large amount, intended receipt of financial (material) support large amount in the conduct of election or referendum campaigning, intended receipt of such financial (material) support from a person who is not entitled to provide such financial (material) support);
- Part 3 and 4 of Art. 159-1 of the CC of Ukraine (actions provided for in Part 2 of this Article, repeatedly committed (Part 3), by a group of persons upon their prior conspiracy, by an organised group or accompanied with the demand for a contribution or financial (material) support in the conduct of election or referendum campaign (Part 4)).

2.7. Is it possible to apply the universal principle of the operation of the Criminal Law of Ukraine to the criminal election offences committed on the territory of the Republic of Poland?

The universal principle means that foreigners or stateless persons who do not reside permanently in Ukraine and have committed criminal offences abroad are liable in Ukraine under the CC of Ukraine in cases provided for by international treaties (Part 1 of Art. 8 of the CC of Ukraine).

However, this principle does not extend to criminal election offences, as they fall within the category of offences for which each state establishes its national legal countermeasures to the extent it considers justified. The universal principle of operation of the criminal law applies to those criminal offences that are capable of harming the interests of all states to the same extent. Criminal election offences, distinct from international crimes (such as crimes against peace and humanity - planning, preparation and waging of aggressive war, genocide, etc.), and crimes of an international nature (contradicting and preventing which international treaties and conventions have been adopted, and the provisions of which are implemented in the national legislation of the signatory states, such as counterfeiting, cybercrimes, domestic violence, acts of corruption, etc.) possess a notable feature and a striking feature. This lies in their special object of criminal law protection - relations of holding the elections to the authorities of a particular state. Consequently, their criminalisation and persecution fall within the exclusive sovereign rights of each state, and all-out (interstate) counteraction to them bears signs of interference in the internal affairs of a state.

Hence, criminal election offences committed outside Ukraine (in particular, outside the premises and territories of diplomatic institutions of Ukraine in the Republic of Poland) by foreigners or stateless persons who do not permanently reside in Ukraine are subject exclusively to the real principle of the operation of the criminal law in space.

Simultaneously, socially dangerous acts that can occur outside the diplomatic institutions of Ukraine significantly jeopardise the proper conduct of elections, endangering their impartial outcomes. Moreover, taking into account the legal gap in the legislation - the non-criminal liability of foreigners and stateless persons who do not permanently reside in Ukraine - various criminals might purposefully take advantage of this gap and involve foreigners in the performance of the objective aspects of these crimes. As a result, the criminal offences in Clause 1.6 of this article may be committed using persons known to the perpetrator not to be criminally responsible for what they have committed. Therefore, these types of criminal offences fall into the category where so-called intermediate (indirect) execution can occur.

Intermediate (indirect) execution of a criminal offence refers to a scenario where a physically sane person who has reached the age of criminal liability carries out the objective part of the offence by employing (or mobilising) other persons who, under the law, cannot be held criminally liable for their involvement in the act.

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

In this connection, the question may arise: should the issue of intermediate (indirect) execution be considered in such cases?

Researchers indicate the following cases when intermediate (indirect) execution may be possible when:

- the perpetrator realises that the person they influenced to commit the crime is insane or has not reached the age of criminal liability;
- such a person commits an act while directly under the influence of physical coercion by the perpetrator or under the influence of hypnosis, rendering them unable to control their actions;
- a person commits an act in a state of extreme necessity, arising as a result of physical coercion by the perpetrator, during which he retains the ability to control their actions, or under mental coercion;
- the perpetrator is conscious that they are giving a criminal order or instruction to a person who is not aware and cannot be aware of its criminal nature;
- a person commits an act, being misled by the perpetrator, or the perpetrator uses the person's mistake to realise a criminal intent;
- the perpetrator uses a person who committed the crime due to carelessness.[29]

V. K. Ghryshhuk refers to the indirect execution of a criminal offence when the perpetrator uses an innocent person, animal or plant to commit a criminal offence.[30] In contrast, V. O. Navrocjkyj wrote that there is no intermediate (indirect) execution of a criminal offence when using for the committing of a criminal offence persons who, in general, are the subjects of a criminal offence, endowed with will and consciousness when performing the relevant actions.[31]

Indeed, the situation we are examining presents an atypical case. The perpetrator uses a person who is formally endowed with the characteristics of a subject of a criminal offence but, due to the norms on the operation of the criminal law in space, is not subject to liability either under the CC of Ukraine or the criminal law of the Republic of Poland. Such scenarios have not emerged previously, neither in theory nor in practice. Nevertheless, during post-war Ukraine elections, they are probable, which allows us to distinguish a new form of indirect execution.

In addressing this matter, the philological interpretation of the criminal law should be applied. In accordance with Part 2 of Art. 27 of the CC of Ukraine, the principal offender (or co-principal offender) shall mean a person who, in association with other criminal offenders, has committed a criminal offence under this Code, directly or through other persons, who cannot be criminally liable, in accordance with the law, for what they have committed. Based on this provision, there are grounds for distinguishing one more form of

29 IA Zinovieva, 'The Principal Offender Acting Through an Innocent Agent: Concepts and Types' (2016) 31 Issues of Crime Prevention 200-1.

30 VK Ghryshhuk, *Criminal Law of Ukraine: General Part* (2nd edn, LvSUIA 2019) 292.

31 VO Navrocjkyj, *Fundamentals of Criminal Law Qualification* (Jurinkom Inter 2006) 229-30.

indirect execution - when a person deliberately uses, involved in the commission of a criminal offence, other persons who are not liable for what has been committed.

It is possible to outline the following options for the qualification of such acts based on the provisions of the current CC of Ukraine:

1. In cases where the subject of an election criminal offence is a citizen of Ukraine or a stateless person who permanently resides on the territory of Ukraine, and such a person commits an election crime through another person - a foreigner or a stateless person who does not permanently reside on the territory of Ukraine - and both act outside of Ukraine, it constitutes intermediate (indirect) execution. In such cases, a person who uses another person not liable to commit a crime must be held responsible as the perpetrator of the criminal offence.
2. Another situation takes place when at least one of these persons, endowed with the characteristics of a subject of a criminal offence, acted on the territory of Ukraine (a citizen of Ukraine or a stateless person permanently residing on the territory of Ukraine, who attracted another person, from the one side, and a foreigner or a stateless person, who does not permanently reside in the territory of Ukraine, who directly commits a socially dangerous act, from another side). In this case, there is a criminal complicity, and both of these persons are liable for this criminal offence committed in complicity. In these cases, the territorial principle of the operation of the criminal law in space is applicable. In particular, in accordance with Part 3 of Art. 6 of the CC of Ukraine, an offence shall be deemed committed in the territory of Ukraine if the principal to such offence, or at least one of the accomplices, has acted in the territory of Ukraine.

Earlier, the issue of the operation of the criminal law of Ukraine on liability for such offences committed by foreigners and stateless persons had not arisen sharply due to objective reasons (low turnout, a significantly smaller number of voters out of the country, etc.). However, the war posed new challenges to Ukraine, particularly regarding protecting the election order in the out-of-country electoral district.

The solution to this problem might be the conclusion of an international agreement between Ukraine and the Republic of Poland, which would determine the peculiarities of the operation of the CC of Ukraine regarding all election offences committed in Poland by foreigners and stateless persons who do not permanently reside in Ukraine. In this additional agreement, it may be determined that the provisions of the CC of Ukraine establishing liability for criminal election offences also apply to foreigners and stateless persons who do not permanently reside in the territory of Ukraine and who have committed relevant criminal offences in the territory of the Republic of Poland.

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

3 ANTICIPATING THE POSSIBILITY OF CREATING ADDITIONAL FOREIGN ELECTION PRECINCTS IN THE REPUBLIC OF POLAND OUTSIDE THE PREMISES OF DIPLOMATIC INSTITUTIONS AND DETERMINING THEIR (TEMPORARY) PUBLIC LEGAL STATUS

The problem of the capacity of the election precincts in foreign constituencies, organised within the limits of diplomatic missions and consular institutions, has existed for the last few years.

The full-scale invasion of the Russian Federation into Ukraine caused the appearance of a huge number of Ukrainian refugees in Europe. According to various data (official and unofficial), there are 5 to 8 million Ukrainian citizens abroad, including temporarily displaced persons.

Hence, establishing additional places or premises for voting outside diplomatic institutions is one of the obvious ways to ensure the expression of the will of a significantly larger number of voters abroad, in contrast to previous elections.

In line with The Central Election Commission's Resolution No. 102 of 27 September 2022, titled 'On Proposals to Improve the Legislation of Ukraine, Aimed at Ensuring the Preparation and Holding of Elections After the Termination or Abolition of Martial Law in Ukraine',[32] the prospect of conducting future elections abroad outside the premises of diplomatic institutions is being considered. At the same time, voting outside diplomatic institutions accentuates the concern of combating administrative and criminal election offences, consequently giving rise to jurisdictional complexities. Specifically, the extension of Ukrainian legislation to encompass legal relations regarding elections on the territory of the Republic of Poland, including criminal, criminal procedural and administrative legislation.

Hence, the issue of the status of places or premises for voting organised outside diplomatic institutions is important:

- for organising the elections and
- for bringing criminal and administrative liability for election offences.

This issue is in the realm of public international law. It should be settled based on the principles of non-interference in domestic affairs of the state (no state or group of states has the right to interfere in the internal affairs of any state (para. 7 of Art. 2 of the UN Charter).

Elections abroad are organised by the authorised authorities of Ukraine — precinct election commissions. Therefore, establishing additional voting locations or premises outside

32 Resolution of the Central Election Commission no 102 of 27 September 2022 'On Proposals to Improve the Legislation of Ukraine, Aimed at Ensuring the Preparation and Holding of Elections After the Termination or Abolition of Martial Law in Ukraine' <https://zakon.rada.gov.ua/laws/show/v0102359-22#Text> accessed 25 September 2023.

diplomatic institutions should be done with due consideration to the principles of state sovereignty and non-interference in internal affairs.

To minimise jurisdictional challenges, the application of the principle of extraterritoriality to voting places or premises outside diplomatic institutions, equating them with the legal status of diplomatic institutions, could alleviate numerous organisational issues of elections. This includes countering and preventing various abuses during voting and bringing offenders to administrative and/or criminal liability.

The issue of the temporary public legal status of additional premises and/or places for voting on the territory of Poland beyond the premises of Ukrainian diplomatic institutions necessitates discussions with the Republic of Poland. The potential future Supplementary Agreement between the Republic of Poland and Ukraine should address issues like the procedure for renting these premises, the interaction of the state authorities and local self-government of Poland with the diplomatic missions and consular institutions of Ukraine, and the protection and maintenance of order at the election precincts etc.

4 CONCLUSIONS

In accordance with the principle of state sovereignty and the principle of non-intervention (non-interference in domestic affairs of the state) as stated in para. 7 of Art. 2 of the UN Charter, each state holds the authority to a) conduct elections abroad for its state authorities, referred to as external voting, and b) enact laws establishing criminal and administrative liability for electoral offences during external voting and to prosecute those responsible.

Furthermore, a foreign state on the territory of which external voting is held may assist Ukraine in organising and holding elections. This collaboration may be extended by bringing election criminals to justice in Ukraine based on international treaties and in the order of international legal assistance.

Foreign election precincts and voting premises are established in a foreign diplomatic institution of Ukraine or the location of a deployed military unit outside Ukraine (Art. 31 of the Election Code of Ukraine).

How the Criminal Code of Ukraine is applied to criminal election offences committed on the territory of a foreign state depends on where the offence was committed — in a diplomatic institution or outside its borders.

Criminal offences related to Ukrainian elections and committed within the premises of Ukrainian diplomatic institutions fall under the territorial jurisdiction of the Criminal Code of Ukraine (Part 1, Art. 6 of the CC and Part 2, Art. 4 of the CPC of Ukraine).

In the event of committing an electoral criminal offence regarding the Ukrainian elections on the territory of a foreign state outside the premises of diplomatic institutions of Ukraine, prosecution is possible according to the principle of citizenship – the real principle of the operation of the criminal law in space. It is essential to note that the real principle solely

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

relates to grave election crimes, as no special grave election offences are outlined in the Criminal Code of Ukraine. Consequently, the jurisdiction of the Criminal Code of Ukraine does not extend its validity to cases where the criminal election offence does not belong to the category of grave offences and is committed outside the territory of diplomatic institutions of Ukraine by foreigners or stateless persons who do not permanently reside in Ukraine.

Addressing these and other problematic issues may be the subject of consensus between the Republic of Poland and Ukraine through a possible Supplementary Agreement on holding Ukrainian elections on the territory of Poland.

REFERENCES

1. Bilodid IK, Docenko PP and Jurchuk LA (eds), *Dictionary of the Ukrainian Language*, vol 2 (Naukova Dumka 1971).
2. Dudorov OO and Khavronjuk MI, *Criminal Law* (Vaite 2014).
3. Ghryshhuk VK, *Criminal Law of Ukraine: General Part* (2nd edn, LvSUIA 2019).
4. Kamminga MT, 'Extraterritoriality' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2020) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1040> accessed 25 September 2023.
5. Ljashhenko TM, *Legal Status of Diplomatic Missions* (National Academy of Management 2008) 45.
6. Navrocjkyj VO, *Fundamentals of Criminal Law Qualification* (Jurinkom Inter 2006).
7. Paust JJ, 'Non-Extraterritoriality of "Special Territorial Jurisdiction" of the United States: Forgotten History and the Errors of *Erdos*' (1999) 24(1) The Yale Journal of International Law 305.
8. Shherycja SI, 'Exterritoriality as an Exception to the Territorial Principle of Effect of the Criminal Procedure Law' (2015) 5 Law and Society 195.
9. Zinovieva IA, 'The Principal Offender Acting Through an Innocent Agent: Concepts and Types' (2016) 31 Issues of Crime Prevention 197.

AUTHORS INFORMATION

Oksana Kaluzhna*
Ph.D. (Law), Ph.D in Law, Associate Professor of the Criminal Procedure and Criminalistic Department at Ivan Franko National University of Lviv, attorney, Lviv, Ukraine
oksana.kaluzhna@lnu.edu.ua
https://orcid.org/0000-0002-5995-1383
Corresponding author, responsible for conceptualization, research methodology, data collection, writing, validating and supervising.

Lidiia Paliukh
Dr.Sc. (Law), Professor of Criminal Law and Criminology Department at Ivan Franko National University of Lviv, Lviv, Ukraine
lidiya.palyukh@lnu.edu.ua
https://orcid.org/0000-0001-7073-5457
Co-author, responsible for conceptualization, research methodology, data collection, writing, validating and supervising.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organizations.

ACKNOWLEDGEMENTS

The research has been partially carried out within the project 'Good Practices of Law Enforcement Agencies in the Electoral Process' implemented by Civil Network OPORA. Non-governmental organization 'Civil Network OPORA' does not bear expenses for the publication of the article. (24 October 2023) https://www.oporaua.org/vybory/vzayemodiya-pravoohoronnih-organiv-ukrayini-y-pol-shhi-dlya-zapobigannya-ta-protidiyi-porushennyam-viborchih-prav-gromadyan-ukrayini-u-pol-shhi-24967?fbclid=IwAR3jXtw9nMC5_ea0Y9lrvmZXXWws9CMHht9NzW_hAlWMq83txwdJKf-TkBc accessed 28 October 2023.

ABOUT THIS ARTICLE

Cite this article
Kaluzhna O and Paliukh L, 'Criminal Law Protection of the Ukrainian External Voting to the State Authorities in Post-War Conditions (A Case Study of Poland)' (2024) 7(1) Access to Justice in Eastern Europe 58-82 <https://doi.org/10.33327/AJEE-18-7.1-a000116>

Submitted on 26 Nov 2023 / Approved 18 Dec 2023
Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000116

Managing editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

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

in the premises of diplomatic institutions of Ukraine abroad? – 2.3. What kind of criminal election offences due to their nature (mechanism) can be committed outside Ukraine (in particular, on the territory of external election precincts, or outside election precincts)? – 2.4. Does the CC of Ukraine apply to the criminal election offences committed outside the diplomatic institutions of Ukraine? – 2.5. To what criminal election offences can the real principle of operation of the Criminal Code of Ukraine be applied? – 2.6. To which criminal election offences the real principle of the CC of Ukraine may not be applied? – 2.7. Might the universal principle of the operation of criminal law of Ukraine be applied to the criminal election offences committed on the territory of the Republic of Poland? – 3. Anticipating the possibility of creating additional foreign election precincts in the Republic of Poland outside the premises of diplomatic institutions and determining their (temporary) public legal status. – 4. Conclusions.

Keywords: *external voting; external voting in post-war conditions; criminal election offences; principles of the operation of criminal law in space; intermediate (indirect) execution of criminal offence; the principle of non-intervention (non-interference in domestic affairs of the state).*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

FREE MOVEMENT OF MEDIATORS ACROSS THE EUROPEAN UNION: A NEW FRONTIER YET TO BE ACCOMPLISHED?

Yuliya Radanova* and Agne Tvaronavičienė

ABSTRACT

Background: *This article explores the challenges that stem from the existing national legislation in the field of mediators' profession regulations on an EU level. It identifies some professional and training requirements in this area and analyses their impact on the freedom and quality of the mediation services offered from one Member State to the other. It further outlines the variety of regulatory models and accreditation practices that apply towards mediators having been certified in the Union or third countries and puts this in the context of spreading mandatory mediation models. The authors explore the different procedures that apply to training and accreditation to see the similarities and differences in the professional standards that apply and their impact on the mediation settlement agreements reached.*

Methods: *Research commenced with a review of the existing scientific literature, a brief overview of the national regulation on the mediators' profession, and a document analysis concerning the recognition and accreditation of mediators in the EU. This was followed by a comparative study of training requirements and court-related mediation procedures that exist in a number of jurisdictions like Bulgaria, Lithuania, and Italy to highlight some of the main differences.*

Results and Conclusions: *The analyses of the existing national legislation in the field of mediators' profession regulations on an EU level showed that it is hard or nearly impossible for mediators trained in one EU Member State to render mediation services in other Member States. The existing regulations, coupled with the diverse national training requirements, call for adopting uniform training standards with a synchronised and applicable curriculum across all states. The authors see this as one of the ways to increase the trust in the quality of the mediation service to be of a certain fixed standard and to support the numerous mandatory mediation schemes which in cross-border disputes raise the question of the suitability of the mediator assisting parties in such a dispute resolution process.*

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

1 INTRODUCTION

Despite a universal recognition that mediation is an effective tool to resolve various kinds of disputes, on the European continent, this alternative to litigation has been struggling to find its place in most national judicial systems for decades. The Council of Europe has provided active support for mediation in its numerous recommendations dating back to the 90s,[1] which aimed to boost the awareness and voluntary uptake of the process. These recommendatory measures eventually were reflected in the European Union (EU) legislation. In summary, mediation within the EU has had three main separate strands of development: (i) family disputes, including those involving children,[2] (ii) civil and commercial disputes,[3] and (iii) conflicts involving consumers[4] and their online resolution.[5] Numerous regulatory acts have been enacted considering these developments, supporting the notion that Member States should be given the discretion to top-up and provide additional measures to increase recourse to mediation.

A continuing debate has been accompanying this as to the desirability and efficacy of introducing mandatory mediation schemes whereby parties are obliged to attend,

1 Recommendation No R(98)1 of the Committee of Ministers to Member States On Family Mediation (21 January 1998) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804ecb6e> accessed 24 October 2023; Recommendation No R(99)19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters (15 September 1999) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168062e02b> accessed 24 October 2023; Recommendation No R(2001)9 of the Committee of Ministers to Member States On Alternatives to Litigation between Administrative Authorities and Private Parties (5 September 2001) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2b59> accessed 24 October 2023; Recommendation No R(2002)10 of the Committee of Ministers to Member States On Mediation in Civil Matters (18 September 2002) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e1f76> accessed 24 October 2023.

2 Art. 55 e) of the Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000 [2003] OJ L 338 <http://data.europa.eu/eli/reg/2003/2201/oj> accessed 24 October 2023.

3 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 On Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L 136 <http://data.europa.eu/eli/dir/2008/52/oj> accessed 16 May 2023.

4 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 On Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L 304 <http://data.europa.eu/eli/dir/2011/83/oj> accessed 16 May 2023.

5 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L 165 <http://data.europa.eu/eli/reg/2013/524/oj> accessed 16 May 2023.

at minimum, an information session on the principles and potential mediation holds within the context of their specific dispute.[6] Notwithstanding such rather academic discussions, there is a tendency to adopt various models of mandatory mediation nationally, which are diverse and country-specific.[7] Such movements, unfortunately, segregate the EU map into rather stand-alone jurisdictions within which ADR and especially mediation are practiced differently. The latter directly affects the opportunities for licensed mediators based in one Member State to practice in another. The problem is further magnified when considering the numerous cross-border disputes that naturally occur because of the creation of a single EU market and the need for their timely and adequate addressing. Those conflicts ask for well-prepared and trained professional mediators from different Member States who can support parties navigating conflict. Ensuring high-quality process outcomes necessitates high professional expertise that is warranted across the EU and only which would ensure the desired mediation quality across the Union.

This article focuses on existing challenges that stem directly from the lack of unified requirements for practising mediation within the EU, the lack of a 'single European mediators market' and some of the implications this leads to. Specific attention is paid to the differences that exist today between a few Member States in terms of their qualification requirements and the various existing recognition and accreditation processes. The ultimate goal of this is to confirm the research question that the lack of uniform requirements towards the practice of mediation impedes the freedom of mediators' movement in the provision of their services across the EU and has a negative impact on the development of cross-border mediation. Based on the above and the analysis of some of the most common challenges in the field, the authors suggest starting a discussion on further consideration of the adoption of unified minimum requirements towards mediators and common EU guidelines on the standards of mediation practice across the Union. This might be further supported by the need to create a single registry of mediators and mediation service providers that consolidates the available mediation expertise in the EU and ensures that the latter meets a certain standard of professionalism.

6 Nadja Alexander, 'Global Trends in Mediation: Riding the Third Wave', in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law Intl 2006) 1, 7; Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) UNSW Law Journal 929; Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) Cardozo Journal of Conflict Resolution 485-7.

7 Indre Korsakoviene, Julija Branimirova Radanova and Agnė Tvaronavičienė, 'Mandatory Mediation in Family Disputes: An Emerging Trend in the European Union?' (2023) 53(2) Review of European and Comparative Law 67, doi:10.31743/recl.15707.

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

2 EXISTING EU STANDARDS AND LEGAL REQUIREMENTS FOR ENTERING THE MEDIATOR'S PROFESSION

2.1. The mediator as a service provider: the EU concept of mediator and the peculiar specifics of this term

One of the earliest documents issued by the European Commission was the recommendatory European Code of Conduct for Mediators. The preamble of this Code of Conduct defined mediation as '<…> any structured process, however, named or referred to, whereby two or more parties to a dispute attempt by themselves, voluntarily, to reach an agreement on the settlement of their dispute with the assistance of a third person – hereinafter 'the mediator'[8].

It should be noted that this definition also involves the notion of the mediator, though it is very broad and does not focus on the specifics of his role in the process. It merely titles any third party that assists the disputants as a meditator. The term mediator has been given a more explicit definition in Art. 3, para. 2 of the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters ('**Mediation Directive**'). It stipulates that a mediator shall be '*any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation*.'[9]

Returning to the Code of Conduct, Art. 1, para 1.1. proclaims the necessity of the meditator's competence of the mediator: 'Mediators must be competent and knowledgeable in the process of mediation. Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.'[10] Upon pure language interpretation, though, it can be established that the specific requirements and professional qualifications for practising mediation are left at the discretion of the Member States. From an EU perspective, the only specification that is provided for mediators is to conduct themselves in an effective, impartial, and competent manner without further eliciting what this may entail.

Taking an alternative interpretation, mediators should be deemed service providers of the mediation service. As such, all auxiliary rights to such service as per Art. 56 and 57 of the Treaty of Functioning of the European Union (TFEU or Treaty)[11] shall apply. According to these provisions, there are three alternative scenarios that may be envisioned as included

8 European Code of Conduct for Mediators (Code of Conduct) <https://imimediation.org/wpfd_file/annex-european-code-of-conduct-for-mediators/> accessed 16 May 2023.

9 Directive 2008/52/EC (n 3) art 3, para 2.

10 Code of Conduct (n 8) art 1, para 1.1.

11 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (13 December 2007) [2012] OJ C 326 <http://data.europa.eu/eli/treaty/tfeu_2012/oj> accessed 18 May 2023.

thereby: the freedom to travel to provide the service, the freedom to travel to receive the service and the freedom of service to travel.[12]

Within the mediation context, this ultimately translates to the right of mediators to provide their mediation services offline or online to residents of another Member State and the right of parties of another Member State to travel to where the mediator is located. In all those scenarios, the services to be rendered should be recognised as mediation, irrespective of the location they are provided from and the national certification the mediator has been subjected to. It is established case law of the CJEU[13] that any rule that hinders access to the market for the out-of-state service provider is caught by the Treaty prohibition on restrictions on the freedom of movement, even if not discriminatory on the grounds of nationality. Such reasoning should equally apply to the provision of mediation services, which in no way differs from other services, all of which fall under the provisions of Directive 2006/123/EC on services in the internal market.[14]

Such interpretation is also supported by the fact that the only exception, explicitly recognised as such in the field of legal services, is for notaries and bailiffs that are excluded from the scope of the Directive.[15] Namely, all other legal professions, which may include the profession of the mediator, should be recognised as falling under the Directive. As such, the latter should be entitled to the free establishment and free provision of their services in a Member State other than that in which they are established, without making the access to or exercise of such service activity subject to discriminatory or disproportionate measures. The only exceptions to the otherwise unlimited right to offer services should be justified for public policy, public security, public health or the protection of the environment and, in all cases, should be proportionate to the objective they pursue.[16]

Such an approach provides service providers, including mediators, a powerful tool to challenge any obstructive national rule. States are, however, able to justify their national rules, which, in principle, breach Art. 56 TFEU either on the grounds provided by the Treaty (public policy, public security or public health) or by reference to so-called 'public interest requirements' which are, essentially, good reasons recognised by the Court of Justice of the EU (CJEU).[17]

12 *Mary Carpenter v Secretary of State for the Home Department* C-60/00 (CJEU, 11 July 2002) [2002] ECR I-6279 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0060> accessed 18 May 2023.

13 *Alpine Investments BV v Minister van Financien* C-384/93 (CJEU, 10 May 1995) [1995] ECR I-01141 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0384> accessed 18 May 2023.

14 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 'On Services in the Internal Market' [2006] OJ L 376 <http://data.europa.eu/eli/dir/2006/123/oj> accessed 20 October 2023.

15 ibid, art 2, para 2 (l).

16 ibid, art 16, para 1 (b).

17 *Criminal proceedings v Piergiorgio Gambelli and Others* C-243/01 (CJEU, 6 November 2003) [2003] ECR I-13031 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001CJ0243> accessed 20 October 2023.

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

In both cases, the level of protection provided by the home state must be taken into account. Depending on the sensitivity of the sector, CJEU has been more or less willing to acknowledge public interest advocated by the defendant state and may find it proportionate. In this respect, though, it is worth pointing out that no public policy exceptions were deemed acceptable regarding the national requirements towards lawyers practising in the Union. This area has not been harmonised.

Though different qualification requirements apply nationally, lawyers registered at a European bar should be able to benefit while delivering services that require interaction with the courts or public authorities from the same conditions as local lawyers without any additional obligations. Such a position has been supported by the European Court of Justice in Case C-20/92 Hubbard/ Hamburger.[18]

The CJEU has not yet had the chance to interpret whether any limitations to the mediation profession practice may be justifiable. However, the authors suggest that the rationale adopted for allowing lawyers to practice freely in the EU should apply by analogy. This is supported by the apparent similarities that can be drawn between the two professions. The regulation of the legal profession in the EU is not harmonised by EU law, which is similar to the role of the mediator. The exercise of both professions is subject to national law regulation. However, European lawyers wishing to exercise their profession permanently from another Member State can choose between two different routes, both acknowledging their previous legal education gained or recognised in the Member State of origin. Hence, they are not required to undergo professional training in another Member State from scratch.

One of the paths that can be followed is the recognition of qualifications as provided for in the Professional Qualifications Directive,[19] which requires passing an aptitude test or an adaptation period. The second alternative is provided specifically under Directive 98/5/EC to facilitate the practice of the profession of lawyer permanently in a Member State other than that in which the qualification was obtained[20] ("**Establishment Directive**"). It enables lawyers to be admitted to practice their profession and use their professional title by means of registering with the competent authority in the host Member State.

In this respect, it should be noted that Art. 1, para. 2, letter a) from the aforementioned Directive explicitly provides a uniform definition of the lawyer profession. It stipulates that

18 *Anthony Hubbard (Testamentvollstrecker) v Peter Hamburger* C-20/92 (CJEU, 10 March 1993) [1993] ECR I-03777 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CC0020> accessed 20 October 2023.

19 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 On the Recognition of Professional Qualification (Text with EEA relevance) [2005] OJ L255 <http://data.europa.eu/eli/dir/2005/36/oj> accessed 20 October 2023.

20 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State other than that in which the Qualification was Obtained [1998] OJ L 77 <http://data.europa.eu/eli/dir/1998/5/oj> accessed 20 October 2023.

a lawyer is any person who is a national of a Member State and is authorised to pursue such professional activities in that Member State. Following the above, all lawyers are entitled to practice using their home country's professional title in a host Member State.

To ensure high-standard professional conduct, though, and irrespective of the rules to which a lawyer is subject in their home Member State, such lawyers must abide by the same rules of professional conduct as those practising under the relevant professional title of the host Member State. The provision for such higher standards *de facto* establishes blended professional requirements towards EU lawyers and paves the way for quick and facilitated access to their services across borders. The same approach should be adopted towards mediators, allowing their services to freely move from one Member State to another.

Moreover, the very nature of mediation, its voluntary character and the lack of the mediator's authority to impose decisions make the curtailment of the freedom to provide their services unjustifiable on grounds of public policy, security or health. Under this, mediators should be allowed to practice their profession freely in the EU upon ensuring they meet certain unified standards in their qualifications and expected conduct. The need for this is further rooted in the growing EU migration rates whereby in 2021, only 1.4 million people previously residing in one EU Member State migrated to another Member State, an increase of almost 17 % compared with 2020.[21] Such figures indicate that the substantial cross-border movements that take place in the EU require easier and facilitated access to mediation services offered by people with various cultural backgrounds to settle the conflicts that inevitably accompany such massive migration.

2.2. National mediators' qualifications and training requirements: existing EU models and developing tendencies within the context of mandatory mediation

The existing legal regulations[22] that have been developing in the EU are country-specific and vary from numerous extremes: from full state regulation of the educational programs that apply towards mediators to laxed provisions allowing for broader entry into the mediation profession.[23] The prevailing tendency that has been depicted, though, is characterised by the following peculiarity: the more extended mediation is established in the specific country, the more comprehensive and intensive mediators' regulations are.[24] The reasons for this are two-fold: on the one hand, new regulations are created in response to the specific problems

21 'Migration and Migrant Population Statistics for 2021' (*Eurostat Statistics Explained*, March 2023) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics#Migration_flows:_Immigration_to_the_EU_was_2.3_million_in_2021> accessed 1 November 2023.

22 Nadja Alexander, Sabine Walsh and Martin Svatos (eds), *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Kluwer Law Intl 2017).

23 Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2013).

24 ibid 79-81.

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

that occur with the unfolding of the mediation practice, while on the other hand, such new rules applicable towards mediators seek to ensure the quality of the mediation service and ultimately, to increase parties' trust into the process by warranting certain standards that they need to abide by.

However, this "rule" should not lead to absolution, claiming that the end goal of such processes is to regulate the profession fully. Several contributing factors should be accounted for in this respect – such as the cultural specifics, social amenability to the mediation process and existing mediation traditions. Concrete samples of the lack of such proportionality between the widespread ADR and density of regulation of the mediation professions are the systems in the UK and the Netherlands, where minimal regulations apply towards the mediators' profession. At the same time, the legislation over the actual process is intense.[25] The academic literature divides the regulation applicable towards mediators into three main categories:

(i) Authorisation model – which provides for a state admission and mediators' registration to allow the practice of mediation. An example depicting such a model is Italy, Hungary, Lithuania, Bulgaria and other countries, whereby mediation may be rendered only by service providers listed in the mediators' registry maintained by the Ministry of Justice or other designated public body and having passed training under licensed by the Ministry program. A subcategory to this model is regulatory models that prescribe for explicit registration and additional requirements applicable towards court-annexed mediators;
(ii) Incentive model – whereby anyone can practice mediation, but only licensed mediators may conduct mediation procedures whose final settlements are subsequently binding. Austria exemplifies such a model whereby non-registered mediators may exercise mediation without a potential settlement, resulting in the same effect as a mediated settlement agreement. Germany also adheres to the very same model, which provides for naming explicitly as certified mediators only those that have undergone certified mediation training;
(iii) Market model – whereby the market naturally regulates the mediators' profession, allowing the highest degree of freedom and autonomy without the state intervening. An example of this model is developed in England, whereby the mediators self-determine their training content and subsequent professional conduct.[26]

The mediators' regulatory categories depicted above are equally valid and applicable regardless of whether mediation takes place as purely voluntary or pursuant to a mandatory mediation model. Simultaneously, though, there is a growing trend, especially in the EU and

25 Felix Steffek, 'Mediation in the European Union: An Introduction' (*European e-Justice*, 2012) <https://e-justice.europa.eu/fileDownload.do?id=b3e6a432-440d-4105-b9d5-29a8be95408f> accessed 1 November 2023.
26 Hopt and Steffek (n 23) 80.

in the field of family disputes,[27] for creating various mediation programs that coerce parties into a mediation process without requiring a specific outcome thereof.[28] Such initiatives are taken to increase the number of mediations conducted annually and advocate for better use of the entire mediation institute.[29] The trend is likely to have been encouraged by the successful example of other non-EU countries and the efforts to respond to the European Parliament's call to 'review of the rules, to find solutions to extend effectively the scope of mediation.'[30]

Although, within the context of the current article, it can be concluded that the creation of various mandatory mediation models *de facto* creates additional requirements towards nationally accredited mediators, which would be bound to follow the specific predicaments such programs have. Given the lack of harmonisation in the field of mediators' regulations, such tendencies further facilitate the patching of regulatory frameworks. This ultimately limits the market of mediators to only cases arising from their home jurisdiction and opens the door for *forum shopping* initiatives. The above justifies the conclusion that with the development of mandatory mediation models, there is a growing need to adopt a unified minimum standard for all mediators whose responsibility for building a positive image of the entire institute of mediation cannot be but recognised. This is further so within the context of the risk of forum shopping whereby parties choose jurisdictions known for the lack of lenient requirements towards mediators and their involvement as part of the national dispute resolution system. However, no single or harmonised approach exists in this respect, and neither is such required under the provisions of the Mediation Directive. Upon close examination of the various training requirements, it can be established that the training *per se* does not specify any explicit particularities towards mediators offering their service within the context of a mandatory mediation model. Mandatoriness of the mediation processes is designed to raise the number of mediated cases and create a higher demand for the services offered by mediators without influencing the mediation process itself. Despite the mandatory initiation of the process, mandatory mediation remains the same structured process, where disputing parties are assisted by the professional mediator, whose only additional knowledge should be in the field of the specific steps required from the respective mandatory model.

27 Celine Jaspers, 'Mandatory Mediation from a Europen and Comparative Law Perspective' in K Boele-Woelki and D Martiny (eds), *Plurality and Diversity of Family Relations in Europe* (Intersentia 2019) 341, doi:10.1017/9781780689111.016.

28 Such position is further taken in Korsakoviene, Radanova and Tvaronavičienė (n 7).

29 Roman Rewald, 'Mediation in Europe: The Most Misunderstood Method of Alternative Dispute Resolution' (2014) 2 World Arbitration Report 14.

30 European Parliament Resolution of 12 September 2017 On the Implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') (2016/2066(INI)) [2018] OJ C 337 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017IP0321> accessed 20 October 2023.

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

Referring to the three models of entering into the mediators' profession, it should be noted that the application of each has different outcomes regarding the free movement of the mediators. In fact, countries that apply the authorisation model fully restrict the possibilities of mediators from other Member Countries to provide mediation services without being accredited according to the legal regulation of that country. In the case of the application of the incentive model, in general, mediators from other countries can practice, but their activities are limited to those allowed for non-licensed mediators. In most cases, this might not be a big loss as not many EU Member States award *res judicata* power for mediation settlement agreements. Settlement agreements usually are binding parties as contracts in general, or there is an additional option of providing mediation settlement agreements for confirmation by the court. In the case of countries that apply the market model, mediators from other member Countries are not restricted to providing services as there are no state qualification requirements for entering the mediation profession.

Entering the mediator's profession is closely connected with initial mediation training. The internationally recognised minimum recommended length of the basic mediation training is 40 hours, as prescribed by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe.[31] Thus, EU member states are applying different qualification requirements in regard to the length of the training. Starting with basic 40 hours in Lithuania,[32] 50 hours of basic training applicable for Italy with refresher mediation courses of 18 hours every 2 years for civil and commercial mediators, 60 hours of training in both Belgium and Bulgaria, continuing to Germany requirements to have at least 120 hours of basic training[33] or Portugal's diversity of requirements that each mediation training organisation sets on its own,[34] and finalising with the Maltese requirements for a person to hold a Master of Arts in Mediation degree from the university.[35] Such huge disparities between the basic mediation certification training and their minimal length highlight the disparities in the national standards of entering the mediation profession across the EU. This also means completely different quality standards and expectations from the professional mediators.

31 Guidelines on Designing and Monitoring Mediation Training Schemes (adopted by CEPEJ on 14 June 2019) art 7 <https://rm.coe.int/cepej-2019-8-en-guidelines-mediation-training-schemes/168094ef3a> accessed 20 October 2023.

32 Law of the Republic of Lithuania No X-1702 of 15 July 2008 'On Mediation' art 6, para 2 [2008] Valstybės žinios 87-3462 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294/asr> accessed 25 October 2023.

33 Order of the Federal Minister of Justice and Consumer Protection of 21 August 2016 'On the Training and Further Education of Certified Mediators (ZMediatAusbV)' para 2 (4) [2016] Bundesgesetzblatt 42/1 <https://www.gesetze-im-internet.de/zmediatausbv/BJNR199400016.html> accessed 1 November 2023.

34 Order of the Ministry of Justice of Portugal No 345/2013 of 27 November 2013 <https://diariodarepublica.pt/dr/detalhe/portaria/345-2013-484144> accessed 1 November 2023.

35 Laws of Malta Ch 474, Mediation Act of 21 December 2004, art 5 (d) <https://legislation.mt/eli/cap/474/eng/> accessed November 2023.

The subsequent matter for discussion is the content of mediator training. Comparing Lithuanian training requirements as approved by the Ministry of Justice[36] and for example, those approved by the Austrian Federal Minister of Justice[37] and the Bulgarian Minister of Justice,[38] it can be noted that in their vast majority, despite differences in length, they share commonalities. Generally, they encompass topics such as:

- Concept and principles of mediation
- Procedure, methods and stages with a special focus on the numerous communication and mediation techniques applicable thereto;
- Areas of mediation particular application;
- Ethical issues of mediation;
- National requirements for the practice of mediation.

Those common characteristics do not include any particular requirements towards the educational backgrounds of the professionals entering mediation. On the contrary, different mediation programs throughout the world employ different approaches in the course of deciding the necessary mediation qualifications.[39] There is little uniformity as to the criteria necessary to qualify a mediator, and in most cases, the only specific requirement is the attendance of an additional training course. As such, the suggestion that a law degree, for example, may be sufficient to ensure high-quality services has not been endorsed in most jurisdictions.[40] In fact, the one trait that has been empirically established to have a positive correlation to the mediators' effectiveness is the mediation experience held.[41]

As a consequence of such findings, professional associations have expressly warned against requirements for an advanced degree to exercise the profession of the mediator as this would unduly restrict the numerous traits of character required by a mediator which do not per se come with the obtainment of a specific educational degree (be it legal or not).[42]

36 Order of the Minister of Justice of the Republic of Lithuania No 1R-289 of 31 December 2018 'On the Implementation of the Law on Mediation of the Republic of Lithuania' [2018] TAR 21997 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/87b2c6700d3c11e98a758703636ea610/asr> accessed 1 November 2023.

37 Federal Law of the Republic of Austria of 2003 On Mediation in Civil Law Matters (ZivMediatG) ch VII [2003] BGBI 29/1 <https://www.ris.bka.gv.at/geltendefassung.wxe?abfrage=bundesnormen&gesetzesnummer=20002753> accessed 1 November 2023.

38 Order of the Minister of Justice of the Republic of Bulgaria No 2 of 15 March 2007 'On the Conditions and Procedures for the Approval of Organizations that train Mediators; On the Training Requirements for Mediators; On the Procedure for Entry, Registration and Delete of Mediators from the Unified Register of Mediators and on the Procedural and Ethical Rules of Conduct of the Mediator' art 8, App No 2 <https://lex.bg/laws/ldoc/2135547782> accessed 1 November 2023.

39 Fiona Furlan, Edward Blumstein and David N Hofstein, 'Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers when Acting as Mediators?' (1997) 14(2) Journal of the American Academy of Matrimonial Law 327.

40 Carole Silver, 'Models for Third Parties in Alternative Dispute Resolution' (1996) 12(1) Ohio State Journal on Dispute Resolution 42.

41 Rosselle L Wissler, 'Court-Connected Mediation in General Civil Cases: What we Know from Empirical Ressesarch' (2002) 17(3) Ohio State Journal on Dispute Resolution 678-9.

42 SPIDR Commission on Qualifications, 'Qualifying Neutrals: The Basic Principles' (Dispute Resolution Forum, May 1989) < https://www.aboutrsi.org/library/qualifying-neutrals-the-basic-principles > accessed 25 October 2023.

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

The same rationale as the one depicted above ultimately applies to mediators participating in mandatory mediation programs across the EU. Different jurisdictions have adopted different regulatory models to ensure that mediators' training covers all aspects of the particular mandatory mediation model practiced in a given jurisdiction. This can be exemplified by the Lithuanian training model, which includes as a separate obligatory subject the specifics of mandatory mediation and basic legal knowledge integrated as an intrinsic part of the entire curriculum.[43] A different approach to the topic is currently under establishment in Bulgaria, where the newly introduced mandatory mediation model to enter effect on 1 July 2024 would require court-annexed mediators also to have legal education on top of their registration in the list of mediators administered by the Ministry of Justice.[44] The rationale of the legislator for including such a requirement is to warranty that potential settlement agreements resulting from the court-annexed mediation procedures are adequately framed with the additional assistance of the parties' lawyers. Whether the law's acclaimed purpose can be achieved by the mere introduction of such educational requirements is yet to be verified, though, and clearly contrasts with the prevailing regulatory models in the Union.

Although no such requirements can be tracked in the other Member States, the overall tendency is that mandatory mediation does not necessitate extra training requirements or qualifications to be exercised by parties. At the same time, it should be clearly outlined that in most of the Member States, the mere requirement for undertaking a mediation training course is also coupled with the need to pass a specific examination certifying that the necessary theoretical knowledge has been obtained and that the basic mediation skills have been acquired. The way this examination is organised differs from country to country, with some jurisdictions having this undertaken by the respective Ministry of Justice,[45] others – vesting the powers for this to a specific regulatory body in charge[46] and still others – providing the training bodies with the power to run the examination themselves.[47]

43 Order of the Minister of Justice of the Republic of Lithuania No 1R-411 of 8 December 2020 'Program of Qualification Examination for Mediators' [2020] TAR 26510 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/82b06242399511eb8c97e01ffe050e1c> accessed 25 October 2023.

44 Law of the Republic of Bulgaria No 110 of 17 December 2004 'On Mediation' art 20, para 1 <https://lex.bg/laws/ldoc/2135496713> accessed 25 October 2023.

45 In the Czech Republic all examination powers have been vested in the Ministry of Justice which is in charge of organizing and holding the mediators' examination according to the Law of the Czech Republic No 202/2012 Coll of 2 May 2012 'On Mediation and Change of Some Laws (Law on Mediation)' S 2 § 23 <https://esipa.cz/sbirka/sbsrv.dll/sb?DR=SB&CP=2012s202> accessed 1 November 2023.

46 For example in Greece there is a special body – the Central Mediation Board which acts as an examination board for mediators according to Law of the Greek Republic No 4640/2019 'Mediation in Civil and Commercial cases and further harmonization of Greek Legislation with the EU Directive 2008/52/EC of21 May 2008 and other provisions' <https://www.kodiko.gr/nomothesia/document/580509/nomos-4640-2019> accessed 1 November 2023.

47 Under the Italian model each training entity is allowed to hold its own examination according to Decree of the Ministry of Justice of the Italian Republic No 180 of 18 October 2010 'Regulation Establishing the Criteria and Methods for Registration and Maintenance of the Register of Mediation Bodies and the List of Mediation Trainers, as well as the Approval of the Compensation Due to the Bodies, Pursuant to Article 16 of the Legislative Decree of 4 March 2010, No 28 (10G0203)' <https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2010-11-04&atto.codiceRedazionale=010G0203&elenco30giorni=false > accessed on 1 November 2023.

In light of the above, the examples from different regulations evidence the diversity in regulations in both training and examination requirements and, hence, the impossibility of practising mediation across borders without undertaking additional accreditations to fill in the gaps that arise from the various training requirements.

2.3. Recognition and accreditation of mediators from other Member States and Third Countries

The recognition process of mediators licensed in a particular Member State to practice the profession in another State is national-specific and subject to compliance with the peculiarities. As much as the principle of free movement of services should prevail, in most cases, its application is limited to temporarily providing the service. For example, such general understanding can be established in Art. 4, para. 7 of the Lithuanian Law on Mediation, which provides the following:

> *Persons who have been granted the right to provide mediation services by the competent authority of that state in accordance with the legislation of a member state of the European Union or a state of the European Economic Area, have unlimited freedom to temporarily provide mediation services in the Republic of Lithuania.*[48]

The aforementioned article confirms the Lithuanian legislator's understanding that the freedom to provide services within the mediation context should be temporarily deemed allowed. The term temporarily shall be assessed on a case-by-case basis in line with the definition given in Art. 5, para. 2 of Directive 2005/36/EC on the recognition of professional qualification.[49] Namely, such assessment should acknowledge in particular, the duration of the services being offered, their frequency, regularity and continuity, and this may well be subject to various interpretations. Such assessment may mean that temporary provision of mediation services should be limited to the three months that EU citizens may freely reside in other Member States without undergoing a permanent/long-term residency process. Another possible interpretation of the temporary requirement may include the occasional provision of services on a case-by-case basis from a permanently established resident from another State, which still, though, would necessitate notifying the State Guaranteed Legal Aid Service.

With the ongoing war in Ukraine, though, the scope of application of Art. 4, para 7 above has been expanded to provide Ukrainian mediators who have been granted temporary protection in Lithuania with the right to practice their profession. The exact new wording of Art. 4, para. 7 includes the following:

> *The freedom to temporarily provide these services in the Republic of Lithuania is also not limited to persons who have arrived (moved) from other foreign countries and who, according to their relevant state, have been granted the right to provide legal mediation services when they are governed by the Law of the Republic of Lithuania 'On the Legal Status of Foreigners', granted a temporary protection Articles 6, 7, 8, 9, 10 and 11 of this law shall not apply to the persons specified in this part, who temporarily provide mediation services in the Republic of Lithuania on behalf of a mediator granted by their state.*

48 Law of the Republic of Lithuania No X-1702 (n 32) art 4, para 7.

49 Directive 2005/36/EC (n 19) art 5, para 2.

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

Such amendment in the law comes into effect on 1 March 2024 and expands the group of people eligible to practice mediation in Lithuania. At the same time, this change is also indicative of the mutual trust that should prevail in the quality of national training requirements. This trust extends not only among EU Member States but also to European countries that are members of the Council of Europe, all of whom are recipients of the various regulatory acts adopted by the Council in the mediation field. While such a provision could be perceived as a good practice, its potential extrapolation to other Member States is yet to be seen. For this to occur, there should be a general understanding of the language in which a certified mediator may render his/her services when offering them in cross-border cases and establishing in host Member States whose language he/she does not speak.

Today, language requirements and practical barriers imposed from offering mediators' exams only in the native language of the Member State where certification is sought pose additional obstacles to the free movement of services within the Union. This situation opens the debate as to whether, given the active role of the European Commission for the Efficiency of Justice (CEPEJ) in the field of mediation, the training and certification of mediators across the Member States of the Council of Europe should not be automatically recognised and be allowed to be provided across Europe in the native language of the mediator, thus strengthening the multiculturality of the available mediation services from which citizens can benefit.

Unlike Lithuanian, the Bulgarian Law on mediation does not include any specifics on how the recognition process of mediators from other Member States should be conducted. Such a specific procedure is neither stipulated in the regulations that have been passed on its basis, nor is listed on the official website of the Ministry. On the contrary, the only reference to EU Member States' citizens is in Art. 8, para. 2 of the Mediation Act,[50] which explicitly provides by way of exception that EU citizens should not evidence the grounds for their residence in the country when registering at the Mediators registry maintained by the Ministry of Justice. Hence, the only requirement for such citizens to register as mediators is to have completed a training course for a mediator without specifying the entity offering such a course.[51]

The aforementioned provision opens the question as to whether such a mediator training course can be any training course that is being offered regardless of the Member State where it is held as long as it passes a recognition process. Such broad interpretation, as much as it may be desirable to expand mediators' freedom of movement, cannot be supported in lieu of para. 4 of the quoted provision, which entitles the Minister of Justice with the right to authorise training organisations to certify mediators.

Hence, the joint application of both linguistic and systematic interpretation leads to the ultimate conclusion that the training of mediators refers merely to training previously recognised by the Minister of Justice of Bulgaria. Recognising the curriculum of foreign

50 Law of the Republic of Bulgaria No 110 (n 44) art 8, para 2.
51 ibid, art 8a, para 2, item 1.

organisations offering mediation training and whether they comply with the requirements applicable towards Bulgarian mediators is not explicitly provided for, though it should not be deemed to breach the applicable legislation.[52]

Applying the same rationale *mutatis mutandis* on an EU level should lead us to the ultimate conclusion that as long as the syllabus of mediation training meets a certain professional standard that ensures acquiring both theoretical knowledge and practical conflict resolution skills, the experts having undergone such training should be allowed to practice across borders. To ensure this, though, additional requirements should be considered towards the respective training entities and their accreditation, which would ultimately result in cutting-edge training that equips future mediators with the necessary skills and ultimately leads to improving the legitimacy of the mediation profession.

A sample of those requirements that can be considered when establishing uniform rules is the Guidelines on designing and monitoring mediation training schemes adopted by CEPEJ on 14 June 2019.[53] They seek to harmonise the minimum training standard to ensure an adequate number of well-trained mediators in each Member State jurisdiction by effectively outlining the desirable practices for the training programmes, regulation of mediation trainers and training providers, incl. quality management and their accreditation, course content, unified competency framework, course duration and group sizes, teaching methodologies, performance assessment and accreditation of future mediators.

The need for moving towards greater unification of the applicable training requirements is further confirmed in point 20 of the European Parliament resolution of 13 September 2011 on the implementation of the Directive on mediation in the Member States, its impact on mediation and its take-up by the court,[54] which acknowledges the importance of establishing common standards for accessing the profession of mediator to promote a better quality of mediation and to ensure high standards of professional training and accreditation across the Union. Achieving the above would inevitably enable the free movement of mediators whose services can be offered across the Union without encountering restrictions stemming from the divergent national regulations.

The lack of a specific accreditation process, whether deliberate or a legislative gap, on a national level (as evidenced in the example of Bulgaria) may be interpreted as an indirect hindrance towards the provision of mediation services from mediators established in another Member State. Indeed, it may be argued that upon triggering the direct effect of the right to provide services, mediators may still be able to render their services across borders.

52 Order of the Minister of Justice of the Republic of Bulgaria No 2 (n 38) art 15.

53 Guidelines on Designing and Monitoring Mediation Training Schemes (n 31).

54 Directive on Mediation in the Member States P7_TA(2011)0361, European Parliament Resolution of 13 September 2011 on the Implementation of the Directive on Mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI)) [2013] OJ C 51E <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011IP0361> accessed 4 November 2023.

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

Notwithstanding the above, though, the obstacles that practically are in place would serve rather as a discouraging factor for the professionals willing to exercise this right and, as such – lead to the distortion of the common mediators' market.

3 CHALLENGES UNDER THE EXISTING PATCHED REGULATIONS ON PRACTICING MEDIATION IN THE EU

The above national regulatory discrepancies highlight the absence of a single EU mediators' market, preventing certified meditators from one Member State from automatically having the right to render their services in another state. This notion can further be reaffirmed by the lack of unified standards and regulatory requirements that apply across borders. In fact, the only attempt to amalgamate these existing differences has been the adoption of the European Code of Conduct for Mediators,[55] as promulgated with the support of the EU Commission. The Code sets out a number of principles towards mediators. However, being a voluntary commitment, it functions more as a high-level policy document rather than a practical solution, especially in addressing challenges faced by mediators in cross-border situations.

Hence, despite efforts to improve regulatory coherence, the challenges faced by mediators in the EU remain unanswered or lack concrete solutions. More recently, on 4 December 2018, during its 31st plenary session, CEPEJ adopted its Code of Conduct for Mediation Providers,[56] which sets out a number of principles to which mediation centres, institutes or other mediation providers may decide to adhere to. However, the adopted provisions lack specific requirements for which training, certification and/or subsequent supervision should be bound. Even if they were more elaborate, these provisions would still lack binding force as they constitute a mere part of the soft law provisions in the field of mediation. Therefore, they do not offer immediate answers to some of the most pressing challenges experienced in the field. Those challenges can be summarised in the following subchapters.

3.1. Absence of unified international standards in regard to international mediation practice

The development of a national credentialing system for mediators has been on the rise ever since 2000.[57] Its emergence is a direct result of adopting various national mediation schemes to strengthen the promotion of ADR. Those specific models under development were

55 Code of Conduct (n 8).

56 European Code of Conduct for Mediation Providers (adopted by CEPEJ on 4 December 2018) <https://rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-conduc/1680901dc6 > accessed 4 November 2023.

57 Nadja Alexander, 'Ten Trends in International Commercial Mediation' (2019) 31(Spec) Singapore Academy of Law Journal 405.

designed to correspond to the peculiar socio-economic environment and the legal system within which they were being established. Hence, each system introduced its own set of criteria and requirements towards practising mediators. Some schemes involve legislative regulations; others rely on promulgating soft-law measures, and still others offer a combination of those two. All these trends led to the inevitable patching of the requirements that should be met by mediators wishing to provide their services in more than one jurisdiction. The complications that stem from this are enhanced further when considering practising mediation internationally. Today, a number of international mediation service providers[58] have developed a roster of mediators based in numerous countries and from various backgrounds simply by recognising mediators' previous experience and/or acknowledging the national or institutional standards under which such individuals were trained. Notwithstanding the above, though, the shift from national to international practice is not coherent and does not provide practising mediators with a single path to follow when wanting to expand their field of practice. Najda Alexander has formulated that usually this may take one of the following four forms:

- Recognition of prior (foreign) training and/or credentials;
- Systems of cross-recognition of national or institutional mediator standards;
- Requirements that foreign and local mediators undertake the same credentialing procedure;
- Development of international standards for mediator credentialing.[59]

As evidenced by the above, the lack of a unanimous cross-recognition process makes it difficult and, in some cases, practically impossible for mediators from certain jurisdictions to practice in other countries. Analysing this issue from an EU perspective, the challenge remains as no specific regulatory or practical measures have been put in place to overcome such barriers. Trying to overcome this, certain Member States have established bilateral arrangements to tackle this issue and allow for an enhanced exchange of professionals able to render their mediation services across borders. One of the few examples of this is the arrangements reached between the German, Swiss and Austrian training organisations[60] which allows for the cross-border recognition of mediator standards between Austria and Germany at an institutional level and facilitates the enhanced movement of mediators across borders. The narrow scope of application of this, though, indicates the magnitude of the problem and the effective lack of measures to tackle it.

58 *International Mediation Institute* (IMI) <https://imimediation.org> accessed 23 May 2023; *Singapore International Mediation Institute* (SIMI) <https://www.simi.org.sg> accessed 23 May 2023.

59 Alexander (n 57) 421.

60 *Bundesverband Mediation* <https://www.bmev.de> accessed 23 May 2023.

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

3.2. Inconsistencies in the recognition process allowing mediators to practice in the EU

The challenges outlined above also lead to numerous discrepancies and inconsistencies in the cases where there is a recognition process in place to allow mediators from one jurisdiction to practice in another. One such example is the Mediators' Institute of Ireland (MII) recognition of equivalent training procedure,[61] which stipulates for recognition of all trained outside of Ireland mediators to evidence the following:

- Certificate for completion of a minimum of 60-hour mediation training;
- The close resemblance of the curriculum of the said training with those of MII.

The cost of the assessment is EUR 100 and, if successful, would allow proceeding to an in-depth MII assessment for an additional EUR 375, allowing the respective professional to receive MII membership.

Another example of a differently organised scheme is the one provided for in Portugal,[62] whereby mediators providing temporary and occasional mediation services are only required to declare such activities to the Directorate-General for Justice Policy in case the mediator shall be working as part of the national institutional framework, i.e. as a mediator equal to those registered in the list of mediators under the auspices of the Ministry of Justice or part of the public mediation system. However, in case a professional wants to permanently establish him/herself and work as a mediator, the full procedure for recognition of professional qualification should be conducted. According to the prescribed procedure, though, a mediator should be able to show the certificate evidencing mediation qualification. Given the patched EU mediation landscape, this requirement alone may prove problematic, considering that no such training is required in some Member States. Additionally, even if passing the recognition process is obtained, the mediator should be able to prove a good command of the Portuguese language.[63] This requirement of a good command of the local language, though based on the assumption that most parties to mediation would want a local, could be deemed, at minimum, discriminatory. Separately, the introduction of such an additional requirement cannot be justified on other grounds, given that no true public interest or another socially

61 'Recognition of Equivalent Training' (*Mediators' Institute of Ireland (MII)*, 28 March 2022) <https://www.themii.ie/membership/general-information/recognition-of-equivalent-training> accessed 25 October 2023.

62 'Conflict Mediator – Provision of Temporary and Occasional Services in Portugal (first time)' (*ePortugal*, 2023) <https://eportugal.gov.pt/en-GB/inicio/espaco-empresa/balcao-do-empreendedor/mediador-de-conflitos-prestacao-de-servicos-temporarios-ou-ocasionais> accessed 25 October 2023; Ana Maria Costa e Silva, and Patrícia Guiomar, 'Mediators in Portugal: Training, Status and Professional Recognition' (2023) 6(1) Journal of Social and Political Sciences 32, doi:10.31014/aior.1991.06.01.391.

63 'Lista de Mediadores Privados' (*Direção-Geral da Política de Justiça (DGPJ)*, 2023) <https://dgpj.justica.gov.pt/Resolucao-de-Litigios/Mediacao/Lista-de-mediadores-privados> accessed 25 October 2023.

significant value could be established to be sought through this. Curtailing the existence of the internal market on non-justifiable grounds, therefore, cannot be supported and as such – it should be deemed as yet another burden before mediators wishing to exercise their profession in numerous Member States. From a practical perspective and with the increase of online mediation and the integration of technologies as means of enabling distant communication, it is not unthinkable that a highly skilled professional mediator may be providing his/her online mediation services regularly in a number of Member States irrespective of the non-command of the corresponding national language. The existing local regulations for recognition of professional qualifications, though subject to the harmonisation under the Directive on the recognition of professional qualifications, 66 have proven inefficient in solving this.

Another example of the recognition process of mediators having been certified in another Member State is the case of the Czech Republic, administered by the Ministry of Education, Youth and Sports.[64] All recognitions of professional qualifications (including those for mediators) are stipulated in Act No 18 /2004 Coll. on the recognition of professional qualifications and other competencies of nationals of the Member States of the European Union and on the amendment of some acts. According to it, however, to practice mediation in the country, the professional mediator should not only be licensed as such in another country but should also hold a Master's university degree.[65] Even if such a requirement *per se* is not unreasonable, it may hinder some mediators from other Member States who wish to practice there. For instance, this could affect mediators from Bulgaria, Latvia, Lithuania, Austria, and Italy, where no such requirement for a Master's degree exists under national rules. Therefore, they may be deprived of the chance to exercise their profession in the Czech Republic merely on such educational grounds.

The above examples prove that even when Member States are seeking to establish concrete measures to recognise mediators' qualifications gained in another jurisdiction, there is a risk of creating or deepening the already existing differences in the way the mediators' profession is 101rganized. This ultimately leads to the conclusion that the only way to overcome those barriers to the free movement of mediators in the EU is by regulating the field on a pan-European level, including by suggesting specific terms for the recognition process of mediators. As a general conclusion, though, it can be noted that for the time being, not only in the EU, but globally there has not been an unanimous understanding of the qualifications that mediators must have to be effective in their work.[66] One reason for this is that studies

64 'How to Proceed – Information for Applicants and Providers of Services' (Ministry of Education Youth and Sports, 2023) <https://www.msmt.cz/eu-and-international-affairs/jak-postupovat?lang=2> accessed 25 October 2023.

65 'Recognition of Professional Qualifications: Database of Regulated Professions and Professional Activities' (*Ministry of Education, Youth and Sports*, 2023) <https://uok.msmt.cz/uok/ru_detail.php?id=674&flet=&forg=&ftype=&fpg=1&ftxt=medi%E1tor&lang=en&dl=en> accessed on 1 November 2023.

66 Sarah R Cole and others, *Mediation: Law, Policy & Practice* (2022-2023 edn, Trial Practice Series, Thomson Reuters 2023) § 1:1.

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

have indicated that more qualification requirements or longer training hours do not necessarily lead to improved mediation.[67] That being said, though, is without prejudice to the earlier assertion that uniformed training requirements are needed to open the market on mediators' services and ultimately trigger the natural processes for increasing the quality fo the mediations provided.

3.3. Cross-border enforceability of mediation settlement agreements resulting from the work of mediators meeting different professional requirements

The existing polyphony of national legislation in terms of recognition and enforceability of mediation settlement agreements (MSAs) currently complicates the EU mediation landscape.[68] According to Art. 6 of the Mediation Directive, an MSA may be enforced by means of a judgement, decision or other authentic document. Namely, enforceability shall be sought of the actual instrument to which the MSA shall have been incorporated. To be able to do so, though, the agreement should have been achieved due to a mediation process conducted by a professional considered a mediator under the respective jurisdiction. In a cross-border environment, though, and if the mediation is taking place in a Member State where the mediator is not licensed, the ultimate MSA may be considered as lacking one of its main characteristics – i.e. the fact that it has been the ultimate result of mediation.[69] This additionally complicates the context for providing cross-border mediation services. At the same time, it can be perceived as a risk for the parties who may be acting under the assumption that they are receiving all benefits of the mediation service while being deprived of one of the key benefits of mediation.

The above is specifically valid within the context of an ever-growing trend for mandatory mediation models across the EU, especially family mediation. Specific examples of the problems that may occur here are depicted in the categorical mandatory family mediation models, where litigants are forced to mediate before filing their petitions. Such, by way of example, are the models applied in Lithuania, Greece, Croatia, Malta, Estonia in child access cases, and Italy in family business disputes.[70] The common characteristic of all these models is that they require litigants ahead of filing their court claim to attend mediation or a mediation information session and to furnish evidence for this to the court. The fact that other countries,[71] like Germany, Spain, Portugal, and Bulgaria, do not have such a requirement effectively leads to the risk of parties to family disputes being left with the choice to seek a more favourable forum that effectively does not require from them compliance with such procedural obligation.

67 Kimberlee K Kovach, *Mediation: Principles and Practice* (3rd edn, West Academic 2004) 23-7.

68 Haris P Meidanis, 'Enforcement of Mediation Settlement Agreements in the EU and the Need for Reform' (2020) 16(2) Journal of Private International Law 275, doi:10.1080/17441048.2020.1796226

69 Directive 2008/52/EC (n 3) art 6.

70 Agnė Tvaronavičienė and others, 'Mediation in the Baltic States: Developments and Challenges of Implementation' (2022) 5(4) Access to Justice in Eastern Europe 68, doi:10.33327/AJEE-18-5.4-a000427.

71 ibid.

Given the massive migration processes that are still on the rise, this problem is not merely of a theoretical nature but may have some practical implications of turning certain jurisdictions into 'mediation heavens' with no mandatory mediation for some cases or where the provisions for its conduct are of a relaxed nature. The same risk also exists in the field of recognising mediation settlement agreements as an enforceable title in all Member States, which may result from the work of various mediators, all of whom are subjected to different national regulations. This gives the parties the chance to pursue the conclusions of settlements via mediation in jurisdictions with a more lenient regulatory framework towards mediators and to seek to subsequently enforce them in the desired jurisdiction where they would not have been enforceable in the first place. All of the above represents some of the challenges that forum shopping and bad faith use of the patched mediator regulations may result in and further stress on the need for urgent reform suggesting uniform criteria and professional regulations of all EU mediators.

4 CONCLUSIONS AND RECOMMENDATIONS

The analyses of existing national legislation in the field of mediators' professional regulations on an EU level has brought to light the consderiable challenges or nearly impossibility for mediators trained in one EU Member State to render mediation services in other Member States. Keeping in mind the essence of the mediation process and its universal nature, this limits mediators from exercising their EU-guaranteed freedom of services and, as such, ultimately leads to the shrinking of the mediators' market and indirectly decreases the quality of the mediation services due to limited competition.

However, a few tools for recognising mediation licenses and training requirements have been implemented, but in their bigger part, they fail to truly foster a single mediators' market in the Union. These tendencies are further strengthened by the uptake of mandatory mediation models, which dramatically raises the number of mediated cases and results in the additional polarisation of the requirements towards practising mediators. Considering the high number of cross-border disputes, the situation becomes even more complicated and creates additional formal obstacles to the development of mediation and its wider usage.

The existing regulatory, coupled with the diverse training requirements applicable nationally, call for a need to adopt uniform training requirements with curriculum that is synchronised and applicable across all states. Unifying the systems of mediation training and certification around the EU requires discussions as it may increase the trust that the quality of the mediation service offered in the numerous Member States meets a certain fixed standard. However, moving towards such unification shall necessitate careful deliberations within the professional community of mediators in the EU to synchronise the advancement and agree upon content specifics that need to be adopted. In addition, such a harmonised approach towards the qualification of the mediators would be highly beneficial to mandatory mediation schemes in cross-border disputes as there will be no more space for the latter discussion on the suitability of the mediator, who was assisting parties in such

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

a dispute resolution process. The latter would also serve as a benchmark for the quality that needs to be maintained across accrediting organisations in the EU. The overarching objective of this would be to increase the credibility of the mediation institute by ensuring it meets an impeccable quality coupled with utmost professionalism.

Separately, the authors propose initiating a discussion about creating a uniform EU registry of mediators and mediators' service and training providers. This might be the next step towards creating a truly European single market of mediation services.

However, prior to their implementation, all of the above notions require a truly European discussion that involves all stakeholders in a process that seeks to and adopts a unified standard of mediation conduct that is applicable throughout the entire European Union.

REFERENCES

1. Alexander N, 'Global Trends in Mediation: Riding the Third Wave', in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law Intl 2006).
2. Alexander N, 'Ten Trends in International Commercial Mediation' (2019) 31(Spec) Singapore Academy of Law Journal 405.
3. Alexander N, Walsh S and Svatos M (eds), *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Kluwer Law Intl 2017).
4. Cole SR and others, *Mediation: Law, Policy & Practice* (2022-2023 edn, Trial Practice Series, Thomson Reuters 2023).
5. Furlan F, Blumstein E and Hofstein DN, 'Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers when Acting as Mediators?' (1997) 14(2) Journal of the American Academy of Matrimonial Law 267.
6. Hanks M, 'Perspectives on Mandatory Mediation' (2012) 35(3) UNSW Law Journal 929.
7. Hopt KJ and Steffek F (eds), *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2013).
8. Jaspers C, 'Mandatory Mediation from a Europen and Comparative Law Perspective' in Boele-Woelki K and Martiny D (eds), *Plurality and Diversity of Family Relations in Europe* (Intersentia 2019) 341, doi:10.1017/9781780689111.016.
9. Korsakoviene I, Radanova JB and Tvaronavičienė A, 'Mandatory Mediation in Family Disputes – An Emerging Trend in the European Union?' (2023) 53(2) Review of European and Comparative Law 67, doi:10.31743/recl.15707.
10. Kovach KK, *Mediation: principles and practice* (3rd edn, West Academic 2004) 23-7.
11. Meidanis HP, 'Enforcement of Mediation Settlement Agreements in the EU and the Need for Reform' (2020) 16(2) Journal of Private International Law 275, doi:10.1080/17441048.2020.1796226.

12. Quek D, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) Cardozo Journal of Conflict Resolution 479.
13. Rewald R, 'Mediation in Europe: The Most Misunderstood Method of Alternative Dispute Resolution' (2014) 2 World Arbitration Report 14.
14. Silva AMCe and Guiomar P, 'Mediators in Portugal: Training, Status and Professional Recognition' (2023) 6(1) Journal of Social and Political Sciences 32, doi:10.31014/aior.1991.06.01.391.
15. Silver C, 'Models for Third Parties in Alternative Dispute Resolution' (1996) 12(1) Ohio State Journal on Dispute Resolution 37.
16. Steffek F, 'Mediation in the European Union: An Introduction' (*European e-Justice*, 2012) <https://e-justice.europa.eu/fileDownload.do?id=b3e6a432-440d-4105-b9d5-29a8be95408f> accessed 1 November 2023.
17. Tvaronavičienė A and others, 'Mediation in the Baltic States: Developments and Challenges of Implementation' (2022) 5(4) Access to Justice in Eastern Europe 68, doi:10.33327/AJEE-18-5.4-a000427.
18. Wissler RL, 'Court-Connected Mediation in General Civil Cases: What we Know from Empirical Ressesarch' (2002) 17(3) Ohio State Journal on Dispute Resolution 641.

AUTHORS INFORMATION

Yuliya Radanova*
Ph.D. (Law), Post-doctor at the Research and Innovation Center at the Social Innovations Doctoral School, Mykolas Romeris University, Vilnius, Lithuania
yuliya.radanova@mruni.eu
https://orcid.org/0000-0001-9672-2582
Corresponding author, responsible for research methodology, data collection, writing, and supervising.

Agne Tvaronavičienė
PhD (Law), Head of Mediation and Sustainable Conflict Resolution Laboratory, Full-time Professor at Mykolas Romeris University, Vilnius, Lithuania
a.tvaronaviciene@mruni.eu
https://orcid.org/0000-0002-5489-5570
Co-author, responsible for conceptualization, writing, and data collection.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organizations.

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

ABOUT THIS ARTICLE

Cite this article

Radanova Yu and Tvaronavičienė A, 'Free movement of mediators across the European Union: a new frontier yet to be accomplished?' (2024) 7(1) Access to Justice in Eastern Europe 83-106 <https://doi.org/10.33327/AJEE-18-7.1-a000122>

Submitted on 26 Nov 2023 / Approved 18 Dec 2023
Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000122

Managing editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Keywords: *mediation, professional requirements, free movement, recognition, international standards.*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

CHALLENGES OF LEGAL GUARANTEES FOR THE ENFORCEMENT OF ARBITRAL AWARDS IN INTERNATIONAL COMMERCIAL CASES

Oleksii Makarenkov* and Lurdes Varregoso Mesquita

ABSTRACT

Background: *The historical determinants of the appearance of international arbitration correspond to the general tendency of the complication of legal relations of highly developed civilisations, where business processes are its drivers. It is expected that a complex transnational business layered on different levels of civilisation is characterised by an increase in the probability of misunderstandings regarding the proper fulfilment of obligations, the resolution of which is referred to as international arbitration, which, by nature, is more effective than national courts. In this regard, within legal doctrine and among legal practitioners, there is an ongoing discourse on strategies to mitigate risks associated with the execution of international arbitration decisions and related issues.*

Methods: *The research employed a methodological toolkit encompassing formal and dialectical logic, a synergistic methodological approach. The primary method within this framework was the synergistic analysis of the transformation of formal-legal sources and the corresponding application practices. Additional methods included historical-legal, comparative-legal, formal-dogmatic methods and contextual analysis.*

Results and Conclusions: *Formal-legal guarantees for the execution of international arbitration decisions represent a system of requirements governing the procedural and actual actions of state-authorised persons (bodies) that ultimately lead to such execution. The basis of such guarantees is the adequacy of the subject to which the method is applied. Firstly, the arbitrators must make the decision. Secondly, this concerns a property (commercial) dispute. Thirdly and fourthly, enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought and arising out of differences between persons, whether physical or legal. These signs follow from the corresponding specific acts of private international law. The enforceability of an arbitral award depends on the timely and appropriate actions of the parties to the contract. Even during the negotiation of a foreign economic agreement, the result of an audit of the business partner's reliability in terms of its ability to fulfil its financial and/or other obligations properly should be obtained.*

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

1 INTRODUCTION

The quasi-judicial role of international commercial arbitration organically complements the proceedings of national and other courts in ensuring the successful course of transnational entrepreneurship. The historical determinants of the appearance of the arbitration method of resolving commercial disputes are not only preserved but also strengthened. This corresponds to the general tendency of the complication of legal relations of highly developed civilisations, where business processes are their drivers with complex compositions of practical implementation, in particular, due to the proper fulfilment of obligations within the framework of agreements with a number of partners, etc. It is expected that a complex transnational business layered on different levels of civilisation is characterised by an increase in the probability of misunderstandings regarding the proper fulfilment of obligations, the resolution of which is referred to as international arbitration, which is inherently more effective than national courts. In this regard, in legal doctrine and among legal practitioners, the issue of risk neutralisation for the execution of international arbitration decisions and related issues is being updated.

In recent decades, there has been a clear tendency to towards increasing the role of international commercial arbitration as a mechanism for resolving disputes in complex commercial legal relations involving a foreign element. Business circles prefer the application of transnational informal norms to the traditional dogmatic approach, primarily for pragmatic reasons since, in this case, this method of resolving international commercial disputes meets their expectations to a greater extent.

For example, under Article 35 'Applicable law, amiable compositeur', the arbitral tribunal is mandated to apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law that it deems appropriate. The arbitral tribunal may resort to deciding as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to do so. Regardless, in all cases, the arbitral tribunal shall decide by the terms of the contract, if any, and take into account any usage of trade applicable to the transaction.[1]

In some societies, 'tribunals' exist apart from the formal court system. In many societies, too, arbitration serves as a prevalent alternative to 'regular' judicial progress. The key distinction between arbitration and litigation chiefly lies in that the arbitrator is only a temporary judge, usually selected by the parties rather than a state official.[2] The term 'arbiter' comes from the Latin – arbiter, mediator. In Roman civil proceedings, an arbiter (arbitri) functioned as a type of judge distinct from ordinary judges (judices). In the realm of international commercial arbitration, an arbitrator is a disinterested mediator called upon to resolve a dispute between two parties and find a compromise solution. Using the term 'court' in the title of international commercial arbitration is considered scientifically

1 UNCITRAL, *UNCITRAL Arbitration Rules (with art 1, para 4, as adopted in 2013 and art 1, para 5, as adopted in 2021); UNCITRAL Expedited Arbitration Rules; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (UN 2021).

2 Lawrence M Friedman, 'Litigation and Society' (1989) 15 Annual Review of Sociology 21.

incorrect. The use of both terms is traditionally the prerogative of the state to nominate its judicial authorities, which is carried out on behalf of the entire state.

Nevertheless, some arbitrations incorporate such terms in their titles, such as the International Chamber of Commerce International Court of Arbitration, London Court of International Arbitration and Permanent Court of Arbitration. This usage can be explained by the development of such arbitrations as historically the first and most significant, as well as by several other historical-legal and foreign policy reasons. According to clause 1 of Part 1 of Article 17 of the Swedish code of judicial procedure, a court is not competent to entertain disputes specified in this chapter that fall within the purview of authorities other than a court, a special court, or required by an act or regulation to be determined directly by arbitrators.[3]

2 JURISDICTIONAL INNOVATIONS IN THE FIELD OF GUARANTEED INTERNATIONAL ARBITRATION AWARDS ENFORCEMENT

When determining the terms of international commercial arbitration, lawyers primarily focus on the ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated 10 June 1958 (hereafter: EFAA Convention 1958).[4] On the territory of the EU, the legal institution of enforcement of court decisions in civil or commercial cases, which are not decisions of international arbitration courts, was strengthened by the Convention on Choice of Court Agreements of 30 June 2005[5] and Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (hereafter: 'Hague Convention 2019').[6] The latter was adopted on 2 July 2019 by the Member States of the Hague Conference on Private International Law during its Twenty-Second Session.

On 1 September 2023, the Hague Convention 2019 entered into force following the ratification by at least two states and their associations (Article 28). The Convention is effective between the European Union (EU), including its member states (except Denmark), and Ukraine. Uruguay deposited its instrument of ratification of the Hague Convention 2019, becoming a new Contracting Party to the Convention, with its entry into force on 1 October 2024.[7] While six additional states have signed the Convention, they have not yet ratified it.

3 The Swedish Code of Judicial Procedure (1942:740) <https://www.government.se/government-policy/judicial-system/the-swedish-code-of-judicial-procedure> accessed 25 September 2023.

4 UN Commission on International Trade Law, *Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York, 1958)* (UN 2008).

5 Convention on Choice of Court Agreements (Hague, 30 June 2005) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> accessed 25 September 2023.

6 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=legissum:4610899> accessed 25 September 2023.

7 'Judgments Convention: Entry into force and ratification by Uruguay' (*Hague Conference on Private International Law (HCCH)*, 1 September 2023) <https://www.hcch.net/en/news-archive/details/?varevent=936> accessed 25 September 2023.

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

Didier Reynders, EU Commissioner for Justice, remarked, 'The time is right for greater international unity and cooperation in civil and commercial law. I hope that the entry of the Hague Judgments Convention into force and its application in the EU and Ukraine will motivate other countries to sign up. In an increasingly globalised world, implementing the law cannot be restricted by borders – the more countries join the Convention, the more effective our judgements will become. Citizens and companies will benefit from the treaty, and it will further facilitate trade and investment between the EU and Ukraine.'[8]

2.1. Formal-Legal Guarantees of Jurisdictional Decisions in Commercial Cases Execution: Comparative-Legal Analysis

The Judgments Convention establishes a common framework for the global circulation of judgments in civil or commercial matters, overcoming the complexities arising from differences in legal systems. By providing a minimum standard for circulating foreign judgments among Contracting Parties, the Convention promotes access to justice for all and facilitates international trade, investment, and mobility by reducing the risks and costs of cross-border litigation.

***Table* 1. Comparison of legal guarantees of foreign arbitral awards and foreign judgments enforcement**

No	Comparison	
	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)	Convention on the recognition and enforcement of foreign judgments in civil or commercial matters was adopted on 2 July 2019 by the Hague Conference on Private International Law
1	Article 3 Each Contracting State recognizes arbitral awards as binding and enforces them.	This Convention does not apply to arbitrations and related proceedings (Part 3, Article 2). This Convention applies to the recognition and enforcement of judgments in civil or commercial matters. Concomitantly, it does not apply to tax, customs or administrative matters (Part 1, Article 1).
2	Article 5 defines the grounds for refusal to execute the decision, namely: incapacity of the party, invalidity of the agreement; non-notification of the appointment of an	Article 5 defines in detail the grounds for executing a court decision; in Article 6 – a court decision issued regarding real property rights to immovable property is recognized and enforced if and only if the property is located in the State where the decision was made; in Article 7 – grounds

8 Directorate-General for Neighbourhood and Enlargement Negotiations, 'Ukraine: mutual recognition of judgments between EU and Ukraine starts today under Hague Convention' (*European Commission*, 1 September 2023) <https://neighbourhood-enlargement.ec.europa.eu/news/ukraine-mutual-recognition-judgments-between-eu-and-ukraine-starts-today-under-hague-convention-2023-09-01_en> accessed 25 September 2023.

2	arbitrator or of arbitration proceedings; violation of the right to provide explanations; the dispute is not covered by the terms of the arbitration agreement or the arbitration clause in the contract; the composition of the arbitration body or the arbitration process did not comply with the agreement of the parties or the law of the country where the arbitration took place; the object of the dispute cannot be the subject of arbitration.	for refusal to execute a court decision. It is also detailed that court decisions are not enforced due to the following general procedural grounds: if proceedings between the same parties and on the same subject are ongoing in the court of the requested State (Part 2 Article 7); if the decision is made on an issue to which this Convention does not apply (clause 1 of Article 8); to the extent that the court decision provides for the recovery of compensation, including punitive fines, which do not compensate the party for actual losses or damage caused (clause 1 of Article 10); if the State has a significant interest in not applying this Convention to a separate issue and declares that it will not apply the Convention to such an issue (clause 1 of Article 18); if the court decision was adopted as a result of proceedings in which the State, a state body or a natural person acting on behalf of the State or such a state body is a party (clause 1 of Article 19).
3	The decision is not executed when the period for appealing such a decision is still running or it is appealed	
4	subparagraph e) clause 1 of Article 5; Article 6	clause 4 of Article 4
5	The decision is not executed if its execution would be obviously incompatible with the public order of the state	
6	subparagraph b) clause 2 of Article 5 (only public order is mentioned)	subparagraph c) clause 1 of Article 7 (the rule is more detailed, namely: the court decision is not enforced even when it is inconsistent with the fundamental principles of procedural justice; related to a violation of the security or sovereignty of the state)
7	The institution of ensuring the execution of the court decision is provided for by the requirements of the procedural law of the state, which is applied during the resolution of the dispute	
8	Mentioned in Article 6	Not mentioned

Thus, the emergence of new international agreements in the field of national court decision enforcement organically complements the system of foreign arbitral awards enforcement, in particular under the rules of the EFAA Convention 1958. This parallel can be likened to the democracy of our legal system – acknowledging major flaws but recognising these are the best we have. This trend reveals the relationship between the state and the private sector in the field of justice.

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

On the one hand, justice remains the exclusive prerogative of the state, a sign of its sovereignty and its desire to strengthen its influence in the areas of both determining the obligations of the parties to commercial relations and resolving disputes regarding the content of such obligations, enforcing decisions following the consequences of resolving such disputes. On the other hand, the sphere of private legal relations demonstrates its autonomy from the state in resolving commercial and civil disputes arising from misunderstandings during the communication of entities registered in at least two different states.

2.2. Dual System of Commercial Interest's Jurisdictional Protection

In commercial (civil) disputes, the party in violation of contractual obligations often simplifies, ignores, and/or otherwise distorts the meaning of the contract terms. Accordingly, the functional essence of court and arbitration is exhausted to the same extent by mediation in the search, discovery and fixation of the only correct knowledge about legal relations between the parties to the dispute, the rules suitable for them, etc. Arbitration in commercial disputes competes with commercial courts of the state. This phenomenon actually represents entrepreneurship in the field of justice. Notably, differences between these two institutes highlight a discernible shift in the criterion of preferences towards arbitration.

Investors should, therefore, develop effective enforcement strategies from the outset of an investment dispute and identify extra-EU jurisdictions where respondent States hold sufficient enforceable assets. Australia, the UK and the US appear to be the preferred options for extra-EU enforcement. The effective enforcement mechanism of arbitration awards and the potential reputational damage of adverse awards (e.g. when issuing government bonds) make settlement negotiations still attractive for respondent States.

Recently, Germany agreed to pay €1.4bn to Swedish Vattenfall to settle its nuclear energy dispute brought under the ECT. It has also been reported that the Republic of Croatia settled its disputes with four European banks over the forced into euro of Swiss franc-indexed loans into euros.

***Table* 2. Advantages and disadvantages of resolving commercial disputes by international arbitration and national court**

Characteristics type	International Arbitration	National Court
Advantages	1) Use of English or another language, as agreed by the parties; 2) The possibility to approve and/or select arbitrator candidates; 3) Eliminated from the system of state corruption; 4) The arbitrator takes great care of his competence and other components of authority; 5) The parties have the opportunity to determine the rules of arbitration proceedings.	1) Covering the costs of court functioning, except for the court fee, is carried out at the expense of public funds; 2) Economic expediency for the parties to resolve disputes with a small, compared to cases in international arbitration, cost of the claim, for example, 250 US dollars, etc.

Disadvantages	High costs for the dispute resolution process are covered exclusively by the parties. In this regard, claims with relatively large amounts of claims are submitted to international arbitration. For instance, this encompasses the cost of remuneration for arbitrators and lawyers, which can be relatively high. Considering the base salaries that were being offered, there was a flood of young people wanting to be lawyers.[9] It should be noted that introducing arbitration as a binding mechanism for the solution of small claims may be complex since it could lead to a situation of mandatory institutional arbitration.[10]	1. Using exclusively the language of the national judiciary; 2. The possibility to challenge a judge and to satisfy such a statement based on the results of its consideration by another judge who, as a rule, are on friendly terms with each other, is limited by the procedural law; 3. The court is in the system of political pressure and other manifestations of corrupt influence; 4. Motives to ensure the competence and other components of the authority of individual judges and/or are sometimes weakened by the overload of the volume of cases that must be considered within the deadline; a system of neutralization of professional mistakes through mutual condescension to each other; lack of direct dependence on the opinion of the parties in the case about the professionalism of the judge, etc.; 5. The parties are deprived of the opportunity to determine the rules according to which the court will consider the case.
Variable	Depending on the features of the specific national legal system, the circumstances of the case, the nature of the parties and arbitrators/judges, the following indicators do not clearly reveal permanent qualities or shortcomings, namely: 1) the speed of decision-making arbitration/court; 2) fact and speed of implementation of arbitration/court decisions; 3) formalisation of procedures for proving the circumstances of the case;	

9 Eliyahu M Goldratt, *Critical Chain* (North River Press 1997) 14.

10 Lurdes Varregoso Mesquita and Catia Marques Cebola, 'European Small Claims Procedure: An Effective Process? A Proposal for an Online Platform' (2022) 5(2) Access to Justice in Eastern Europe 19.

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

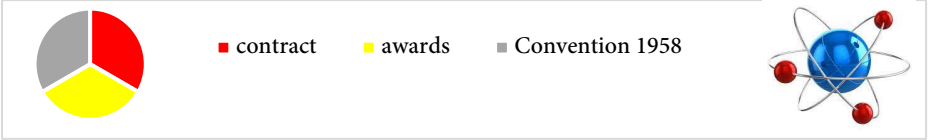
Variable	4) formalisation of fidelity verification procedures and balancedness of the decision made in the case; 5) use of procedures for appealing the decision. For instance, these changing factors become unequivocal advantages of arbitration in cases where the breaching contract is registered in a country with a high corruption index and a low rule of law index, such as the Republic of Azerbaijan, the United States of Mexico, Ukraine, based on Corruption PI estimates for 1991-2023. On the contrary, these factors are equally the advantages of justice carried out by national courts, e.g. the United Kingdom of Great Britain and Northern Ireland, the Republic of Singapore, the State of Japan. The factor of compliance with the principles of procedural competitiveness and dispositiveness of the parties to the dispute is also important. 'Expedited rules need to be handled with care, especially when they contain a time limit for the arbitral tribunal to render the award. There are issues for the respondent in presenting their case in a very short time frame, and there is a latent risk that exceeding the time limit may be considered a relevant procedural error in a jurisdiction of enforcement.'[11]

3 IDENTIFICATION OF OBSTACLES TO THE INTERNATIONAL ARBITRATION AWARDS ENFORCEMENT

Execution of international arbitration decisions can be imagined as an atomic quantity. Sufficient conditions for such performance are the terms of the contract between the parties to the dispute, the successful completion of the consideration of this dispute by international arbitration and the fact that the EFAA Convention 1958 is in force in the states, the jurisdictions of which the parties to the contract belong. Schematically, this can be represented as three parts of one whole in the diagram on the left of the table, collectively representing the enforcement of an international arbitration award.

An alternative scheme of the atom (on the right side of the table) illustrates the image of the three formal-legal factors as particles revolving around the nucleus, thus forming the atom. At the core of this atom is the enforcement of international arbitration awards, as illustrated in chart 3.

Chart 3. Enforcement of international arbitration awards as an atomic magnitude



11 Freshfields Bruckhaus Deringer, *International Arbitration in 2022: Top Trends* (Freshfields Bruckhaus Deringer LLP 2022) 17.

3.1. Formalisation of Legal Risk Calculations of International Arbitration Awards Non-Enforcement

Legal, political, economic, spiritual, cultural, and other social contexts of execution of international arbitration decisions expand the factors that must be considered. This is not to mention possible 'follow-up' legal battles on the enforcement front. After all, the disputes end when the arbitral awards are settled, not just issued.[12] This is required by a conclusion about the expediency of consideration of a commercial dispute by international arbitration and the real possibility of ultimately fulfilling the decision of this arbitration. Integrals in these relationships become the principle of the rule of law and the corruption perception index. Legal guarantees for the enforcement of arbitral awards in international commercial cases can be determined by the formula of the product of the functions of both parameters, namely: ∫eaa = ∫rl (l + p + e + s + o) + ∫cpi.

The value of ∫eaa is an integral calculation of the possibility of executing an international arbitration decision in legal reality. It is the product of two other elementary functions, namely ∫rl (rule of law) and ∫cpi (freedom from corruption). In essence, these two factors reflect different aspects of law as a phenomenon of objective reality, a system of objectively expressed and accessible for human perception universally binding, anthropomorphic requirements. The value product ∫rl consists of the following contextual components, namely: l – legal context, p – political context, e – economic context, s – spiritual context, o – other social contexts). F. i., What strikes the eye in the case of Canada – in comparison to the other countries – is the high percentage of cases involving the judicial review of various measures of government institutions/bodies/agencies.[13]

The index of the rule of law in international arbitration plays the function of evaluating the level of civilisation of the country's legal system where the arbitral decision is to be implemented. Legally, this index is divided into components of the creation and application of law, which, in turn, are economically, politically, and spiritually determined. For instance, the Eiser award was annulled on 11.06.2020 due to a violation of the procedural principles of law (impartiality of the arbitrator, his integrity and other deviations from the requirements of the rule of law during the consideration of the case). However, the annulment was not based on the legal reasoning of the award but on a lack of disclosure of a relationship between one of the arbitrators (claimants' nominee) and the claimants' damages experts. This led the annulment committee to decide that the arbitral tribunal was improperly constituted. The case was resubmitted to a new tribunal, and the new arbitration remains pending.[14]

12 Filip Balcerzak, *Renewable Energy Arbitration – Quo Vadis? Implications of the Spanish Saga for International Investment Law* (Nijhoff International Investment Law Series 23, Brill Nijhoff 2023) 59.

13 Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022) 192.

14 *Eiser v Spain* ARB/13/36 (ICSID, 11 June 2020) <https://jusmundi.com/en/document/decision/en-eiser-infrastructure-limited-and-energia-solar-luxembourg-s-a-r-l-v-kingdom-of-spain-decision-on-the-kingdom-of-spains-application-for-annulment-thursday-11th-june-2020> accessed 25 September 2023.

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

Simultaneously, we consider the influence of other social factors, i.e., religion, relations with other nations, etc. The factor of corruption perception within the specified formula of magnitude integration that affects the reality of the international arbitration awards enforcement shows the degree of distortion of legal standards in the psyche of people. As was noted by the former United Nations Secretary-General Mr. Kofi Annan, corruption 'undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish.'[15] Law in the objective sense is sociogenic and anthropomorphic. Accordingly, the implementation of the law requirements or the distortion of the law are objectified in human actions. Such variants of attitude to law correlate with degrees of human virtues and manifestations of vices. Subjective perception and reproduction of objectively expressed law are observed in the content of legal relations. In our case, legal relations in international arbitration awards enforcement represent the essence of the relationship between human nature and law dynamics. This can be an evasion of the international arbitration awards enforcement, opposition to such execution and/or its impossibility both in advance and at the stage of the direct course of enforcement proceedings.

3.2. Characteristics of Implicit Features in the Risks of International Arbitration Awards Non-Enforcement

The legal analysis of the mentioned social contexts of arbitral awards enforcement becomes increasingingly imperative as the indicators of the rule of law and freedom from corruption diminish in a given country. The most successful moment of such an analysis coincides with the beginning of the parties' work under the contract, aiming to meticulously identify all significant potential risks that may impede the enforcement of arbitral awards.

Critical elements of this analysis pertain to the legal characteristics of the hypothetical defendant's tangible assets, which may become the subject of potential claims. Disturbing signs of such assets include its inflated price, its being pledged, its insufficiency to meet the demands of all existing and/or future creditors (i.e., lack of correlation with payables), belonging to family members of public authorities' representatives (potential oligarchy), and others.

Combating corruption has become an en-vogue topic in many areas of law, such as tax law and employment law, as well as in optimising public procurement rules, corporate governance and arbitration. It goes without saying that the bribe-giver cannot openly approach his business partner's agent and offer him a bribe. Rather, the illegality of these activities requires that the bribe results from a careful and subtle approach. Accordingly, negotiations concerning bribery often feature intermediaries to ease the transaction. Such middlemen often appear as 'consultants' or brokers to their employers. Consulting services are common in international trade and can be a sensible approach, for instance, concerning the political or economic situation in the target country or with respect to regional customs and practices. However, amongst the herd of consultants are black sheep whose main or sole

15 Adilbek Tussupov, *Corruption and Fraud in Investment Arbitration: Procedural and Substantive Challenges* (European Yearbook of International Economic Law 22, Springer Cham 2022) 4.

activity consists of funnelling bribes to influential people. These people have at their disposal both the political contacts as well as the know-how for such covert transactions.[16] All these signs testify to the danger of lack and/or unavailability of property when the need to enforce arbitral awards arises.

Oligarchic or other corrupt influence involves improper and/or unofficial influence on judges to make decisions in favour of specific individuals. These are markers of the crisis of the rule of law in the country, posing critical risks to the enforcement of arbitration decisions.

The Rule of Law is a signal virtue of civilised societies. Where the Rule of Law is obtained, the government of a state is carried on within a framework laid down by law. This provides significant security for the independence and dignity of each citizen. In societies where the Rule of Law prevails, individuals have a clear understanding of their rights and actions, minimising the likelihood of getting themselves embroiled in civil litigation or in the criminal justice system. Authority, in such contexts, has to be grounded in adherence to norms posed or evolved in a certain way or on the values (peace and good order) secured by such recognition. The justification of norms posed by authorities must presumably be in terms of their rightness (justice) or the good they bring about. Even in cases where authority is considered self-sufficient, without further appeal to substantive reasons, it underscores the ultimate dependency of reasons of authority on substantive reasons and the necessity for institutional argumentation to be anchored in pure practical argumentation.

For instance, following the consistent line of past cases ensures legal certainty, generally a universally recognised value in law.[17] Concomitantly, when various types of public power abuse prevail, the guarantee of legal requirements disappears. In particular, within the framework of the issues raised in this work, such abuses occur through the mechanisms of bureaucratic (political, organisational) decisions regarding the formal-legal distortion of the defendant enterprises' legal status. The unethical motive, in this case, would be to obstruct the collection of funds under potential or already existing arbitration awards for an improper benefit.

Consider a scenario where a bank's activity is obstructed by labelling it as problematic. Concomitantly, such a bank is not recognised as insolvent, and the public authority is not obligated to pay the deposits it guarantees. During this time, legal entities cannot decide on the collection of funds from the bank, as its new legal status imposes a moratorium on such collection. Meanwhile, the public authorities await the predicted collapse of the national currency. After that, the funds are paid to depositors in the equivalent of world currencies (US dollars, euros), which is several times lower than the exchange rate that was on the day the bank was blocked by the state regulator, limiting client access to their accounts.

Another example involves the formal preservation of the solvency status of an insurance company with multimillion-dollar debts due to enforcement proceedings by hundreds of

16 Michael Joachim Bonell and Olaf Meyer (eds), *The Impact of Corruption on International Commercial Contracts* (Ius Comparatum – Global Studies in Comparative Law 11, Springer Cham 2015) 3, 7.

17 Charalampos Giannakopoulos, *Manifestations of Coherence and Investor-State Arbitration* (CUP 2023) 27, 42, 77.

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

debt collectors. This status allows the state to refrain from using legal mechanisms to satisfy creditors' demands at the expense of motor transport bureaus, reinsurers and other funds.

The above-described model of legal reality oligarchic distortion, which allows non-execution of international arbitration awards, court decisions, and other executive documents, may be accompanied by the risk of unavailability to recover the pledged property. In the case of pledged property, the pledgee has a priority right over all other debt collectors to satisfy their claims at the expense of such property. If such property was also artificially overvalued, this fact should be discovered beforehand. It is expedient to do this so that the ratio of collateral obligations to collateral property declared in the documents does not give the impression, essentially false, that if necessary, satisfaction of the other creditors' demands is also possible at the expense of such property. It is also worth taking into account the fact of the long-term, friendly nature of business relations between the mortgagor and the mortgagee. In this case, they can jointly lay in commercial legal documents distortions of the content of the legal relations to their mutual benefit, particularly through artificial but formal legal grounds for the bankruptcy procedures of enterprises.

Insolvency affects every phase of arbitration, from a party's ability to participate in arbitration proceedings to the pursuit of arbitral proceedings and, ultimately, enforcement. The high levels of debt across Africa and Asia are particularly noteworthy due in part to the slowing of the Chinese economy and the resulting reduction in Chinese foreign direct investment abroad.[18] In countries characterised by a low rule of law index, high corruption and/or low business culture, the insolvency of the enterprise and its subsequent bankruptcy do not guarantee the enforcement of international arbitration awards or implementation of other executive documents.

Variations in bankruptcy procedures aimed at avoiding the payment of large sums of debt are proportional to the possibilities of procedural jurisdictional, managerial, financial and/or commercial distortions and their combinations. For instance, assets like vehicles, technical documentation, equipment, land, premises or their part are leased by the enterprise and not owned by it. Part of fixed assets may be in pledges, making it challenging to collect funds from such an enterprise involved in international commercial arbitration, forcing it to fulfil contractual terms or otherwise satisfy claims. Such enterprises may undergo bankruptcy proceedings, and concomitantly, their leased assets may already be leased by another enterprise engaged in the same type of business activity as the debtor enterprise. Even the workforce of this new enterprise may be absolutely identical to the composition of employees who previously worked at the debtor enterprise, whether in bankruptcy proceedings or likely to enter into such proceedings without incurring any financial loss.

Avoidance of the above-mentioned and other risks of international arbitration awards enforcement risks in practice is facilitated by the institutions of assignment by creditors of their debts, sale of debts, and the like. One key tool for liquidity management is the capital allocation strategy, and third-party funding of legal claims appears complementary to this strategy. Users cite the freeing up of working capital, taking cost liability off the balance sheet, and risk management as the top three key benefits of

18 Freshfields Bruckhaus Deringer (n 11) 7.

litigation funding. There is now even a growing market for the sale and purchase of arbitration awards, through which claimants can monetise awards in their favour without incurring the risk and cost of enforcement.[19]

3.3. Procedural and Other Factors Affecting the Enforceability of Arbitration Awards

A purely procedural guarantee of the proper execution of an arbitration award is the legal institution of securing a claim. Measures to secure a claim can be implemented at different stages of resolving an international commercial dispute, either by a national commercial court, a foreign court handling commercial disputes and whose decisions are enforceable in the defendant's country, or through international arbitration.

According to clause 4, Article 6 of the European Convention on International Commercial Arbitration 1961, a request for interim measures or measures of conservation addressed to a judicial authority does not conflict with the arbitration agreement or regarded as a submission of the substance of the case to the court.[20] Strengthening the requirements of this comprehensive regulatory legal act, delineating the limits of state court intervention in arbitration proceedings when exercising judicial control and addressing other aspects of their interaction can be traced at the level of national laws. For instance, according to clauses 4 and 5 of Part 1 of Article 175 of the Economic Procedural Code of Ukraine, a judge refuses to open proceedings in a case if there is a decision of an arbitration court, international commercial arbitration, made within its jurisdiction in Ukraine regarding a dispute between the same parties, on the same subject and the same grounds, except for cases when the court refused to issue an executive document for the enforcement of such a decision. This includes decisions of a foreign court or international commercial arbitration recognised in Ukraine involving the same parties on the same subject and grounds.[21]

Section 139 of the Civil Procedure Law 1999 of the Republic of Latvia stipulates that 'an application for securing a claim before an action is brought shall be submitted to the court in which the action regarding the claim sought to be secured is to be brought'; 'upon satisfying an application for securing a claim before an action is brought, a judge shall determine a time period for the plaintiff within which he or she must submit a statement of claim to the court or permanent arbitration'.[22] Thus, the civil procedural regulations of Latvia do not provide for the possibility of asking the court to secure the claim if it is essentially planned to be filed with the court of another state.

19 ibid 10.

20 European Convention on International Commercial Arbitration (Geneva, 21 April 1961) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en> accessed 25 September 2023.

21 Economic Procedural Code of Ukraine no 1798-XII of 6 November 1991 <https://zakon.rada.gov.ua/laws/show/1798-12#Text> accessed 25 September 2023.

22 Andrejs Gvozdevičs, 'The Securing a Claim in the Context of Sustainable Development: An Evaluation of the Latvian Experience' (2021) 10(4) European Journal of Sustainable Development 285.

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

Concomitantly, according to Article 17 of the UNCITRAL Model Law on International Commercial Arbitration 1985, unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures at the request of a party. An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.[23]

If a state does not or cannot provide effective legal protection against corruption, an argument that it does not respect the full protection and security standard under the relevant investment treaty may be expected. The stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investments from physical harm.[24]

The intensification of global problems, international competition, which is often far from fair, and the economic failure of a number of nations only confirm the weakness of public authority. Consequently, there is a growing trend to actualise alternative methods of communication with the state to ensure as much as progress as possible in finance, digital technologies and other spheres of commerce, spiritual culture, etc. International commercial arbitration is not exempt from this trend. For instance, since 2013, claims concerning international investment law in the renewable energy sector have outnumbered any other claims based on the Energy Charter Treaty. This tendency has remained valid.[25]

Tech companies, typically innovators and disruptors, have traditionally favoured litigation and been underrepresented in alternative dispute resolution methods like arbitration. However, that is changing as tech companies are becoming more aware of investment treaty protection and increasingly turn to arbitration for disputes involving cryptocurrency, blockchain and artificial intelligence (AI).[26] Concomitantly, the leaders of the G20, in their declaration following the joint meeting, instructed their Financial Stability Board to promote the effective and timely implementation of the recommendations for the regulation, supervision and oversight of crypto-assets activities and markets and of global stablecoin arrangements consistently globally to avoid regulatory arbitrage.[27]

Considering the problems of the effectiveness of states in the modern world, the legal institution of international commercial arbitration is not only a good alternative for resolving

23 UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (UN 2008).

24 Tussupov (n 15) 132.

25 Balcerzak (n 12) 59.

26 Freshfields Bruckhaus Deringer (n 11) 19.

27 G20 New Delhi Leaders' Declaration (New Delhi, India, 9 September 2023) <https://www.g20.org/en/media-resources/documents/doc-outcomes/> accessed 25 September 2023.

disputes between economic entities, but also demonstrates a constructive synergy. This synergy is evident in the derivation of mediators and arbitrators for reconciling parties involved in international investment disputes. For instance, in the Sanum Investments v. Lao People's Democratic Republic case, the arbitral tribunal did emphasise that severe financial misconduct by the Claimants, incompatible with their good faith obligations as investors in the host country (such as criminality in defrauding the host Government in respect of investment) has Treaty consequences. These consequences extend to their reliance on the guarantee of fair and equitable treatment, as well as their entitlement to relief of any kind from an international tribunal.[28]

Arbitration jurisdiction is understood to be the competence to decide a case. In the realm of commercial or investment arbitration, the jurisdiction of tribunals is always based on the parties' consent to a particular dispute. In treaty-based arbitrations, states consent to arbitrate in their capacity as contracting parties to a particular investment treaty. It is commonly described as an 'offer' to arbitrate any future disputes. This offer, contained in a jurisdictional clause of a treaty, is directed to investors with the nationality of another contracting state to that treaty and covers the defined class of investments set out in the treaty. This means that an entity or individual must meet certain requirements in the applicable treaty to be 'eligible' to effectively accept the offer to arbitrate made by the states.[29]

Persisting corruption offences, illegal violence and other consequences of condescension to human vices weaken judges and other representatives of public authority. Under such conditions, public policy in the sphere of investments and other areas of economic activity is ineffective, as it determines the distortion of the legal reality of business. Accordingly, these shortcomings of the public authorities are compensated by the activity of arbitrators, which equally favourably affects the course of commercial relations and their investment component. For instance, the Karkey tribunal found that the sum of USD 100,000 was not a significant amount considering the value of the whole investment project and the Minister's high-ranking position within the government. In other words, the tribunal assumed that this amount would have likely been insufficient to bribe a high-ranking governmental official, although it refrained from making definitive statements about the level of corruption. It appears that the Karkey tribunal did not attempt to assess the facts in light of the circumstances that were typical for the socio-economic environment of the relevant region.[30]

Compared to participants in private legal relations, these defects of public authority make it slow, incompetent, clumsy and/or amorphous. Court decisions and their implementation through the resources of this kind of public power are counterproductive. The commercial dimension of private legal relations is exclusively focused on the goal and the proper solution

28 *Sanum Investments Limited v Lao People's Democratic Republic* no 2013-13 (PCA, 13 December 2013) <https://www.italaw.com/cases/2050> accessed 25 September 2023; Tussupov (n 15) 91.

29 Balcerzak (n 12) 79.

30 *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan* ARB/13/1 (ICSID, 22 August 2017) para 551 <https://jusmundi.com/en/document/decision/en-karkey-karadeniz-elektrik-uretim-a-s-v-islamic-republic-of-pakistan-award-tuesday-22nd-august-2017> accessed 25 September 2023; Tussupov (n 15) 126.

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

of the assigned tasks; that is, every day, it acts as best as possible and as quickly as possible. Simultaneously, the public authorities of any country are significantly inferior in this respect to representatives of businesses operating in conditions of fair economic competition. As we can see, the emergence and development of international commercial arbitration can be traced back to the historical and legal logic of building relationships between people in the public and private spheres, understanding the objective correlations between them, and recognising the relationships inherent in each of them separately.

4 CONCLUSIONS

Thus, arbitration as a method of settling disputes arising in international commercial relations requires legal guarantees of its acceptability and ultimate effectiveness. Arbitration proceedings to resolve an international commercial dispute are very interesting for lawyers. It is profitable for them. Simultaneously, the plaintiff in this dispute is only interested in the final result, representing the execution of the arbitral awards. In this regard, it is important to correctly assess the balance of risks that exclude the execution of a decision and legal guarantees that make such a decision inevitable.

Formal-legal guarantees of execution of international arbitration decisions are requirements for procedural and actual actions of persons (bodies) authorised by the state, which ultimately lead to such execution. The basis of such guarantees is the adequacy of the subject to which the method is applied. Firstly, the decisions must be made by the arbitrators, whether international or national. Secondly, it concerns commercial disputes. Thirdly, the enforcement of arbitral decisions pertains to those carried out in a state different from the one where recognition and enforcement of such decisions are sought. Fourthly, the enforcement of an arbitration award arises as a result of the unwillingness of the defendant (individual and/or legal entity) to comply with this award voluntarily. Fifth, these awards are final. These criteria emanate from the corresponding specific acts of private international law. It is noteworthy that the titles of existing conventions on international arbitration may explicitly use the term 'execution' since, according to the logic of the term and the content of these legal acts, execution is inherently impossible without recognition, provision of the text of the decision and all other relevant logical operations.

The enforceability of an arbitral award depends on the timely and appropriate actions of the parties to the contract. Even when concluding a foreign economic agreement, the result of an audit of the business partner's reliability in terms of its ability to fulfil its financial and/or other obligations properly should be obtained. Penalties for contract violations represent a guarantee to prevent such breaches. The stage of the grounds for filing a claim in international arbitration emerges to protect one's right violated by the other party (parties) to the contract, signalling the need to use the institution of securing a claim. Seizure of the defendant's property in the amount of the claims and similar measures guarantee the reality of an international arbitration award enforcement. Institutions of liability insurance of the other party under the contract and the possibility of sale and assignment of the debt also become effective means of guaranteeing the fulfilment of the obligations specified in the arbitration decision.

The circumstances of the specific case and the legal reality of each jurisdiction where the decision on this case is planned to be made require an assessment of the absence of distortions of the enforcement proceedings subject. If the degree of such distortions precludes the execution of an international arbitration decision on the territory of a specific state, this method is counterproductive. Legal reality distortions are defined according to the parameters of indices of freedom from corruption, rule of law, freedom of doing business, anthropocentric and/or legally impartial results of judicial practice, etc. Accordingly, it is necessary to find a legal instrument for its neutralisation for each challenge for the actual international arbitration awards enforcement. In a specific region of the state or the state itself, its regional associations (e.g., the EU), quality legislation, and practices of its application serve as such tools. However, at the global level associations of states do not show reliability in the matter of the inevitable execution of arbitral awards. The assessment of the risks of non-implementation of these decisions requires that lawyers take into account the natural asynchrony of the legislative framework formation of each state and the disproportionality of saturation with the content of effective connections between various branches of law (civil and economic, criminal procedural and administrative, etc.), the degree of unification of practices for the implementation of legislative requirements, as well as the level of responsibility for one's actions and other features of the participants in legal relations culture, attitudes towards citizens of other countries, and the like. Relying only on the fact that a state has ratified international arbitration conventions is clearly not sufficient to guarantee the enforcement of such an arbitration award.

The subject of this work is conceptualised as a molecular and, accordingly, an indivisible quantity. The functionality of this magnitude is determined by the necessary number of impulses of its atoms, namely legal (formal and factual), economic, political, spiritual-cultural and other social contexts, as well as the virtues of legal subjects. Their sufficient quantity translates into the desired quality of the ratios of these atoms. The molarity of the studied concept obtained in this way means its viability in each specific case when the party to the dispute seeks to fulfil the international arbitration decision. The lack of components in the concept and/or improper proportions of the ratio of their quantitative and, accordingly, qualitative features exclude the very fact of the existence of the concept – 'international arbitration awards enforcement', denying its nature. The assessment by the parties of an international commercial dispute of only certain aspects, parts, and features of the legal institution and not of its entire system is counterproductive. In this regard, although the phenomenon of atomicity formally-legally assumes the feasibility and necessity of completing the transaction, it ignores the objectively existing external socio-legal connections and influences.

International arbitration is a quasi-judicial body that performs almost the function of justice, and a national court is the only body that can be designated by the term 'court', and its primary function is justice. International commercial arbitration complements the function of justice of national courts in essence but does not acquire such functionality formally. The binding nature of arbitration decisions for implementation within the national

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

legal space gives them legal significance. Simultaneously, failure to comply with these decisions and/or other violations during enforcement proceedings are decided exclusively by national courts, in particular on the territory of the state where such a tort occurs. In fact, arbitration at the stage of execution of its decisions is fully subject to the influence of the public power, both its bodies that enforce arbitration decisions and the courts that administer justice in the field of challenging the illegality of these bodies' actions.

If the level of importance of the social purpose and functionality of arbitration and courts is the same, then ceteris paribus, arbitration shows more advantages than a court. The advantages of national courts increase in those states that are free from corruption and ensure the dominance of the rule of law principle in society. Dynamic and/or large businesses are more interested in arbitration procedures, which, firstly, have the necessary financial and organisational resources for full participation and, secondly, do not have the opportunity to delay the resolution of the dispute, seek to save time to increase profits, rather than wasting it on the laziness of national courts.

The challenges of common law content for international commercial arbitration outlined above determine the prospects of our next scientific searches, namely: 1) resolution of disputes regarding the use of domains, digital technologies and the Internet; circulation of digital currencies; 2) unification of law enforcement practice; 3) fulfilment of environmental requirements of commercial agreements; 4) fulfilment of the requirements of economic contracts regarding energy efficiency.

REFERENCES

1. Balcerzak F, *Renewable Energy Arbitration – Quo Vadis? Implications of the Spanish Saga for International Investment Law* (Nijhoff International Investment Law Series 23, Brill Nijhoff 2023).
2. Behn D, Fauchald OK and Langford M (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022).
3. Bonell MJ and Meyer O (eds), *The Impact of Corruption on International Commercial Contracts* (Ius Comparatum – Global Studies in Comparative Law 11, Springer Cham 2015) doi:10.1007/978-3-319-19054-9.
4. Friedman LM, 'Litigation and Society' (1989) 15 Annual Review of Sociology 17, doi:10.1146/annurev.so.15.080189.000313.
5. Giannakopoulos C, *Manifestations of Coherence and Investor-State Arbitration* (CUP 2023) doi:10.1017/9781009153874.
6. Goldratt EM, *Critical Chain* (North River Press 1997).
7. Gvozdevičs A, 'The Securing a Claim in the Context of Sustainable Development: An Evaluation of the Latvian Experience' (2021) 10(4) European Journal of Sustainable Development 281, doi:10.14207/ejsd.2021.v10n4p281.

8. Mesquita LV and Cebola CM, 'European Small Claims Procedure: An Effective Process? A Proposal for an Online Platform' (2022) 5(2) Access to Justice in Eastern Europe 7, doi:10.33327/AJEE-18-5.2-a000206.

9. Tussupov A, *Corruption and Fraud in Investment Arbitration: Procedural and Substantive Challenges* (European Yearbook of International Economic Law 22, Springer Cham 2022) doi:10.1007/978-3-030-90606-1.

AUTHORS INFORMATION

Oleksii Makarenkov*
Dr. Sc. (Law), Professor, Researcher of Portucalense Legal Institute of Infante D. Henrique Portucalense University, Porto, Portuguese Republic
oleksii@upt.pt
https://orcid.org/0000-0003-0042-165X
Corresponding author, solely responsible for the manuscript preparing.

Lurdes Varregoso Mesquita
Responsible on IJP – Instituto Jurídico Portucalense, Oporto, Portugal
lvm@upt.pt
mlcm@estg.ipp.pt
https://orcid.org/0000-0003-3491-1921
Co-author, responsible for writing and research.

Competing interests: No competing interests were disclosed.
Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free of any impact of any organizations.

ADDITIONAL INFORMATION

This work was supported by the UIDB/04112/2020 Program Contract, funded by national funds through the FCT I.P.

ABOUT THIS ARTICLE

Cite this article
Makarenkov O and Mesquita LV, 'Challenges of Legal Guarantees for the Enforcement of Arbitral Awards in International Commercial Cases' 2024) 7(1) Access to Justice in Eastern Europe 107-26 <https://doi.org/10.33327/AJEE-18-7.1-a000133>

Submitted on 23 Oct 2023 / Revised 21 Nov 2023 / Approved 26 Nov 2023
Published ONLINE: 20 Dec 2023 / Last Published: 1 Feb 2023
DOI https://doi.org/10.33327/AJEE-18-7.1-a000133

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

Keywords: *commercial disputes, contract, corruption, enforcement, international arbitration, rule of law.*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

ADVANCING SUSTAINABLE JUSTICE THROUGH AI-BASED CASE LAW ANALYSIS: UKRAINIAN EXPERIENCE

Iryna Izarova*, Oksana Uhrynovska, Oksana Khotynska-Nor, Yuriy Prytyka, Oleksandr Bedyukh and Yuliia Alendar

ABSTRACT

Background: *Ukraine has a unique Unified State Register of Court Decisions that publishes all court decisions in cases considered and resolved by courts in the public domain. There are more than one hundred million such documents in the register today. This provides unique opportunities for collecting, analysing, and summarising the empirical base of justice. This has the potential to form the basis for further transformation of the national model of justice. This study's impetus may have risen from the realisation that relying solely on human resources for such endeavours may present challenges.*

Methods: *The study is based on the hypothesis that using hardware and software to analyse large data sets of state registers of court decisions and judicial statistics data can identify persistent patterns and causes of inefficient functioning of the judicial system.*

Results and Conclusions: *The study led to the development of software with functionality that annotates court decision text, intended for further use in advanced Natural Language Processing algorithms. Furthermore, the study underscores the need to develop an algorithm for predicting risks and outcomes of court proceedings and a methodology for processing large amounts of data from the Unified State Register of Court Decisions. This is justified based on specific indicators of the effectiveness of dispute resolution. This article advocates for the use of machine learning algorithms as an innovative tool to generalise large data sets from court decision registers, particularly to obtain objective data on a large scale. The article also examines the prerequisites for establishing the Institute of National Judicial Practice and explores its functioning in the present stage of judicial reform.*

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

1 INTRODUCTION

Every year, Ukrainian courts handle over 4 million cases, with the vast majority involving civil matters concerning Ukrainian citizens.[1] The effectiveness of the judicial system is mainly assessed by citizens, which significantly affects the level of their trust in the judiciary and the state power as a whole. According to opinion polls, the majority of citizens do not trust the judiciary.[2]

At the same time, the quality of the administration of justice in Ukraine radically affects its assessment by international organisations and partners. In the World Bank's Doing Business reports, Ukraine ranked 64th out of 190 countries in 2020.[3] In terms of the number of complaints lodged against Ukraine at the ECtHR, the country occupies one of the highest positions, with almost one-third of the decisions made against Ukraine testifying to violations of the length of court proceedings or enforcement of court decisions.[4] Unfortunately, several judicial reforms in Ukraine have not significantly affected the efficiency and quality of the administration of justice and the organisation of justice in the country.[5]

1 'Judicial Statistics' (*Ukrainian Judiciary, 2023)* <https://court.gov.ua/inshe/sudova_statystyka> accessed 4 November 2023.

2 'Citizens' Assessment of the Situation in the Country and the Actions of the Authorities, Trust in Social Institutions (February–March 2023)' (Razumkov Centre, 15 March 2023) <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/otsinka-gromadianamy-sytuatsii-v-kraini-ta-dii-vlady-dovira-do-sotsialnykh-instytutiv-liutyi-berezen-2023r> accessed 4 November 2023; 'Citizens' Assessment of the Situation in the Country, Trust in Social Institutions, Politicians, Officials and Public Figures (May 2023)' (*Razumkov Centre*, 14 June 2023) <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/otsinka-gromadianamy-sytuatsii-v-kraini-dovira-do-sotsialnykh-instytutiv-politykiv-posadovtsiv-ta-gromadskykh-diiachiv-traven-2023r> accessed 4 November 2023.

3 'Ease of Doing Business rankings' (*The World Bank, Doing Business archive,* May 2019) <https://archive.doingbusiness.org/en/rankings> accessed 4 November 2023; 'The World Bank in Ukraine' (The World Bank, 10 October 2023) <https://www.worldbank.org/en/country/ukraine/overview> accessed 4 November 2023; Olga Hetmanets, 'Ukraine has improved its position in the Doing Business ranking' *Economic Truth* (Kyiv, 24 October 2019) <https://www.epravda.com.ua/news/2019/10/24/652904/> accessed 4 November 2023; 'Ukraine has improved its ranking in the Doing Business-2020 ranking' (*State Tax Service of Ukraine*, 24 October 2019) <https://tax.gov.ua/media-tsentr/novini/print-395389.html> accessed 4 November 2023.

4 'Ukraine and the European Court of Human Rights' (*Permanent Representation of Ukraine to the Council of Europe*, 31 August 2021) <https://coe.mfa.gov.ua/spivrobitnictvo/ukrayina-ta-yevropejskij-sud-z-prav-lyudini> accessed 4 November 2023.

5 Oksana Khotynska-Nor, *Theory and Practice of Judicial Reform in Ukraine* (Pravova yednist', Alerta 2016); Oksana Khotynska-Nor and Andrii Potapenko, 'Courts of Ukraine in Wartime: Issues of Sustainable Functioning' (2022) 31 Revista Jurídica Portucalense 218, doi:10.34625/issn.2183-2705(31)2022.ic-09; Yuriy Prytyka and Iryna Izarova (eds), *Access to Justice in Conditions of Sustainable Development: to the 30th Anniversary of Ukraine's Independence* (Dakor 2021); *Judicial Reform in Ukraine: Current Results and Nearest Prospects : Information and Analytical Materials for the Expert Discussion on the topic "Judicial Reform of 2010: does it bring justice in Ukraine closer to European norms and standards?" 4 April 2013* (Razumkov Centre 2013); 'Judicial Reform in Ukraine: A Short Overview' (*DEJURE (Democracy, Justice, Reforms), 7 March 2023)* <https://dejure.foundation/tpost/vrjydyipz1-sudova-reforma-v-ukran-korotkii-oglyad> accessed 4 November 2023.

This underscores the urgent need to search for innovative tools and technologies, which, in particular, can be used to analyse an extensive array of court decisions. Ensuring equal access to justice for all necessitates a constant transformation of the national model of justice to identify and eliminate shortcomings in a timely manner and introduce the most cost-effective dispute resolution procedures – in state courts or out-of-court conciliation procedures. Based on the analysis of a large array of data on court decisions, it is possible to develop a system that assesses the risks of achieving the desired outcome of court proceedings in civil cases. This system aims to increase the percentage of decisions on awarding money, promote the efficiency of the use of budget funds for the maintenance of the judiciary in the state, and establish a foundation for bolstering societal trust in the judicial system.

Based on the above, the proposed project is based on the following hypothesis: employing both hardware and software to analyse extensive amounts of data from state registers of court decisions and judicial statistics to identify persistent patterns and causes of inefficient functioning of the judicial system. This approach forecasts changes in the number of cases, the composition of participants, the number of court costs and other circumstances that directly affect the proper functioning of the judicial system, with the ultimate goal of ensuring equal access to justice for all.

As a result of the study, software with functionality was developed that provides marking of the text of court decisions for further use in deep algorithms of Natural Language Processing.[6] In addition, the need to develop an algorithm for forecasting risks and outcomes of court proceedings, as well as a methodology for processing large amounts of data from the Unified State Register of Court Decisions based on certain indicators of efficiency of dispute resolution, is substantiated.

This article also substantiates the need to use machine learning algorithms for summarising large data sets of court decision registers as an innovative tool, which, in particular, will help to obtain objective data of large volumes. The article also examines the prerequisites for the formation of the Institute of National Judicial Practice and the features of its functioning at the present stage of judicial reform.

2 JUDICIAL PRACTICE IN UKRAINE: FROM JUDICIAL GENERALISATIONS TO AN OPEN DATABASE OF COURT DECISIONS[7]

A retrospective analysis of the decision-monitoring system in Ukraine allows us to comprehensively present the issues surrounding the formation and functioning of the Institute of Judicial Practice and Regulation over several stages since Ukraine's proclamation of independence.

6 For software and intermediate results of text labeling, see: Vitalii Golomozyi, Yuliya Mishura, Iryna Izarova and Tetiana Ianevych, 'Processing Big Data of Court Decisions' (2023) 11(4) Baltic Journal of Modern Computing 580, doi:10.22364/bjmc.2023.11.4.04.

7 Students of Ivan Franko National University of Lviv Andriy Balkovyi, Vadym Katchyk, Yaryna Nechyporuk, Yurii Magey, Marta Parasiuk (specialization "Justice and Court Administration") took part in the preparation of materials on judicial practice for this article.

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

The initial stage in the development of the Institute of Judicial Practice can be conditionally identified between 1991 and 2002. At this stage of state formation, Soviet normative legal acts were temporarily used. This practice persisted until the adoption of pertinent legislation in Ukraine. In instances where Ukrainian legislation did not address certain matters, legislation of the USSR was applied on the territory of the republic, provided that such application did not contradict the Constitution and laws of Ukraine.[8] One of these regulations was the Law of the Ukrainian SSR 'On the Judicial System of Ukraine' No. 2022-X of 5 June 1981.[9] Until 2022, this law defined the legal basis for the activities of courts and the organisation of the judicial system in Ukraine. Additionally, this act did not bypass the generalisation of judicial practice.

Until 1994, the Ministry of Justice of Ukraine and the justice departments of the executive committees of regional and Kyiv City Councils of People's Deputies held the authority to study and summarise judicial practice (para. 4, Part 2 of Art. 19 of the Law of the Ukrainian SSR No. 2022-X as amended in 1992). Subsequently, only the judiciary was engaged in such activities.

During this period, the Supreme Court of Ukraine was vested with special powers. In addition to summarising judicial practice, it guided the courts on the application of republican legislation. Under para. 2, Part 1 of Art. 40 of the Law of the Ukrainian SSR No. 2022-X, the guidelines issued by the Plenum of the Supreme Court of Ukraine were mandatory for courts, as well as other bodies and officials interpreting the relevant law. That is, the legislator directly determined the legal force of the explanations of the Plenum of the Supreme Court of Ukraine.

A systematic analysis of the provisions of the Law of the Ukrainian SSR 'On the Judicial System of Ukraine' No. 2022-X (as amended before 2001) reveals the bodies responsible for generalising judicial practices. These include the district (city) court (Art. 25), the regional Kyiv City Court (Art. 31), the Supreme Court of the Republic of Crimea, the Sevastopol City Court (Art. 31, since 1994), and the Plenum of the Supreme Court of Ukraine (para. 2, Part 1 of Art. 45).

Separately, it is worth noting the existence of military courts in Ukraine during this period, administering justice within the Armed Forces of Ukraine and other military formations provided for by the legislation of Ukraine.[10] These military courts, including those of garrisons, regions and the Navy, were actively involved in studying and generalising judicial practices.

Significant changes to the provisions of the legislation on the judiciary took place following the adoption of the Constitution of Ukraine, a requirement formulated in para. 12 of the

8 Resolution of the Verkhovna Rada of Ukraine No 1545-XII 'On the procedure for the temporary effect on the territory of Ukraine of certain acts of the legislation of the Union of SSR' of 12 September 1991 [1991] Vidomosti of the Verkhovna Rada of Ukraine 46/621.

9 Law of the Ukrainian SSR No 2022-X 'On the Judicial System of Ukraine' of 5 June 1981 [1981] Vidomosti of the Verkhovna Rada of the Ukrainian SSR 24/357.

10 ibid, ch 3-1.

Transitional Provisions of the Constitution of Ukraine.[11] The Law of Ukraine 'On Amendments to the Law of Ukraine 'On the Judicial System of Ukraine' of 21 June 2001, No. 2531-III introduced the system of courts of Ukraine under the requirements of Article 125 of the Constitution.[12]

In line with these amendments, the entrustment of studying and generalising judicial practice was granted to local courts, courts of appeal, high specialised courts, and the Supreme Court of Ukraine. Based on the results of this work, these courts provided advisory clarifications on the application of the law.[13] In this context, the tasks of the Plenum of the Supreme Court of Ukraine to consider the materials of generalisation of judicial practice and judicial statistics and provide explanations to the courts on the application of legislation remained unchanged. The same applied to the chambers of the Supreme Court of Ukraine.

A noteworthy aspect of this legislative act was the empowerment of the Presidium of the Supreme Court of Ukraine, which, previously focused on organising the work of judicial panels and court personnel, acquired the competence to consider materials for the study of judicial practice and analysis of judicial statistics. However, systematic work of the Presidium only commenced in 2003, spanning between 2003-2009. During this time, the Presidium of the Supreme Court of Ukraine considered several issues, including the results of the generalisation of judicial practice in cases of certain categories and the analysis of judicial statistics on the organisation of the work of the Court Chamber for Civil Cases and strategies for its improvement, the establishment of the Scientific Advisory Council at the Supreme Court of Ukraine, approval of its composition and regulations, the introduction of comprehensive familiarisation with the organisation and provision of activities of lower courts, and the evaluation of the administration of justice by individual courts, etc.[14]

It should be added that during this period, the annual cases considered by the courts grew rapidly. Between 1996 and 2001, the number of cases increased by more than 1 million, reaching 2.73 million. At the same time, there was a steady trend towards an increase in the share of civil cases in the total volume of court cases – by more than 600,000 during the period under review, and administrative cases showed a rise of 700,000.[15] By 2002, the total number of cases under consideration by courts of general jurisdiction exceeded 4 million,

11 Constitution of Ukraine No 254 k/96-BP of 28 June 1996 (as amended of 01 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 4 November 2023.

12 Law of Ukraine No 2531-III 'On Amendments to the Law of Ukraine "On the Judicial System of Ukraine"' of 21 June 2001 [2001] Vidomosti of the Verkhovna Rada of Ukraine 40/191.

13 Explanation of the Supreme Commercial Court of Ukraine No 04-5/563 'About Some Issues of the Practice of Reviewing Decisions, Resolutions, and Resolutions Based on Newly Discovered Circumstances' of 21 May 2002 <https://zakon.rada.gov.ua/laws/show/v_563600-02#Text> accessed 4 November 2023; VS Moskalenko and VP Selivanenko, *Collection of Explanations of the Supreme Commercial Court of Ukraine* (DM Prytyka ed, 2nd edn, In-Jure 2003).

14 Examples of resolutions of the Presidium can be found on the website of the Supreme Court of Ukraine, which was in force until 2017: Supreme *Court of Ukraine* <https://www.viaduk.net/clients/vs.nsf/0/56BFC627FF8E56A5C2256CE10051B54A?OpenDocument> accessed 4 November 2023.

15 'Materials of the V Congress of Judges of Ukraine' (*Ukrainian Judiciary*, 24 October 2002) <https://court.gov.ua/sudova-vlada/969076/67856767> accessed 4 November 2023.

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

with a remarkably swift increase in civil cases. In 1992, there were 518,000 cases; by 2002, this number had risen to 1.6 million.[16]

As of 22 October 2002, the total number of local courts, which was legally envisaged in Ukraine then, was approximately 700 courts of first instance,[17] where about 21.8% of judicial positions remained vacant. The persistent staff shortages and several other systemic problems adversely affected the state of administration of justice by local courts. This is evidenced by statistics indicating that 19.5% of civil cases in 2002 were handled in violation of procedural deadlines.[18]

Accordingly, the above clearly underscores the significant rise in the volume of information and cases considered by the courts, juxtaposed against the unchanging number of courts up to the present day. As of the beginning of 2022, there are 674 courts of appeal and local courts in Ukraine,[19], and this has had a notably adverse impact on the quality of their administration of justice.

The second stage of the Institute of Judicial Practice development occurred between 2002 and 2010. In February 2002, the Law of Ukraine 'On the Judicial System of Ukraine' was adopted.[20] This law incorporated the Court of Cassation of Ukraine in the system of courts of general jurisdiction, granting it the authority to maintain and analyse judicial statistics and study and generalise judicial practice. However, a significant development occurred with the Constitutional Court of Ukraine's decision on 11 December 2003 regarding the constitutionality of the provisions establishing the Court of Cassation of Ukraine within the general jurisdiction court system.[21] This decision rendered those provisions unconstitutional in Ukraine, excluding one subject from the process of analysis of judicial practice and judicial statistics.

The new law also deprived local courts of general jurisdiction and the authority to generalise case law, a move attributed to the overwhelming caseload of the courts of the first instance. Notably, as of 2002, cases arising from administrative-legal relations were considered in civil proceedings by local general courts. In this regard, there arose a need to establish a separate link of courts of administrative jurisdiction.

16 Resolution of the Presidium of the Supreme Court of Ukraine, the Presidium of the Council of Judges of Ukraine and the Collegium of the State Judicial Administration of Ukraine No 17 'On the state of administration of justice in 2002 and tasks for the current year' of 12 March 2003 <https://zakon.rada.gov.ua/laws/show/v0017700-03#Text> accessed 4 November 2023.

17 Decree of the President of Ukraine No 641/2001 'On the Network and Quantitative Composition of Judges of Local Courts' of 20 August 2001 (as amended of 22 October 2002) <https://zakon.rada.gov.ua/laws/show/641/2001/ed20011018/conv#Text> accessed 4 November 2023.

18 Resolution of the Presidium of the Supreme Court of Ukraine and others No 17 (n 16).

19 'Report on the Activities of the State Judicial Administration of Ukraine for 2022' (State Judicial *Administration of Ukraine, March 2023)* <https://dsa.court.gov.ua/dsa/pokazniki-diyalnosti/1233/zvit_dsa_22> accessed 4 November 2023.

20 Law of Ukraine No 3018-III 'On the Judicial System of Ukraine' of 7 February 2002 [2002] Vidomosti of the Verkhovna Rada of Ukraine 27-28/180.

21 Case No 1-38/2003 *On the Court of Cassation of Ukraine* (Constitutional Court of Ukraine, 11 December 2003) [2003] Official Gazette of Ukraine 51/ 2705.

On 16 November 2004, the Decree of the President of Ukraine 'On the Establishment of Local and Appellate Administrative Courts, Approval of Their Network and Number of Judges'[22] was issued. Subsequently, on 1 September 2005, the Code of Administrative Procedure of Ukraine came into force, marking the commencement of human rights protection in the sphere of public relations through administrative proceedings.[23] In practical terms, the administrative courts officially began their work in 2007. The number of administrative cases considered witnessed a substantial increase from 132,239 in 2006 to 196,403 in 2007. That is, in one year, the number of considered administrative cases increased by 48.52% – the highest figure compared to other jurisdictions.[24]

The establishment of administrative courts significantly reduced the burden not only on local general courts but also on general courts of appeal by almost two-thirds.[25] According to the 2008 statistics, each judge in the general court of appeal received 9.6 cases and materials per month (compared to 11.3 cases in 2007).[26] During this period, the courts of appeal retained the authority to generalise judicial practice.

The law in question additionally empowered the higher specialised courts to provide methodological assistance to the lower courts for the uniform application of the provisions of the Constitution of Ukraine and laws in judicial practice based on their generalisations and analysis of judicial statistics. Additionally, the higher specialised courts provide lower-level courts with advisory explanations on the application of legislation in resolving cases of the relevant judicial jurisdiction. The Presidium of the High Specialized Court was also empowered to adopt relevant recommendations based on the results of the generalisation of judicial practice.

The third stage of the development of the Institute of Judicial Practice in Ukraine is associated with the period from 2010 to 2016. On 7 July 2010, the Law of Ukraine 'On the Judiciary and the Status of Judges' was adopted[27], abolishing the authority of the Plenum of the Supreme Court of Ukraine to generalise judicial practice. Instead, the Plenary Sessions of High Specialized Courts acquired broad powers in this domain.

22 Decree of the President of Ukraine No 1417/2004 'On the Establishment of Local and Appellate Administrative Courts, Approval of their Network and the Quantitative Composition of Judges' of 16 November 2004 <https://zakon.rada.gov.ua/laws/show/1417/2004#Text> accessed 4 November 2023.

23 Code of Administrative Legal Proceedings of Ukraine No 2747-IV of 6 July 2005 [2005] Official Gazette of Ukraine 32/1918.

24 Review of Data on the State of Administration of Justice by Local and Appellate Courts in 2007' (*Ukrainian Judiciary*, 2008) <https://court.gov.ua/inshe/sudova_statystyka/166666> accessed 4 November 2023.

25 ibid.

26 "Review of Data on the State of Administration of Justice in 2008' (*Ukrainian Judiciary*, 2009) <https://court.gov.ua/inshe/sudova_statystyka/345345457> accessed 4 November 2023.

27 Law of Ukraine No 2453-VI 'On the Judicial System and the Status of Judges' of 7 July 2010 [2010] Official Gazette of Ukraine 55-1/1900.

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

In accordance with para. 2 and 6, Part 2 of Art. 36 of the said Law, the Plenum of the High Specialized Court is mandated to:

- ensure the uniform application of the rules of law in the resolution of certain categories of cases of the relevant judicial specialisation, generalise the practice of application of substantive and procedural laws, systematise and ensure the publication of legal positions of the high specialised court regarding the court decisions in which they were formulated;
- offer advisory explanations on the application of legislation by specialised courts in resolving cases of relevant judicial specialisation based on the analysis of judicial statistics and the generalisation of judicial practice.[28]

In the preceding Law of Ukraine 'On the Judicial System of Ukraine' of 2002, the Plenum of the Supreme Court of Ukraine had the authority not only to provide explanations to courts of general jurisdiction but also, if necessary, invalidate the relevant explanations of higher specialised courts.[29] The Law of Ukraine 'On the Judiciary and the Status of Judges' of 2010 entirely removed such powers and transferred them to high specialised courts.

It should be noted that during this period, the burden on the judicial system increased significantly. In 2010, local courts of general jurisdiction received 2.4 million applications in civil cases – 30.1% more than in 2009.[30]

At the end of this period, the situation looked somewhat more optimistic, as evidenced by the number of cases submitted to local courts of general jurisdiction in 2016. This amounted to 1.2 million materials of civil proceedings and 669,000 cases of administrative offences. [31] Notably, a portion of these cases can be linked to the emergence in 2014 of territories temporarily not controlled by Ukraine and, accordingly, a certain decrease in litigation due to this. Nevertheless, the critical workload on judges persisted, averaging around 36 new cases and materials per judge per month, encompassing civil, administrative, and cases on administrative offences.[32]

During this period, a significant development was the creation of the Unified State Register of Court Decisions in Ukraine – an automated system for collecting, storing, protecting, recording, searching and providing electronic copies of court decisions. These decisions are openly accessible for free around the clock on the official web portal of the judiciary of Ukraine.

28 ibid.

29 Law of Ukraine No 3018-III (n 20).

30 'Analysis of the State of Judicial Proceedings by Courts of General Jurisdiction in 2010 (according to judicial statistics)' (*Supreme Court of Ukraine, 2011)* <https://www.viaduk.net/clients/vsu/vsu.nsf/(documents)/7E0CBF357826A9DDC2257B7B00510448> accessed 4 November 2023.

31 'Analysis of the State of Judicial Proceedings in 2016 (according to judicial statistics)' (*Supreme Court of Ukraine*, 2017) <https://www.viaduk.net/clients/vsu/vsu.nsf/(documents)/FC0243F91293BFEEC22580E400478576> accessed 4 November 2023.

32 Supreme Court of Ukraine, *The State of the Administration of Justice in Ukraine in 2016 (Processed Statistical Data of the State Judicial Administration of Ukraine, Higher Specialized Courts, the Supreme Court of Ukraine): Statistical Collection* (Supreme Court 2017).

Under the Law of Ukraine 'On Access to Court Decisions' of 22 December 2005, No. 3262-IV, the procedure for access to court decisions was determined to ensure the transparency of the activities of courts of general jurisdiction, the predictability of court decisions and the promotion of uniform application of legislation. This was particularly facilitated through the introduction of the Unified State Register of Court Decisions.[33]

The Register includes court decisions from various levels of the judiciary, including the Supreme Court of Ukraine, high specialised, appellate and local courts. These decisions comprise verdicts, resolutions, orders, rulings, and separate court rulings (rulings) adopted (ruling) by courts in criminal, civil, and economic cases, in cases of administrative jurisdiction, and cases of administrative offences. However, court decisions containing information classified as state secrets are excluded from the Register.

In the initial years of the Register's operation, 340,000 decisions were recorded in 2006, surpassing more than 1 million in 2007. Currently, the Register contains more than 106 million court decisions.[34]

The next period marks the contemporary period in the development of the Institute of Judicial Practice, commencing in 2016. This pivotal year saw the Verkhovna Rada of Ukraine adopt the new Law of Ukraine titled 'On the Judiciary and the Status of Judges'.[35] According to the provisions of this Law, the generalisation of judicial practice is now carried out by the Grand Chamber of the Supreme Court (in Art. 45) alongside the high specialised courts (in Art. 32(1)(2)) and the courts of appeal (in Art. 27(1)(2)) with the mandatory notification of the Supreme Court. Notably, the Plenum of the Supreme Court no longer possess the authority to provide generalisations of judicial practice (in Art. 46). The court chambers of the Court of Cassation are now tasked solely with analysing judicial statistics and studying judicial practice, as per sub-para. 2, para. 1 of Century. 44 of the Law.

Therefore, with the enactment of this Law, the courts of cassation (CAP, CCC, CCC, CCC) compared to their 'predecessors' (the High Commercial Court of Ukraine, the High Specialized Court of Ukraine, the High Administrative Court of Ukraine) lost the authority to generalise judicial practice. Instead, such powers were transferred to the Grand Chamber of the Supreme Court.

On 3 October 2017, the Verkhovna Rada of Ukraine adopted the Law of Ukraine No. 2147-VIII, which, among other things, introduced amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges'.[36] The changes included the addition of Part 2 of Art. 46 para. 10-1,

33 Law of Ukraine No 3262-IV 'On Access to Court Decisions' of 22 December 2005 [2006] Vidomosti of the Verkhovna Rada of Ukraine 15/128.

34 'State judicial administration of Ukraine: Data Sets' (*Open Data Portal, 2023)* <https://data.gov.ua/organization/b5ee25dd-1516-4a2a-a9cb-7afb5e8ec61a?license_id=cc-by&_tags_limit=0> accessed 4 November 2023.

35 Law of Ukraine No 1402-VIII 'On the Judicial System and the Status of Judges' of 2 June 2016 [2016] Vidomosti of the Verkhovna Rada of Ukraine 31/545.

36 Law of Ukraine No 2147-VIII 'On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine, and other legislative acts' of 3 October 2017 [2017] Vidomosti of the Verkhovna Rada of Ukraine 48/436.

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

which states that the Plenum of the Supreme Court, in order to ensure the uniform application of the rules of law in resolving certain categories of cases, generalises the practice of applying substantive and procedural laws, systemises and ensures the publication of legal positions of the Supreme Court with reference to the court decisions in which they were formulated. Despite this legislative change explicitly providing for the authority of the Plenum of the Supreme Court to summarise judicial practice, it has never utilised this tool. The Grand Chamber of the Supreme Court, high specialised courts, and appellate courts retained the authority to generalise judicial practice.

In 2018, the Supreme Court initiated the issuance of summaries of its practice through Digests[37] and Judicial Practice Reviews.[38]

The primary difference between these two forms lies in the subject of their publication: the authorship of the Digests belongs to the Grand Chamber of the Supreme Court, while all Cassation Courts conduct the Reviews of Judicial Practice. Under para. 3, Part 2 of Art. 45 of the Law of Ukraine 'On the Judiciary and the Status of Judges', the Grand Chamber of the Supreme Court, among other responsibilities, analyses judicial statistics, studies judicial practice, and generalises judicial practice. Since 2018, this legally enshrined authority of the Grand Chamber has been implemented in the form of two types of generalisations of judicial practice – thematic and periodic.

Let us consider the generalisations published from 2018 to the present day.

As of now, the Supreme Court's website features digests of judicial practice compiled by the Grand Chamber of the Supreme Court, collected since the fall of 2018. These digests are typically published at an approximate frequency of publication of one per month. Also, in addition to the monthly digests, the Grand Chamber compiles a consolidated digest of its practice for each year and every six months.

As for the thematic structuring of such generalisations, for the convenience of using digests, the Grand Chamber has opted for a criterion based on the rationale for considering cases in which the position of the Supreme Court was formulated. Notably, the content of these digests includes the following categories:

1) cases considered on the grounds of the existence of an exclusive legal problem;
2) cases considered on the grounds of the need to deviate from the legal opinion of the Supreme Court of Ukraine;

37 Supreme Court of Ukraine, *Digest of Judicial Practice of the Grand Chamber of the Supreme Court: Decisions Entered in the Unified State Register of Court Decisions from 29/10/2018 to 02/11/2018* (Supreme Court 2018); Supreme Court of Ukraine, Digest of the Legal Positions of the Grand Chamber of the Supreme Court on the right, in which the GCh SCU came as a result of the reinstatement of the rules of law in similar legal positions, presented in previously praised decisions to the SCU or the GCh SCU, which confirmed their 2018–2020 fates*: Decisions Entered in the USRCD from 01/01/2018 to 10/03/2020* (Supreme Court 2020).

38 Supreme Court of Ukraine, *Review of the Judicial Practice of the Civil Court of Cassation as part of the Supreme Court: Decisions Entered in the USRCD for January 2020* (Supreme Court 2020); Supreme Court of Ukraine, *Review of the Judicial Practice of the Civil Court of Cassation as part of the Supreme Court in Cases of Compensation for Material Damage Caused by an Employee to an Enterprise, Institution, or Organization: Decisions Entered in the USRCD from* 2018 to July 2023 (Supreme Court 2023).

3) cases considered on the grounds of the need to deviate from the previously expressed legal opinion of the Supreme Court;
4) cases considered on the grounds of the need to determine jurisdiction;
5) claims that are not subject to judicial review.[39]

Each of these groups consists of subdivisions that depend on the type of judicial jurisdiction – administrative, commercial, criminal or civil.

Continuing the review of the generalisations by the Grand Chamber of the Supreme Court, it is noteworthy to consider digests formed not by the temporal criterion but by thematic focus. These include the Digest of the Grand Chamber of the Supreme Court in Criminal Proceedings (Cases), cases of disputes arising from land relations, and cases in which the Grand Chamber of the Supreme Court deviated from the conclusions on the application of the rules of law in similar legal relations set out in previously adopted decisions of the Supreme Court of Ukraine or the Grand Chamber of the Supreme Court.

In addition to the Grand Chamber's digests, reviews are also formed by the Administrative, Civil, Commercial and Criminal Courts of Cassation within the Supreme Court. Such reviews, akin to the Grand Chamber digests, are periodic and thematic. The criterion for dividing judicial practice in reviews is the case category. For example, analysing the monthly reviews of the Civil Court of Cassation within the Supreme Court, one can find content related to defamation disputes, matters concerning dignity and business reputation, disputes arising from transactions (including contracts) and disputes arising from labour relations, etc.[40]

Some thematic reviews are also typical for cassation courts within the Supreme Court. Examples include a review of the case law of the Civil Court of Cassation within the Supreme Court concerning compensation for material damage caused by an employee to an enterprise, institution, organisation; a review of the case law of the Civil Court of Cassation within the Supreme Court regarding cases in disputes arising from inheritance legal relations; and a review of the case law of the Civil Court of Cassation within the Supreme Court in cases of appealing against decisions of arbitration courts and granting permission to enforce decisions of arbitration courts. Notably, these thematic reviews primarily cover decisions from 2018 to the present day, indicating a fairly thorough approach and a significant review of the material from a temporal perspective, providing a high-quality sample of the legal positions of the Supreme Court.

To ensure the unity and consistency of judicial practice of the Civil Cassation Court in the first half of 2023, ten reviews of judicial practice were published – six monthly, two consolidated and two thematic.[41] These reviews possess a peculiarity as they contain only brief descriptions of legal opinions with reference to the Unified State Register of Court

39 Supreme Court of Ukraine, *Digest of Judicial Practice of the Grand Chamber of the Supreme Court for the first half of 2023: Decisions Entered in the USRCD from 01/01/2023 to 30/06/2023* (Supreme Court 2023).

40 Supreme Court of Ukraine, *Review of the Judicial Practice of the Civil Court of Cassation as part of the Supreme Court (current practice): Decisions Entered in the USRCD for July 2023* (Supreme Court 2023).

41 'Reviews of Judicial Practice of Cassation Courts' (*Ukrainian Judiciary, Supreme Court, 2023)* <https://supreme.court.gov.ua/supreme/pokazniki-diyalnosti/analiz/> accessed 4 November 2023.

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

Decisions. This allows a quick and easy familiarisation with the most current judicial practice of the Grand Chamber of the Supreme Court. It is important to note that such digests do not serve as standalone legal acts of the supreme body of the judiciary that can be cited in the enforcement of law but rather as a means to aggregate all positions of the Grand Chamber of the Supreme Court or each court of cassation within the Supreme Court for a certain period or in a particular thematic direction. This aims to facilitate a more convenient search by law enforcement officers for this practice. Modern generalisations are not a source of law and do not claim to be a foundation for forming new legal conclusions by the highest court of Ukraine.

Most recently, the Supreme Court has unveiled its development strategy for 2023-2027 online. One of the problems highlighted in the strategy addresses the 'inconvenient ways of bringing legal opinions to the attention of judges, other lawyers, and the public – the release of digests and reviews is chaotic, difficult to find on the website, not everyone takes the time to get acquainted with them; Not all practice is included in the specialised digests, at the time of the digest's publication it is already outdated because it does not cover new positions, there is no analytics in the digest – only legal positions.'[42]

It should be noted that compared to the above data from 2016, local courts of general jurisdiction received 648,000 civil cases, 702,000 cases of administrative offences, and 21,000 administrative cases in 2022.[43] Moreover, the administration of justice has become more complicated as a result of the full-scale invasion of the Russian Federation on the territory of Ukraine. By the end of 2022, the jurisdiction of 169 local and appellate courts (including 84 local courts, the jurisdiction of which was transferred from 2014 to 2022) was changed, constituting more than 22% of the total number of local and appellate courts. As a result, over one-fifth of local and appellate courts have not submitted annual statistical reports, complicating the derivation of objective indicators.[44]

The retrospective analysis demonstrates the necessity for a systematic search for new tools to ensure the effective study and generalisation of judicial practice in Ukraine. One potential tool, in particular, could be automated services for processing court decisions, namely large databases of court decisions from the Unified State Register of Court Decisions.

42 Development Strategy of the Supreme Court for 2023–2027 (draft as of May 2023) <https://drive.google.com/file/d/1pFBJyBAfrCCoopnHEOS5WFFq0ANSBk-t/view> accessed 4 November 2023.

43 'Judicial Statistics, 2022' (*Ukrainian Judiciary, 2023)* <https://court.gov.ua/inshe/sudova_statystyka/zvit_dsau_2022> accessed 4 November 2023.

44 'The State Judicial Administration of Ukraine Published Statistics on the State of Justice in 2022 under Martial Law' (*Ukrainian Judiciary*, 17 February 2023) <https://court.gov.ua/press/news/1384043/> accessed 4 November 2023.

3 DATABASES OF COURT DECISIONS OF THE UNIFIED STATE REGISTER OF COURT DECISIONS OF UKRAINE: PROBLEM OR SOLUTION?

The Law of Ukraine of 21 November 2002 approved the Concept of the National Programme for the Adaptation of Ukrainian Legislation to the Legislation of the European Union. Section III of this concept outlined establishing a national information network of court decisions to ensure access to examples of judicial practice and the possibility of public discussion.[45]

Subsequently, by Resolution No. 2 of the Presidium of the Supreme Court of Ukraine, the Presidium of the Council of Judges of Ukraine and the Collegium of the State Judicial Administration of Ukraine of 18 February 2005, the State Judicial Administration was instructed to introduce a register of court decisions with the creation of an appropriate database in the computer network and to provide access to it in accordance with the procedure established by law.[46]

On 22 December 2005, the Law of Ukraine 'On Access to Court Decisions' was adopted.[47] In compliance with this law, the State Judicial Administration opened the Unified State Register of Court Decisions (hereinafter referred to as the USRCD or the Register) for access to court decisions of courts of general jurisdiction on 1 June 2006. The Unified State Register of Court Decisions is an automated system for collecting, storing, protecting, recording, searching and providing electronic copies of court decisions.

By its Resolution No. 740 of 25 May 2006, the Cabinet of Ministers of Ukraine approved the Procedure for maintaining the USRCD.[48] This procedure, in particular, outlined the process of forming and maintaining the USRCD, including the entry of all court decisions from general jurisdiction courts and individual opinions of judges set out in writing into the Register. Control over sending electronic copies of court decisions to the Register's administrator was the responsibility of the head of the court, who was entrusted with personal accountability established by law.

The legal basis determining the procedure for the formation and maintenance of the Register has undergone changes. On 19 April 2018, the High Council of Justice adopted Decision No. 1200/0/15-18, which approved, as of today, the Procedure for maintaining the Unified State Register of Court Decisions, sub-para. 3, para. 1 of which of the state enterprise

45 Law of Ukraine No 228-IV 'On the Concept of the National Program for the Adaptation of the Legislation of Ukraine to the Legislation of the European Union' of 21 November 2002 [2003] Vidomosti of the Verkhovna Rada of Ukraine 3/12.

46 Resolution of the Presidium of the Supreme Court of Ukraine, the Presidium of the Council of Judges of Ukraine and the Collegium of the State Judicial Administration of Ukraine No 2 'On the State of Administration of Justice in 2004 and Tasks for 2005' of 18 February 2005 <https://www.viaduk.net/clients/vs.nsf/0/2FEC892F873B73FEC3256FE2001EF898?OpenDocument&CollapseView&RestrictToCategory=2FEC892F873B73FEC3256FE2001EF898&Count=500&> accessed 4 November 2023.

47 Law of Ukraine No 3262-IV (n 33).

48 Resolution of the Cabinet of Ministers of Ukraine No 740 'On the Approval of the Procedure for Maintaining the Unified State Register of Court Decisions' of 25 May 2006 [2006] Official Gazette of Ukraine 22/1623.

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

'Information Judicial Systems', referred to the sphere of management of the State Judicial Administration of Ukraine, is determined by the administrator of the register.[49]

In addition, it should be noted that the order of the SJA of Ukraine dated 14 June 2022, No. 178, approved the sectoral Program for Informatization of Local and Appellate Courts and the project for building the Unified Judicial Information and Telecommunication System for 2022-2024. Annex No. 1 to this document is the Concept for Building the Unified Judicial Information and Telecommunication System (UJITS) in a new edition (hereinafter referred to as the Concept).[50] The UJITS has several modules, one of which is the USRCD, designed for convenient search of court decisions.

As stated in the Concept, the USRCD is one of the functional subsystems (modules) within the UJITS. USRCD serves as a software product designed to replace the outdated accumulation, storage, protection, search and review of electronic copies of court decisions and individual opinions of judges. Its purpose is to process electronic copies of court decisions entered in the register, allowing for the storage of full texts as well as impersonal electronic copies of court decisions, automatically masking information that cannot be disclosed in accordance with the law.

It should also be noted that the implementation of transparency and publicity of the work of state bodies, including the judiciary, is facilitated by the creation and support of open public registers by the state, in particular the Open Data Portal, [51] a project aimed at providing free and free access to data received by state bodies, in particular, the State Judicial Administration of Ukraine. Analysis, processing and use of information from the Open Data Portal is the basis for the functioning of many services and applications: YouControl, Opendatabot, PravoSud and many others for various purposes.[52]

The legal basis that made it possible to launch and operate the Open Data Portal was the Regulation on Data Sets to be Published in the Form of Open Data, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 835 of 21 October 2015. This regulation defines the requirements for the format and structure of data sets to be published in the form of open data, including the frequency of updates and the procedure for their publication. It also includes the list of data sets to be published as open data,[53] specifying the

49 Decision of the High Council of Justice No 1200/0/15-18 'On the Approval of the Procedure for Maintaining the Unified State Register of Court Decisions' of 19 April 2018 <https://zakon.rada.gov.ua/rada/show/v1200910-18#Text> accessed 4 November 2023.

50 Order of the State Judicial Administration of Ukraine No 178 'On Approval of the Sectoral Program for the Informatization of Local and Appellate Courts and the Project for the Construction of the Unified Judicial Information and Telecommunication System for 2022–2024' of 14 June 2022 <https://zakon.rada.gov.ua/rada/show/v0178750-22#doc_info> accessed 4 November 2023.

51 *Open Data Portal* <https://data.gov.ua> accessed 4 November 2023.

52 'Services' (*Dija. Open Data, 2023)* <https://diia.data.gov.ua/services> accessed 4 November 2023.

53 Resolution of the Cabinet of Ministers of Ukraine No 835 'On the Approval of the Regulation on Data Sets to be Made Public in the form of Open Data' of 21 October 2015 [2015] Official Gazette of Ukraine 85/2850.

composition and type of such data for each information administrator according to their competence. For example, the State Judicial Administration is obliged to publish in the form of open data information on the details for the payment of court fees, judicial statistics, a list of courts with details, information on the stage of consideration of court cases, a list of court cases scheduled for consideration, information on bankruptcy cases, protocols of automated distribution of court cases among judges, as well as entering information into the Unified State Register of Court Decisions.

The project's rapid development and continuous improvement have positioned Ukraine as a leader in the pace of development of open data. Thus, in 2020, Ukraine took 17th place in the European Open Data Maturity ranking, surpassing several European countries with an open data maturity figure of 84%, compared to the European average of 78%.[54] Subsequently, in 2021, Ukraine was ranked 6th, and in 2022, it secured 2nd place. This impressive progression underscores the country's rapid and sustainable growth in the field of open data, even amid challenging security and political-economic conditions.

The 'Court in the Palm' stands out as an analytical tool for searching, researching and visualising court decisions. Developed as a legal startup by the private company MA Promedia Consulting LLC, this service utilises public data to offer a range of functionalities.[55] Users can view court decisions conveniently, study certain categories of cases, and apply filters not inherent in the Unified Register of Court Decisions. These filters enable users to choose the desired characteristics of a court decision, not only to search for a certain cost of the claim, a specific party or participant in the case, etc. Additionally, 'Court in the Palm' includes the WINCOUR Court Document Analyzer, allowing users to predict potential case outcomes.

The innovative approach of 'Court in the Palm' service was recognised as one of the top three winners in the Open Data Challenge 2017. The competition was held by the USAID/UK aid project 'Transparency and Accountability in Public Administration and Services/TAPAS' of the Eurasia Foundation, contributing to the official launch of the service at the end of 2018.[56]

54 'The Center of Competences "Dija. Open Data" Started Working in Ukraine' (*Government Portal*, 18 May 2021) <https://www.kmu.gov.ua/news/v-ukrayini-zapracyuvav-centr-kompetencij-diya-vidkriti-dani> accessed 4 November 2023.

55 *Court on the Palm* <https://conp.com.ua> accessed 4 November 2023.

56 USAID and UK aid, 'Court on the Palm: Analyze Court Rulings in Just a Few Clicks' (*Transparency and Accountability in Public Administration and Services/TAPAS,* 18 December 2019) <https://tapas.org.ua/all-uk/blogs-uk/sud-na-doloni-analiz-sudovykh-rishen-u-kilka-klikiv/> accessed 4 November 2023.

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

4 AI FOR LITIGATION RESEARCH NEEDS

The effective functioning of the judiciary is the basis of the modern rule of law, necessitating Ukraine to fulfil its international obligations following the signing of the Association Agreement with the EU[57] and the establishment of a comprehensive Free Trade Area.[58] Economic development hinges on the stable and proper functioning of judicial and law enforcement agencies, which is crucial for ensuring effective protection of the rights of participants in these relations. Ukrainian society holds hope for the restoration of trust in the judiciary, responsibility for law enforcement and the proper functioning of mechanisms for resolving private law disputes.

Artificial intelligence has the potential for application across various fields of human activity. With a consistent and moderate strategic course, its introduction to data collection and analysis of large amounts of data provides unique opportunities for generalising experiences and predicting future circumstances. In recent years, Ukraine has been gradually introducing some aspects of artificial intelligence, modern information and communication technologies into the circulation of state bodies (e.g., Diia, unified state registers).[59] A broader introduction of e-justice and communication between state bodies, as well as between bodies of different states, is expected (the program of digitalisation of justice in the EU).[60]

In our opinion, the need to analyse large data sets of the State Register of Court Decisions necessitates the introduction of such mechanisms that will ensure the transparency of the functioning of the justice system and the openness of information about the course of the case and the execution of the court decision. This approach will equip the systems with enhanced functionality, enabling more effective strategies for effective dispute resolution.

The collection and analysis of data from the State Register of Court Decisions should be based on certain objective principles indicators that will be used to assess the judicial activity and behaviour of participants in the process for efficiency, proportionality of costs and time, as well as risks of enforcement of the court decision and/or achievement of the expected result.

57 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part of 27 June 2014 <http://data.europa.eu/eli/agree_internation/2014/295/oj> accessed 4 November 2023.

58 'Implementation of a Deep and Comprehensive Free Trade Area with the European Union: New Opportunities for Business and Investors' (*Embassy of Ukraine in the Republic of Serbia*, 16 June 2014) <https://serbia.mfa.gov.ua/news/1663-zaprovadzhennya-pogliblenoji-ta-vseohoplyujuchoji-zoni-vilynoji-torgivli-z-jevropejsykim-sojuzom-novi-mozhlivosti-dlya-biznesu-ta-investoriv> accessed 4 November 2023.

59 *Dija. Open Data* (n 52); 'Unified and State Registers' (*Ministry of Justice of Ukraine, 2023)* <https://minjust.gov.ua/m/edini-ta-derjavni-reestri> accessed 4 November 2023.

60 Roman Smalyuk and Tetjana Ruda, 'Accessibility, Digitalization, Trust: 3D Ukrainian Justice on the Way to the EU' (*Centre of Policy and Legal Reform*, 2 December 2022) <https://pravo.org.ua/blogs/dostupnist-didzhytalizatsiya-dovira-3d-ukrayinskogo-pravosuddya-na-shlyahu-do-yes/> accessed 4 November 2023.

Bringing the data of the State Register of Court Decisions to a form suitable for statistical processing will make it possible to conduct an in-depth analysis of court cases, predict various indicators, identify patterns and draw conclusions based on a significant amount of data from court decisions. The fact that the most valuable information in the State Register of Court Decisions is presented as texts of court decisions makes it very difficult to process. It is impossible to process an array of more than 100 million. Court decisions use only human intellectual resources – it takes too much time and resources. Therefore, hardware and software for analysing large data sets will make it possible to study and analyse information from the state register more efficiently and quickly and based on a scientific approach.

By transferring information from a text format to a statistical format through advanced Natural Language Processing algorithms, coupled with a preliminary procedure for labelling texts, researchers, government officials, journalists, and all interested persons can effectively utilise information related to court decisions in their research and decision-making. This approach aims to improve their approach to the functioning of the judicial system.

For this purpose, within the framework of the project, a program was developed to download arrays of open data in text format from the register of court decisions. Additionally, a program was launched to form a raw sample of several thousand cases and store it on the server. Another component of the project involved preparing a program for annotating parts of the court decision texts to enable persons to independently recognise the necessary information in the text in the future and translate it into a (numerical) format suitable for analysis.[61]

The study utilised court decisions from the Unified State Register of Court Decisions of Ukraine, which, as of 27 June 2023, contained more than 109 million court decisions.[62] The Law of Ukraine 'On Access to Court Decisions'[63] defined the procedure for accessing court decisions to ensure the transparency of general jurisdiction court activities, the predictability of court decisions, and the promotion of uniform application of legislation.[64] Accordingly, courts of general jurisdiction are obliged to input all court decisions and written dissenting opinions of judges into the Register no later than the next day after their adoption or production of the full text.

It should be noted that court decisions, in accordance with the procedural codes of Ukraine, encompass court rulings, court decisions, resolutions and court orders (Code of Civil Procedure, Article 258 and others).[65] As a result, the Register stores all court decisions in the case, from the decision to initiate proceedings to the final court decision.

61 See. For more information, see Golomozyi and others (n 6).

62 *Unified State Register of Court Decisions* <https://reyestr.court.gov.ua> accessed 4 November 2023.

63 Law of Ukraine No 3262-IV (n 33).

64 Taras Lesyuk, 'The Activities of the Judiciary Will Become More Transparent' *Legal Newspaper* (Kyiv, 19 January 2005) 5 <https://pravo.org.ua/diyalnist-sudovoyi-vlady-stane-prozorishoyu/> accessed 4 November 2023; 'The Register of Court Decisions Should Work Better' (*Centre of Policy and Legal Reform*, 3 September 2009) <https://pravo.org.ua/reyestr-sudovyh-rishen-maye-pratsyuvaty-krashhe/> accessed 4 November 2023.

65 Code of Civil Procedure of Ukraine No 1618-IV of 18 March 2004 (as amended of 4 November 2023) <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 4 November 2023.

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

At the same time, in our opinion, the procedural rulings of the court hold primary interest for forecasting and analysing the effectiveness of the judicial system, as they mediate the specific circumstances influencing the case outcome.

To avoid violating Section XVI of the Criminal Code of Ukraine, which addresses crimes related to the use of electronic computers, systems, computer networks and telecommunication networks, [66] the study utilised data sets available on the Unified State Web Portal of Open Data.[67] This portal is a project aimed at providing unrestricted access to data received by government agencies, in particular, the State Judicial Administration of Ukraine. Interestingly, this data has been presented in a machine-readable format, allowing for automated data processing by electronic means. However, this potential cannot be realised due to court decisions being stored in a format unsuitable for automated processing.

The decision-selection process involved applying specific search criteria, including the year, type of proceedings (civil, commercial and administrative jurisdiction), and keywords for filtering civil, commercial and administrative jurisdiction. According to the number of proceedings, court decisions were combined into cases, significantly streamlining the data processing. This approach enabled the identification of the specific group of cases for the study.

During the experimental part of the study, the hardware and software complex designed for processing court decisions underwent training. The description of the study's methodology encompasses technical characteristics of the prepared complex, along with criteria and markers for marking information in a court case. This marking became the primary criterion for collecting information and further statistical processing. Comparing trial results with case circumstances provides us with objective data to draw conclusions about the trial opportunities, advantages and disadvantages, terms, and costs. This analysis is a prerequisite for building a successful strategy for effective dispute resolution.

5 CONCLUSIONS

In the course of the project, ideas on specific components of building trust in the judiciary have been further developed. Based on this, objective recommendations for assessing the quality of the judicial system in the state, as well as algorithms for collecting data on its functioning to strengthen trust in the justice system in society. These recommendations can follow the examples set by counterparts in the EU and the Council of Europe. Establishing indicators for the effective functioning of justice, aided by algorithms for continuous monitoring and data collection, will enable a timely and flexible response to unavoidable changes.

66 Criminal Code of Ukraine No 2341-III of 5 April 2001 (as amended of 5 October 2023) <https://zakon.rada.gov.ua/laws/show/2341-14#top> accessed 4 November 2023.

67 'Unified State Register of Court Decisions for 2022' (*Open Data Portal, 2022)* <https://data.gov.ua/dataset/ediniy-derzhavniy-reestr-sudovih-rishen-za-2022-rik_763> accessed 4 November 2023.

In the future, the obtained data set, suitable for statistical processing, can be utilised to identify patterns and features of court cases, assess the effectiveness of the administration of justice, predict the enforcement of court decisions, and estimate the duration of court cases. Furthermore, it can be instrumental in considering procedural and judicial legislation in the course of further reform. The development and improvement of the judicial system, ensuring its independence and proper funding, require enormous efforts to effectively implement everyone's right to a fair trial, as guaranteed by the Convention for the Protection of Rights and Fundamental Freedoms. Data collected and analysed through the developed software can provide additional, unique information, which will become the basis for more detailed studies of the conditions and causes of shortcomings in the functioning of the domestic judicial system and the execution of court decisions.

REFERENCES

1. Golomozyi V, Mishura Yu, Izarova I and Ianevych T, 'Processing Big Data of Court Decisions' (2023) 11(4) Baltic Journal of Modern Computing 580, doi:10.22364/bjmc.2023.11.4.04.
2. Khotynska-Nor O and Potapenko A, 'Courts of Ukraine in Wartime: Issues of Sustainable Functioning' (2022) 31 Revista Jurídica Portucalense 218, doi:10.34625/issn.2183-2705(31)2022.ic-09.
3. Khotynska-Nor O, *Theory and Practice of Judicial Reform in Ukraine* (Pravova yednist', Alerta 2016).
4. Lesyuk T, 'The Activities of the Judiciary Will Become More Transparent' *Legal Newspaper* (Kyiv, 19 January 2005) 5 <https://pravo.org.ua/diyalnist-sudovoyi-vlady-stane-prozorishoyu/> accessed 4 November 2023.
5. Moskalenko VS and Selivanenko VP, *Collection of Explanations of the Supreme Commercial Court of Ukraine* (DM Prytyka ed, 2nd edn, In-Jure 2003).
6. Prytyka Yu and Izarova I (eds), *Access to Justice in Conditions of Sustainable Development: to the 30th Anniversary of Ukraine's Independence* (Dakor 2021).
7. Smalyuk R and Ruda T, 'Accessibility, Digitalization, Trust: 3D Ukrainian Justice on the Way to the EU' (*Centre of Policy and Legal Reform*, 2 December 2022) <https://pravo.org.ua/blogs/dostupnist-didzhytalizatsiya-dovira-3d-ukrayinskogo-pravosuddya-na-shlyahu-do-yes/> accessed 4 November 2023.

AUTHORS INFORMATION

Iryna Izarova
Dr.Sc. (Law), Professor, Professor, Law School, Taras Shevchenko National Unibersity of Kyiv, Ukraine
Irina.izarova@knu.ua
https://orcid.org/0000-0002-1909-7020

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

Co-author, responsible for responsible for conceptualization, methodology, investigation, supervision and writing.
Competing interests: Prof. Izarova serves as an Editor in Chief of AJEE, thus, she was not involved in decision-making, and this article underwent the full process of peer review and editing. To avoid potential conflict or the perception of bias, the final decisions for the publication of this note were handled by other editors, including choice of peer reviewers.

Oksana Uhrynovska
Cand. of Science of Law (Equiv. Ph.D.), Assoc. Prof. of the Department of Civil Law and Procedure, Ivan Franko National University of Lviv, Ukraine
oksana.uhrynovska@lnu.edu.ua
https://orcid.org/0000-0002-3642-5903
Co-author, responsible for responsible for conceptualization, methodology, investigation, supervision and writing.
Competing interests: Dr Uhrynovska serves as a Managing Editor of AJEE, which may cause a potential conflict or the perception of bias. Despite this, the final decisions for the publication of this note, including the choice of peer reviewers, were handled by the editors and the editorial board members, who are not biased.

Oksana Khotynska-Nor
Professor, Dr. Sc (Law), Head of the Department, Law School, Taras Shevchenko National University of Kyiv, Ukraine
oksananor@knu.ua
https://orcid.org/0000-0002-4480-6677
Co-author, responsible for responsible for supervision and writing.
Competing interests: Although the author serves at the same institution as the Editor-in-Chief of AJEE, which may cause a potential conflict or the perception of bias, the final decisions for the publication of this article, including the choice of peer reviewers, were handled by the editor and the editorial board members, who are not affiliated with the same institution.

Yuriy Prytyka
Dr. Sc. (Law), Prof., Head of Civil Procedure Department of Taras Shevchenko National University of Kyiv; Vice President of the International Commercial Arbitration Court (ICAC); ex-Deputy Minister of Justice of Ukraine, Kyiv, Ukraine
https://orcid.org/0000-0001-5992-1144
Co-author, responsible for responsible for supervision and writing.
Competing interests: Prof. Prytyka serves on the board of AJEE, a Member of the Advisory Board, thus, he was not involved in decision-making, and this article underwent the full process of peer review and editing. To avoid potential conflict or the perception of bias, the final decisions for the publication of this note were handled by other editors, including choice of peer reviewers.

Oleksandr Bediukh
Dr.Sc., Researcher, Taras Shevchenko National Unibersity of Kyiv, Ukraine
bediukh@knu.ua
Co-author, responsible for responsible for investigation and writing.

Yuliia Alendar
Mag. (Law), PhD Student, Department of Civil Procedure, Taras Shevchenko National Unibersity of Kyiv, Ukraine
yuliya2211@ukr.net
Co-author, responsible for investigation and writing.

Disclaimer: The authors declares that their opinion and views expressed in this manuscript are free of any impact of any organizations.

ADDITIONAL INFORMATION

Within the project **"Innovative technologies for processing court decisions using machine learning algorithms"**, that financed by an external instrument of assistance of the European Union to fulfill Ukraine's obligations in the European Union Framework Program for Research and Innovation "Horizon 2020".

ABOUT THIS ARTICLE

Cite this article
Izarova I, Uhrynovska O, Khotynska-Nor O, Prytyka Yu, Bedyukh O and Alendar Yu, 'Advancing Sustainable Justice through AI-Based Case Law Analysis' (2024) 7(1) Access to Justice in Eastern Europe 127-48 <https://doi.org/10.33327/AJEE-18-7.1-a000123>

Submitted on 01 Oct 2023 / Revised 5 Nov 2023 / Approved 13 Nov 2023
Published ONLINE: 20 Dec 2023 / Last Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000123

Managing editor – Mag. Polina Siedova**. English Editor** – Julie Bold.

Keywords: *artificial intelligence, judicial system, legal proceedings, civil procedure, court decisions, e-justice, judicial reform, analysis of large data sets, judicial statistics.*

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

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

LEGAL ADAPTATION FOR THE SYRIAN CONSTITUTIONAL COMMITTEE FORMED BASED ON UN SECURITY COUNCIL RESOLUTION 2245

Hamoud Tannar*, Ayman Mohamed Afify and Sam Dalla

ABSTRACT

Background: *Presumably, constitution-making is a national process reflecting the state's sovereignty and people's will. The severity of the conflict in Syria and its danger led the international community to intervene, and in 2015, the Security Council issued Resolution 2254 to settle the conflict. This resolution, in item 4, called for the start of the drafting process of a new Constitution for Syria; hereby, the Constitutional Committee was formed in Geneva in 2019 with the agreement of the conflict parties, the government and the opposition, and the consent of the international community represented by the United Nations. This research discusses the extent to which the intervention of the United Nations in the Syrian Constitutional Committee's formation and work in Geneva affects the principle of the Constitution's nationalism and state sovereignty. The research also discusses the legitimacy of the powers granted to this committee, whether in drafting a new constitution for the Syrian state or amending the current 2012 Constitution, and whether they conflict with the national sovereignty principle in considering the constitutional law principles.*

Methods: *We relied on the analytical method to study the legal adaptation of the Syrian Constitutional Committee formed based on Security Council Resolution 2254. The impact of the United Nations intervention in the Syrian Constitutional Committee and whether it conflicts with the principle of national sovereignty depends on clarifying the role played by the United Nations in forming the committee and its ability to impose binding decisions on it. Achieving this objective requires analysing the powers of the Constitutional Committee in light of the principles and rules of constitutional law. This entails determining whether the committee possesses the full authority of the original constituent power to establish a new constitution for the state without referring to the people or if its jurisdiction is limited to drafting. Through this analytical method, we shall know whether the formation of the Constitutional Committee and the jurisdiction granted contradicts the principle of national sovereignty, which assumes that the Constitution is a national industry.*

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

Results and Conclusions: *The formation of the Syrian Constitutional Committee, authorised by the United Nations through the Security Council Resolution 2254, does not detract from Syrian national sovereignty nor conflict with the principle of constitutional nationalism. Firstly, the formation of the constituent authority responsible for establishing the Constitution is not a legal issue but rather derives its existence from reality, and this applies to the Syrian Constitutional Committee, which derived its existence from the Syrian reality conflict and with the agreement of its parties, government and opposition. Therefore, one cannot say that the formation of this committee is illegitimate or inconsistent with the principles of constitutional law, given the absence of a legal framework governing the mechanism for forming the constituent authority, whether in Syrian constitutional law or comparative constitutional law. The Constitution is a result of the circumstances and situations that have accompanied its emergence and determined the method of its establishment. Secondly, the Constitutional Committee is not a full constituent authority because it does not have the power to approve a new constitution or an amendment to the current Constitution in its sole discretion. It might adapt as a technical consensus committee whose role is limited to formulating proposals that require popular consent. Thirdly, It is arguable that Security Council Resolution 2254 and the decision to form the Syrian Constitutional Committee constitute the legal framework from which this committee derives its legitimacy and work. Therefore, we can say that the issue of forming the Syrian Constitutional Committee and its work has become a legal issue governed by an international legal framework, marking a departure from its previous extrajudicial status under national constitutional law.*

1 INTRODUCTION

A state constitution-making body shall require a differentiated body from its governing bodies. That body has a constructivist mission, as it is the one that makes the constitution and derives its existence from it; but vice versa.[1] The constitutional body is an institutional body established as a constituent authority in the name of the people (the sovereign) that exercises its role by formulating a constitutional framework and sometimes adopting it on behalf of the people. The body's shape and composition shall determine the extent to which it effectively represents the people, and thereupon, it is of crucial importance in determining the Constitution's content and legitimacy as well as the constitution-building process as a whole.[2]

The necessity for a new state constitution arises not only when a new state is established but also in cases of conflicts and crises within the state, where, as an initial step, work on a new state constitution begins towards ending the conflict and outlining the new political and constitutional system of the state As everyone is aware, the crisis in Syria started in March 2011, prompting the ruling authority to establish a new state constitution in 2012, which

1 Sam Dalla, *Principles of Constitutional Law and Political Systems* (3rd edn, University of Sharjah 2022) 33.

2 Kimana Zulueta-Fülscher and Sumit Bisarya, *(S)electing Constitution-Making Bodies in Fragile and Conflict-Affected Settings: International IDEA Policy Paper no 16* (International IDEA 2021) 8.

was approved by the people in a referendum on February 26, 2012, and went into force the following day[3].

The constitution, hereinbefore enshrined the principle of political pluralism in its eighth article, did not grant any privileges in leading the affairs of the state to any political party named after it or specifically, and made the exercise of power democratically through voting. It also abolished the mechanism for selecting the Head of State by referendum, which had been in force in the previous Constitution, which had been repealed in 1973, and made it by direct election of the people. However, that had not prevented or alleviated the conflict, nor had it formed the basis for peacebuilding in Syria.

This is what prompted the international community to intervene in the Syrian conflict, where the Security Council adopted Resolution 2254 on December 18, 2015, related to a ceasefire and a political settlement for the situation in Syria.[4] This has led to the international community's interference in the Syrian conflict. To achieve a political settlement led and owned by Syria and under the auspices of the United Nations, this resolution supported the start of a process to draft a new constitution for Syria in its fourth item. Security Council resolution 2254 (2015) mandated the United Nations to facilitate the Syrian-led political process, which, inter alia, set a timetable and process for drafting a new constitution. Herein, free and fair elections should be held under the auspices of the United Nations, by the highest international standards of transparency and accountability, for all Syrians who might participate, including those living in the diaspora.

According to this resolution on the fulfilment of his mandate, the Special Envoy of the United Nations Geir Pedersen, appointed on October 31, 2018, by the Secretary-General of the United Nations to succeed Staffan de Mistura,[5] established a credible, balanced, and inclusive constitutional commission under the Syrian-led and Syrian-owned.

The Constitutional Commission was established based on an agreement between the Syrian Arab Republic Government and the opposition Syrian negotiating body on a package agreement on the terms of reference and fundamental procedural rules, announced by the Secretary-General of the United Nations on September 23, 2019.

The reality is that, during historical experiences, building a new constitutional system in conflict situations might be one of the essential components of achieving peace through a negotiating path. At the negotiating table, no decisions are limited to matters of constitutional design; they extend to the constitution-building process itself. Important

3 Constitution of the Syrian Arab Republic of 2012 <https://www.wipo.int/wipolex/en/legislation/details/16572> accessed 5 October 2023.

4 UNSC Res 2254 (18 December 2015) <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/2254(2015)&Lang=E> accessed 5 October 2023.

5 'Geir O Pedersen Special Envoy of the Secretary-General for Syria' (*United Nations*, 31 October 2018) <https://www.un.org/sg/en/content/profiles/geir-pedersen> accessed 5 October 2023; *Office of the Special Envoy of the Secretary-General for Syria (UN OSES)* <https://specialenvoysyria.unmissions.org> accessed 5 October 2023.

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

issues for the parties concerned include the type, method of selection, powers, time frames, and decision-making rules of the Constitution-making body.[6]

The Syrian Constitutional Committee was formed of two bodies – an expanded body and a mini-body. The expanded body comprises 150 men and women members: 50 members appointed by the Syrian government, 50 appointed by the Syrian opposition negotiating body, and 50 from civil society selected by the United Nations. The mini body comprises 45 members' men and women, with each party represented by 15 members chosen from among its members in the expanded body.

The Committee was vested with the competence to review the current Syrian Constitution of 2012 in the context of other Syrian constitutional experiences, amend the current Constitution, or draft a new Constitution. The Constitutional Committee may also agree on new rules of procedure or amend the basic rules of procedure as may be necessary to enable the Commission to proceed with its work.[7] Given that the Constitution is the state's most fundamental and supreme law, it is assumed to be a national industry, reflecting the sovereignty of the state and the people's will.[8]

Consistent with this, can the United Nations' intervention in the Syrian Constitutional Committee's work, authorised by the UN in Geneva, be deemed incompatible with the principle of constitutional nationalism and derogating from the principle of the Syrian State's sovereignty?

That is, on the one hand.

On the other, should the terms of reference vest to this Committee, the drafting of a new constitution for the Syrian State or the amending of the current Constitution of 2012, in conformity with the principles of constitutional law or not?

6 Zulueta-Fülscher and Bisarya (n 2) 8.

7 UNSC S/2019/775 'Terms of Reference and Core Rules of Procedure for a Syrian-led, Syrian-owned, credible, balanced and inclusive Constitutional Committee facilitated by the United Nations in Geneva' (27 September 2019) <https://specialenvoysyria.unmissions.org/constitutional-committee-0> accessed 5 October 2023.

8 That is what has been deemed in the preamble of the different states' constitutions. The preamble of the United States Constitution of 1787 states: 'We the People of the United States, to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Similarly, the French Constitution of 1958 affirms: 'The French people solemnly proclaim their attachment to the rights of man and the principles of national sovereignty as defined by the Declaration of 1789, which reaffirmed and completed by the Preamble to the Constitution of 1946, and to the rights and duties as recognized in the Charter for the Environment of 2004.' Likewise, the preamble of the Turkish Constitution of 1982 states: 'Emphasizing the eternal existence of the Turkish nation and the indivisible unity of the state of Turkey, under the notion of nationalism introduced by the founder of the Republic of Turkey, Atatürk... the absolute sovereignty is vested fully and unconditionally in the Turkish nation, and it is against the principles of this Constitution and its legal framework for any individual or body to exercise this sovereignty on behalf of the nation without adhering to the free democracy referred to in this Constitution and the legal system it establishes.'

Thereupon, our first step will be to indicate the compatibility of the formation of the Constitutional Committee with constitutional law and then examine, second, the compatibility of the functions of the Constitutional Committee with the principles of constitutional law.

2 THE COMPATIBILITY OF THE FORMATION OF THE CONSTITUTIONAL COMMITTEE WITH CONSTITUTIONAL LAW

Constitutions shall not determine which competent authority shall have the decision to abrogate the current Constitution in force and to make a new state Constitution. Constitutions also shall not indicate the method that should be followed in establishing a new constitution. Instead, they shall determine solely the body or entity responsible for amending the constitution and the procedures that should be followed in the amendment process. This body is called the so-called derivative constituent authority, distinguishing it from the original constituent authority that makes the constitution.[9]

The reason constitutions shall not determine the competent authority to make a new constitution is that the formation issue of such an authority is not a legal one. Therefore, the legitimacy of the original constituent authority shall be governed not by law but by the political consensus of the actors in the State when they are constituted. This is the case with the formation of the Syrian Constitutional Committee in Geneva. Conversely, the impact of the United Nations' intervention in the formation of the Syrian Constitutional Committee on the committee's national identity and the principle of Syrian national sovereignty shall depend on the scope reserved for the United Nations in forming the committee. It also shall depend on the United Nations' ability to impose binding decisions on the Constitutional Committee.

2.1. The Formation of the Constitutional Committee is not a legal issue

The Syrian Constitutional Committee was formed in Geneva with the agreement of the United Nations, the Syrian government, and the Syrian opposition. The Committee consisted of 150 members representing the three parties equally: the Syrian government, the opposition, and the list of civil society members chosen by the United Nations and approved by the conflicting parties. This committee was vested with the authority to review the current Syrian constitution of 2012 in the context of other Syrian constitutional

9 It is worth noting that the problem related to the distinction between the original and established constituent authority and the powers of each of them has been raised in several Arab Spring countries. In the Egyptian case, for example, following the demonstrations of June 30, 2013, which led to the fall of the Muslim Brotherhood regime, the 2012 Constitution was suspended to make limited amendments to it. However, given that these amendments were made in a way other than that prescribed by the 2012 Constitution, Egyptian jurisprudence relied on the formal criteria to consider the 2014 Constitution as new, despite the similarities between these two Constitutions.
Regarding the procedures for preparing the Egyptian Constitution of 2014 and the circumstances in which it was issued, see Ayman Mohamed-Afify, 'La Constitution égyptienne de 2014: entre traditions et tendances révolutionnaires' (2015) 101(1) Revue française de droit constitutionnel 121, doi:10.3917/rfdc.101.0121.

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

experiments and work on amending the current constitution or drafting a new one. In such case, we find ourselves in front of a constitutional constituent body: either the original for drafting a new constitution or an amendment to the 2012 Constitution.

What is the legal adaptability of such a committee's formation? Is it a legal issue that should be worked around? Is its formation an issue that is not subject to the law ?

The Constitution, above all, requires a constituent body or authority, and the Constitution shall not made by the founding authorities but by the constituent body.[10] The formation of the constituent body shall be, thereon, the cornerstone of the constitution, and doctrine defines it as the authority that makes the constitution.[11] Despite the importance of the founding body, different countries' constitutions do not indicate how or what mechanism should be used to form it.[12]

The Syrian Constitution of 2012, subject to review by the Syrian Constitutional Committee in Geneva, did not deviate from this rule. It did not indicate the authority that had the power to abolish it but only identified the body responsible for making amendments and outlined the procedures that should be followed. Jurisprudence holds that the founding body is not a legal issue or subject to legal adaptation. This is because, in drafting a constitution distinct from what currently exists, the process involves not legal practice but rather facing a political consensus to establish legitimacy for a new constitutional system.[13]

The constituent authority is a power derived from reality, characterised by its original and independent nature, obtaining its powers from itself rather than from another authority.[14] As long as it is a power of reality that exists beyond the limits of the law.[15] The constituent authority remains after all change movements[16] and is not subject to any prior legal framework.[17] However, the reality of power unfolds in the wake of political change movements of the state, and the circumstances at hand govern the decision-making process for the formation of the constitutive authority and whom it represents.

Thereupon, the most influential parties tend to wield the constitutive authority.[18] This became evident when the President of the Republic issued Republican Decree No. 33 of 2011, which established a national committee to prepare a new constitution for the Syrian Arab Republic in preparation for its adoption by constitutional rules. Pursuant to this decree, the President of the Republic, who holds and controls the power, unilaterally

10 Emmanuel Sieyès, *Qu'est-Ce Que Le Tiers Etat?* (Librairie Droz 1970) 180-1.

11 R Carre de Malberg, *Contribution à la Théorie Générale De L'état: Spécialement d'après Les Données Fournies Par Le Droit Constitutionnel Français,* t 2 (CNRS 1962) 510.

12 Contrary to this principle, the Swiss Constitution provides a mechanism to abolish it. Article 138 of the Swiss Constitution of 1999 states: '*1- One hundred thousand citizens who have the right to vote may propose a comprehensive revision of the federal Constitution, within 18 months from the official publication date of their initiative. 2- This proposal shall be submitted to the people for a voting.*'

13 Louis Favoreu and others, *Droit Constitutionnel* (5th edn, Dalloz 2002) 97.

14 Kemal Gözler, *Le Pouvoir de Révision Constitutionnelle* (Presses universitaires du Septentrion 1997) 27.

15 Georges Burdeau, *Traité de Science Politique*, t 4 *Le statut du pouvoir dans l'état* (3rd edn, LGDJ 1983) 79.

16 ibid 82.

17 ibid 80.

18 Malberg (n 11) 496.

determined the names of the members of the Constitutional Committee. After completing its work, the Constitutional Committee presented the 2012 constitution draft, and then the President issued a decree setting February 26 as the date for the referendum on the constitution draft.[19] This occurred during the outset of the Syrian crisis.

However, with the increasing intensity of the conflict in Syria and the intervention of international parties in it, countries and organisations, and the inability of any party to end the conflict in its favour, the reality that established the 2012 constitution has completely changed, locally and internationally. The new Syrian context pushed the Security Council's members to agree on Resolution No. 2254 on December 18, 2015, regarding a ceasefire and finding a political settlement for the status quo in Syria. This resolution, in paragraph 4, referred to the start of the drafting process of a new constitution for Syria, and accordingly, the Constitutional Committee was formed in Geneva in 2019 with the consent of both parties to the conflict, the Government and the opposition, and the consent of the international community represented by the United Nations. Given the above, let us briefly summarise our viewpoint within points hereinafter as follows:

1. The mechanism for the Syrian Constitutional Committee's formation in Geneva and the appointment of its members shall be imposed by the reality of the conflict in Syria and by the intervention of the international community. Consequently, it is a realistic authority as the question of its formation is not subject to the provisions of the law. Thus, it could not be said that the committee's formation is illegal or incompatible with the constitutional law's principles in a legal framework's absence governing the constituent body's formation, both in Syrian constitutional and comparative constitutional law. The Constitution resulted from the conditions and circumstances surrounding its emergence, which determined its formation. We agree with the jurisprudence view that the method of constitution-making is not legally adaptable.[20]
2. The Syrian Constitutional Committee in Geneva is not a total original constituent authority. The Constituent Authority has the advantage of being unrestricted and exempt from any proceedings and is free to express its will by the mechanisms it determines.[21] The Syrian Constitutional Committee in Geneva does not have that freedom, which obliged, as stated in the formation decision, to coordinate with the United Nations Special Envoy in convening its meetings and carrying out its work. The formation decision shall require the Syrian Constitutional Committee to submit the result of its work to popular consent. Thus, we could adapt the Syrian Constitutional Committee as a committee or consensus body of a technical nature that exercises its powers as proposals and does not have the authority to impose its decisions by force of law or fact.
3. Even though the constituent body responsible for drafting the Constitution is not a legal issue, we believe that the Constitutional Committee's formation shall derive its legitimacy from Security Council resolution 2254 (2015) and the composition decision

19 Regarding the method of drafting the Syrian Constitution of 2012, please refer to the following legal academic sources: Hardware Al-Bahri, *Comparative Constitutional Law* (Damascus University Pub 2021) 331-4; Hamoud Tannar, *Constitutional Law* (2nd edn, Aleppo University Pub 2021) 252-5.

20 Gözler (n 14) 26.

21 ibid.

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

authorised by the United Nations and approved by the Syrian Government, as well as by other actors in the Syrian conflict, from the opposition and an international community. Differences of opinion doubtless, interpreting the said Security Council resolution between the Syrian Government and the States' supports, on the one hand, and the Syrian opposition and the States' supporters, on the other, do not affect the legality and legitimacy of the formation of the Syrian Constitutional Committee and do not detract from its powers to draft a new constitution for Syria or to amend the Constitution in force in 2012. In short, it could be said that Security Council resolution 2254 and the formation decision of the Syrian Constitutional Committee form the legal framework within which the Committee derives the legitimacy of its formation and functioning. Thus, we could say that the formation of the Syrian Constitutional Committee in Geneva has become a legal issue governed by an international legal framework from which to derive its legitimacy since it was an extra-legal issue under the national constitutional law.

2.2. The Impact of Internationalisation on the Formation of the Syrian Constitutional Committee and its Nationality

There are various types of constitutions, but they all share a common denominator: they are the National Constituent Body-made.[22] The constitution is a national law subject to national sovereignty, and its creation is an internal jurisdiction issue State. Powers and competencies state drive from its sovereignty, and the law, in turn, derives the same.[23] Therefore, international intervention in state constitution-making could attack or diminish national sovereignty. In the case of international intervention, we move on from the nationalism of constitution-making to the phenomenon of internationalisation of constitution-making or internationalised constitutions. The fundamental issue in internationalised constitutions lies in the original constituent body. The internationalised constitution is not solely the result of the National Constituent body's work but rather the result of international organisation's work or other stats, whereby these international entities exceed the state's sovereign jurisdiction and take on the sovereign people's role or the role of the bodies representing the state.[24] The last decade of constitutions-making for many countries saw an increase in international intervention in the last decade of the 20th century under the auspices of peacebuilding.

International intervention in constitution-making varies from one case to another. It might be partial, in which case the National Constituent Body shall not be derogated but rather subject to the supervision of an international body or a group of countries that impose a set of principles.[25] Examples of this include the Constitutions of Namibia, East Timor, Cambodia, Macedonia, Cyprus, and Kosovo. The internationalised constitution might also

22 Carolina Cedra-Guzman, 'Repenser les Constitutions Internationalisées' (2015) 6 Revue du Droit Public 1567.

23 Monique Chemillier-Gendreau, 'Le Concept de Souveraineté a-t-Il Encore Un Avenir?' (2014) 5 Revue du Droit Public 1283.

24 Nicolas Maziau, 'L'internationalisation Du Pouvoir Constituant : Essai de Typologie : Le Point de Vue Hétérodoxe Du Constitutionnaliste' (2002) 3 Revue Générale de Droit International Public 549.

25 ibid.

be an entire constitution where the national constituent body is fully controlled by an international organisation or a group of countries, as is the case with the Bosnia and Herzegovina Constitution.[26]

The first case of internationalisation of constitution-making, i.e., partial internationalisation, applies to the Syrian Constitutional Committee. Based on Security Council Resolution 2254 (2015), the Syrian Constitutional Committee was formed under the umbrella of the UN and with its authorisation. It is not just a matter of licensing; the international organisation is represented in the committee formation through a list of civil society members selected by the United Nations, totalling 50, forming one-third of the committee members. In addition, the UN Special Envoy for Syria facilitates the committee work by announcing and supervising the dates of its meetings after the parties' agreement and monitoring the extent to which members comply with their code of conduct. In short, it could be said that the UN- represented by its special envoy, manages the Syrian Constitutional Committee.

Jurisprudence, conversely, considers that the mere imposition of standards on the national constituent body is a contradiction per se to the principle of the sovereignty of the constituent body[27] as a national body. The imposition of international standards at the time of the Constitution's drafting led to the transfer of law-making authority (the Constitution) from the national constituent body to other States or international organisations. This, in turn, leads to a fundamental result of changing or abolishing the traditional concept of the constituent body.[28] In the case of the Syrian Constitutional Committee, its decision to establish imposes a set of controls or standards that the committee must adhere to in its meetings and work.[29]

Regarding its composition, the Constitutional Committee is structured to have a large and a small body. The smaller body is responsible for preparing and drafting constitutional proposals, while the larger body is tasked with adopting them. The large body may convene, in parallel or periodically, as the work of the small body progresses to discuss and adopt proposals.[30] As for its decision-making, both large and small bodies of the Constitutional Committee advance and take decisions by consensus where possible. In cases where consensus is unattainable, decisions are reached through voting, requiring the support of a minimum of 75% of members in the respective body (i.e. 113 members present and voting in the large body, 34 members present and voting in the small body). The 75% voting threshold is a fixed one.[31] As for her chairing, the Constitutional Committee ensures a

26 Cedra-Guzman (n 22).

27 Marie-Claire Ponthoreau, *Droit(s) Constitutionnel(s) Comparé(s)* (Economica 2010) 154.

28 Cedra-Guzman (n 22).

29 'The United Nations Special Envoy for Syria looks forward to convening under United Nations auspices, in Geneva on 30 October 2019, and facilitating a credible, balanced and inclusive Syrian-led, Syrian-owned Constitutional Committee that operates in accordance with these Terms of Reference and Core Rules of Procedure', UNSC S/2019/775 (n 7) para 6.

30 ibid, art 2.

31 ibid, art 3.

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

balanced chairing arrangement with two Co-Chairs – one nominated by the Government of Syria and one by the Syrian Negotiations Commission.[32]

Despite the intervention of the international organisation in the Constitutional Committee's formation, we believe that being a Syrian entity is independent of the Committee's national character. All members of the Committee, who represent the three parties, government, opposition, and the United Nations, and whose number is 150, are Syrians. Furthermore, the decision to establish the Committee herein, the international organisation, does not grant the authority to compel the same members of the Constitutional Committee to accept any proposed constitutional texts from any party. This decision is subject to approval by the Committee members through consensus, if possible, or by a majority of 75% of the members present at the meeting in each of the Committee's bodies.

One could argue that the standards imposed by the decision to establish the Constitutional Committee are standards related to the organisational aspect and confidence-building among the parties involved without affecting the essence of the Committee's mandate, which is to conduct a constitutional review - the most significant aspect. As a constructive body, the Constitutional Committee is a Syrian committee led and owned by Syrians, and the role of the United Nations is limited to facilitation, not imposition or compulsion. This decision affirms the Syrian Constitutional Committee's formation, which refers in its first item to the strong commitment of the Syrian Arab Sovereignty.[33] Therefore, we believe that the United Nations' intervention in the Syrian Constitutional Committee's formation shall not be a substitute for Syrian national sovereignty and shall never detract from the Committee's national character. We agree with the standpoint that the internationalisation of the constituent body is not inherently problematic as long as the state has consented.[34]

The problem is not in the internationalisation of the Syrian Constitutional Committee as long as the conflicting parties have agreed per se; however, the challenge lies in the extent to which this committee shall accomplish its assigned task. It has been about five years since the Constitutional Committee's formation, during which it has held seven meetings, but tangible results have yet to be achieved. We feel that the Syrian Constitutional Committee's internationalisation was not a choice made by the disputing parties but rather naturally the reality of the conflict in Syria and the international community's division over Syria. In such a reality, deciding on a constitutional drafting body through elections or allowing one party to control its formation might be difficult. In this case, the optimal way to choose the constitutional drafting body is through dialogue and consensus among the conflicting parties, as was the case for the Syrian Constitutional Committee's formation in Geneva. Therefore, the internationalisation of the Syrian Constitutional Committee shall not detract from its legitimacy and Syrian national character so long as the United Nations' role is limited to supervision and facilitation and has no effect on the content of the constitutional reform that the Constitutional Committee shall present.

32 ibid, art 4.
33 ibid, para 1.
34 Maziau (n 24).

3 COMPATIBILITY OF THE JURISDICTION OF THE CONSTITUTIONAL COMMITTEE WITH CONSTITUTIONAL LAW

We pointed out that the Constitutional Committee's formation poses a challenge that must be addressed through legal adaptation due to the reality imposed on the formation's mechanism. Consequently, its legitimacy is rooted in the existing reality.

However, as is well known, the Constitutional Committee's formation is not an end per se, but rather the formation objective, the jurisdiction granted to the committee. It is a legal issue that deserves discussion.

According to the decision to establish it, the Syrian Constitutional Committee can amend the current constitution or draft a new one.[35]

This jurisdiction is consistent with the concept of constituent authority contained in the Constitutional Dictionary, which generally defines it as 'a body with constitutional powers, which has the authority to draft a new constitution or to amend the Constitution in force'.[36]

'It is the same definition adopted by the doctrine of the constituent authority that its function is that of formulating or amending the Constitution',[37] but in contrast, the doctrine distinguishes between two types of constituent authority in terms of the limits and nature of its powers: the first is to draft a new constitution for the State, which is called the original constituent authority, and the second is to amend the existing constitution in part without repealing it, which is called the derived constituent power.[38] Notably, the Syrian Constitutional Committee has been given the power to exercise both competencies and choose the most suitable in between. Accordingly, we will examine within the jurisdiction of the Constitutional Committee as an original constituent authority should it opt to draft a new state constitution and as a derived constituent authority should it choose to amend the existing 2012 Constitution.

3.1. The limits of the jurisdiction of the Constitutional Committee to draft a new Constitution

The Constitution requires, above all, a constituent authority. The authority usually intervenes in the case of a constitutional vacuum in the state, i.e., when there are no legal provisions specifying the government system. Practically, such a constitutional vacuum can occur in the event of the emergence of a new state or in the event of a breakdown in the legal

35 Article 1 of the decision S/2019/775 to establish the Syrian Constitutional Committee: 'The Constitutional Committee shall, within the context of the UN-facilitated Geneva process, prepare and draft for popular approval a constitutional reform, as a contribution to the political settlement in Syria and the implementation of Security Council resolution 2254 (2015). The constitutional reform shall, inter alia, embody in the constitution and constitutional practices of Syria the letter and spirit of the Twelve Living Intra-Syrian Essential Principles.
The Constitutional Committee may review the 2012 Constitution including in the context of other Syrian constitutional experiences and amend the current constitution or draft a new constitution.

36 Olivier Duhamel and Yves Meny, *Dictionnaire Constitutionnel* (Presses Universitaire de France 1992) 777.

37 Jacques Velu, *Droit Public*, t 1 *Le statut des gouvernants* (Bruylant 1986) 139.

38 Gözler (n 14) 7-111.

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

system.[39] The Constituent Authority may also intervene without a constitutional vacuum when there is a political change in the state and the desire to replace the existing constitution that is no longer compatible.[40] This was exemplified in Syria in 2012. Nearly 40 years after the entry into force of the Syrian Constitution of 1973, following a wave of protests and protest movements in many Syrian cities in the context of the so-called 'Arab Spring,' the governing authority in Syria undertook some constitutional reforms to calm the protests.

The 2012 Constitution was drafted by referendum as a new constitution for the country, although this "new" Constitution is only an amendment to the previous Constitution of 1973. However, the 2012 Constitution did not contribute to ending or curtailing protest movements. The conflict became a military conflict, which resulted in the international community's intervention, culminating in Security Council resolution 2254 of 2015 and the formation of the Syrian Constitutional Committee in 2019. The Syrian Constitutional Committee has empowered the jurisdiction to make a new constitution for Syria.

In principle, we believe in granting the Syrian Constitutional Committee the authority to draft a new constitution under an effective constitution - the 2012 Constitution - *not* statute law with constitutional principles. On the one hand, the role of the constituent authority is not limited to intervening only in a constitutional state vacuum; instead, the state constitution shall be designed to make it necessary for the constituent authority's existence. However, what promotes this viewpoint is the current Constitution, the 2012 Constitution, which is subject to review by the Constitutional Committee. Notably, the 2012 Constitution does not stipulate a mechanism for its abolition or specify its ownership.

Thus, entrusting the Constitutional Committee in Geneva with the authority to draft a new Syrian Constitution does not contradict the norms of Syrian constitutional law. However, the crucial question arises: Should the Syrian Constitutional Committee have the authority to abrogate the 2012 Constitution and draft a new constitution? Should the Syrian Constitutional Committee be adapted as an original constituent authority, endowed with the power to abolish the existing constitution and draft a new constitution?

The original Constituent Authority is a sovereign and supreme unfettered authority[41] with the authority to abrogate the existing Constitution and draft a new one.[42] Under this description, the Constitutional Committee, if considered an original constituent authority, has the power to draft a constitution. In such a scenario, there is no doubt that the legality or legitimacy of the competence of the Constitutional Committee to draft a new constitution

39 Bernard Chante bout, *Droit Constitutionnel* (23rd edn, Sirey Universite 2006) 28-9; Edward McWhinney, *Constitution-Making: Principles, Process, Practice* (University of Toronto Press 1981) 14-21; Pierre Pactet et Ferdinand Mélin-Soucramanien, *Droit Constitutionnel* (34th edn, Sirey Université 2015) 111.

40 MR Abdel Wahab, *Constitutional Law* (Manshurat Al-Ma'arif 1990) 88-9; G Sari, *Principles and Provisions of Constitutional Law* (4th edn, Dar Al-Nahda Al-Arabia 2002/2003) 137.

41 The French Constitutional Council affirmed this principle by saying that the Constituent Assembly is a sovereign authority. *Décision no 92-312 DC* (Constitutional Council, 2 Septembre 1992) [1992] 204 Lois et Décrets 13337.

42 Gözler (n 14) 22.

hinges on the legitimacy of the decision to establish it and the agreement of the disputing parties to grant it authority to draft a new constitution.

Meanwhile, the jurisdiction of the Syrian Constitutional Committee to draw up a new constitution depends on the limits established by the formation decision and on the extent to which it is deemed sovereign or not. A constituent authority is considered sovereign if it has the power to draw up and approve a constitution without necessitating presentation to the people by referendum.[43] Conversely, a non-sovereign constituent authority is limited to preparing or drawing up a constitution draft, and the constitution only becomes legally binding upon approval by the people through a general referendum.[44] In the case of a non-sovereign constituent authority, ultimate authority remains with the people who have the final decision-making power to approve or reject the draft constitution prepared by the constituent authority.[45]

3.2. Limits of the Constitutional Committee's jurisdiction to amend the existing Constitution of 2012

Referring to the decision to form the Syrian Constitutional Committee, we find that Article 1 regarding the committee states the following jurisdiction: *'The Constitutional Committee may review the 2012 Constitution including in the context of other Syrian constitutional experiences and amend the current constitution or draft a new constitution*'.[46] According to this text, the competence of the Constitutional Committee is not limited to drafting a new constitution only. As part of its constitutional review, the Constitutional Committee can draft a new constitution or amend the existing constitution, as agreed upon by the members of the Committee. If the Constitutional Committee chooses to amend the 2012 Constitution, it will serve as a derived founding authority. In this capacity, does the Constitutional Committee have the power to amend the existing constitution? In other words, what are the limits of its jurisdiction to amend the Constitution?

If the constituent authority, as an original authority responsible for drafting a new constitution, is exempt from the provisions of the effective constitutional law in its formation and determination of its jurisdiction due to its non-legal nature, it is crucial to recognise that the constituent authority, when functioning as an amending body, operates under an entirely different in nature and mechanism of its competencies. The Constitution's amendment is a legal issue where the Constitution determines the competent authority to

43 That is the situation of the Constituent Assembly that drafted the Syrian Constitution of 1950, where it had sovereign constituent authority. It was responsible for formulating and approving the constitution on behalf of the people. The preamble of this constitution stated: '*We, the representatives of the Syrian Arab people, gathered in a Constituent Assembly by the will of God and the desire of the free people, declare that we have established this constitution to achieve the following sacred goals*'...

44 Similarly, such is the case of the Constitutional Committee, which was currently drafting the Syrian Constitution of 2012, where it has non-sovereign constituent authority. This committee was formed by the President of the Republic, whose work is limited to formulating a new constitution for Syria. After completing its task, the mentioned committee presented the drafted constitution to the President, who referred it to the people for a referendum.

45 Philippe Ardant, *Institutions politiques et droit constitutionnel* (14th edn, LGDJ 2002) 76.

46 UNSC S/2019/775 (n 7) para 8.

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

amend its provisions and the controls subjected by authority due to the legal process herein. Therefore, the constituent authority as an amending authority derives the legitimacy of exercising its competence in amending the Constitution from the said constitution, contrary to the original constituent authority, which derives its legitimacy from reality (political consensus). As a derived authority, the amendment authority is bound in its work by the scope defined by the constitution that created it and is committed to the procedures drawn for it.[47] Accordingly, any amendment to the Constitution outside the framework specified in the Constitution would be an illegitimate act and constitute an attack on the Constitution. In other words, exercising the jurisdiction to amend the constitution by an entity or body other than that specified by the constitution document would be contrary to the rules of constitutional law.

Regarding the mechanism for amending the Syrian Constitution of 2012, Article 150 regulated the amendment procedures and identified the competent authority to exercise that jurisdiction, as follows:

> '1. The President of the Republic, as well as one-third of the members of the Syrian People's Assembly, have the right to propose an amendment to the Constitution.
> 2. The amendment proposal includes the provisions to be amended and the reasons for it.
> 3. The Syrian People's Assembly shall immediately form a special committee to study the proposal for amendment.
> 4. The people's Assembly shall discuss the amendment proposal, and if adopted by a three-quarters majority of its members, the alteration shall be final, subject to the President of the Republic's agreement.'

According to this text, we could believe that the constituent authority as the amending authority of the Syrian 2012 Constitution consists only of the President of the Republic and the People's Assembly and shall not have any other body to exercise that competence. The Syrian constitutional legislator has considered the balance between the executive and legislative powers and theoretically maintained a degree of neutrality and objectivity in amending the Constitution. The power to propose an amendment to the Constitution, as a first step in the amendment process, is held solely by the President of the Republic and the People's Assembly. Still, neither of them can complete the amendment process without the approval of the other party. To complete the amending process of the Constitution, the proposed amendment should, as a second step, be presented to the People's Assembly for discussion and voting. Also, the approval of the People's Assembly for the proposed amendment by the required majority is not sufficient for the amendment to be final and effective, as it should be associated with the approval of the President of the Republic as a third step.[48]

47 Duhamel and Meny (n 36) 778.

48 Hardware Al-Bahri, 'Constitution of the Syrian Arab Republic – Comparative Study between the Constitutions of 1973 and 2012' (2021) 34(2) Damascus University Journal of Economic and Legal Sciences 9.

Accordingly, based on the above, we see that the Constitutional Committee in Geneva is not legally authorised to exercise the jurisdiction to amend the 2012 constitution, neither in terms of formulating a proposal for amendment nor in terms of approving that amendment. Therefore, the exercise of the Constitutional Committee for the authority to amend the 2012 constitution would be inconsistent with the rules of Syrian constitutional law. For the constitutional amendments formulated by the Constitutional Committee to be legal and legitimate, the amendment process should be carried out under Article 150 of the Constitution, which requires that the proposed amendments be presented to the People's Assembly and obtain its approval and that this be associated, as a final step, with the consent of the President of the Republic. We see that there is an opportunity or possibility to overcome the problem of the unconstitutionality of the Constitutional Committee's exercise of the power to amend the 2012 Constitution.

Nothing is preventing the adoption of the amendments formulated by the Constitutional Committee by the President of the Republic or one-third of the members of the People's Assembly by the provisions of Article 150 of the Constitution. This approach is possible from either the President of the Republic or the Assembly. Any amendments proposed by the Committee shall only adopted when approved by the members of the Constitutional Committee in Geneva who represent the Syrian government. Therefore, any amendments adopted by the Constitutional Committee will reflect the Syrian government's point of view and will receive its approval. In this case, the President of the Republic can adopt the amendments agreed upon by the Constitutional Committee and present them as a proposal to amend the Constitution under Article 150 of the Constitution.

On the other side, more than 20% of the fifty members representing the Syrian government on the Constitutional Committee in Geneva are members of the Syrian People's Assembly.[49] Therefore, nothing is preventing the People's Council from adopting the amendments agreed upon as a proposal to amend the Constitution and implementing them under Article 150 of the Constitution. That might be possible, especially if we consider that the Chairman of the Constitutional Committee in Geneva, representing the Syrian government, Mr. Ahmed Kuzbari, is a member of the People's Assembly and serves as the Chairman of the Constitutional Committee herein.

On the other hand, the decision to form the Constitutional Committee did not vest the authority to make ultimate and effective decisions. If it chooses to amend the Constitution, the committee's work is limited to formulating and approving proposed amendments without admitting. To admit an amendment, as stipulated in Article 1 of the decision to form the Constitutional Committee, shall require popular consent during a referendum. Article 1 of the decision formulating the Constitutional Committee shall require presenting the result of the committee's work for popular consent but not change the illegitimacy of the Constitutional Committee's exercise of the authority to amend the Constitution. It is undoubtedly unconstitutional to enact a constitutional amendment in this way because it violates the procedures for amendment outlined in Article 150 of the

49 Among these members are: Ahmed Kazbari, Mohammed Al-Ajilani, Mohammed Khair Al-Akam, Raymond Hallal, Maha Al-Ajlili, Nora Arisian, Jamal Kaderi, Safwan Qarbi, Sherine Al-Youssef, and Khaled Al-Abboud.

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

2012 Constitution, which shall not require presenting a proposed constitutional amendment to the people for voting due admitting.

Moreover, we assert that the illegitimacy of the Constitutional Committee's authority to amend the 2012 Constitution is reinforced by the illegitimacy of the text of Article 1 of the decision to establish the Constitutional Committee, which serves as the legal foundation for its work. Contrary to the rules of Syrian constitutional law, the text adopts a mechanism for amending the 2012 Constitution that violates the amendment mechanism specified in Article 150. Therefore, the text of Article 1 of the decision to form the Constitutional Committee, in the form in which it is presented, constitutes an amendment to the Constitution before the amendment.

Additionally, the approval of the conflict parties represented in the Constitutional Committee's membership could not confer legitimacy on the committee's authority to amend the Constitution. The legitimacy of the constitutional amendment requires the amendment to be made according to the procedures specified in the Constitution herein. Any constitutional amendment made contrary to that shall be illegal and illegitimate.

On the other hand, could the presentation of the constitutional amendments agreed upon by the Constitutional Committee for popular consent be considered a means of legitimising the Constitution's amendment? This notion stems from the idea that the people are the sovereign and the ultimate authority in the constitutional founding process, capable of exercising this power in each abrogation and amendment. In this context, some constitutional jurisprudence contends that legal formalities do not restrict the people's founding authority, as popular sovereignty is implicit in the popular founding authority. Therefore, if the Constitution binds derived authorities, it should not restrict the original founding authority, which is the source of the Constitution. Based on this, the people could amend the Constitution outside the procedures specified in the Constitution.[50]

This view is reinforced by what is stated in the provisions of the Syrian Constitution of 2012. The Constitution affirmed in its provisions that 'sovereignty belongs to the people, and no individual or group may claim it. It is based on the principle of the people's rule by the people and for the people to exercise sovereignty within the forms and limits prescribed in the Constitution.[51] The referendum is one of the forms of exercising popular sovereignty stipulated by the Constitution, where Article 49 of the Constitution states that 'voting and referendum are a right and duty of citizens, and their practice is regulated by law.'

The authority to determine the timing of resorting to the referendum and to determine its subjects has been entrusted to the President of the Republic by Article 116 of the Constitution, which states that.

> 'the President of the Republic may hold a referendum on important issues related to the country's higher interests, and the result of the referendum is binding and effective from the date of its announcement, and the President of the Republic publishes it'.

50 Georges Burdeau, 'Essais d'une théorie de la révision des lois constitutionnelles en droit positif français' (thèse pour le doctorat, Faculté de Droit de Paris 1930) 9.

51 Constitution (n 3) art 2, paras 2, 3.

The referendum can take various forms - legislative, political, or constitutional. The constitutional referendum, in turn, might be founding or amending, and it is defined as a referendum that aims to enact or amend the state's Constitution. This process involves presenting the draft constitution or amendment - as prepared - to the popular vote for approval or rejection.[52] Returning to the rules regulating the referendum process in Syrian law, it becomes evident that the referendum process is limited to the situation of the Constitution's drafting only. The language used, specifically the expression '*in the referendum on the constitution and any other popular referendum,*'[53] lacks a precise definition of the term's content. This ambiguity leads us to infer that, according to Syrian law, a referendum on the constitution encompasses both the drafting and amending of the constitution.

According to this attitude, the mechanism for amending the 2012 Constitution stipulated in Article 150 does not restrict the original founding authority possessed by the Syrian people, nor does it prevent them from amending the Constitution because the latter is a sovereign authority transcending the former. The derived authority is of a legal speciality, and it is a secondary or subsidiary authority that operates according to the specified jurisdiction in the constitution and amends the constitution according to the objective and procedural constitutional set restrictions. On the other hand, the original founding authority responsible for drafting the Constitution has the authority to review or replace with others.

In the context of effecting fundamental changes,[54] given that the original constituent authority is, by definition, an authority outside or above the Constitution and therefore not subject to it in its activities,[55] it could be seen that the Syrian people, as the sovereign, could disregard the procedures for amendment stipulated in Article 150 of the 2012 Constitution and approve a constitutional amendment through a constitutional referendum. Consequently, if a proposal to amend the Syrian Constitution for 2012, submitted by the Syrian Constitutional Committee in Geneva, were to be coupled with the approval of the people, this would lend legitimacy to the amendment process because the people are the ones who approved the constitution through a popular referendum, and whoever owns the whole owns the part.

4 CONCLUSIONS

The study of the Syrian Constitutional Committee's formation and work, established based on UN Security Council Resolution 2254, is of utmost importance. As is well known, the Constitution is a national law subject to national sovereignty, and its creation is an issue that falls within the internal jurisdiction of the state. Therefore, international intervention in constitution-making can be an attack on or a diminution of national sovereignty. In the case

52 Majed Ragheb El-Helou, *Popular Referendum and Islamic Sharia* (2nd edn, University Press House 1983) 181.

53 Article 1 of Legislative Decree No. 3 of 1973, which includes the rules of Referendum in Syria.

54 Essam Said Abd Al-Obeidi, 'Amendment of Constitutional Rules in a Democratic System' (2016) 30 Moroccan Law Journal 115, doi:10.37258/1282-000-030-003.

55 Munther Al-Shawi, *Philosophy of the State* (Jordanian Dar Ward for Publishing and Distribution 2012) 397-9.

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

of international intervention, we move on from the nationalism of constitution-making to the phenomenon of internationalisation of constitution-making or internationalised constitutions.

The intervention of the international organisation in the Syrian conflict and the issuance of UN Security Council Resolution 2254 was not an end per se; it aimed to put an end to the conflict and find a political settlement. The formation of the Syrian Constitutional Committee, authorised by the United Nations and given the power to conduct a constitutional review, was a step in this direction. The claim that international intervention in constitution-making conflicts with national sovereignty and diminishes it is a relative matter determined by the extent of the role played by the international community in the constitution-making process. Through this research, we have concluded that international intervention in the Syrian Constitutional Committee was partial and limited to supervision, facilitation, and achieving consensus among Parties to Syria's conflict without detracting from the national character of this committee as a Syrian entity. Without the conflict parties' consent, including the government and opposition, the United Nations resolution on formulating the Syrian Constitutional Committee would not have been issued. The formulating committee's resolution came as an expression of the Syrian government's will and approval, and the issuance of this resolution by the United Nations does not detract from the legitimacy of the committee's work.

Therefore, we can say that the issue of forming the Syrian Constitutional Committee in Geneva has become a legal issue governed by an international legal framework after it was previously outside the framework of national constitutional law. With the intervention of the international organisation in the Constitutional Committee's formation, we believe that being a Syrian entity does not detract from the Committee's national character. All members of the Committee, who represent the three parties, government, opposition, and the United Nations, and whose number is 150, are Syrians. Furthermore, the decision to establish the Committee herein, the international organisation, does not possess the authority to compel the same members of the Constitutional Committee to accept any proposed constitutional texts from any of the parties. As a constructive body, the Constitutional Committee is a Syrian committee led and owned by Syrians, and the role of the United Nations is limited to facilitation, not imposition or compulsion. This decision shall confirm the Syrian Constitutional Committee's formation, which refers in its first item to the strong commitment of the Syrian Arab Sovereignty.

Therefore, we believe that the United Nations' intervention in the Syrian Constitutional Committee's formation does not replace Syrian national sovereignty and does not diminish the Committee's national character. The Constitutional Committee is not a complete founding authority because it lacks the autonomy to adopt a new constitution or amend the current one at its discretion. It is a consensus committee of a technical nature whose role is limited to formulating proposals that require popular consent. The Syrian people are the sovereign who have the final say in approving any constitutional review proposed by the committee. In other words, the approval of any constitutional reform will be in the name of the people, by the people, and attributed to them, not to the Constitutional Committee.

As a result, the internationalisation of the formation and work of the Syrian Constitutional Committee is acceptable per se as long as the state has given its consent. The problem is not in the internationalisation of the Syrian Constitutional Committee as long as the conflicting parties have agreed per se. It has been about five years since the Constitutional Committee's formation, during which the committee has held seven meetings but has yet to achieve any tangible results.

REFERENCES

1. Abdel Wahab MR, *Constitutional Law* (Manshurat Al-Ma'arif 1990)
2. Al-Bahri H, 'Constitution of the Syrian Arab Republic – Comparative Study between the Constitutions of 1973 and 2012' (2021) 34(2) Damascus University Journal of Economic and Legal Sciences 9
3. Al-Bahri H, *Comparative Constitutional Law* (Damascus University Pub 2021)
4. Al-Obeidi ESA, 'Amendment of Constitutional Rules in a Democratic System' (2016) 30 Moroccan Law Journal 73, doi:10.37258/1282-000-030-003
5. Al-Shawi M, *Philosophy of the State* (Jordanian Dar Ward for Publishing and Distribution 2012)
6. Ardant P, *Institutions politiques et droit constitutionnel* (14th edn, LGDJ 2002)
7. Burdeau G, 'Essais d'une théorie de la révision des lois constitutionnelles en droit positif français' (thèse pour le doctorat, Faculté de Droit de Paris 1930)
8. Burdeau G, *Traité de Science Politique*, t 4 *Le statut du pouvoir dans l'état* (3rd edn, LGDJ 1983)
9. Cedra-Guzman C, 'Repenser les Constitutions Internationalisées' (2015) 6 Revue du Droit Public 1567
10. Chantebout B, *Droit Constitutionnel* (23rd edn, Sirey Universite 2006)
11. Chemillier-Gendreau M, 'Le Concept de Souveraineté a-t-Il Encore Un Avenir ?' (2014) 5 Revue du Droit Public 1283
12. Dalla S, *Principles of Constitutional Law and Political Systems* (3rd edn, University of Sharjah 2022)
13. Duhamel O and Meny Y, *Dictionnaire Constitutionnel* (Presses Universitaire de France 1992)
14. El-Helou MR, *Popular Referendum and Islamic Sharia* (2nd edn, University Press House 1983)
15. Favoreu L and others, *Droit Constitutionnel* (5th edn, Dalloz 2002)
16. Gözler K, *Le Pouvoir de Révision Constitutionnelle* (Presses universitaires du Septentrion 1997)
17. Malberg RC, *Contribution à la Théorie Générale De L'état: Spécialement d'après Les Données Fournies Par Le Droit Constitutionnel Français,* t 2 (CNRS 1962)

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

18. Maziau N, 'L'internationalisation Du Pouvoir Constituant : Essai de Typologie : Le Point de Vue Hétérodoxe Du Constitutionnaliste' (2002) 3 Revue Générale de Droit International Public 549
19. McWhinney E, *Constitution-Making: Principles, Process, Practice* (University of Toronto Press 1981)
20. Mohamed-Afify A, 'La Constitution égyptienne de 2014: entre traditions et tendances révolutionnaires' (2015) 101(1) Revue française de droit constitutionnel 121, doi:10.3917/rfdc.101.0121
21. Pactet P et Mélin-Soucramanien F, *Droit Constitutionnel* (34th edn, Sirey Université 2015)
22. Ponthoreau MC, *Droit(s) Constitutionnel(s) Comparé(s)* (Economica 2010)
23. Sari G, *Principles and Provisions of Constitutional Law* (4th edn, Dar Al-Nahda Al-Arabia 2002/2003)
24. Sieyès E, *Qu'est-Ce Que Le Tiers Etat?* (Librairie Droz 1970)
25. Tannar H, *Constitutional Law* (2nd edn, Aleppo University Pub 2021)
26. Velu J, *Droit Public*, t 1 *Le statut des gouvernants* (Bruylant 1986)
27. Zulueta-Fülscher K and Bisarya S, *(S)electing Constitution-Making Bodies in Fragile and Conflict-Affected Settings: International IDEA Policy Paper no 16* (International IDEA 2021) doi:10.31752/idea.2018.67

AUTHORS INFORMATION

Hamoud Tannar*
Associate Professor (public law), College of Law, Sharjah University, Sharjah, United Arab Emirates
htannar@sharjah.ac.ae
https://orcid.org/0009-0002-0934-5374
Corresponding author, principle author responsible for writing.

Ayman Mohamed Afify
Assistant professor (public law), College of Law, Kalba University, Sharjah, United Arab Emirates, University of Alexandria, Egypt
ayman.mohamed@sharjah.ac.ae
https://orcid.org/0000-0002-6275-0670
Co-author, responsible for plan of the study and translation.

Sam Dalla
Professor (public law), College of Law, Sharjah University, Sharjah, United Arab Emirates
sdalla@sharjah.ac.ae
https://orcid.org/0000-0003-3525-082X
Co-author, responsible for plan of the study and writing.

CO-AUTHORSHIP

All co-authors contributed equally to the preparation and writing the article.
Competing interests: No competing interests were disclosed.
Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free of any impact on any organisations.

ABOUT THIS ARTICLE

Cite this article
Tannar H, Mohamed Afify A and Dalla S, 'Legal Adaptation for the Syrian Constitutional Committee Formed Based on UN Security Council Resolution 2245' (2024) 7(1) Access to Justice in Eastern Europe 149-69 <https://doi.org/10.33327/AJEE-18-7.1-r000101>

Submitted on 15 Oct 2023 / Revised 5 Nov 2023 / Approved 7 Nov 2023
Published ONLINE: 1 Dec 2023 / Last Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-r000101

Managing editor – Prof. Iryna Izarova**. English Editor** – Julie Bold.

***Keywords*:** *constitution-making, original constituent authority, constituent power, sovereign authority.*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

UNDERSTANDING THE RELATIONSHIP BETWEEN THE RULE OF LAW AND SUSTAINABLE DEVELOPMENT

Adnan Mahmutovic* and Abdulaziz Alhamoudi

ABSTRACT

Background: *The aim of this paper is to investigate the relationship between the rule of law and sustainable development. The rule of law, frequently referred to as 'the empire of laws and not of men,' underscores the significance of constraining capricious authority and ensuring that public servants adhere to legal structures in their conduct. The rule of law, being a legal principle, is of paramount significance for society's overall advancement and well-being; therefore, its importance should not be undervalued. Its worth should not be diminished. In contrast, sustainable development enddeavours to reconcile the interests of current and future generations through the integration of economic, social, and environmental considerations.*
Methods: *This study primarily focuses on theoretical observations and employs a qualitative methodology. Its objective is to explore the relationship between the rule of law and sustainable development by analysing their attributes, viewpoints, and interpretations. By integrating the idea of the rule of law with sustainable development, it aims to consolidate information that is often scattered or semi-structured. Data is gathered through methods including desk research, descriptive analysis, and theoretical observations.*
Results and Conclusions: *The significance of upholding the rule of law in the pursuit of sustainable development is underscored in this article. Furthermore, the present study investigates the correlation between the advancement of sustainable development and the notion of the rule of law. This encompasses a comprehensive examination of multiple facets, including formal, procedural, substantive, constitutional, and good governance elements. The rule of law is recognised by the international development community as a foundational element that facilitates the achievement of additional development goals. This scholarly article enhances the existing understanding of the reciprocal support between sustainable development and the rule of law by analysing this intricate interplay.).*

1 INTRODUCTION

Social fragmentation, economic inequality, and the erosion of democratic standards and human rights are among the complex and interconnected issues of the present day. The wealth gap has contributed to an increase in homelessness, hunger, and poverty, whereas intolerance and extremism fuel political and social divisions. Those trends are placing pressure on the social fabric and rendering it progressively more difficult to identify shared interests and collaborate in pursuit of common objectives. Significant challenges and expectations confront the international community of sovereign countries. In this regard, several initiatives have already been implemented to promote the general welfare. One such initiative is adopting the 2030 Agenda for Sustainable Development, which aims to achieve 17 development goals by 2030.[1] The 2030 agenda presents both opportunities and challenges. This comprehensive agenda has the potential to start the transformation of international development.

For the first time, the three pillars of sustainability – social, economic development, and environmental protection - are being considered together to balance the ambitions of current generations with the interests of future ones. The fundamental concept of sustainability pertains to the capacity of a given entity to persist, with a reasonable degree of continuity, over an extended period. Sustainability is a defining attribute of a process or condition that can be upheld at a specific level indefinitely without being subject to temporal limitations. The concept of sustainable development primarily seeks to enhance the well-being of individuals and utilise the natural environment as a reflection of the prevailing adverse phenomena within society. The agenda includes goals related to economic growth, protection of natural resources, education, health, and responsible consumption. Addressing gender, societal, and international disparities is a fundamental aim of the agenda. This is demonstrated through the document's repetitive statement 'Leave no one behind' (LNOB)[2] and its transformative pledge. To attain sustainable development, the LNOB principle guarantees that the most marginalised and vulnerable individuals are not abandoned. This entails prioritising their requirements and ensuring they have the necessary resources and opportunities to flourish. The high-level political forum of the United Nations mandates that all nations furnish progress reports in light of the agenda's universal applicability. This statement recognises that the development process is not confined to particular geographical areas and that poverty is not exclusively found in developing nations. Finally, the agenda recognises access to justice and the rule of law as important goals, a significant shift in development policy. The inclusion of the rule of law in the Agenda for Sustainable Development has brought an interesting new dimension to the notion of development to the theory and policy of international development. In recent years, sustainable development has emerged as the prevailing global framework

1 'The Sustainable Development Agenda' (*Sustainable Development Goals*, 2023) <https://www.un.org/sustainabledevelopment/development-agenda> accessed 10 July 2023.

2 'Universal Values Principle Two: Leave No One Behind' (*United Nations Sustainable Development Group*, 2023) <https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind> accessed 10 July 2023.

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

influencing the ongoing restructuring of international and domestic law. Since its inception, legal scholars worldwide have been conscientiously striving to understand the legal implications associated with the concept of sustainable development.[3] Today, the concept of sustainable development finds expression in legally enforceable international, regional (European), and national documents.

1.1. Research Methodology

The research methodology employs a qualitative approach. Qualitative research, enhanced by theoretical foundations, aims to investigate the connections between the rule of law and sustainable development by examining the characteristics, perspectives, and interpretations of both. It combines the concept of the rule of law with sustainable growth, gathering usually disorganised or partially organised information. The data is collected using desk research, descriptive analysis, and theoretical observations.

To comprehend the relationship between the SDGs and the rule of law, one must possess a comprehensive understanding of the concept of the rule of law. Consequently, the preliminary segment of the paper examines the historical development of the rule of law, with a specific emphasis on the ancient and modern epochs. The principal aim is to illustrate that the rule of law is firmly rooted in historical principles as opposed to theoretical constructs. The objective is to demonstrate that the notion can be modified to fit current institutional developments and maintain its conceptual viability within legal theory. In the second section of this paper, we emphasised that the rule of law is a highly contentious concept, not only on account of divergent interpretations and compliance levels but also on account of differing perspectives on its fundamental principles. To effectively confront this challenge, the cultivation of a global community is of dire importance. This community comprises legal professionals actively involved in advocacy, law reform, legislation drafting, legal education, and the provision of legal support and representation. The third section of this paper delves into examining the United Nations' endeavours to advance the rule of law and the significance of such efforts in relation to the Sustainable Development Goals (SDGs). The definition of the rule of law and its three fundamental components, which are essential for attaining the SDGs, are scrutinised. In the fourth section, central to this research, we examine various aspects of the interaction between the rule of law and sustainable development. This includes exploring global advocacy for the rule of law, examining SDGs related to the rule of law, and investigating how different dimensions of the rule of law can intersect with the SDGs. The concept of the rule of law is fundamental to national regulations within the boundaries of sovereign states. Through inter-state interaction, international regulations are established, and international organisations are founded, as discussed in the conclusion of this paper. Without establishing an international concept of the rule of law, today's international relations between distinct subjects of international law would be unimaginable. These international relations are integral to the achievement of sustainable development objectives.

3 Klaus Bosselmann, 'Losing the Forest for the Trees: Environmental Reductionism in the Law' (2010) 2(8) Sustainability 2424, doi:10.3390/su2082424.

1.2. Literature Review

The literature review has shown that, despite the fact that the topic addressing the relationship between the rule of law and sustainable development is very current and significant, the contribution is still timid. Several articles jointly emphasise the correlation between the rule of law and sustainable development.[4] Some authors examine the rule of law as both a goal and a method for achieving sustainable development, presenting a framework for understanding and evaluating the rule of law.[5] Available literature demonstrates that the principle of the rule of law is widely acknowledged as a crucial element of sustainable development.[6] The literature study emphasises that the rule of law is applicable to the economic, social, and environmental components of sustainable development.[7] Several authors analyse the necessity for enterprises to incorporate international legal norms pertaining to social, environmental, and human rights issues.[8] Some researchers have discovered a direct correlation between the rule of law and both economic growth and environmental protection in high-income countries.[9] Furthermore, proponents assert that the rule of law is essential in attaining sustainable development and alleviating poverty, underscoring its function in establishing a legal structure and implementing sustainable development programs.[10]

2 COMPREHENDING THE RULE OF LAW ACROSS TIME

2.1. Ancient Era

The concept of the rule of law has its roots in ancient civilisations such as the Greeks, Chinese, and Romans.[11] The Code of Hammurabi, dating back to 1760 BC, is one of the earliest examples of a legal system that governed society based on essential legal principles.[12] Although the term 'rule of law' gained popularity in classical liberalism, its origins

4 Danielle Watson and others, 'Problematising the Rule of Law Agenda in the SDG Context' in J Blaustein and others (eds), *The Emerald Handbook of Crime, Justice and Sustainable Development* (2020) 131, doi:10.1108/978-1-78769-355-520201010.

5 Steven Malby, 'The Rule of Law and Sustainable Development' (2017) 43(3-4) Commonwealth Law Bulletin 521, doi:10.1080/03050718.2017.1436229.

6 Jonas Ebbesson and Ellen Hey, *The Cambridge Handbook of the Sustainable Development Goals and International Law* (CUP 2022) doi:10.1017/9781108769631.

7 Arnold Kreilhuber and Angela Kariuki, 'Environmental Rule of Law in the Context of Sustainable Development' (2020) 32 The Georgetown Environmental Law Review 591.

8 Lelia Mooney, 'Promoting the Rule of Law in the Intersection of Business, Human Rights, and Sustainability' (2015) 46 Georgetown Journal of International Law 1135.

9 Concetta Castiglione, Davide Infante and Janna Smirnova, 'Environment and Economic Growth: Is the Rule of Law the Go-Between? The Case of High-Income Countries' (2015) 5 Energy, Sustainability and Society 26, doi:10.1186/s13705-015-0054-8.

10 Gopala Anjinappa, 'Rule of Law: A Fundamental Pillar Enabling Sustainable Development and Reduction of Poverty in India' (2015) 6(1) International Journal of Asian Business and Information Management 38, doi:10.4018/IJABIM.2015010103.

11 Edric Selous, 'The Rule of Law and the Debate on it in the United Nations' in CA Feinäugle (ed), *The Rule of Law and Its Application to the United Nations* (Routledge 2016) 13, doi:10.5771/9783845275017-13.

12 ibid.

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

can be traced back to Plato. In his dialogue 'The Laws' Plato proposed that the government should be subordinate to the law.[13] His student Aristotle further developed this idea in 'The Politics', where he distinguished between the rule of law, based on reason, and the rule of man, driven by passion.[14] According to Aristotle, the rule of law was attractive because it aimed for justice, which required treating equals equally and punishing those who committed the same crimes equally.[15] This way, law steadily maintained the administration of justice, and for Aristotle, the rule of law was meaningless without justice. Justice was considered a virtue in ancient Greece. Aristotle believed it was better to be ruled by law than by another human being because very few people are wise and concerned about the well-being of others. In a republic or polity, where many rule together, wisdom and good intentions can prevail, and laws can be made to handle most cases. However, Aristotle's influential work on the rule of law recognised the importance of considering the type of law and regime when determining whether governance is best left to the best man or the best laws. Despite some cases requiring the specific insight of judges, Aristotle maintained that laws provide advantages such as being laid down in general terms and made after long consideration, which helps to satisfy claims of justice. His emphasis on the desirability of rules and the use of equity continue to shape modern jurisprudence.[16] These concepts revolve around themes such as 'the rule of law, not man,' 'a government of laws, not men,' and 'law is reason, man is passion.'[17] However, its adherence to the other two components, namely legal supremacy and legal certainty, was compromised by social practices and cultural values. These Greek philosophical works had a significant impact on Roman legal thinking, particularly on Cicero, who emphasised in his work 'De Legibus' (circa 54-51 BC) that the law should serve the greater good of the community, thus subjecting it to ideals of justice.[18] It is important to note that this discussion holds relevance beyond their historical context, as it relates to the contemporary understanding of the principle that no individual or entity is above the law – the modern-day understanding of the rule of law.

2.2. Modern Time

In Summa Theologicae, Thomas Aquinas formulated a natural law theory built upon Aristotle's perspective.[19] Aquinas reaffirmed Aristotle's assertion that the foundation of law is human reason and emphasised the imperative nature of establishing laws for the collective benefit. Aquinas's contributions further developed the notion that legal systems ought to be in accordance with the intrinsic and universal principles of natural law, which govern human

13 Thomas L Pangle, *The Laws of Plato* (University of Chicago Press 1988).
14 Jill Frank, 'Aristotle on Constitutionalism and the Rule of Law' (2006) 8(1) Theoretical Inquiries in Law 37, doi:10.2202/1565-3404.1142.
15 Karen Margrethe Nielsen, 'Aristotle on Justice' in M Sellers and S Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2022) 1, doi:10.1007/978-94-007-6730-0_923-1.
16 Lawrence B Solum, 'Equity and the Rule of Law' (1994) 36 Nomos 120.
17 Aleardo Zanghellini, 'The Foundations of the Rule of Law' (2016) 28(2) Yale Journal of Law & Humanities 213.
18 Catherine Steel (ed), *The Cambridge Companion to Cicero* (CUP 2013).
19 SuperSummary, *Study Guide: Summa Theologica by Thomas Aquinas* (Independently pub 2020).

behaviour in a manner that advances justice and the welfare of society.[20] During the Enlightenment period in Europe, thinkers emphasised the importance of laws limiting the state's power and protecting individual rights. John Locke, a prominent philosopher in the development of liberalism, viewed liberty as freedom from restraint and violence, with the law acting as a safeguard and enabler of this freedom. Locke introduced the concept of the social contract, wherein individuals consented to be governed in exchange for protecting their personal freedoms and property.[21] This agreement established the government's legitimacy through popular consent, empowering it to create and enforce laws for the common good. Although Locke did not explicitly address a separate judiciary, he focused on upholding individual rights and preserving property, setting the stage for developing the rule of law. In 'The Spirit of the Laws' (1748), Montesquieu expanded on Locke's ideas by proposing separating powers to prevent governmental abuse and safeguard liberty. Montesquieu advocated for separating powers or dividing legislative, executive, and judicial functions among distinct entities, emphasising the need for checks and balances. The term 'rule of law' gained widespread usage in the nineteenth century, primarily due to the contributions of British constitutionalist Albert V. Dicey. In his influential work, 'Introduction to the Study of the Laws of the Constitution' (1885), Dicey presented the first comprehensive elucidation of the rule of law within the context of liberal democracy. Dicey places significant emphasis on a formal interpretation of the concept, characterised by three fundamental components.[22] These components are as follows: (1) being governed by the law instead of arbitrary authority, (2) equal subjection to the law for both government officials and private individuals, and (3) submission to the ordinary courts' overall jurisdiction, which provide the most dependable legal protection. Friedrich Hayek, an Austrian economist and political theorist who won the Nobel Prize, discussed the historical background and significance of the concept of the rule of law in his work, The Constitution of Liberty. Hayek examined the concept and progression of the rule of law, starting from its inception in the works of ancient Greek and Roman philosophers and culminating in its advancement in English constitutional history.[23]

The concept of the rule of law applies to both democratic and non-democratic systems of government. Today, almost every nation asserts its compliance with the rule of law, which comes with the entitlement to govern based on ethical principles and legitimising norms.[24] Scholars hold divergent views on the definition and usefulness of the rule of law.[25] The concept is universally acknowledged to be challenging to define in a manner that encompasses

20 Paul J Cornish, 'Marriage, Slavery, and Natural Rights in the Political Thought of Aquinas' (1998) 60(3) The Review of Politics 545, doi:10.1017/S0034670500027467.

21 Jeremy Waldron, 'John Locke: Social Contract Versus Political Anthropology' (1989) 51(1) The Review of Politics 3, doi:10.1017/S0034670500015837.

22 Stephane Beaulac, 'An Inquiry into the International Rule of Law' (2007) 14 EUI Working Paper MWP <https://hdl.handle.net/1814/6957> accessed 10 July 2023.

23 FA Hayek, *The Constitution of Liberty* (University of Chicago Press 1960).

24 Mortimer NS Sellers, 'What is the Rule of Law and Why is It so Important?' in J Silkenat, J Hickey and P Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State* (Springer 2014) 3.

25 Tom Bingham, *The Rule of Law* (Allen Lane 2010); AV Dicey, *Introduction to the Study of the Law of the Constitution* (7th edn, Macmillan and co limited 1908); Robert Stein, 'Rule of Law: What Does It Mean?' (2009) 18 Minnesota Journal of International Law 293.

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

its entire significance.[26] Some claim that because it is so widely used and in many diverse contexts, it is essentially meaningless, while others offer long lists of necessary components. However, legal supremacy, legal equality, and legal certainty are a succinct list of essential elements for clarity. Although the first two elements are unambiguous, there are disagreements in contemporary legal study on the third. There are doubts about the predictability and clarity of laws, particularly the degree to which general laws can be applied consistently and with full certainty in particular circumstances. Moreover, the question of whether the law can consistently provide justice in certain instances is raised in relation to the stringent adherence to its apparent meaning.

Some authors argue about the division of the history of law and politics into a battle between two factions: those supporting the rule of law (government 'de jure') and those supporting the rule of specific individuals (government 'de facto').[27] This transfer of authority across countries exemplifies the milestones of the modern rule of law tradition. It seeks to implement the principles of the rule of law practically. The conflict between the 'de facto' theory of law as a tool of power and the 'de jure' conception of law as a result of reason and justice has been the driving force behind legal modernity and the global advancement of constitutional government.[28]

Overall, the rule of law concept is rooted in historical principles rather than abstract ones. It is flexible enough to be applied to modern institutional changes and is conceptually sustainable on a legal theoretical level.

3 UNDERSTANDING THE AMBIGUITY AND COMPLEXITY OF THE RULE OF LAW CONCEPT

Although the expression 'rule of law' is commonly used in international instruments and acknowledged as a constitutional principle, its meaning remains unclear.[29] Legal theorists even call it an 'essentially contested concept'.[30] Maybe that is why it is universally appealing - like the idea of 'the good', where everyone has ideas about what it means. An English judge, Lord Bingham, suggests it did not require a statutory legal definition. He acknowledges that judges routinely apply the rule of law in their judgments.[31] Fukuyama illustrates the rule of law, suggesting that its fundamental essence lies in a societal agreement that the laws are

26 Bingham (n 25) 5-7.
27 Sellers (n 24).
28 MNS Sellers, *The Sacred Fire of Liberty: Republicanism, Liberalism, and the Law* (Palgrave Macmillan 1998) doi:10.1057/9780230371811.
29 Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2(1) Hague Journal on the Rule of Law 48, doi:10.1017/S1876404510100037.
30 Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21(2) Law and Philosophy 137, doi:10.1023/A:1014513930336.
31 Lord Bingham, 'The Rule of Law' (2007) 66(1) The Cambridge Law Journal 67, doi:10.1017/S0008197307000037.

and exist independently of those in power, constraining their behaviour.[32] According to Fukuyama, the ruler does not hold ultimate authority; instead, the law is sovereign. Legitimacy for the ruler is derived solely from the just powers the law grants.[33]

The World Justice Project defines the rule of law as a resilient framework consisting of laws, institutions, norms, and community dedication that upholds four fundamental principles: accountability, just laws, open government, and accessible and impartial dispute resolution.[34] The Rule of Law Index evaluates over 190 nations worldwide, as well as within their specific regional and income categories, based on these four principles.[35] It assesses their performance in relation to eight parameters. The factors encompassed in this list are limitations on governmental authority, lack of corruption, transparent governance, basic rights, maintenance of law and order, effective regulation, fair civil legal proceedings, and just criminal legal proceedings. Today, the interpretation of the rule of law differs across countries. In certain countries, it prioritises legality and predictability to drive economic growth. However, in other countries, the emphasis is on the cost and efficiency of justice rather than the quality of justice. To clarify the conceptual ambiguity surrounding the rule of law, some authors delve into the diverse notions of this concept, which occasionally conflict with one another and underlie distinct aggregate measures.[36] In the common law tradition, Dicey's work is particularly significant.[37] In contrast, the civil law tradition places less emphasis on the judicial process and more on the nature of the state, as evidenced by concepts like *état de droit*, *stato di diritto*, and *Rechtsstaat*, which all refer to the notion of a state based on the rule of law.[38]

The rule of law is a contentious concept contested not only on account of divergent viewpoints regarding its foundational principles but also on account of modifications in its application and interpretation. Although certain principles are universally applicable, others are subject to interpretation and permit differing levels of adherence. The required level of compliance is not specified by the rule of law, and it may be impossible to adhere to all principles; therefore, the executive, administrative, and judicial branches must exercise discretion. Discretion is essential because it enables the law to adapt sufficiently to changes in the world and extraordinary circumstances. However, taking these principles to their extreme would hinder any legislation or modification to the law, which is impractical. Some authors distinguish between the rule of law in a narrow sense, which includes legality and due process (referred to as the rule of law I), and the rule of law in a broader sense, which

32 Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Farrar, Straus and Giroux 2011).

33 ibid.

34 'What is the Rule of Law?' (*World Justice Project*, 2023) <https://worldjusticeproject.org/about-us/overview/what-rule-law> accessed 10 July 2023.

35 'Rule of law - Country rankings' (*The Global Economy: Business and economic data for 200 countries*, 2022) <https://www.theglobaleconomy.com/rankings/wb_ruleoflaw> accessed 10 July 2023.

36 Jørgen Møller and Svend-Erik Skaaning, *The Rule of Law: Definitions, Measures, Patterns, and Causes* (Palgrave Macmillan 2014).

37 Dicey (n 25).

38 Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65(2) International and Comparative Law Quarterly 277, doi:10.1017/S0020589316000026.

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

includes constitutional democracy (referred to as the rule of law II).[39] It is noted that some countries adhere only to the rule of law I, while others implement both mechanisms. China, the largest country in the world, has a poor score on the rule of law II and a score of 0 on the rule of law I. In contrast, Singapore, a small city-state, has a high ranking on the rule of law I and a medium ranking on the rule of law II.[40] However, None of the countries can assert flawless compliance with the rule of law. The rule of law serves as a reliable and constant point of reference that can provide us with guidance both presently and in the times to come.

4 THE UN'S ROLE IN PROMOTING THE RULE OF LAW

The notion of the rule of law is firmly entrenched inside the United Nations. The rule of law serves as the means by which human rights are put into effect. The 1948 Universal Declaration of Human Rights underscores the crucial significance of safeguarding human rights through the application of legal principles, asserting in its preamble that it is imperative to avert individuals from being compelled to engage in rebellion against despotic authority and suppression.[41] The rule of law has been described as the fourth pillar of the UN Charter and is considered the foundation for achieving peace and security, human rights, and development.[42] Without the rule of law, achieving these objectives fairly and justly is difficult. However, the UN's ability to promote the rule of law depends on Member States' willingness to cooperate and adhere to established norms and practices. Therefore, the UN acknowledged that the rule of law applies to all states and international organisations (including the UN and its principal organs) and that upholding and promoting the rule of law and justice should serve as guiding principles for all their activities.

In some cases, Member States may resist UN efforts to promote the rule of law. Hence, the effectiveness of UN efforts in promoting the rule of law may vary depending on the political and social context of Member States. In some countries, there may be deep-rooted corruption, weak institutions, and a lack of political will to reform. In such cases, UN efforts may face significant challenges. To tackle such cases at the national level, the UN has improved its approach to supporting the rule of law by assisting in constitution-making, enhancing the national legal framework, strengthening justice, governance, security, and human rights institutions, facilitating transitional justice processes, and empowering civil society. The UN has developed the SDG Impact Standards.[43] These guidelines are highly beneficial for various stakeholders seeking to integrate sustainability and the Sustainable

39 Jan-Erik Lane, 'Political Modernisation: The Rule of Law Perspective on Good Governance' (2015) 5(1) The Open Journal of Political Science 13, doi:10.4236/ojps.2015.51002.

40 ibid.

41 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) <https://digitallibrary.un.org/record/666853?ln=en> accessed 10 July 2023.

42 UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General' (23 August 2004) UN Doc S/2004/616, note 1, para 9 <https://digitallibrary.un.org/record/527647?ln=en> accessed 10 July 2023.

43 *SDG Impact UNDP* <https://sdgimpact.undp.org> accessed 10 July 2023.

Development Goals (SDGs) into their decision-making processes. These systems are constructed based on core concepts and offer a structure for effortlessly incorporating various tools and frameworks into the decision-making process. By embracing these criteria, organisations may guarantee a thorough and methodical method of incorporating sustainability and the SDGs into their strategy and daily activities. It is advisable to establish a mandate to perform SDG impact assessments for any new legislation, programs, and development initiatives, regardless of their scope, whether local, national, or worldwide. Ensuring that legal decisions align with sustainable development goals is crucial. By performing these assessments, the United Nations may enforce accountability on decision-makers for their choices and actions.

At the international level, several declarations and statements have emphasised the significance of the rule of law. One such example is the 1970 Declaration on Principles of International Law Friendly Relations and Cooperation among States under the Charter of the United Nations, which is viewed as a clarification of the UN Charter and highlights the crucial role of the UN Charter in advancing the rule of law among nations.[44] In 1992, the United Nations Conference on Environment and Development adopted the Rio Declaration on Environment and Development.[45] Principle 27 of the Rio Declaration emphasises the need for cooperation and partnership among states and people to fulfil the principles outlined in the Declaration and further develop international law in sustainable development. While Principle 27 acknowledges the existence of international law in this field, it does not specify its content, whether procedural, substantive, or both, or where it can be found. Independent legal experts reviewed legal and policy instruments and the international practice of states to determine the content of sustainable development law.[46] They concluded that 'sustainable development' is a legal term encompassing processes, principles, objectives, and a substantial body of international agreements related to environmental, economic, civil and political rights. The UNCED process is significant because it supports an integrated strategy that jointly addresses existing concepts, regulations, and institutional arrangements rather than inventing new ones. The United Nations Millennium Declaration of 2000 laid down fundamental principles that should serve as the foundation for international relations in the 21st century.[47] These principles encompass freedom, equality, solidarity, tolerance, environmental preservation, and shared responsibility. The derivation of the Millennium Development Goals can be traced back to this declaration. The Millennium Declaration identified strengthening the rule of law as the top priority. At the same time, the World Summit 2005 reiterated the significance of good

44 Declaration on Principles of International Law Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations (adopted 24 October 1970 UNGA Res 2625 (XXV)) <https://digitallibrary.un.org/record/202170> accessed 10 July 2023.

45 United Nations, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol 1, Resolutions adopted by the Conference (UN 1993) 3-8.

46 'Report of the Consultation on Sustainable Development: the Challenge to International Law' (1994) 3 Review of European Community and International Environmental Law 1 et seq.

47 United Nations Millennium Declaration (adopted 08 September 2000 UNGA Res 55/2) <https://digitallibrary.un.org/record/422015?ln=en> accessed 10 July 2023.

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

governance and the rule of law as critical to sustaining economic growth.[48] The Sustainable Development Goals 2015 also include a target to promote the rule of law at national and international levels and ensure equitable access to justice for all.[49] The rule of law is increasingly viewed as both a developmental objective and a mechanism for achieving development in all nations.

As defined by the International Bar Association Council, the rule of law includes vital principles like an independent judiciary, presumption of innocence, fair trials, proportional punishment, a robust legal profession, confidentiality of lawyer-client communications, and legal equality.[50] Practices such as arbitrary arrests, secret trials, indefinite detention without trial, cruel treatment, degrading punishment, and electoral corruption are considered unacceptable. The rule of law forms the basis of a civilised society, ensuring a transparent and fair system that empowers and protects individuals. However, the United Nations Secretary-General's 2004 report on the rule of law and transitional justice provides the most widely accepted understanding of the rule of law.[51] It explains the rule of law as a principle of governance where all persons, institutions, and entities, including the state itself, are accountable to publicly promulgated laws that are equally enforced, independently adjudicated and aligned with international human rights norms and standards. The principle requires measures to ensure the supremacy of the law, equality before the law, accountability to the law, fairness in its application, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. The Secretary-General has avoided elaborating on the issue and kept the interpretation of his 2004 report open. He did not imply that the 'concept' meant to define the rule of law for use within the United Nations could apply beyond the Secretariat. In his following report to the Security Council, the Secretary-General emphasised the importance of the rule of law to the organisation's work. He downplayed his terminology as simply an effort to create a 'common language of justice' that includes the concept of the rule of law, among other things.

Based on the UN interpretation, one can understand the rule of law as consisting of three core elements: legal frameworks, institutional capacity, and legal empowerment.[52] Legal frameworks encompass laws at different levels, while institutional capacity includes the justice system, encompassing formal and informal institutions responsible for implementing and enforcing laws. Legal empowerment refers to individuals' ability to access and effectively use the justice system to protect their rights. These elements correspond to

48 2005 World Summit Outcome (adopted 24 October 2005 UNGA Res 60/1) para 11 <https://digitallibrary.un.org/record/556636?ln=en> accessed 10 July 2023.

49 Draft outcome document of the United Nations summit for the adoption of the post-2015 development agenda, Annex: Transforming Our World: the 2030 Agenda for Sustainable Development (adopted 1 September 2015 UNGA Res 69/315) <https://digitallibrary.un.org/record/803344?ln=en> accessed 10 July 2023.

50 The Rule of Law: A Commentary on the IBA Council's Resolution of September 2005 (IBA Council's Resolution of 8 October 2009) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=9925C6FD-5804-407F-9D39-ECB9D6A8B9D4> accessed 10 July 2023.

51 UN Secretary-General (n 42).

52 Steven Malby, *The Rule of Law and Sustainable Development: A Report of the CSIS Program on Prosperity and Development* (CSIS 2020).

the different components of the UN definition of the rule of law. The notion of 'access to justice,' part of Sustainable Development Goals - SDG Target 16.3, also involves several elements.[53] The SDG target stresses promoting the rule of law and access to justice, requiring a focus on all three elements and their corresponding components. Countries must consider these elements to evaluate progress towards achieving these goals.

5 THE INTERPLAY BETWEEN THE RULE OF LAW AND SUSTAINABLE DEVELOPMENT

When discussing the relationship between the rule of law and the SDGs, it is evident that they complement and reinforce each other. In other words, a clear correlation exists between a society's commitment to the rule of law and its progress in sustainable development. The World Summit in September 2005 marked the first recognition of such a correlation.[54] Paragraph 119 emphasised the interplay and mutual reinforcement of human rights, the rule of law, and democracy.[55] Moreover, paragraph 134 reaffirmed the commitment to universally adhere to and implement the rule of law at national and international levels, underscoring its importance for peaceful coexistence and cooperation among states.[56] It is noted that adhering to the rule of law fosters fairness, justice, and accountability, providing a solid foundation for social, economic, and environmental advancement. It facilitates the effective implementation of sustainable development policies and regulations. As a result, societies emphasising the rule of law are more likely to achieve long-term, balanced progress in sustainable development. This is acknowledged by the 2030 Agenda for Sustainable Development, specifically SDG 16, which recognises that access to justice and adherence to the rule of law are vital for promoting sustainable development.[57]

5.1. Global Advocacy for the Rule of Law: The Importance of a Culture of Lawfulness

Advocacy for the rule of law has become global. People, governments, and organisations worldwide are committed to this ideal. The Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, held in Qatar in 2015, saw Member States in which they were pledging to cultivate a culture of lawfulness grounded in the safeguarding of human rights and the rule of law.[58] However, the precise meaning of a 'culture of lawfulness' remains subject to varying interpretations and misunderstandings. While some view it as a culture

53 'The 17 Goals' (*Sustainable Development Goals*, 2023) <https://www.un.org/sustainabledevelopment/development-agenda> accessed 10 July 2023.

54 Elyse Wakelin, 'Rule of Law and the UN Sustainable Development Goals' in W Leal Filho and others (eds), *Peace, Justice and Strong Institutions: Encyclopedia of the UN Sustainable Development Goals* (Springer 2019) 822, doi:10.1007/978-3-319-95960-3_36.

55 2005 World Summit Outcome (n 48).

56 ibid.

57 'Goal 16: Promote just, peaceful and inclusive societies' (*Sustainable Development Goals*, 2023) <https://www.un.org/sustainabledevelopment/peace-justice> accessed 10 July 2023.

58 Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, Annex: Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation (adopted 17 December 2015 UNGA Res 70/174) <https://digitallibrary.un.org/record/816763?ln=en> accessed 10 July 2023.

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

founded on trust and respect for the justice system, law enforcement, and the law, others equate it to mere obedience to the law driven by habit, fear, or self-interest. As with the rule of law, this concept has no definitive definition.[59] The potential usefulness of the 'culture of lawfulness' lies in its ability to provide a new shared narrative that can underpin a wide range of justice reforms rooted in human rights and democratic principles. This concept encompasses various vague yet significant ideas, including access to justice, accountability and transparency of criminal justice institutions, security, public safety, and fairness in the administration and delivery of justice.[60] Each of these notions could serve as a fundamental component of a culture of lawfulness.

A 'culture of lawfulness' implies that a society's predominant or mainstream culture, values, and beliefs support the rule of law.[61] In such a culture, the average person acknowledges that legal norms are integral to justice and provide a path to achieve justice, thereby enhancing the quality of life for individuals and society.[62] The argument underlying this concept is that relying solely on regulatory measures and strong institutions is inadequate for establishing or sustaining lawful and orderly societies. To this end, Godson recommends cultivating a culture of lawfulness through civic and school-based education, centres of moral authority, and positive media messaging that reinforce 'the values that promote law-abiding, values-oriented citizenship'.[63] Building a culture of lawfulness is essential for a society to enjoy peace, security, and effective response to emerging threats, such as crime and terrorism.

The Doha Declaration commits Member States to fostering a culture that upholds the rule of law and human rights while respecting cultural identities, specifically focusing on children and youth.[64] This dual focus on supporting human rights and honouring cultural identities reflects the political and ideological tensions that have given rise to debates over the definition of the rule of law.

5.2. The Rule of Law in the SDGs Agenda

The concept of the rule of law is now a central element of Sustainable Development Goal 16, which urges Member States to establish 'peaceful and inclusive societies for sustainable development,' ensure access to justice for everyone, and construct effective, accountable, and inclusive institutions at all levels.[65] SDG 16 stands out as it incorporates the lessons learned from the previous Millennium Development Goals (MDGs). This SDG is focused on establishing governance institutions and a judicial system that ensures a stable environment devoid of corruption and violence. These institutions aim to enable citizens to exercise their human rights without hindrance. Recognising the rule of law as the bedrock of sustainable

59 Yvon Dandurand and Jessica Jahn, 'The Fragility of a Culture of Lawfulness' (2018) 23(3) Białostockie Studia Prawnicze 13, doi:10.15290/bsp.2018.23.03.01.
60 ibid.
61 Roy Godson, 'Guide to Developing a Culture of lawfulness' (2000) 5(3) Trends in Organised Crime 91, doi:10.1007/s12117-000-1038-3.
62 ibid.
63 ibid.
64 Thirteenth United Nations Congress (n 58).
65 Transforming Our World: The 2030 Agenda for Sustainable Development (adopted 25 September 2015 UNGA Res 70/1) <https://digitallibrary.un.org/record/3923923?ln=en> accessed 10 July 2023.

development, SDG 16 outlines crucial objectives for achieving all other goals. In the beginning, there was an expectation that SDG 16 would face the most opposition or disagreement compared to the other SDGs. This could be because the rule of law and access to justice are complex issues requiring significant reforms and resources. Target 16.3 requires states to promote the rule of law at the national and international levels and ensure equal access to justice. However, the Agenda does not precisely define the specific interplay between the rule of law and sustainable development and the content and responsibilities of states under Target 16.3. The Agenda acknowledges that each country may have different approaches, visions, models, and tools to achieve these goals based on national circumstances and priorities.

Moreover, governments may set their own national targets, guided by the global level of ambition but considering their unique circumstances.[66] The idea of interaction between the rule of law and sustainable development was previously recognised by the Johannesburg Principles adopted at the Global Judges Symposium held in Johannesburg, South Africa, on 18–20 August 2002. The Johannesburg Principles aim to uphold sustainable development and the rule of law, affirming that the framework of international and national law that has evolved since the Stockholm Conference on Human Environment in 1972 provides a sound basis for addressing environmental threats.[67] The principles emphasise the importance of an independent judiciary and the peaceful resolution of conflicts, recognising the close connection between human rights, sustainable development, and the rule of law. The judiciary is viewed as a crucial partner in promoting compliance with environmental law, and judges, prosecutors, legislators, and other critical persons should have sufficient knowledge, skills, and information to enforce environmental law effectively. Furthermore, environmental law and sustainable development should feature prominently in academic curricula and legal studies at all levels. The principles also recognise the importance of strengthening the capacity of the poor to defend environmental rights and of powerful nations to protect the global environment.

Including the rule of law in the Agenda for Sustainable Development has brought a fascinating new dimension to the theory and policy of International Development. Although the rule of law principle is acknowledged explicitly in SDG 16.3, its tenets extend throughout the agenda, underscoring the significance of equitable access rights, robust legal frameworks, and inclusive institutions. This marks a significant shift in the concept of the rule of law, which is no longer seen as a backup process but as a critical factor in improving people's lives. The rule of law not only stands as a goal in itself but also provides an enabling environment for other areas of development. It is too important to be left solely in the hands of lawyers, and it requires the participation of all members of society. The Sixth Committee (Legal) has also affirmed that the rule of law can be utilised to achieve various other SDGs. These SDGs include but are not restricted to eradicating poverty and hunger (SDGs 1 and 2), enhancing access to clean water and sanitation (SDG 6), guaranteeing

66 ibid, para 55.

67 'The Johannesburg Principles on the Role of Law and Sustainable Development' (2002) 32(5) Environmental Policy and Law 236.

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

access to affordable and clean energy (SDG 7), addressing climate change (SDG 13), and conserving aquatic and terrestrial biodiversity (SDGs 14 and 15).[68]

Therefore, sustainable development is not just about preserving the environment or promoting economic growth but also about maintaining a stable and predictable legal and social framework that allows for the creative and sustainable use of resources. National legal frameworks have a wide-reaching impact on sustainable development across all three dimensions.[69] They touch upon a range of areas such as commerce, finance, competition, trade, investment, legal entities, criminal law, public and administrative law, education, health, and the environment. For instance, laws that regulate economic transactions, contracts, ownership, property, and access to financial resources and markets promote economic growth, aligning with SDG 8. Similarly, laws that regulate social behaviour, legal identity, access to justice, medical services, and social rights align with SDGs 3, 4, and 16. Lastly, regulatory, criminal, and procedural laws significantly impact environmental protection, access to natural resources such as water, minerals, and forests, and climate change adaptation and mitigation, impacting the realisation of SDGs 13, 14, and 15.[70] The rule of law is crucial in enabling sustainable development in several ways. Firstly, it ensures that all individuals, including marginalised groups, receive equal treatment, protection, and fair opportunities. This focus on equality and equity helps to address social and economic disparities. Secondly, the rule of law provides predictability, clarity, and legality in everyday affairs. It guarantees that laws and regulations are transparently applied and upheld, ensuring that individuals and businesses can operate within a stable and reliable legal framework. This fosters trust, encourages investment, and promotes economic growth. Thirdly, the rule of law establishes processes and mechanisms that aim to balance sustainable development's economic, social, and environmental dimensions. This encourages sustainable practices, responsible resource management, and environmental protection. Lastly, the rule of law promotes peaceful resolution of disputes. Access to fair and impartial judicial systems helps prevent conflicts and promotes political stability. This stability, in turn, creates a favourable environment for social progress and economic prosperity.

5.3. Exploring the Formal, Procedural, and Substantive Dimensions

An effective approach to comprehending the relationship between the rule of law and sustainable development is to examine the distinct aspects of the rule of law, namely its formal, procedural, and substantive components. The formal aspect of the rule of law offers a stable and predictable legal structure for enterprises and individuals, which is crucial for achieving sustainable economic growth. An effective legal system can have a beneficial influence on the economy by offering transparency, assurance, and reliability in commercial dealings.[71] It can also ensure secure land titles and balance investment incentives, increasing confidence in investment and business. For the rule of law to be effective, the laws must be

68 The 17 Goals (n 53).
69 Malby (n 52).
70 ibid.
71 Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93(Aprl) Law Quarterly Review 195, doi:10.3316/agispt.19771103.

easily accessible, predictable, and generalised, commonly referred to as legality.[72] Some authors illustrate this perspective by stating that the rule of law entails 'the rule by laws,' meaning that individuals should comply with and be governed by the law.[73] This interpretation emphasises the fundamental nature of the rule of law.

In addition to the formal approach, the procedural approach to the rule of law mandates the inclusion of dispute-resolution mechanisms that independent and unbiased judges oversee.[74] This requirement supplements the previous emphasis on accessibility, predictability, publicity, and generality of laws. Additionally, people must have access to legal representation, be present during their hearing, cross-examine witnesses, and receive an explanation of the tribunal's decision.[75] These principles are essential for ensuring that no one should have any penalty, stigma, or severe loss imposed upon them by the government without proper procedures.[76] In a society where the procedural dimension of the rule of law is upheld, everyone is entitled to a fair and impartial hearing, regardless of their social status, political affiliation, or economic power. By ensuring that disputes are resolved efficiently and effectively, the rule of law can create a favourable environment for sustainable development.

While some jurists follow Raz's view that the rule of law is purely procedural, as the rule of law principles primarily focus on the processes and methods by which the law is created and implemented,[77] others argue for a substantive dimension. The procedural aspects of the Rule of Law can generate momentum towards substantive ideals such as justice and liberty.[78] One primary differentiation between formal and substantive conceptions of the rule of law relates to the impact that adherence to the rule of law has on the substance or content of legal rules. Put differently, the substantive aspect of the rule of law broadens the definition to encompass more extensive objectives, such as human rights, liberty, and justice. In South Africa, for instance, the rule of law has both procedural and substantive elements that must be understood in the context of the country's post-apartheid constitutional system. The new constitution emphasises the protection of human rights and the advancement of freedom and democracy, in contrast to the past apartheid legal order, which implemented a racist ideology through law. The key difference is that the new constitution guarantees rights and liberties and rejects the discriminatory ideology of the past.[79] However, it is essential to note that the formal and procedural aspects of the rule of law are critical for ensuring that the legal system operates effectively, fairly, and transparently. Without these basic prerequisites, the growth and development of societies can be stunted. Pursuing the seventeen Sustainable

72 Lon L Fuller, *The Morality of Law* (Yale UP 1964).

73 Raz (n 71).

74 Stephane Beaulac, 'The Rule of Law in International Law Today' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 197.

75 Raz (n 71).

76 A Wallace Tashima, 'The War on Terror and the Rule of Law' (2008) 15(1) Asian American Law Journal 245, doi:10.15779/Z38MK2H.

77 Joseph Raz, 'The Law's Own Virtue' (2019) 39(1) Oxford Journal of Legal Studies 1, doi:10.1093/ojls/gqy041.

78 Bingham (n 25).

79 Louis J Kotzé, 'Sustainable Development and Rule of Law for Nature: : A Constitutional Reading' in C Voigt (ed), *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP 2013) 130.

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

Development Goals will bring fresh aspects to conventional legal formalism. These goals prioritise a rule of law that effectively upholds human rights, territorial community integrity, social inclusion, specific public goods, and public values. Notably, Goal 16 holds great significance in development as it aims to foster peaceful and inclusive societies, ensure universal access to justice, and establish accountable and efficient institutions at all levels. In other words, to achieve sustainable development comprehensively, it is important to tackle the substantive aspect of the rule of law.[80] The substantive dimension of the rule of law can ensure that laws are designed to promote sustainable development and are enforced consistently and fairly. This expansion towards more substantive theories has rendered the notion more ambiguous and contested, but it can be seen as a positive development from a human rights and environmental perspective. Within this framework, the crucial importance of access to water, food, and energy is emphasised, as these basic needs must be addressed to ensure the law's adherence.[81]

5.4. Constitutional Implications

Laws should maintain stability over time. Excessive amendments or frequent changes can undermine legal certainty. Consequently, the rule of law necessitates that states possess a constitution, whether it is codified or uncodified, that clearly outlines the organisational structure of a country and the division of power. Therefore, the rule of law is commonly recognised as a constitutional value that establishes a standard for measuring other laws and behaviours. It provides an interpretive framework for constitutional provisions directly and indirectly for all other laws. Including both procedural and substantive elements can strengthen commitments to legality. From a Constitutional Law standpoint, the rule of law can be understood by examining the concept of 'constitutionality,' which refers to the adherence of state entities, including state organs, and individuals to objective legal principles as outlined in the highest legal document of a state, namely the Constitution. The Constitution, serving as the paramount legal instrument, delineates the demarcation between the conduct of the state and its organs and the safeguarded human and civil liberties and rights. The concept of constitutionality plays a significant role within the framework of the Constitution. Constitutions typically do not explicitly mention sustainable development in their founding provisions. While the SDGs are not legally binding, they are a policy instrument and a document rather than a treaty.

Constitutions imply sustainable development indirectly through their contextual and value-based framework, including human dignity, equality, and freedom. Social benefits, economic opportunities, and environmental resources must be equally accessible to everyone to lead a dignified life and enjoy these rights. Sustainable development is essential to improving people's quality of life and encompasses social, economic, and ecological conditions. In other words, sustainable development is necessary to achieve the broader constitutional ideals and specific objectives of human dignity, equality, and human rights protection. The wording in this segment suggests that sustainable development is an explicit constitutional objective as it is inherent to social, economic, and environmental rights.

80 ibid.
81 ibid.

Therefore, the government must achieve, promote, safeguard, respect, and advance sustainable development objectives through these rights. The right incorporates inter-generational and intra-generational characteristics associated with sustainable development, expressing the constitutional goal of balancing ecological, social, and economic considerations. However, some examples of domestic legal systems have constitutionally embedded sustainable development. South Africa included an environmental right in its 1996 Constitution[82] and implemented a comprehensive set of environmental laws to give effect to its broader policies and constitutional objectives. Through this constitutional entrenchment, sustainable development has become a focal point in the country's legal system.

5.5. The Rule of Law and Good Governance

The international community recognises the rule of law as a fundamental principle and safeguard of good governance, closely tied to sustainable development. The UN Secretary-General has confirmed this.[83] In his famous statement, Kofi Annan stated that 'good governance may be the most significant factor in eliminating poverty and advancing development.'[84] The rule of law is widely recognised as a fundamental aspect of promoting good governance. Various global declarations, such as those adopted at the World Summit in 2005, the High-level Meeting of the General Assembly on the Rule of Law in 2012, and the Sustainable Development Summit in 2015, have endorsed the interrelationship between good governance, the rule of law, and sustainable development.[85] These declarations are not merely aspirational; they are backed by compelling research demonstrating a strong correlation between adherence to the rule of law and sustainable progress in economic, political, social, and environmental dimensions.[86] At the same time, the rule of law refers to a system of governance based on non-arbitrary principles, in contrast to a system that relies on the authority and arbitrary actions of a single absolute ruler. While effective decision-making processes, efficient implementation of policies and programs, transparency, accountability, participation, and inclusivity are all vital components of good governance, they must also be carried out following the principles of the rule of law. Without upholding the rule of law, the principles of good governance may be easily undermined by corruption, bias, or abuse of power. However, due to the complex and inherently political nature of the rule of law, there is no single understanding of it accepted by all member states of the UN, which makes it controversial. To quote Waldron, a sceptic might argue that the term 'rule of law' has a grandiose ring, but ultimately, many may perceive it as nothing more than an expression of loyalty or enthusiasm for a particular side or viewpoint.[87]

82 Constitution of the Republic of South Africa (1996) <https://www.gov.za/documents/constitution-republic-south-africa-1996> accessed 10 July 2023.

83 UN Secretary-General (n 42) para 6.

84 Rachel M Gisselquist, 'What Does Good Governance Mean?' (*UNU-WIDER Blog*, January 2012) <https://www.wider.unu.edu/publication/what-does-good-governance-mean> accessed 10 July 2023.

85 2005 World Summit Outcome (n 48) para 11.

86 Thomas Higdon and Durwood Zaelke, 'The Role of Compliance in the Rule of Law, Good Governance, and Sustainable Development' (2006) 3(5) Journal for European Environmental & Planning Law 376, doi:10.1163/187601006X00425.

87 Waldron (n 30).

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

6 INTERNATIONAL RULE OF LAW

The rule of law was developed at the state level and is traditionally not a standard or widely used term in international law. History would tell us that from the 17th century onwards, the rule of law has become a dominant legal principle within modern nation-states. At the same time, sovereignty has taken centre stage as the leading legal principle between states. This juxtaposition illustrates how the rule of law represents the domestic power structure of the state over its society. At the same time, sovereignty institutionalises the absence of hierarchy and order in international relations. Bingham's eighth principle asserts that the state must comply with its international responsibilities in the same manner as it complies with national law, as a requirement of the rule of law.[88] This principle raises the issue of establishing an international rule of law. Although his essay primarily addresses the rule of law inside nations and the obligations of governments towards their populations, Bingham urges us to contemplate the presence and implementation of the rule of law at a global level.[89] He queries the obligation of nation states to adhere to international accords established among themselves. Bingham's perspective is relevant, as well as the belief that we are currently observing the progression of a global system of legal principles, which we expect to advance further. Hence, while initially developed in the context of domestic legal systems, the concept of the rule of law extends beyond these frameworks and can be applied to supranational legal systems.[90] It is possible to view the rule of law as a set of characteristics that should exist in all legal orders. However, it has become widely accepted in recent decades that the international legal and political system must also respect the rule of law. In other words, the concept of the rule of law within a country was applied by analogy to the global stage to close the divide between the two parties.[91] The presence of the rule of law in the realm of international law is exemplified by the established protocols for formulating regulations within international organisations, including but not limited to the United Nations, the Council of Europe, and the European Union (EU). Enshrined in Article 2 of the Treaty of the European Union, the rule of law is a fundamental principle of the EU. Furthermore, it has evolved into a guiding principle for the Union's conduct in the international arena, as articulated in Article 21 of the Treaty. Nevertheless, the EU has encountered obstacles in maintaining the rule of law in every member state.[92] These protocols encompass enacting, implementing, and safeguarding these regulations, ensuring the protection of both states and individuals from infringing upon them. The legal community has experienced significant growth in the international rule of law (IROL)

88 Bingham (n 25) 110.
89 ibid 110-2.
90 NW Barber, 'The Rechtsstaat and the Rule of Law' (2003) 53(4) University of Toronto Law Journal 443, doi:10.2307/3650895.
91 SB Chimni, 'Legitimating the Rule of Law' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 290.
92 Adnan Mahmutovic, 'Erosion of the Rule of Law in the European Union' (2021) 24(S3) Journal of Legal, Ethical and Regulatory Issues 1.

literature, reflected by academic conferences, research projects, and journals.[93] However, there is little exploration of theoretical issues regarding the feasibility and desirability of IROL despite the increasing interest in the subject. Scholarly contributions to IROL mainly concentrate on legal doctrine, particularly analysing case law, but frequently assume the concept's value and justification.[94]

The essential meaning of the rule of law is the same at both the state and international levels. Unlike the vertical relationship between subjects and the state in domestic legal systems, the actors in the international legal order, namely states, stand on a horizontal footing. Therefore, the definition of the rule of law for the international legal order must be appropriate to its distinct nature, separate from that of national legal systems. Considering this structural difference, some authors identify three interpretations of the international rule of law: the application of the rule of law principles to states and other actors in international law, the supremacy of international law over national law, and the emergence of a global rule of law with normative regimes.[95] International organisations have also advocated for the principles of the international rule of law to promote their mandates. For example, the UN defines the rule of law as the adherence to existing international laws and its fundamental principles enshrined in the UN Charter.

While consensus on the matter is lacking, it is widely acknowledged that sustainable development has emerged as a prominent topic in discussions within the realm of international law. Incorporating sustainable development into a range of international treaties, specifically those pertaining to the environment, constitutes the most extensive legal acknowledgement of this principle within the domain of international law. Consequently, sustainable development assumes a legally binding status within the parameters established by these treaties. However, it is imperative to emphasise that the binding nature of treaties exclusively applies to the parties involved, namely states or international organisations. Private actors, such as industries and individual citizens, are typically not subject to treaty obligations unless specific circumstances arise, such as situations involving individual criminal responsibility before the International Criminal Court.[96] However, the primary remaining obstacle to achieving SDGs is ensuring compliance with international law and the rule of law at the global level, not just within individual states. While various institutions and organisations, such as the United Nations,

93 Anne-Marie Slaughter, Andrew S Tulumello and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92(3) American Journal of International Law 367, doi:10.2307/2997914; Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) doi:10.1017/CBO9781139107310.

94 Denise Wohlwend, *The International Rule of Law: Scope, Subjects, Requirements* (Edward Elgar Pub Ltd 2021) doi:10.4337/9781789907421.

95 Simon Chesterman, 'Rule of Law' in A Peters and R Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (OUP 2007) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1676?prd=EPIL> accessed 10 July 2023.

96 Marjan Peeters and Thomas Schomerus, 'Sustainable Development and Law' in H Heinrichs and others (eds), *Sustainability Science* (Springer 2016) 110, doi:10.1007/978-94-017-7242-6_9.

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

monitor their treaties, no central legislative body is responsible for making international law accessible, clear, and specific.

Furthermore, to achieve better compliance with international law and ensure that breaches of international law are treated equally, idealists believe that the judicialisation of adjudication procedures is necessary.[97] They argue that developing an international rule of law depends mainly on establishing sound judicial institutions for adjudication procedures rather than relying on diplomatic efforts. On the other hand, realists hold a different perspective, rejecting the idea that the design of adjudication procedures significantly impacts state compliance with international law or ensures that comparable breaches of international law are treated similarly. Given the anarchical nature of international relations, they believe powerful states will act as they please in both judicial and traditional diplomatic procedures. In contrast, weaker states will be left to suffer.[98] Adopting judicialised adjudication procedures is a fundamental prerequisite for establishing an international rule of law. Unlike traditional diplomatic adjudication, judicialised procedures allow breaches of international law to be treated comparably, which is crucial for the emergence of an international rule of law.[99]

The role of courts in promoting sustainable development is a topic of discussion. Some argue that courts should focus on procedural aspects.[100] This approach aims to uphold fairness, transparency, and inclusivity in decision-making, thereby enhancing the legitimacy and accountability of environmental governance. On the other hand, there are proponents of courts intervening in substantive decision-making.[101] They believe courts possess the expertise and authority to assess whether decisions align with sustainability objectives and consider their broader societal and environmental impacts. By actively participating in substantive matters, courts can influence the development of policies and practices that support sustainable development goals. The appropriate extent of court intervention depends on factors such as the legal framework, the specific issue, and the balance between judicial and executive functions. Some legal systems empower courts to review and enforce environmental laws, while others grant administrative bodies more discretionary power. The level of judicial intervention may vary based on factors such as the severity of environmental harm, clear legal standards, and the availability of scientific evidence.

As we can see, the rule of law applies within national borders and between nations, yet its use in this context is not fully understood. The international rule of law is often discussed

97 Bernhard Zangl, 'Is there an Emerging International Rule of Law?' (2005) 13(S1) European Review 73, doi:10.1017/S1062798705000207.

98 ibid.

99 Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Pieces of a Puzzle' (1999) 31(4) New York University Journal of International Law and Politics 709.

100 Lu Liao, Mildred E Warner and George C Homsy, 'Sustainability's Forgotten Third E: What Influences Local Government Actions on Social Equity?' (2019) 24(12) Local Environment 1197, doi:10.1080/13549839.2019.1683725.

101 Carine Nadal, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a 'Pillar' of Empowerment' (2008) 10(1) Environmental Law Review 28, doi:10.1350/ENLR.2008.10.1.003.

regarding determinacy, clarity, and predictability.[102] On the international stage, adherence to the rule of law entails fulfilling obligations under international law by those bound by it. Most of these obligations are outlined in treaties formulated by international organisations, which cover various legal issues. However, these international treaties are frequently crafted using ambiguous language, leaving room for interpretation. For instance, Article 18 of the 1969 Vienna Convention on the Law of Treaties states that a State that has signed or ratified a treaty must refrain from actions that would undermine its purpose before it comes into effect.[103] The lack of clarity in this provision regarding its interpretation and obligations has been recognised as one of the significant drawbacks of the Convention. Environmental treaties often exhibit a common characteristic of employing vague language. For instance, the United Nations Framework Convention on Climate Change (UNFCCC) of 1992 lacks significant binding obligations for treaty participants.[104] Still, it establishes an institutional framework for subsequent decision-making conducted by the Conferences of the Parties (COP). Within this decision-making process, the UNFCCC outlines principles that include recognising the right to sustainable development. However, the wording of the UNFCCC allows for considerable interpretation and does not provide a clear substantive rule regarding sustainable development.[105] Therefore, the treaty parties are responsible for facilitating interpretation and policy development to establish binding commitments, as demonstrated in the Kyoto Protocol 1997.[106]

States are better informed of their legal obligations than individuals since they are parties to treaties and practices that establish international law. Additionally, protecting the liberty of national states is not as crucial as protecting the liberty of individuals. Therefore, invoking the Rule of Law in the international realm must not undermine the values it secures within national borders. Whether international institutions, such as the UN, should be bound by the Rule of Law remains controversial, as officials worry about diplomatic immunity and the potential unravelling of international action.

7 CONCLUSION

The rule of law is widely acknowledged as a timeless principle and a standard of legal conduct that has exhibited remarkable durability over time. Adhering to the rule of law principle is crucial for safeguarding and promoting both democracy and sustainable development. Moreover, breaches of the principle have far-reaching consequences for economic, social, and environmental endeavours, recognised as the primary foundations of the United Nations Sustainable Development Goals (SDGs) Agenda. Disregarding the rule

102 Simon Chesterman, 'An International Rule of Law?' (2008) 56(2) The American Journal of Comparative Law 331, doi:10.5131/ajcl.2007.0009.

103 Vienna Convention on the Law of Treaties (23 May 1969) <https://www.refworld.org/docid/3ae6b3a10.html> accessed 10 July 2023.

104 United Nations Framework Convention on Climate Change (1992) <https://unfccc.int/resource/docs/convkp/conveng.pdf> accessed 10 July 2023.

105 ibid, art 3, para 4.

106 Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) <https://unfccc.int/resource/docs/convkp/kpeng.pdf> accessed 10 July 2023.

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

of law significantly erodes confidence in the long-term progress of development. This comprehensive examination of the various dimensions of the correlation between sustainable development and the rule of law, encompassing domestic and global contexts, has substantiated the notion that these two principles pursue certain shared goals. One aspect to consider is that the rule of law functions as a fundamental criterion for determining constitutionality, guiding all legal statutes and processes. The rule of law provides a comprehensive analysis of legality through its emphasis on formal, procedural, and substantive elements. It prevents the abuse of authority and arbitrary decision-making by mandating that the government protect the fundamental rights of individuals and that all laws and government actions be logically connected to legitimate government objectives. The rule of law upholds the authority and stipulations of constitutional law by ensuring that all individuals and actions are governed by it.

Furthermore, it reinforces institutions by establishing principles that govern the interpretation of the constitution and laws; thus, it elevates the judiciary to the highest regard as a defender of the rule of law. In addition to assuring environmental rights and protection in general, the rule of law is crucial for supporting consumers, encouraging investments, establishing a stable business environment, and guaranteeing and protecting human rights. These are fundamental dimensions of the UN SDG Agenda. Sustainable development, on the other hand, not only explicitly emphasises the significance of the rule of law (UN SDG 16.3) but can also play an important role in upholding and strengthening the rule of law. Sustainable development incorporates the procedural aspects of the rule of law, establishing a benchmark for the creation and implementation of reasonable legislative and administrative measures aimed at achieving social, economic, and environmental well-being for present and future generations. This is accomplished by utilising the content and goals of the right to social, economic, and environmental well-being as the prevalent standard for the rule of law. In this regard, institutions must enact legislative and administrative measures that contribute to achieving these objectives. Failure to do so could be construed as violating the rule of law.

However, SDG 16 faces its greatest obstacle in the form of international compliance with the rule of law and international law. Although a number of institutions, including the United Nations, supervise their treaties, there is no centralised legislative body tasked with ensuring the clarity, accessibility, and certainty of international law. Notwithstanding these challenges, it is generally recognised that maintaining compliance with international law is critical for safeguarding the rule of law. While international law violations occur, they are generally considered exceptional circumstances rather than the norm. It is the duty of legal academicians and practitioners to analyse the integration of sustainability principles into legal frameworks and formulate practical implementation strategies for particular legal proceedings. Hence, it is critical to advocate for the progress and evolution of sustainability law in the wider field of sustainability sciences.

REFERENCES

1. Anjinappa G, 'Rule of Law: A Fundamental Pillar Enabling Sustainable Development and Reduction of Poverty in India' (2015) 6(1) International Journal of Asian Business and Information Management 38, doi:10.4018/IJABIM.2015010103.
2. Barber NW, 'The Rechtsstaat and the Rule of Law' (2003) 53(4) University of Toronto Law Journal 443, doi:10.2307/3650895.
3. Beaulac S, 'An Inquiry into the International Rule of Law' (2007) 14 EUI Working Paper MWP <https://hdl.handle.net/1814/6957> accessed 10 July 2023.
4. Beaulac S, 'The Rule of Law in International Law Today' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 197.
5. Bedner A, 'An Elementary Approach to the Rule of Law' (2010) 2(1) Hague Journal on the Rule of Law 48, doi:10.1017/S1876404510100037.
6. Bingham T, 'The Rule of Law' (2007) 66(1) The Cambridge Law Journal 67, doi:10.1017/S0008197307000037.
7. Bingham T, *The Rule of Law* (Allen Lane 2010).
8. Bosselmann K, 'Losing the Forest for the Trees: Environmental Reductionism in the Law' (2010) 2(8) Sustainability 2424, doi:10.3390/su2082424.
9. Castiglione C, Davide Infante and Janna Smirnova, 'Environment and Economic Growth: Is the Rule of Law the Go-Between? The Case of High-Income Countries' (2015) 5 Energy, Sustainability and Society 26, doi:10.1186/s13705-015-0054-8.
10. Chesterman S, 'An International Rule of Law?' (2008) 56(2) The American Journal of Comparative Law 331, doi:10.5131/ajcl.2007.0009.
11. Chesterman S, 'Rule of Law' in A Peters and R Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (OUP 2007) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1676?prd=EPIL> accessed 10 July 2023.
12. Chimni, S. Bhupinder (2012). Legitimating the rule of law. 290–308 in The Cambridge Companion to International Law, edited by James Crawford and Martti Koskenniemi. Cambridge: Cambridge University Press.
13. Cornish PJ, 'Marriage, Slavery, and Natural Rights in the Political Thought of Aquinas' (1998) 60(3) The Review of Politics 545, doi:10.1017/S0034670500027467.
14. Dandurand Y and Jahn J, 'The Fragility of a Culture of Lawfulness' (2018) 23(3) Białostockie Studia Prawnicze 13, doi:10.15290/bsp.2018.23.03.01.
15. Denise Wohlwend, *The International Rule of Law: Scope, Subjects, Requirements* (Edward Elgar Pub Ltd 2021) doi:10.4337/9781789907421.
16. Dicey AV, *Introduction to the Study of the Law of the Constitution* (7th edn, Macmillan and Co limited 1908).

17. Dunoff JL and Pollack MA (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) doi:10.1017/CBO9781139107310.

18. Ebbesson J and Hey E, *The Cambridge Handbook of the Sustainable Development Goals and International Law* (CUP 2022) doi:10.1017/9781108769631.

19. Frank J, 'Aristotle on Constitutionalism and the Rule of Law' (2006) 8(1) Theoretical Inquiries in Law 37, doi:10.2202/1565-3404.1142.

20. Fukuyama F, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Farrar, Straus and Giroux 2011).

21. Fuller LL, *The Morality of Law* (Yale UP 1964).

22. Gisselquist RM, 'What Does Good Governance Mean?' (*UNU-WIDER Blog*, January 2012) <https://www.wider.unu.edu/publication/what-does-good-governance-mean> accessed 10 July 2023.

23. Godson R, 'Guide to Developing a Culture of Lawfulness' (2000) 5(3) Trends in Organised Crime 91, doi:10.1007/s12117-000-1038-3.

24. Hayek FA, *The Constitution of Liberty* (University of Chicago Press 1960).

25. Higdon T and Zaelke D, 'The Role of Compliance in the Rule of Law, Good Governance, and Sustainable Development' (2006) 3(5) Journal for European Environmental & Planning Law 376, doi:10.1163/187601006X00425.

26. Kotzé LJ, 'Sustainable Development and Rule of Law for Nature: A Constitutional Reading' in C Voigt (ed), *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP 2013) 130.

27. Kreilhuber A and Kariuki A, 'Environmental Rule of Law in the Context of Sustainable Development' (2020) 32 The Georgetown Environmental Law Review 591.

28. Lane JE, 'Political Modernisation: The Rule of Law Perspective on Good Governance' (2015) 5(1) The Open Journal of Political Science 13, doi:10.4236/ojps.2015.51002.

29. Liao L, Warner ME and Homsy GC, 'Sustainability's Forgotten Third E: What Influences Local Government Actions on Social Equity?' (2019) 24(12) Local Environment 1197, doi:10.1080/13549839.2019.1683725.

30. Mahmutovic A, 'Erosion of the Rule of Law in the European Union' (2021) 24(S3) Journal of Legal, Ethical and Regulatory Issues 1.

31. Malby S, 'The Rule of Law and Sustainable Development' (2017) 43(3-4) Commonwealth Law Bulletin 521, doi:10.1080/03050718.2017.1436229.

32. Malby S, *The Rule of Law and Sustainable Development: A Report of the CSIS Program on Prosperity and Development* (CSIS 2020).

33. McCorquodale R, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65(2) International and Comparative Law Quarterly 277, doi:10.1017/S0020589316000026.

34. Møller J and Skaaning SE, *The Rule of Law: Definitions, Measures, Patterns, and Causes* (Palgrave Macmillan 2014).

35. Mooney L, 'Promoting the Rule of Law in the Intersection of Business, Human Rights, and Sustainability' (2015) 46 Georgetown Journal of International Law 1135.

36. Nadal C, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a 'Pillar' of Empowerment' (2008) 10(1) Environmental Law Review 28, doi:10.1350/ENLR.2008.10.1.003.

37. Nielsen KM, 'Aristotle on Justice' in M Sellers and S Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2022) 1, doi:10.1007/978-94-007-6730-0_923-1.

38. Pangle TL, *The Laws of Plato* (University of Chicago Press 1988).

39. Peeters M and Schomerus T, 'Sustainable Development and Law' in H Heinrichs and others (eds), *Sustainability Science* (Springer 2016) 109, doi:10.1007/978-94-017-7242-6_9.

40. Raz J, 'The Law's Own Virtue' (2019) 39(1) Oxford Journal of Legal Studies 1, doi:10.1093/ojls/gqy041.

41. Raz J, 'The Rule of Law and its Virtue' (1977) 93(Aprl) Law Quarterly Review 195, doi:10.3316/agispt.19771103.

42. Romano CPR, 'The Proliferation of International Judicial Bodies: The Pieces of a Puzzle' (1999) 31(4) New York University Journal of International Law and Politics 709.

43. Sellers MNS, *The Sacred Fire of Liberty: Republicanism, Liberalism, and the Law* (Palgrave Macmillan 1998) doi:10.1057/9780230371811.

44. Sellers MNS, 'What is the Rule of Law and Why is It so Important?' in J Silkenat, J Hickey and P Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State* (Springer 2014) 3.

45. Selous E, 'The Rule of Law and the Debate on it in the United Nations' in CA Feinäugle (ed), *The Rule of Law and Its Application to the United Nations* (Routledge 2016) 13, doi:10.5771/9783845275017-13.

46. Slaughter AM, Tulumello AS and Wood S, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92(3) American Journal of International Law 367, doi:10.2307/2997914.

47. Solum LB, 'Equity and the Rule of Law' (1994) 36 Nomos 120.

48. Steel C (ed), *The Cambridge Companion to Cicero* (CUP 2013).

49. Stein R, 'Rule of Law: What Does It Mean?' (2009) 18 Minnesota Journal of International Law 293.

50. SuperSummary, *Study Guide: Summa Theologica by Thomas Aquinas* (Independently pub 2020).

51. Tashima AW, 'The War on Terror and the Rule of Law' (2008) 15(1) Asian American Law Journal 245, doi:10.15779/Z38MK2H.

52. Wakelin E, 'Rule of Law and the UN Sustainable Development Goals' in W Leal Filho and others (eds), *Peace, Justice and Strong Institutions: Encyclopedia of the UN Sustainable Development Goals* (Springer 2019) 822, doi:10.1007/978-3-319-95960-3_36.

53. Waldron J, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21(2) Law and Philosophy 137, doi:10.1023/A:1014513930336.

54. Waldron J, 'John Locke: Social Contract Versus Political Anthropology' (1989) 51(1) The Review of Politics 3, doi:10.1017/S0034670500015837.

55. Watson D and others, 'Problematising the Rule of Law Agenda in the SDG Context' in J Blaustein and others (eds), *The Emerald Handbook of Crime, Justice and Sustainable Development* (2020) 131, doi:10.1108/978-1-78769-355-520201010.

56. Zanghellini A, 'The Foundations of the Rule of Law' (2016) 28(2) Yale Journal of Law & Humanities 213.

57. Zangl B, 'Is there an Emerging International Rule of Law?' (2005) 13(S1) European Review 73, doi:10.1017/S1062798705000207.

AUTHORS INFORMATION

Adnan Mahmutovic*
Ph.D. (Law), Assistant Professor, College of Law, Al Yamamah University, Saudi Arabia
mahmut.beg@hotmail.com
https://orcid.org/0000-0002-3553-2870
Corresponding author, responsible for the manuscript submission.

Abdulaziz Alhamoudi
Ph.D. (Law), Assistant Professor, College of Law, King Saud University, Al Yamamah University, Saudi Arabia
a_alhamoudi@yu.edu.sa
https://orcid.org/0009-0008-7113-2744

CO-AUTHORSHIP

Conceptualization – Adnan Mahmutovic
Data curation – Abdulaziz Alhamoudi
Formal Analysis – Abdulaziz Alhamoudi
Investigation – Adnan Mahmutovic
Methodology – Adnan Mahmutovic
Writing – original draft – Adnan Mahmutovic
Writing – review & editing – Adnan Mahmutovic & Abdulaziz Alhamoudi

Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations.

ABOUT THIS ARTICLE

Cite this article
Mahmutovic A and Alhamoudi A, 'Understanding the Relationship between the Rule of Law and Sustainable Development' (2024) 7(1) Access to Justice in Eastern Europe 170-97 <https://doi.org/10.33327/AJEE-18-7.1-a000102>

Submitted on 19 Jul 2023 / Revised 13 Oct 2023 / Revised 2nd 10 Nov 2023 /
Approved 13 Nov 2023 / Published ONLINE: 1 Dec 2023 / Last Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000102

Managing editor – Mag. Polina Siedova. **English Editor** – Julie Bold.

Keywords: *the rule of law, sustainable development goals, the international rule of law, interplay.*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

TOWARDS AN EFFECTIVE LEGAL PROTECTION FOR OLDER PERSONS IN THE 21ST CENTURY: A COMPARATIVE STUDY OF INTERNATIONAL HUMAN RIGHTS LAW AND ARAB CONSTITUTIONS

Jamal Barafi*, Zeyad Jaffal, Faisal Alshawabkeh and Riad Al Ajlani

ABSTRACT

Background: *This study explores legal protections for older people in the 21st century, particularly in the contexts of international human rights laws and Arabic constitutions. While international human rights systems afford implicit protections for senior citizens, the international legal framework is inadequate for addressing their specific rights and challenges. While Arabic constitutions often include general provisions protecting the rights of citizens, they do not explicitly address the rights and legal protection of older people.*
Methods: *This study aims to confront this gap by examining legal frameworks that protect the rights of senior citizens in both international human rights law and Arabic constitutions.*
Results and Conclusions: *The lack of a universally accepted definition for the term 'older person' poses a challenge when studying that demographic, as they are a highly heterogeneous group. In a rapidly ageing world, it is essential to develop legal frameworks that specifically address the rights of older people to ensure their dignity and well-being.*

1 INTRODUCTION

Ageing is a biological concept but is also a social phenomenon influenced by various factors. The difficulty in establishing objective criteria for defining this concept has led to the widespread use of chronological definitions of older persons based solely on age. Although the United Nations defines individuals aged 60 years or older in its statistical reports as older persons, many countries have established 65 years as a specific threshold for old age, which

is closely tied to the legal retirement age. However, there is no universal consensus on the specific age at which a person becomes an 'elder'.[1]

International conventions frequently refer to broader principles regarding the rights and welfare of older persons, emphasising concepts such as dignity, non-discrimination, social integration, and access to healthcare without explicitly defining the term 'older person'. The United Nations Principles for Older Persons, adopted in 1992, provide guiding principles for addressing the rights and needs of older persons without explicitly defining the term 'older persons'.[2] Similarly, the Madrid International Plan of Action on Aging (2002) employs the term 'older persons' without specifying a particular age range.[3]

Given the absence of a universally agreed-upon definition or specific age threshold for old age, the study of older persons is hindered by the fact that this highly heterogeneous group varies in terms of sex, ethnicity, economic status, health conditions, accepted social values, educational level, and residence in countries with varying levels of development. The paradox of ageing lies in that, while the world's population is growing older, individuals maintain mental and physical vitality for longer compared to previous generations. The World Health Organization has noted that, unlike the youth category, older persons exhibit tremendous diversity in their health, including physical and mental capabilities.[4]

Despite being a minority (approximately 7% of the world's population), older people are the fastest-growing segment globally.[5] According to the United Nations, the global population of individuals aged 60 years and above reached 901 million in 2015, reflecting a significant increase of 48% compared to the 607 million recorded in 2000. This trend is projected to continue, with the global population of older persons projected to double to approximately 2.1 billion by 2050. Furthermore, according to UN data, the number of people aged 80 years and over is expected to triple by 2050.[6]

The increasing longevity observed in recent decades is a testimony to advancements in human development and healthcare. Nevertheless, this rapid demographic transition has exposed inadequate protective measures and significant shortcomings in policies and programs designed to address the needs of older persons.[7] This is particularly noticeable during the global outbreak of the COVID-19 pandemic.[8]

1 Mira Lulić and Ivana Rešetar Čulo, 'Poverty: A Challenge to the Protection of Human Rights of Older Persons in the Republic of Croatia' (2020) 33(1) Ekonomski vjesnik / Econviews 243.

2 United Nations Principles for Older Persons (adopted 16 December 1991 UNGA Res 46/91) <https://digitallibrary.un.org/record/135779?ln=en> accessed 1 October 2023.

3 United Nations, *Political Declaration and Madrid International Plan of Action on Ageing: Second World Assembly on Ageing, Madrid, Spain, 8–12 April 2002* (UN 2002).

4 Lulic and Čulo (n 1).

5 Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11(1) Human Rights Law Review 37, doi:10.1093/hrlr/ngq050.

6 Lulic and Čulo (n 1).

7 'OHCHR and Older Persons: Overview' (*United Nations OHCHR*, 2021) <https://www.ohchr.org/en/older-persons> accessed 1 October 2023.

8 ibid.

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

At present, older persons are not explicitly encompassed by the existing international human rights legal frameworks. There is a scarcity of universally applicable binding international standards that can act as benchmarks for national legislation addressing the rights of older persons. The national constitutions discussed in this study were chosen based on their focus on the rights of older persons. These constitutions relied on general international texts dating back to the last century, which made the treated rights scattered among international and national texts.

This study scrutinises the functionality of public and private legal frameworks within international human rights law to ensure the adequate safeguarding of older persons. This study aimed to evaluate the effectiveness of constitutional texts in protecting the rights of older persons and their alignment with international frameworks concerning the protection of these rights. To address this issue, this paper is divided into the following sections.

2 PROTECTING THE RIGHTS OF THE OLDER PERSONS IN INTERNATIONAL LAW

The scope of public international law has evolved to encompass individuals beyond the confines of states and intergovernmental organisations. In this realm, individuals have emerged as subjects amenable to international law regulations, directly or indirectly. Consequently, international conferences and agreements have been convened to ensure protection for all individuals, including specific groups such as women, children, refugees, and older persons.[9]

2.1. Protecting of the Older Persons in General International Instruments

Following the end of World War II, which resulted in the loss of countless lives globally, there has been a heightened focus on the protection of human rights and the preservation of human life, body, and dignity. An array of principles and international agreements has been established to safeguard human rights, encompassing all categories, without distinction between men and women. Although specific provisions and rules dedicated to older people are lacking, their rights are Following the end of World War II, which resulted in the loss of countless lives globally, there has been a heightened focus on the protection of human rights and the preservation of human life, body, and dignity. An array of principles and international agreements has been established to safeguard human rights, encompassing all categories, without distinction between men and women. Although specific provisions and rules dedicated to older people are lacking, their rights are implicitly protected using general instruments. In the following section, the authors examine the most critical aspects of these instruments.

9 Ansam Qassim Hajim, 'Iraq's International Obligations over the Years Preparation' (2018) 1(10) Lark Journal for Philosophy, Linguistics, and Social Sciences 240.

2.1.1. Charter of the United Nations

The United Nations Charter aims to promote international peace and security, uphold international law, respect human rights, and improve global living standards.[10] The preamble of the Charter affirms the dignity and worth of every human being and recognises the fundamental rights of all individuals. Article 1(3) of the Charter states that the United Nations aims to address economic, social, cultural, and humanitarian issues and promote respect for human rights without discrimination. Additionally, several provisions of the charter emphasise equal respect for human rights, including Article 13(1), which gives the General Assembly authority to make recommendations and promote studies in the field of human rights.

While the texts in the United Nations Charter related to human rights are broad and vague, they have contributed to endowing universal human rights with a new global dimension.[11] However, they do not constitute a comprehensive system for protecting human rights, particularly for older persons.[12]

2.1.2. Universal Declaration of Human Rights

The Universal Declaration of Human Rights is a globally recognised document that embodies the principles of freedom and equality.[13] As a vital safeguard for individuals' rights, regardless of location, it serves as a universal standard for human rights protection. Adopted by the United Nations General Assembly on December 10 1948, the declaration consists of 30 articles encompassing civil, political, social, economic, and cultural rights. This marked the first time nations reached a consensus on the rights deserving of global protection. Unlike the more general provisions of the United Nations Charter, the Universal Declaration of Human Rights features a precise delineation of human rights that sets it apart and distinguishes it from other international instruments.[14] The articles of the Declaration are formulated in a general manner, allowing for multiple interpretations while maintaining a focus on commonalities among nations to facilitate global acceptance.[15]

The Universal Declaration of Human Rights was framed politically and had limited legal authority. It was not sanctioned as an international treaty, precluding its ratification and binding effect on the participating states. Nevertheless, it holds significant moral weight and serves as a comprehensive reference for human rights at both global and national levels. Based on the Universal Declaration of Human Rights, various binding human rights accords

10 Charter of the United Nations (1945) <https://www.un.org/en/about-us/un-charter/full-text> accessed 1 October 2023.

11 Hajim (n 9).

12 Amani Akram Al-Asasfeh, *Elderly Rights in the Jordanian Constitution and Positive Laws and International Conventions* (Mutah University 2021).

13 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) <https://digitallibrary.un.org/record/666853?ln=en> accessed 1 October 2023.

14 Yousef Elias, *Legal Protection for the Elderly in the GCC States: A Comparative Legal Study* (Social Studies Series 69, Executive office 2012).

15 Al-Asasfeh (n 12).

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

have been established.[16] Notably, many rights enshrined in the Universal Declaration of Human Rights have been enfolded into national constitutions and local legal frameworks. Notably, the Universal Declaration of Human Rights does not explicitly address the rights of older persons. However, Article 25(1) of the Declaration asserts that all individuals are entitled to a standard of living adequate for their health and well-being, including food, clothing, housing, and medical care, and emphasises the need to ensure livelihood in circumstances such as unemployment, disability, old age, and other situations.[17]

2.1.3. International Covenants on Civil and Political Rights

The proclamation of the Universal Declaration of Human Rights elicited a strong impetus from stakeholders at the international level to render general principles concerning civil and political rights more specific and legally binding. The International Covenant on Civil and Political Rights was drafted in 1966.[18]

Despite the comprehensive nature of the International Covenant on Civil and Political Rights, it does not contain specific provisions that address the rights of older persons. Nevertheless, their rights are shielded by general guarantees of the rights of all individuals and various age groups. The prohibition of torture or inhuman treatment in Article 7 of the Covenant underscores the inviolability of human dignity, and older persons, like other members of society, are entitled to the right to life, a fundamental human right. The preservation of this right is crucial for the enjoyment of all other human rights, and it is considered a non-derogable right, meaning that it cannot be abridged even under exceptional circumstances.

Older persons also enjoy the protection of their civil rights within the scope of the protection provided by the covenant for the family, considering it as the basic unit of society. This protection is guaranteed by Article 23/1 of the Covenant and is further safeguarded by the state and society. The covenant also recognises the legal personality of every individual. It emphasises respect for their right to privacy and freedom of movement, which should only be restricted to specific circumstances.[19]

Regarding political rights accorded to citizens based on their nationality, the International Covenant on Civil and Political Rights provides a more comprehensive list of such rights than the Universal Declaration of Human Rights. Although the covenant does not explicitly mention political rights for senior citizens, they are entitled to general protections granted to all state citizens. In accordance with the principle of nationality, seniors possess the right to vote, be elected, and participate in public offices, just like any other members of the populace.[20]

16 Hajim (n 9).
17 ibid.
18 International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) <https://digitallibrary.un.org/record/660192?ln=en> accessed 1 October 2023; Jabar Mohammed Mahdi AlSaadi and Hasan Mohammed Salih, 'Protecting the Elderly in Light of International Human Rights Conventions' (2021) 10(1) Journal of Juridical and Political Science 345, doi:10.55716/jjps.2021.10.19.
19 AlSaadi and Salih (n 18).
20 ibid.

2.1.4. The International Covenant on Economic, Social, and Cultural Rights

The United Nations General Assembly adopted the International Covenant on Economic, Social, and Cultural Rights on December 16 1966.[21] It is the first multilateral treaty to establish specific and binding provisions for member states to guarantee economic, social, and cultural rights to individuals.[22] Although the International Covenant on Economic, Social, and Cultural Rights provides more detailed provisions on the rights outlined in the Universal Declaration of Human Rights, it does not specifically dedicate articles to protecting the rights of older persons. However, Article 9 addresses the 'right of everyone to social security, including social insurance,' which can be applicable in situations of unemployment, disability, illness, or old age. As the rights guaranteed by the covenant encompass all individuals in society, regardless of gender or age, it can be inferred that older persons have an implicit right to social security.[23]

The International Covenant on Economic, Social, and Cultural Rights recognises the right to work as a fundamental and inseparable aspect of human dignity, as outlined in Article 6/1. It is imperative that all individuals, including older persons, have the opportunity to work and enjoy fair and favourable working conditions without discrimination.[24] Article 7 of the covenant emphasises the importance of ensuring safe working conditions for older persons by ensuring they enjoy fair and favourable working conditions. Furthermore, as outlined in General Comment No. 6 of the Committee on Economic, Social, and Cultural Rights, older personnel should be utilised to optimise their experience and technical knowledge.

Article 8 of the covenant grants individuals the right to form trade unions and participate in collective bargaining as well as the right to strike, provided that these rights are exercised in accordance with the laws of the respective country.

The Covenant on Civil and Political Rights, as well as the Covenant on Economic, Social, and Cultural Rights, both recognise the importance of protecting and supporting families and individuals. Article 10 of the Covenant on Civil and Political Rights obligates member states to provide special protection for mothers and children from all forms of hazards. Additionally, Article 13 of the Covenant on Economic, Social, and Cultural Rights recognises the rights of every individual to education, including the freedom to establish educational institutions, and emphasises the importance of making primary education compulsory and free, as well as ensuring access to education at all levels for all members of society. Article 12/1 of the Covenant on Civil and Political Rights also highlights the right to healthcare. It obligates state parties to provide a satisfactory level of physical and mental health to older persons. It is important to note that the right to health is closely linked to human rights such as the right to food, housing, work, and education.[25]

21 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) <https://digitallibrary.un.org/record/660192?ln=en> accessed 1 October 2023.

22 Safa Samir Ibrahim, 'The Role of the United Nations in Promoting the Rights of Elder People' (2013) 2 Journal of Legal Sciences 323.

23 Al-Asasfeh (n 12).

24 AlSaadi and Salih (n 18).

25 ibid.

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

Article 3 of the Covenant recognises the right of men and women to enjoy equality in the enjoyment of all economic, social, and cultural rights set forth in the Covenant. Notably, the exclusion of age as a consideration for discrimination is noted in both the Covenant and the Universal Declaration of Human Rights.[26]

The Committee on Social, Economic, and Cultural Rights has issued comments regarding the treatment of older persons, particularly regarding the right to health for older persons.[27] The Committee notes that the absence of explicit recognition of this right in relevant instruments may have been due to the limited awareness of demographic ageing at the time of their adoption. Although the covenant prohibits discrimination based on 'any other status', the scope of permissible age discrimination is limited. The Committee emphasises that while age discrimination is not entirely prohibited under the covenant, it remains a matter of concern. The comment also stressed the need for efforts to overcome stereotypes of older persons with disabilities, the incapability of independent action, and the lack of roles and positions in society. These initiatives should involve governments, non-governmental organisations, older persons, media outlets, and educational institutions. The goal is to create a society that fully integrates older persons.

In summary, the International Covenants and Universal Declaration of Human Rights, collectively known as the 'International Bill of Human Rights', have established a comprehensive system of human rights that serves as the basis for all subsequent international agreements and conferences. Nevertheless, the rights of older persons require specific legislation that considers their circumstances and needs.

2.2. The Protection of Older Persons in Light of the International Conventions Pertaining to Specific Categories

The protection of older persons is of utmost importance, and the United Nations has issued numerous international agreements to ensure their well-being. These agreements, which relate to specific categories of individuals, provide special protection to older persons based on their unique social, cultural, and personal circumstances. These agreements recognise the rights of older persons to receive the necessary protection to ensure their well-being and guarantee their rights.

2.2.1. Convention on the Elimination of All Forms of Discrimination Against Women

The United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on December 18 1979, with the aim of achieving equality in rights between women and men.[28] The CEDAW comprises 30 articles and establishes a legally binding framework to eliminate discrimination against women in

26 Al-Asasfeh (n 12).

27 CESCR General Comment No 6: The Economic, Social and Cultural Rights of Older Persons (adopted 12 December 1995) <https://www.refworld.org/docid/4538838f11.html> accessed 27 September 2023.

28 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979 UNGA Res 34/180) <https://digitallibrary.un.org/record/10649?ln=en> accessed 27 September 2023.

all fields. The first article defines discrimination against women as 'any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.'

CEDAW is comprehensive in nature, guaranteeing women's political, economic, social, cultural, and civil rights, including those of older women. Specifically, Article 10 of the Convention mandates that state parties ensure equal access to education and equal opportunities for scholarships and financial assistance. Furthermore, under Article 3, State parties are obligated to take appropriate measures, including the enactment of legislative measures, to promote the advancement and progress of women and ensure their equal enjoyment of human rights alongside men in all areas.

2.2.2. International Convention on the Rights of Migrant Workers and Members of Their Families

This Convention[29] was adopted by the United Nations General Assembly in 1990 to safeguard the rights of migrant workers and family members who reside temporarily or permanently in a country other than their country of origin. This Convention established ethical standards to be followed and relied upon to enhance the rights of migrants and their families in host countries.

Article 7 of the Convention emphasises the reasons for prohibiting discrimination based on factors such as sex, race, colour, language, religion, belief, political opinion, age, or any other status. This Article obliges countries to ensure respect for all human rights as stipulated, thereby guaranteeing the rights of older migrants, regardless of their gender.[30]

2.2.3. The International Convention on the Rights of Persons with Disabilities

The United Nations General Assembly adopted the Convention on December 13 2006. The Convention is a binding multilateral treaty that recognises the human rights and fundamental freedoms of all individuals with disabilities, including older persons. Article 1 of the Convention outlines its purpose, stating: 'To promote, protect, and ensure the full enjoyment and equal participation in all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'

The Convention acknowledges several rights for individuals with disabilities, including the right to a decent standard of living, social protection, and access to the highest standard of health care. Article 28/2 emphasises the importance of ensuring that women, girls, and older persons receive social protection and poverty reduction programs and that individuals with disabilities have access to public housing and retirement programs.[31] Paragraph 2(b) recognises the rights of older persons to social security, which represents a significant step in providing the necessary protection for their rights in international agreements.

29 International Convention on the Rights of Migrant Workers and Members of Their Families (adopted 18 December 1990 UNGA Res 45/158) <https://digitallibrary.un.org/record/105636?ln=en> accessed 27 September 2023.

30 Al-Asasfeh (n 12).

31 Ibrahim (n 22).

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

Older persons with disabilities require special care and protection because of their health and physical and mental conditions. Some of these individuals rely on caregivers for daily support and face challenges related to lack of independence, legal capacity, discrimination, and inadequate social protection.[32]

3 INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF THE RIGHTS OF OLDER PERSONS

The development of laws pertaining to the rights of older persons under public international law began in the early 1980s. In 1982, the United Nations General Assembly passed a resolution endorsing the Vienna International Plan of Action on Aging. This was subsequently followed by a plethora of plans, principles, and programs related to ageing, which are listed below in chronological order.

3.1. Vienna International Plan of Action on Aging, 1982

The United Nations General Assembly has expressed notable concerns about issues affecting older persons, who constitute an increasing segment of the global population. In response to these concerns, Resolution 33/52 was issued on December 14 1978,[33] to draw international attention to the challenges of ageing and facilitate consultations with member states. The establishment of the International Association of Older Persons in collaboration with specialised agencies and relevant organisations in 1982 further underscores the global interest in addressing the needs of older persons.

In 1982, the United Nations General Assembly convened the First World Assembly on Aging in Vienna to develop an international action program to ensure the economic and social security of older persons and to enhance their opportunities to contribute to national development. During this assembly, the International Plan of Action on Aging was adopted, commonly referred to as the 'Plan of Action,'[34] which comprises 62 recommendations covering research, data collection, training, education, health and nutrition for older persons, as well as social care and consumer protection.[35]

This plan aims to strengthen the ability of governments and civil society to address the population's ageing effectively by outlining specific measures that countries should implement to ensure that the rights of older persons are upheld in accordance with international human rights covenants.[36] While the plan represents a significant achievement

32 Catalina Devandas-Aguilar, 'Rights of Persons with Disabilities: Note' (17 July 2019) <https://digitallibrary.un.org/record/3823803?ln=en> accessed 27 September 2023.
33 World Assembly on the Elderly (adopted 14 December 1978 UNGA Res 33/52) <https://digitallibrary.un.org/record/187392?ln=en > accessed 27 September 2023.
34 United Nations, *Report of the World Assembly on Ageing, Vienna, 26 July to 6 August 1982* (UN 1982) 46-83.
35 Jaber Al-Huwail, 'The Rights of Older People under International Human Rights Norms and Conventions and Their Preservation in the Framework of the Family and Society' (The Symposium on the Rights of the Elderly, Qatar, Doha, 2014).
36 Elias (n 14).

in recognising older persons' rights at the international level, it lacks a legally binding force. Consequently, it serves as a set of guidelines for member states to consider when developing international and national standards for protecting older persons.

3.2. The 1992 United Nations Principles on Older Persons

The United Nations Principles for Older Persons were adopted by the UN General Assembly through Resolution 46/91 on December 16 1991.[37] This resolution encouraged states to integrate these principles into their national policies and programmers. The UN recognised this initiative as a means of acknowledging the rights of older persons and appreciating their contributions during their working years and activities. The objective of the principles was to coordinate efforts and promote collaboration at both national and international levels. A set of 18 principles were established, which can be summarised as follows:[38]

a) Independence

In accordance with the principle of independence, older persons must have access to the necessary resources to ensure their well-being, including adequate income, support from the family and community, suitable living arrangements, and access to education and training. This includes the provision of employment opportunities and a safe living environment that allows them to age in place with dignity. It is the responsibility of states to ensure that these fundamental requirements are provided to all citizens and residents, as they are essential for the protection of the rights of older persons.

b) Participation

Participation is considered one of the most important principles that motivate older people to persevere in life, overcome challenges, and avoid despair and depression. Older persons must remain integrated and actively engaged in society, capable of sharing their knowledge and skills with the younger generations. In accordance with the principle of participation, older persons should be able to seek and develop opportunities to serve the community. They should also be capable of forming movements or associations with fellow older people.

The importance of this principle is reflected by its realism and dynamism. Securing the basic needs of older persons, such as clothing and shelter, is a basic requirement. Still, we need the participation of older persons in social life so that they continue to give and so that the state and younger generations benefit from their experiences, opinions, and experiences. The authors note that most of the constitutions mentioned in this research focus on the primary needs of individuals and older persons without paying attention to the concept of participation of older persons in society after retirement.

c) Sponsorship

The principle of care states that older persons should benefit from the care and protection of the family and local community and have access to health care to delay or prevent the onset of diseases. Older persons should also have access to social and legal services to

37 United Nations Principles (n 2).
38 ibid.

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

strengthen their independence, protection, and care. They can also enjoy human rights and fundamental freedoms when staying in any shelter, care, or treatment facility. They have the right to decide on their care and quality of life.

National and international constitutions and laws have guaranteed this principle, such as the right to welfare and Social Security, regardless of where they are located. The most important thing that this principle has brought is the right to make important decisions related to health and life so that they do not seem to be ignored, pressured, or influenced by their will. [39]

d) Self-realisation

According to the principle of self-realisation, older persons should have opportunities to fully develop their potential and access and benefit from society's educational, cultural, spiritual, and recreational resources. States must take necessary measures to ensure that older people have access to all community services as members of society with all rights and privileges.

e) Dignity

Older persons should enjoy dignity and security without material or moral exploitation. They should be treated with fairness and respect irrespective of gender, age, ethnicity, financial status, or disability. This principle aims to ensure that older persons live with dignity without exploitation or discrimination.

Notwithstanding the urging of the General Assembly to formulate policies and programs aimed at the practical application of these principles, significant obstacles persist in their implementation. Although the Universal Declaration on Aging has gained recognition, it remains a non-binding document, serving as an inspiration for some countries and international organisations to address the rights of older persons. Furthermore, the principles do not impose any legal obligations on the concerned states as their implementation has been limited. [40] The application of these principles varies across countries depending on their socioeconomic conditions and the extent of their commitment to human rights.[41]

In the same year, two additional central documents were published to promote the rights of older people: a scheme for integrating older people in development, the Age and Disability Capacity Program (ADCAP), and the Declaration on Aging. The first document outlines the eight goals set by the UN General Assembly for the rights of older persons. The latest document, published on the tenth anniversary of the Vienna International Plan of Action on Aging, urged 'countries to support older women who work in caring for home and family has not been recognised. The document also encouraged older persons to continue living a creative life afterwards. Retirement.' The declaration recognised the importance of encouraging, supporting, and strengthening families by pointing out that families form the basis for supporting the older population. Finally, the declaration called for countries to

39 Al-Asasfeh (n 12).

40 Rosa Sanz, *Older People and Human Rights: A reference guide for professionals working with older people* (2nd edn, Age UK 2011).

41 Ibrahim (n 22).

strengthen cooperation in the field of research to expand their knowledge on the topic of ageing and older persons.[42]

3.3. Program of Action of the International Conference on Population and Development

On September 5 1994, the UN convened the World Conference on Population and Development (ICPD) in Cairo with the participation of twenty thousand delegates and representatives from various governments, UN bodies, non-governmental organisations, and media professionals. This conference focused on issues related to migration, family planning, and women's welfare. Conference Commissioners agreed on the following objectives: universal education, reduction of infant and child mortality, reduction of maternal mortality, and access to reproductive and sexual health services, including family planning. [43]

The conference resulted in a program that served as a guide for the United Nations Population Fund. Item (c) of Chapter VI on population growth and structure says that states should promote self-reliance among older people and enhance their quality of life by enabling them to work and live independently for as long as possible and by developing healthcare systems. It was emphasised that economic and social security systems, support systems, and safety nets for senior citizens are necessary.[44] The program focused on women, who make up the majority of Older People. The need for governments to create the necessary conditions for senior citizens to lead healthy lives and utilise their skills for the benefit of society while eliminating violence and age discrimination was emphasised.[45]

In 2013, on the anniversary of the ICPD, a regional conference was held in Cairo to assess the progress of the program's goals in the Arabic region.[46] The conference was designed to evaluate the population and development in the Arabic region by 2014 and to support countries in meeting their development objectives. The conference identified deficiencies in addressing the issues and needs of older people. Inadequate attention has been paid to several areas, such as creating employment opportunities for older persons, addressing various forms of discrimination against them, and addressing issues of neglect, abuse, and violence.[47] The Cairo Declaration was adopted at the conference and contained several recommendations regarding older persons that countries are currently implementing. Among these recommendations, the most crucial are enhancing a supportive environment for older persons, providing them with social and economic opportunities, collaborating with relevant authorities to integrate the older persons into the path of development,

42 Benny Spanier, Israel (Issi) Doron and Faina Milman-Sivant, 'In Course of Change: Soft Law, Elder Rights, and the European Court of Human Rights' (2016) 34(1) Law & Inequality 55.

43 United Nations, *Report of the International Conference on Population and Development, Cairo, 5-13 September 1994* (UN 1995).

44 Mohammed Hamid Al-Ghannam and Mohammed Hussain Abdul-Hameed, 'International Protection of Old People within the Framework of the Provisions of Public International Law' (2022) 34(98) The Spirit of Arbitrated Laws 1, doi:10.21608/LAS.2022.265635.

45 ibid; UN Economic and Social Affairs, *Population and Development: Programme of Action adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994* (UN 1995) <https://tinyurl.com/3scy3mjv> accessed 1 October 2023.

46 Al-Asasfeh (n 12).

47 ibid.

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

engaging civil society organisations, and the private sector to support the implementation of legislation that enables families to care for their older persons, ensuring non-discrimination based on age, and guaranteeing that older persons, especially women, live with dignity.[48]

3.4. Madrid International Plan of Action on Ageing

In 2002, the Second World Assembly on Aging convened in Madrid 20 years after the Vienna Action Plan. The assembly resulted in the adoption of the Madrid International Plan of Action on Ageing (MIPAA), [49] which examined the Vienna Conference on Aging's decisions and received approval from all UN member states. MIPAA called for the recognition and promotion of older persons' rights on a global scale, representing a significant milestone in the recognition of older persons' rights at the international level.[50]

MIPAA identified three key priorities. The first priority, and of utmost importance, concerns the well-being and development of older persons. The recommended course of action is to implement programs that guarantee the economic and social protection of older persons. The MIPAA urges all individuals, regardless of gender or profession, to have equal access to social insurance. Furthermore, the plan advocates that countries extend protection to individuals who lack social security. In addition, MIPAA calls for states to provide support to older persons, especially during natural disasters and other humanitarian crises, by ensuring their access to essential needs such as food, housing, and medical care. The second priority pertains to the need to improve the health of older individuals, emphasising the importance of equal access to medical care, including mental health care. Finally, MIPAA calls for countries to ensure adequate and old living environments for older persons.[51]

MIPAA agreed to a set of goals to achieve, including promoting and protecting the universally recognised human rights of older persons; eliminating all forms of violence and discrimination against them; paying attention to quality health care and providing prevention, protection, and support for older persons; providing social protection for older persons; providing them with the opportunity for self-realisation and individual development; and seeking to solve the problem of poverty among older persons.[52]

MIPAA is a policymaking reference for governments, NGOs, and other actors to redraw the ways in which their societies perceive older citizens. This policy framework represents a historic agreement by governments to integrate ageing concerns into broader frameworks for social and economic development and human rights, as adopted by United Nations

48 ibid.
49 United Nations (n 3).
50 Spanier, Doron and Milman-Sivant (n 42).
51 ibid.
52 'Global Frameworks on Older Persons' (*UN Economic and Social Commission for Western Asia*, 2017) <https://archive.unescwa.org/publications/ageing-global-frameworks> accessed 1 October 2023.; Ibrahim (n 22).

conferences and summits.[53] Governments have pledged to translate MIPAA's objectives into tangible national policies that positively impact the well-being of the older population.[54] The Madrid Plan, despite being a significant step towards advancing the rights of older persons, lacks legal enforcement and does not propose a binding global agreement on the matter.[55]

4 PROTECTING THE RIGHTS OF OLDER PERSONS ON THE REGIONAL AND NATIONAL LEVEL

To provide comprehensive protection for older persons, international obligations must be translated into regional agreements and applied by regional and national institutions. This will be addressed as follows:

4.1. Protection of Older Persons at the Regional Level

The Arab Charter on Human Rights came into force in 2008,[56] addressing human rights without dedicating specific articles to older people. However, Article 38/B obligates states to provide special care and protection for the family, motherhood, childhood, and old age. Article 30 requires states to guarantee comprehensive social security for all citizens. This might be incompatible with Article 9 of the International Covenant on Economic, Social and Cultural Rights, which states that all persons, not just citizens, must have access to social security.

The League of Arab States has incorporated mechanisms for the protection of the elderly into its agenda and adopted the Social Work Charter of 2017 to safeguard citizens against disability, old age, unemployment, and disease.[57]

A milestone occurred during the Arab Summit in Tunisia in March 2019 when the Arab Strategy for the Elderly was approved. This represented a significant qualitative leap for this demographic, enabling them to exercise their rights and benefit from their experience. The League's Assistant Secretary-General, Ambassador Haifa Abu-Ghazaleh, revealed that a draft law, 'The Arab Guideline for Protecting the Rights of the Elderly', is being prepared to support all efforts to implement the strategy.

4.2. Protection of Older Persons by National Institutions

Several institutions have been created in Arab countries to support older persons, enabling them to carry out their daily routines and leisure activities and offering specialised care for those affected by conditions such as memory loss, mental confusion, and dementia. These

53 'Madrid Plan of Action and Its Implementation' (*United Nations Department of Economic and Social Affairs*, 2002) <https://social.desa.un.org/issues/ageing/madrid-plan-of-action-and-its-implementation-main/madrid-plan-of-action-and-its> accessed 1 October 2023.

54 Al-Asasfeh (n 12).

55 Spanier, Doron and Milman-Sivant (n 42).

56 Arab Charter on Human Rights (revised 22 May 2004) <https://www.right-to-education.org/resource/arab-charter-human-rights-revised> accessed 10 November 2023.

57 'Social Work Charter of Arab Countries' (*Haqqi*, 4 April 2023) < https://haqqi.info/en/haqqi/legislation/social-work-charter-arab-countries > accessed 10 November 2023.

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

institutions can further aid by providing appropriate accommodation for elderly couples and ensuring they receive adequate food to maintain their human dignity.

For example, the Kuwaiti Charitable Society for Elderly Care and Rehabilitation, established by the Ministerial Resolution of the Ministry of Social Affairs and Labor No. (116/A) of 2014.[58] Their services include:

1. Giving materials and moral support to provide health, psychological, and medical equipment for the elderly.
2. Raising awareness among the elderly and their families about the care services provided by the Ministry of Social Affairs and Labor. This includes encouraging them to participate in recreational, social, cultural, and craft activities aimed at promoting their integration into society.
   The society strives to enhance the government's comprehensive role in serving the elderly by offering support to related institutions.

In Jordan, there are ten care institutions for the elderly that cater to both males and females. Research has shown that these institutions have not been fully utilised due to the elderly's preference to live with their families. Notably, care homes are non-governmental; therefore, the Jordanian legislature is invited to establish government-run care homes and provide the necessary funding and resources for both government-run and voluntary care homes.[59]

In the United Arab Emirates, Federal Law No. (9) of 2019 on the Rights of Senior Emiratis determines the commitment of the Ministry of Community Development to provide services that benefit the elderly. Services include providing care at assisted facilities and at homes or by mobile service units, social assistance and discounted or free transportation, parking facilities and issuing discount cards for use at retail stores and restaurants. These services are free of charge, as stated in Article 16 of the law, and subject to restrictions outlined in its executive regulation.

5 OLDER PERSONS RIGHTS IN THE CONSTITUTIONS OF ARAB STATES

It is universally acknowledged that human rights are inherent and inalienable entitlements that every individual is endowed with by virtue of being human. These rights, which are typically enshrined in national constitutions, serve as a legal foundation for safeguarding citizens' dignity, equality, and welfare. The provision of national constitutions that address human rights can be particularly advantageous for older persons.

5.1. The Right to Equality and Non-Discrimination

The principle of equality is one of the basic pillars of the establishment of states, and it is considered one of the highest values associated with a person and human dignity. As such, the national constitutions recognised the principle of equality between the rights of all

58 *Kuwaiti Charitable Society for Elderly care and Rehabilitation* <http://kw-care.org/site/?page_id=65> accessed 10 November 2023.

59 Al-Asasfeh (n 12).

citizens, regardless of age and gender, and considered equality as one of the basic pillars of the system of government.[60]

It is imperative to note that the concept of equality encompassed within the phrase 'all human beings are equal in dignity and rights' refers to the parity in legal standing that individuals share in relation to their rights and responsibilities. This concept is fundamental to the principles of justice and fairness and is embodied in the notion of equality before the law.

Article 19 of the amended Syrian constitution of 2012 states, 'The society in the Syrian Arab Republic is based on solidarity, solidarity, respect for the principles of social justice, freedom, equality, and the maintenance of the human dignity of every individual.'[61]

In a related context and in affirmation of the principle of equality, the Kuwaiti Constitution equalised all citizens before the law in rights and duties, where it dedicated Article 29 of the Constitution of Kuwait, stating 'People are equal in human dignity, they are equal before the law in public rights and duties, there is no discrimination among them in terms of sex, origin, language, or religion.'[62]

As for the Kingdom of Saudi Arabia, it has adopted a special approach in this regard, as Article 8 of the kingdom's statute states, 'Governance in the kingdom of Saudi Arabia is based on Justice, Shura and equality under Islamic law,' which means that the recognition of the principle of equality is restricted in accordance with the provisions of this Sharia, and not in accordance with the situational and international standards of human rights.[63]

The constitutional right to equality is combined with the right not to discriminate between citizens, the grounds of which are specified exclusively. Article 33/3 of the amended Syrian constitution of 2012 stated that 'Citizens are equal in rights and duties, there is no discrimination among them on the basis of sex, origin, language, religion or creed.'

As for the Jordanian constitution amended in 2016, Article 6/1 emphasised that the equality of Jordanians is before the law, and there is no discrimination between them in rights and duties, even if they differ in ethnicity, language, or religion.[64] The article did not refer specifically to older persons, but the government of Jordan pointed out during its dialogue with the UN bodies that the word (Jordanians) can be interpreted broadly to include other categories of Jordanian society.[65]

60 Elias (n 14).

61 Constitution of the Syrian Arab Republic (2012) <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/91436/106031/F-931434246/constitution2.pdf> accessed 1 October 2023.

62 Constitution of Kuwait (1962) <https://wwwex.ilo.org/dyn/natlex2/natlex2/files/download/74769/KWA74769%20Eng.pdf> accessed 1 October 2023.

63 Elias (n 14).

64 Constitution of the Hashemite Kingdom of Jordan (rev 2016) <https://wwwex.ilo.org/dyn/natlex2/natlex2/files/download/34112/JOR34112%20Eng.pdf> accessed 1 October 2023.

65 CEDAW, Consideration of reports submitted by States parties under article 18 of the Convention, Jordan 25 June 2015 (CEDAW/C/JOR/6) <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=56e7c1d24> accessed 1 October 2023.

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

Article 25 of the UAE Constitution of 1971 states that there is no discrimination among federation citizens on the grounds of origin, domicile, religious belief, or social status. [66]

Considering the preceding discussion, it is evident that the constitutions have set forth principles of equality and non-discrimination for all citizens, albeit with some variations regarding grounds for discrimination. It should be emphasised that the constitutions do not endorse the concept of positive discrimination, a measure intended to rectify imbalances by granting certain groups in society advantages equal to those afforded to other groups. This form of discrimination, preferential treatment, was not recognised within the constitutions.[67]

The principles of equality and non-discrimination are interdependent and cannot exist separately.[68] It is well established that the constitutions of various countries have consistently ensured the protection of rights and freedom of all age groups, including older persons. This is in accordance with the stance taken by the UN High Commissioner for Human Rights, Michelle Bachelet, who emphasised that 'Every life has equal value. Our rights do not diminish with age.'[69]

5.2. The Right to Work

The right to work is a fundamental right essential for promoting human dignity and maintaining social stability. This right has been enshrined in several Arab constitutions, with some including specific articles related to it and others mentioning it alongside other rights.

Article 40/1 of the amended Syrian constitution of 2012 ensures that 'Work shall be a right and a duty for every citizen, and the State shall endeavour to provide for all citizens, and the law shall organise work, its conditions and the workers' rights.' Article 23/1 of the Jordanian constitution (Amendment 2016) stipulates that work is a right for all citizens, and the state should provide it to Jordanians by directing the national economy. Article 41 of the Kuwaiti Constitution of 1962 states: 'Every Kuwaiti shall have the right to work and to choose the nature of his occupation. Work is the duty of every citizen. Dignity requires it and the public welfare ordains it. The State shall make work available to citizens and shall see to the equity of its conditions.' Article 20 of the UAE Constitution stipulates that community values work as a fundamental pillar of its progress and work to provide it to citizens and qualify them for it, creating the appropriate conditions for this. However, Article 34 grants Emirati citizens the freedom to choose their jobs. Lastly, Article 26 of the Qatari Constitution of 2004 states property, capital, and labour are essential components of the social entity of the state, and they are all rights of social nature regulated by law.

Notably, the Arab constitutions have conferred recognition of the importance of work, with the majority acknowledging its status as a right and some recognising the state's responsibility to provide favourable conditions for its pursuit. In fact, certain constitutions,

66 Constitution of the United Arab Emirates (1971) <https://www.constituteproject.org/constitution/United_Arab_Emirates_2009> accessed 1 October 2023.

67 Elias (n 14).

68 Mohammad Yousef Alwan and Mohammad Khalil Al-Mousa, *International Human Rights Law: Protected Rights*, vol 2 (Dar Althaqafa Publication and Distribution 2014).

69 OHCHR and Older Persons (n 7).

such as the Syrian and Kuwaiti, have even established it as a duty for citizens. Furthermore, some constitutions, including the UAE and Kuwait, have granted citizens the right to choose their preferred work type. [70]

Considering the provisions outlined in the Constitution, there is no explicit exclusion of older persons regarding their right to work. Furthermore, no restrictions or conditions were imposed on this category of citizens. As such, older persons are entitled to the same rights and protections as other workers, without discrimination based on age. [71]

5.3. Right to Social Security

Social Security holds great significance for both older persons and all citizens as a cornerstone of human dignity and the full realisation of human rights. Its importance lies in its ability to alleviate poverty, mitigate its effects, and foster social integration, particularly for those experiencing inadequate or insufficient income. With age, individuals may find it difficult to work or secure employment that provides a suitable standard of living, and social security serves as a crucial safety net to ensure that basic rights are met. Most constitutions recognise the human right to social security as a fundamental human right, albeit with varying terminology.

Article 30/2 of the Iraqi Constitution stipulates that the state should provide social and health security to its citizens in the event of old age, illness, incapacity, homelessness, orphanhood, unemployment, or any other similar circumstances, as regulated by law. Similarly, Article 69 of the Algerian Constitution ensures workers' right to social security. In contrast, Article 73 confirms the state's commitment to providing for the living conditions of citizens who are unable to work, including those who are completely unable to do so. [72]

Article 5/c of the Bahraini Constitution ensures social security for citizens in the event of old age, illness, inability to work, or unemployment. Likewise, article Eight of the Constitution affirms the state's commitment to providing health care to all citizens.[73] In line with the mentioned constitutional articles, Article 2 of Bahraini Law No. 58 of 2009 on the Rights of the Elderly affirms the state's commitment to caring for a decent life for older persons by assisting them financially and morally. The mentioned article stressed the state's commitment to providing them health, housing, social, and administrative services.

Article 16 of the UAE Constitution states, 'Society shall be responsible for protecting childhood and motherhood and shall protect minors and others unable to look after themselves for any reason, such as illness, incapacity, old age, or forced unemployment. It shall be responsible for assisting them and enabling them to help themselves for their own benefit as well as that of the community. Such matters shall be regulated by welfare and social security legislations.' Based on the mentioned article, Federal Law No. (2) of 2001 was

70 Elias (n 14).

71 ibid.

72 Constitution of the People's Democratic Republic of Algeria (2016) <https://www.joradp.dz/har/consti.htm> accessed 30 September 2023.

73 Constitution of the Kingdom of Bahrain (2002, rev 2017) <https://www.constituteproject.org/constitution/Bahrain_2017> accessed 30 September 2023.

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

enacted regarding social security, which specified the conditions for obtaining social security benefits and specified in its third and fourth articles the categories that benefit from social security, which incorporates older persons.

In accordance with Article 11 of the Kuwaiti Constitution, the state affords aid to citizens in the event of old age and provides them with social insurance, aid, and welfare services. Similarly, Article 27 of the Saudi Basic Law guarantees the rights of citizens and their families in cases of emergency, illness, disability, and old age and supports the Social Security System. Based on the previous text, Article 2 of the Saudi Social Security System for the year 1427 AH specified the conditions for citizens' entitlement to social security. Article 3 also specified the categories eligible for this security and assured that new categories may be added by a decision of the Council of Ministers by a proposal from the Minister. Correspondingly, Article 22/1 of the Syrian Constitution of 2012 stipulates that the state ensures the provision of aid to citizens and their families in cases of emergency, illness, disability, orphanhood, and old age.

Most Arab national constitutions recognise mandatory Social Security insurance for citizens of the state, particularly for those who are older. This aligns with the requirements stipulated in international instruments such as the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Rights of Persons with Disabilities. However, certain constitutions have explicitly mentioned social security, such as those of Iraq, Algeria, and Saudi Arabia, while others have employed the term 'social insurance', such as those of Kuwait and Syria. Notably, the Syrian Constitution does not specify any form of guarantee or mechanism to ensure the welfare of citizens in the event of old age. Certain constitutions, including those of Iraq and the Emirates, have enacted special laws to address this issue thoroughly.

Social security systems are characterised by the fact that they are financed by the general budget of the state, and they are managed by the public utility of the state, which does not seek to achieve profit, and they are characterised by generality and apply to all citizens. It should be noted that social security systems are backup systems; they do not apply to persons to whom special insurance and pension systems provide citizens with income equal to or greater than the amount of support specified in the Social Security System. Thus, the social security system is a last resort for providing income to those who do not have a decent income.[74]

5.4. The Right to Health Care

The right to health care is fundamentally inextricably linked to notions of equality, employment, and Social Security. This right encompasses healthcare provision and the availability of essential components that contribute to health, including safe food and water, adequate housing, and a healthy work environment. To fulfil the right to health, states have an obligation to create the necessary conditions that enable individuals to attain the highest level of health possible. It is important to note that the realisation of the right to health does not guarantee that all individuals will be healthy but rather that appropriate healthcare and conditions are provided to ensure that all citizens have access to the means to achieve

74 Elias (n 14).

optimal health. The obligation to provide health care, therefore, can be understood as an obligation to achieve a result, while the obligation to take care ensures that all citizens have access to the resources necessary to maintain their health.[75]

Given the importance of health issues for older persons, it is noteworthy that many constitutions have not dedicated special articles on their health. Article 31/1 of the Iraqi Constitution of 2005 specifies that each Iraqi has the right to the state concerned with public health and ensures prevention and treatment by establishing various types of hospitals and health institutions. In the same context, Article 22/2 of the Constitution states that the state protects the health of citizens and provides them with means of prevention, treatment, and medication. Article 25 of the Syrian Constitution states that education, health, and social services are essential pillars for building society, and the state is working to achieve balanced development among all regions of the Syrian Arab Republic. Article 55 of the Yemeni Constitution states that health is a fundamental right accorded to all citizens, and the state recognises this right by establishing and developing numerous hospitals and healthcare institutions. Article 66 of the 2016 Algerian Constitution affirms that healthcare is a right that belongs to the citizens of Algeria. The state is responsible for preventing and controlling the spread of epidemics and other infectious diseases.

The Kuwaiti Constitution specifically provides for the right to healthcare for older persons. Article 11 states that the state guarantees aid to citizens in the case of old age and provides them with social insurance, social aid, and welfare services.

One of the modern Arab constitutions that guarantees the rights of older persons is the Moroccan constitution of 2011, which states in Article 34, 'the public authorities develop and activate policies aimed at people and groups with special needs. For this purpose, special care was given to 'addressing and preventing the vulnerable situations of groups of women and mothers, children and older persons.' In this article, it is observed that the Moroccan constitution recognises older persons as a vulnerable group that requires special protection and care and charges public authorities responsible for implementing corresponding policies.

The authors observed previous constitutional provisions that although the constitutions agreed on the obligation to care for citizens' health, there was a difference in the methodology of dealing with healthcare and how the texts were drafted. It is also clear that constitutions hesitate to deal with the issue of health care; some of them have given it the status of the right, such as the Iraqi, Yemeni, and Algerian constitutions, and some of them only emphasised the obligation of states to provide health care to their citizens. This implies an implicit recognition of citizens' right to healthcare.[76]

The Arab constitutions' provisions regarding the provision of healthcare for older persons align with the standards set by international human rights courts, such as the European

75 ibid.
76 ibid.

Court of Human Rights, which affirmed that the age of the individual should not exempt them from prosecution or imprisonment if they are treated with dignity and receive adequate medical care.[77]

6 CONCLUSION AND RECOMMENDATIONS

In conclusion, the study highlighted the urgent need to strengthen the protection of older persons by combining international human rights law and the Arab constitutions and reached the following conclusions and recommendations:

6.1. Conclusions

1. The development regarding the protection of the rights of older persons in the twenty-first century is doubtful and does not live up to the level of aspirations. No new binding instruments have been enacted in this regard, so the commitment remains to arise from previous international legislation and modern national constitutions and legislation.
2. The general protections provided by human rights laws, both in international human rights charters and national legislation, are inadequate when it comes to protecting geriatric citizens.
3. Most international instruments on older people are legal documents that are not binding on states; they are merely guidelines that governments may or may not adopt.
4. There is a lack of a dedicated legal framework designed specifically for the rights and needs of older people in both international human rights laws and Arabic legislation. This gap underscores the need for a focused and comprehensive international convention to address this growing demographic.
5. Without a universal, legally binding international framework, it is feasible to rely on the provisions of national constitutions to safeguard the well-being and recognise the rights of older people.

6.2. Recommendations

1. Given the demographic transition towards an ageing population and the unique challenges older citizens face, it is imperative for Arabic countries, in cooperation with the international community, to reconsider and revise their constitutional frameworks to proactively address the challenges faced by senior citizens. This can be accomplished by harmonising national laws with international human rights standards.
2. This study emphasises the importance of a comprehensive approach to protect older citizens. This approach should include not only health care but also social support, economic welfare, and social inclusion. Arabic constitutions must address these multifaceted needs to ensure comprehensive and effective protection.

77 Caroline Davidson, 'Aging Out: Elderly Defendants and International Crimes' (2020) 61(1) Virginia Journal of International Law 57; *Sawoniuk v. United Kingdom* (Court of Appeal (Criminal Division), Great Britain (UK), 10 February 2000) <https://internationalcrimesdatabase.org/Case/744/Sawoniuk> accessed 1 October 2023.

3. Protecting older people under international human rights laws and Arabic constitutions requires adopting effective legislative procedures. These include the establishment of government agencies and organisations with specific responsibilities to older people and monitoring the implementation of laws related to them. Raising awareness and educating society about the rights of senior citizens and promoting their understanding and respect is imperative. Arabic countries should adopt integrated policies and programs to improve the conditions of senior citizens and provide them with the necessary support and care. These programs can include adequate healthcare, job opportunities and continuing education, adequate housing, and promoting social solidarity to ensure dignified and stable lives for older people.
4. The protection of older people under international human rights laws and the constitutions of Arabic states requires cooperation and joint efforts from governments, civil society, and international and local organisations. Senior citizens deserve decent lives and should benefit from all human rights, including healthcare, social justice, and political participation. Providing for their legal protection and protecting their civil rights promotes social justice and contributes to a prosperous and equitable society.

REFERENCES

1. Al-Asasfeh AA, *Elderly Rights in the Jordanian Constitution and Positive Laws and International Conventions* (Mutah University 2021).
2. Al-Ghannam MH and Abdul-Hameed MH, 'International Protection of Old People within the Framework of the Provisions of Public International Law' (2022) 34(98) The Spirit of Arbitrated Laws 1, doi:10.21608/LAS.2022.265635.
3. Al-Huwail J, 'The Rights of Older People under International Human Rights Norms and Conventions and Their Preservation in the Framework of the Family and Society' (The Symposium on the Rights of the Elderly, Qatar, Doha, 2014).
4. AlSaadi JMM and Salih HM, 'Protecting the Elderly in Light of International Human Rights Conventions' (2021) 10(1) Journal of Juridical and Political Science 345, doi:10.55716/jjps.2021.10.19.
5. Alwan MY and Al-Mousa MK, *International Human Rights Law: Protected Rights*, vol 2 (Dar Althaqafa Publication and Distribution 2014).
6. Davidson C, 'Aging Out: Elderly Defendants and International Crimes' (2020) 61(1) Virginia Journal of International Law 57.
7. Elias Y, *Legal Protection for the Elderly in the GCC States: A Comparative Legal Study* (Social Studies Series 69, Executive office 2012).
8. Hajim AQ, 'Iraq's International Obligations over the Years Preparation' (2018) 1(10) Lark Journal for Philosophy, Linguistics, and Social Sciences 240.
9. Ibrahim SS, 'The Role of the United Nations in Promoting the Rights of Elder People' (2013) 2 Journal of Legal Sciences 323.

10. Lulić M and Čulo IR, 'Poverty: A Challenge to the Protection of Human Rights of Older Persons in the Republic of Croatia' (2020) 33(1) Ekonomski vjesnik / Econviews 243.
11. Mégret F, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11(1) Human Rights Law Review 37, doi:10.1093/hrlr/ngq050.
12. Sanz R, *Older People and Human Rights: A reference guide for professionals working with older people* (2nd edn, Age UK 2011).
13. Spanier B, Doron I and Milman-Sivant F, 'In Course of Change: Soft Law, Elder Rights, and the European Court of Human Rights' (2016) 34(1) Law & Inequality 55.

AUTHORS INFORMATION

Jamal Barafi*
Ph.D. (Law), College of Law, University of Sharjah, United Arab Emirates
jamal.barafi@yahoo.com
https://orcid.org/0000-0003-1551-7187
Corresponding author, responsible for the manuscript submitting.

Zeyad Jaffal
Ph.D. (Law), College of Law , Al Ain University, United Arab Emirates
zeyad.jaffal@aau.ac.ae
https://orcid.org/0000-0002-3100-4173

Faisal Alshawabkeh
Ph.D. (Law), College of Law, Al Ain University, United Arab Emirates
faisal.shawabkeh@aau.ac.ae
https://orcid.org/0000-0002-0086-9326

Riad Al Ajlani
Ph.D. (Law), College of Law, United Arab Emirates University, Abu Dhabi, United Arab Emirates
r_alajlani@uaeu.ac.ae
https://orcid.org/0000-0002-2587-6733

CO-AUTHORSHIP

Conceptualization - Barafi Jamal, Al Ajlani Riad, Alshawabkeh Faisal, Jaffal Zeyad
Data curation - Alshawabkeh Faisal, Jaffal Zeyad
Formal Analysis Barafi Jamal, Al Ajlani Riad
Investigation Jaffal Zeyad, Alshawabkeh Faisal
Methodology Barafi Jamal, Al Ajlani Riad
Project administration Jaffal Zeyad, Barafi Jamal
Supervision Jaffal Zeyad, Alshawabkeh Faisal
Validation Barafi Jamal, Al Ajlani Riad
Writing – original draft Barafi Jamal, Jaffal Zeyad Al Ajlani Riad, Alshawabkeh Faisal,
Writing – review & editing Barafi Jamal, Alshawabkeh Faisal, Jaffal Zeyad

Competing interests: No competing interests were disclosed.
Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free of any impact of any organizations

ABOUT THIS ARTICLE

Cite this article
Barafi J, Jaffal Z, Alshawabkeh F and Al Ajlani R, 'Towards an Effective Legal Protection for Older Persons in the 21st Century: A Comparative Study of International Human Rights Law and Arab Constitutions' (2024) 7(1) Access to Justice in Eastern Europe 198-221 <https://doi.org/10.33327/AJEE-18-7.1-a000106>

Submitted on 05 Oct 2023 / Revised 10 Nov 2023 / Approved 14 Nov 2023
Published ONLINE: 1 Dec 2023 / Last Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000106

Managing editor – Prof. Iryna Izarova**. English Editor** – Julie Bold.

Keywords: *older person, international instruments, Vienna action plan, The Madrid Plan, Arab law.*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

NON-COMPLIANCE OF KAZAKHSTAN'S CRIMINAL LAW WITH INTERNATIONAL ANTI-CORRUPTION STANDARDS

Elena Mitskaya*

ABSTRACT

Background: *Since the adoption of the new Criminal Code of Kazakhstan, the norms regulating criminal liability for corruption offences have already been repeatedly amended and supplemented to meet the requirements of anti-corruption international legal obligations. However, some inconsistencies pose a challenge to the successful eradication of corruption.*
Methods: *The study employed various methodologies, including the historical and legal method, statistical analysis, formal logic, and system analysis and synthesis. Eradication of corruption is a priority task of the National Development Plan of Kazakhstan. The analysis of anti-corruption criminal legal norms of foreign countries has shown the variability of fixing the norms of international conventions in national criminal law. However, the general essence of these norms remains unchanged. Based on a critical approach to the analysis of corruption prevention by Kazakhstani criminal law norms, the paper substantiates the need for further correction to bring them in line with international anti-corruption standards.*
Results and Conclusions: *The article proposes measures to strengthen corruption prevention by improving the anti-corruption norms of Kazakhstan's criminal law in light of international requirements.*

1 INTRODUCTION

The Transparency International Corruption Perceptions Index for 2022 places Kazakhstan 103rd out of 180 countries, slightly worsening its position by one from its 2021 ranking of 102nd. Over the past five years, Kazakhstan has been ranked 94th only once, in 2020. This was the best position in 2019 - 113th place and 2018 - 124th place. Unfortunately, 2020's position could not be retained, and no significant, noticeable progress in rooting out corruption remains. Over the past 30 years, hundreds of billions of US dollars have been

illegally taken out of the states.[1] It is not difficult to imagine what they would have been essential for improving the quality of life of Kazakhstani citizens. Therefore, it is not by chance that rooting out corruption in Kazakhstan is one of the strategic objectives of the state's development. Thus, the state cannot sufficiently protect human rights. When the state cannot deal with corrupt officials 2, corruption damages the public administration system and society's social capital by establishing a vicious cycle.[2]

Corruption continues to be significant for all the extensive work done in the country in this regard. Most notable progress has been limited to a reduction in petty and minor corruption.[3] As stated in the National Development Plan through 2025, Kazakhstan should shift from routine anti-corruption measures to a significant change in public perception and conscious rejection of all types of corruption and nepotism. It should be emphasised that 70% of Kazakhstanis relate their faith in the unwavering fight against corruption with the personality of Kazakhstan's current President and express their trust in Kassym-Jomart Tokayev.[4]

While citizens express their trust in the President, their trust in other authorities involved in the fight against corruption is comparatively lower: Government of the Republic of Kazakhstan - 59%; Ministry of Internal Affairs - 50%; District Authorities - 47%; Human Rights Ombudsman - 44%; and Courts - 41%. In a sociological poll conducted by the President of the Republic of Kazakhstan's Central Communications Service in March 2022, approximately 60% of Kazakhstanis are willing to participate in the fight against corruption. This result implies that Kazakhstani society has a reasonably high level of civic activism. Additionally, 71.3 percent of respondents believe the situation on corruption eradication would improve in the next two years.[5]

In April-May 2023, the Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan conducted a sample survey on 'the level of public confidence in law enforcement agencies and the judicial system' across all regions of the country, both urban and rural. It demonstrated a rise in public trust in law enforcement institutions: 57.1% trust the prosecutor's office, 57.5% trust the police, and 55.2% trust the courts.[6]

---

1 Rabiga Dyusengulova, 'About 100 billion dollars withdrawn from Kazakhstan - Minister Kuantyrov' (*Tengri News*, 14 April 2022) <https://tengrinews.kz/kazakhstan_news/okolo-100-milliardov-dollarov-vyiveli-kazahstana-ministr-466449> accessed 8 June 2023.

2 Andris Zimelis, '(Non)Determinants of Corruption: A Sceptical View From Eastern Europe' (2011) 4(2) Journal of Comparative Politics 4; Bo Rothstein and Eric M Uslaner, 'All for All: Equality, Corruption, and Social Trust' (2005) 58(1) World Politics 41; Bo Rothstein, 'Social Capital in the Social Democratic Welfare State' in B Rothstein, *Social Traps and the Problem of Trust* (CUP 2005) 71, doi:10.1017/CBO9780511490323.

3 'Kazakhstan: Freedom on the Net 2022' (*Freedom House*, 2022) <https://freedomhouse.org/country/kazakhstan/freedom-net/2022/> accessed 8 June 2023.

4 'Our Work in Kazakhstan' (*Transparency International*, 2023) <https://www.transparency.org/en/countries/kazakhstan> accessed 28 September 2023.

5 'More than 70% of Kazakhstanis approve of President Tokayev's measures, according to a sociological survey' (*Service of Central Communications under the President of the Republic of Kazakhstan*, 11 April 2022) <https://ortcom.kz/ru/korotko-o-glavnom/1649655034> accessed 28 September 2023.

6 'On the Level of Public Confidence in Law Enforcement Agencies and the Judiciary (April–May 2023)' (*Bureau of National Statistics*, 17 July 2023) <https://stat.gov.kz/ru/industries/social-statistics/stat-crime/publications/70710/> accessed 28 September 2023.

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

However, it is impossible to deny that Kazakhstan has never had a comprehensive study and analysis conducted by independent Kazakhstani non-governmental groups to determine the systemic hazards of corruption, its extent, and its impact across multiple areas.[7] Corruption crime is very latent.[8] Corruption is difficult to quantify in most countries, and Kazakhstan is no exception. In Kazakhstan, fighting corruption is a top priority. Kazakhstan is anticipated to join the Criminal Law Convention on Corruption (ETS 173) soon.[9] This gives reason to believe that Kazakhstan will not veer from its unwavering campaign against corruption.

The institutional framework for countering corruption has been established, comprising many laws and by-laws. Among them are the anti-corruption law, the public services law, the civil service law, the law on state control and audit, the law on public procurement, the law on public councils, the law on access to information, the law on the return of illegally acquired assets to the state, and others. There is disciplinary, administrative, and criminal liability for committing corruption offences. Since independence, Kazakhstan's legislation has always been shaped with international law in mind, and anti-corruption legislation has been based on international norms.

The Kazakhstan Parliament has ratified the UN Conventions against Corruption (ratified on 4 May 2008), against Transnational Organised Crime (ratified on 4 June 2008), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ratified on 2 May 2011). By Law of December 30 2019, the Republic of Kazakhstan ratified the Agreement between the Republic of Kazakhstan and the Council of Europe on the privileges and immunities of representatives of the Group of States against Corruption and members of assessment teams, making Kazakhstan a member of the Group of States against Corruption - GRECO. Joining GRECO opens up the opportunity to ratify other Council of Europe conventions, strengthening cooperation with European countries on providing legal assistance, extradition of criminals, and return of illegally acquired property. It will lay the groundwork for Kazakhstani law enforcement officers to participate in operational and search activities on the territory of European countries for international investigative assistance. As a result, Kazakhstan's zero tolerance for corruption goal is attainable. It will be achievable in the near future with the alignment of national legislation with international norms and the utilisation of criminal law's latent power to combat corruption.

---

7 GRECO, 'Joint First and Second Evaluation Rounds: Evaluation Report on Kazakhstan (adoption 25 March 2022)' <https://rm.coe.int/joint-first-and-second-evaluation-rounds-evaluation-report-on-kazakhst/1680a6e276> accessed 28 September 2023.

8 MR Abilkairov, MM Kamnazarov and SM Rakhmetov, 'Corruption as a Socially Negative Phenomenon: Research Materials on Combating Corruption' (*Supreme Court of the Republic of Kazakhstan*, 22 April 2015) <http://sud.gov.kz/rus/content/korrupciya-kak-socialno-negativnoe-yavlenie/> accessed 28 September 2023.

9 'Draft Law of the Republic of Kazakhstan "On Ratification of the Agreement between the Republic of Kazakhstan and the Council of Europe on the Privileges and Immunities of Representatives of Anti-Corruption States and Members of Evaluation Groups"' (*Senate of the Parliament of the Republic of Kazakhstan*, 18 December 2019) <https://senate.parlam.kz/ru-RU/blog/932/news/details/20869/> accessed 2 October 2023.

Despite incorporating international legal norms against corruption, not all are fully implemented in criminal law, limiting the potential of criminal law prevention. The focus on the unrelenting fight against corruption makes it necessary to study the experience of other states aimed at rooting out corruption. This study intends to provide ideas on how to strengthen anti-corruption criminal law measures, as they are practically important for preventing corruption. Furthermore, this study aims to extend the conversation on Kazakhstan's Criminal Code innovations.

2 METHODOLOGY OF THE STUDY

This study is grounded in published research on the rule of law and the prevention of offences. Most of the research is related to the effectiveness of criminal law and the practical consequences stemming from imperfections in criminal law norms in the fight against corruption. Emphasis was placed on foreign criminal laws and the inconsistencies between Kazakhstan's criminal law and the norms of international conventions it has ratified. The paper employed various methodologies, including historical and legal, statistical, method of formal logic, system analysis, and synthesis. Despite establishing a new criminal code in 2014, the development of Kazakhstan's criminal law to fight corruption is ongoing. The historical-legal method proved instrumental in pinpointing changes in criminal-legal anti-corruption norms and institutions of the General Part of the Criminal Code of the Republic of Kazakhstan aimed at preventing corruption. The statistical method was used to analyse the level of perception of corruption by Transparency International over the last five years. Formal logic was employed to scrutinise the completeness and reliability of the materials used to study corruption prevention by criminal law. System analysis and synthesis methods made it possible to formulate conclusions on how to improve criminal law to strengthen the prevention of corruption.

3 PREVENTION OF CRIMINAL OFFENCES AS ONE OF THE MAIN TASKS OF THE CRIMINAL LAW

The criminal law of any state establishes prohibitions and other restrictions of a criminal-legal nature, which should deter a person from committing socially dangerous acts that would entail criminal liability. In other words, criminal law can suppress criminal activity, as under the threat of punishment, criminal law prohibits the commission of criminally punishable acts or omissions. All this fully applies to the anti-corruption norms of criminal law.

The Criminal Code of the Republic of Kazakhstan[10] incorporates a special chapter that contains corruptive offences, but other chapters also contain corruptive offences. The distribution of corruption-related offences across different chapters of criminal law is not a peculiarity to Kazakhstani criminal law.; it is a common characteristic observed in various legal systems. For example, the Criminal Code of the Czech Republic includes corruption offences in different structural parts. Acts of corruption involving official persons are placed

10 Criminal Code of the Republic of Kazakhstan no 226-V ZRK of 3 July 2014 (as amended of 10 July 2023) <https://cis-legislation.com/document.fwx?rgn=68429> accessed 28 September 2023.

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

in the second part, titled 'Criminal acts of official persons', which include abuse of the authority of an official person and obstructing the task of an official due to negligence. The elements of bribery (the acceptance of a bribe, bribery, indirect bribery) are established in the same chapter but in its third part. The legalisation of the proceeds of crime and the legalisation of proceeds from criminal activity due to negligence is placed in the fifth chapter under 'criminal offences against property'.[11]

Similarly, the Ukrainian Criminal Code does not include all criminal acts in a single chapter. All criminal offences in Ukraine are classified into two categories: corruption and corruption-related. The specification of which criminal offences qualify as corrupt is outlined in the note to Article 45 of the Criminal Code of Ukraine. These offences include those under Articles 191, 262, 308, 312, 313, 320, 357, and 410 when committed through the abuse of office. Additionally, criminal offences under Articles 210, 354, 364, 364-1, 365-2, 368, 368-3 - 369, 369-2 and 369-3 of the Criminal Code of Ukraine are considered corrupt.[12]

In Ukraine, corruption-related crimes are prosecuted under Articles 366-2 and 366-3 of the Criminal Code. While the Kazakh Criminal Code has a dedicated section to corruption offences, it lacks a specific definition of what constitutes a corruption offence. Corruption offences are not defined in the Criminal Code. Furthermore, like Ukraine, Kazakhstan incorporates the concept of criminal misdemeanours into its philosophy of criminal law, classifying all criminal offences as misdemeanours or crimes. However, there are no misdemeanours for corruption offences.

In the Criminal Code of the Republic of Kazakhstan, 17 corruption offences have been established:

misappropriation or embezzlement of entrusted property (Article 189, Part 3, Clause 2);

- fraud (Article 190, Part 3, Clause 2);
- legalisation (laundering) of money and (or) other property obtained by criminal means (Article 218, Clause 1);
- economic smuggling (Clause 1, Part 3 Criminal Code art. 362);
- unlawful participation in business activities (art. 364);
- obstructing lawful business activities (art. 365);
- bribery taking (art. 366);
- bribery giving (art. 367);
- mediation in bribery (art. 368);
- forgery in office (art. 369);
- omission in office (art. 370); abuse of power (art. abuse of power or
- exceeding of authority by a superior or official to obtain benefits or advantages for himself or herself or for other persons or organisations or of causing harm to other persons or organisations, resulting in a substantial violation of the rights and legitimate interests of citizens or organisations or the legally protected interests of society or the State (art. 451(2)); and omission of authority (art. 452).[13]

11 Criminal Code of the Czech Republic no 40/2009 Sb of 8 January 2009 <https://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=84824&p_count=97611> accessed 8 June 2023.

12 Criminal Code of Ukraine no 2341-III of 5 April 2001 (as amended of 11 August 2023) <https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text> accessed 28 September 2023.

13 Criminal Code of the Republic of Kazakhstan no 226-V ZRK (n 10).

The definition of corruption offences is determined by the will of the Kazakhstani legislature. Several offences against justice, such as wilfully unjust sentences, decisions, or other judicial acts, knowingly false testimony of a witness, expert, or specialist, and knowingly false testimony of an interpreter and others, include a corruption component, but they are not corruption offences. However, Czech criminal law neither has the inducement to false testimony nor the provision of false evidence as corrupt practices. While in Kazakh criminal law, legalisation or laundering money and (or) other property obtained by criminal means is enshrined in one article, the Czech criminal law establishes liability for money laundering, which includes concealment of the origin of proceeds of crime (Article 214), and for transfer and use of proceeds of crime (Article 215). At the same time, patronisation in money laundering is provided for in a separate article.

Along with national officials, the subjects of corruption offences in Kazakhstani criminal law are officials of a foreign State or international organisation who act personally or through intermediaries. The concept of intermediaries includes representatives and those authorised by them. This approach is consistent with international anti-corruption standards.

Kazakhstan's criminal legislation has been changing toward increasing liability for corruption offences. The Criminal Code of the Republic of Kazakhstan enshrines:

- a prohibition on granting probation to those convicted of corruption offences;
- restrictions on parole for corruption offences (this type of release has become impossible for grave and especially grave corruption offences, except if they are committed by 1) women who are pregnant or have young children or are 58 years of age or older; 2) men who are raising young children alone or are 63 years of age or older; 3) persons with a group 1 or 2 disability; 4) convicted persons who have signed a procedural agreement on cooperation and fulfilled all conditions of the agreement;
- a prohibition on exempting perpetrators of corruption offences from criminal liability in connection with reconciliation of the parties;
- a restriction on the exemption from criminal responsibility for a corruption offence in connection with active repentance: the exemption is only possible by a court and only for first-time offenders;
- prohibition of exemption from criminal liability for a corruption offence due to the establishment of a surety;
- the multiplicity of fines for bribery is determined by the amount of the bribe (with the latest amendments to the Criminal Code, the multiplicity has been increased, and the minimum fine has doubled);
- increased bribery penalties for judges and law enforcement officials;
- increased penalties for accepting, giving, or acting as an intermediary in the giving or receiving of bribes; increased fines and raised the upper limit of imprisonment from five years to seven years;
- all corruption offences carry two additional penalties: compulsory confiscation of property and life imprisonment from holding certain positions in state bodies and organisations (previously, imprisonment from holding certain positions or carrying out certain activities was applied for up to 7 years).[14]

[14] ibid.

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

From the point of view of an uncompromising and tough fight against corruption, the prohibitions and restrictions of the Ukrainian Criminal Code are more favourable to us.[15] In Ukraine, persons who have committed a corruption offence are not exempted from criminal liability: in connection with active repentance (Art. 45); in connection with reconciliation between the perpetrator and the victim (Art. 46); in connection with bailment of the person (Art. 47); in connection with a change of circumstances (Art. 48). The Criminal Code of Ukraine prohibits the replacement of a part of the sentence not served by the corrupt person with a lighter one if the corrupt person has served one-third of the sentence. Only after serving half of the sentence is replacement possible. The legislative positions of Kazakhstan and Ukraine on amnesty and pardon for corrupt officials are substantially different. For example, under Ukraine's Criminal Code, persons found guilty of corruption-related criminal offences whose sentences have not entered into legal force may not be released from serving their sentences, and persons whose sentences have entered into legal force may not be fully released from serving their sentences by the law on amnesty (part 4 of Article 86). Persons convicted of corruption may be released from serving their sentences by being pardoned after serving the terms stipulated in part three of Article 81 of the Ukrainian Criminal Code (part 4 of Article 87). Amnesty and pardon for corruption offences are not restricted in Kazakhstan.

Any criminal law's incentive norms can significantly impact the offender's post-criminal behaviour and crime prevention. Incentive in the Criminal Code of the Republic of Kazakhstan is the exemption of a person from criminal liability in relation to active repentance if the person has committed a corruption offence for the first time (except for those committed as part of a criminal group) or for giving a bribe if the person has been subjected to bribe extortion and voluntarily reported it to the law enforcement authorities or if the person voluntarily declares that the person is preparing or committed money/property legalisation (in the absence of any other offence in the person's actions) or if all the conditions of a procedural agreement are met. The last regulation is new; it was introduced not long ago by the Law of 12 July 2023.[16] As can be seen, there are not many incentive norms, but thanks to them, the state stimulates the positive behaviour of the offender to achieve one of the objectives of the criminal law – the prevention of corruption offences. In this section, the criminal law norms correspond to Article 37 of the UN Convention Against Corruption, which enshrines each state's ability to reduce punishment or grant immunity from criminal prosecution to individuals who provide substantial assistance in solving the committed crime.

3.1. Non-compliance of the norms of the criminal law of Kazakhstan with the norms of international conventions

The criminal law provisions against corruption are, for the most part, in conformity with Kazakhstan's obligations to fulfil the ratified conventions. However, some differences undoubtedly harm corruption prevention. For example, Kazakhstan has yet to implement

15 Criminal Code of Ukraine no 2341-III (n 12).

16 Law of the Republic of Kazakhstan no 21-VIII ZRK 'About Return to the State of Illegally Acquired Assets' of 12 July 2023 <https://cis-legislation.com/document.fwx?rgn=151347> accessed 28 September 2023.

criminal liability for legal entities, as the UN Convention against Corruption stipulated.[17] Bribe offer/promise and consent to receive a bribe are not criminalised. The criminalisation of legal entities in Kazakhstan and the criminalisation of promising or receiving a bribe is currently being debated in the professional community.

Kazakhstan has not signed the Council of Europe Convention on the Criminalisation of Corruption (ETS 173)[18], which defines bribery as property and non-property benefits. Although, the non-accession to this Convention does not preclude national legislation from becoming compliant with it. Nonetheless, Kazakhstani legislators in criminal law establish a restrictive definition of bribery, which contradicts this Convention.

Non-property or intangible rewards are not considered bribery in modern Kazakhstan doctrine and practice. Non-pecuniary benefits are not covered by the Criminal Code or the Supreme Court's explanations.[19] Non-pecuniary benefits, such as receiving a positive recommendation or characteristic or a guarantee of support in resolving an issue affecting, for example, promotion, concealing an unfavourable situation in reality, or the incompetence of someone or others, do not pose a lower social risk than pecuniary benefits. The majority of countries recognise the object of a bribe as an undue advantage, whether of a non-monetary nature.

The Kazakhstani legislature has lately broadened the definition of a public official, and the subject of corruption offences is now a quasi-state sector official. However, it has not yet been possible to extend corruption prevention to the private sector. Despite this, the UN Convention does not restrict the spread of corruption offences to the public sector. For example, the Criminal Codes of the Czech Republic,[20] Latvia[21] and Poland[22] recognise corruption offences in public and private sectors, stipulating active and passive bribery in business activities and procurement for public needs.

Illicit enrichment of public officials, enshrined as a criminal offence in Article 20 of the UN Convention against Corruption, is not criminalised. The legitimate enrichment of any person is a legitimate subjective human right. The UN Convention criminalises illicit enrichment, including enrichment obtained in violation of financial, civil and labour legislation. Illicit enrichment is widely described as the enjoyment of wealth not supported by legitimate revenue. Illegal enrichment, obtained in violation of financial, civil and labour legislation, is

17 United Nations Convention against Corruption (adopted 31 October 2003 UNGA Res 58/4) <https://www.unodc.org/unodc/en/corruption/uncac.html> accessed 28 September 2023.

18 Council of Europe Criminal Law Convention on Corruption ETS no 173 of 27 January 1999 <https://www.coe.int/en/web/conventions/-/council-of-europe-criminal-law-convention-on-corruption-ets-no-173-translations> accessed 28 September 2023.

19 Normative decision of the Supreme Court of the Republic of Kazakhstan no 8 'On the Practice of Consideration of Certain Corruption-Related Crimes' of 27 November 2015 <https://adilet.zan.kz/eng/docs/P150000008S> accessed 28 September 2023.

20 Criminal Code of the Czech Republic no 40/2009 Sb (n 11).

21 Criminal Law of the Republic of Latvia of 17 June 1998 <https://www.refworld.org/docid/4c3c56292.html> accessed 28 September 2023.

22 Criminal Code of the Republic of Poland of 6 June 1997 <https://supertrans2014.files.wordpress.com/2014/06/the-criminal-code.pdf> accessed 28 September 2023.

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

criminalised in the UN Convention. Illicit enrichment can be broadly defined as the enjoyment of an amount of wealth that is not justified through reference to lawful income.[23]

It is a violation of social justice, threatening social turmoil. January 2022 events are one example of this. They demonstrated how the people's sense of injustice has been exacerbated by the unreported disparity in income and quality of life between regular people, the ex-president's family, and those close to him. People demonstrated in large numbers and marched to the barricades. As a result, to begin Kazakhstan's development as a just state[24], establishing zero tolerance for corruption[25] in society is a vital and realistic reform for Kazakhstani society. Moreover, justice in society can only be conceived with justice in the creation of law and its application.[26] The question of criminalisation of illicit enrichment in Kazakhstan is a matter of political will. The new law on the restitution of illegally acquired property to the state undoubtedly contributes to the fight against corruption. Still, it is not a substitute for criminal liability for illicit enrichment.

The Criminal Code of the Republic of Kazakhstan establishes the possibility of exemption from criminal liability if a person fulfils all the conditions of a procedural agreement on confession of guilt and return of illegally acquired property. Impunity for corruption can be defined as a lack of criminal liability for illicit enrichment.[27]

As a result, amendments to Kazakhstan's Criminal Code are required to align them with international anti-corruption standards.

3.2. Proposals to eliminate inconsistency of the criminal code of Kazakhstan with international anti-corruption standards and to strengthen prevention of corruption

The criminal liability of legal persons for corruption offences is a contentious issue, as establishing guilt is required for criminal liability. For example, Latvian criminal law[28] does not provide for criminal liability to a legal entity implicated in a criminal offence, but rather for criminal-law enforcement means that are not criminal punishment. For example, the Czech Republic has made legal entities criminally liable. Legal entities can be subject to

23 Andrew Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth* (Basel Institute on Governance 2021) 25, doi:10.2307/j.ctv2c74pzx.

24 Decree of the President of the Republic of Kazakhstan no 802 'Anti-Corruption Policy Concept of the Republic of Kazakhstan for 2022–2026' of 2 February 2022 <https://www.gov.kz/memleket/entities/anticorruption/documents/details/412521?lang=en> accessed 8 June 2023.

25 Kassym-Jomart Tokayev, 'A Fair State. One Nation. Prosperous Society: President Kassym-Jomart Tokayev's State of the Nation Address' (*Official website of the President of the Republic of Kazakhstan*, 1 September 2022) <https://www.akorda.kz/en/president-kassym-jomart-tokayevs-state-of-the-nation-address-181857> accessed 8 June 2023.

26 Alexandra Letková and Anna Schneiderová, 'The Value of Justice in Czechoslovak Criminal Law Norms in the 20th Century' 2021 4(2) Access to Justice in Eastern Europe 89, doi:10.33327/AJEE-18-4.2-a000062.

27 Roman Kuibida, 'Constitutional Court Strikes the Anti-Corruption System in Ukraine' (2020) 3(4) Access to Justice in Eastern Europe 287, doi:10.33327/AJEE-18-3.4-n000040.

28 Criminal Law of the Republic of Latvia (n 21).

criminal penalties such as abolition, confiscation of property, fines, and ban of activity, including suspension, grants, and subsidies.[29] However, if the distinction between the subject of a criminal offence and the subject of criminal liability is clarified, the prospect of establishing the criminal liability of legal persons, which may be for specific criminal violations, is not ruled out in the long run. A natural person will be the subject of a criminal offence, but under certain conditions, a legal entity may also be found to be criminally liable.

According to the Lithuanian Criminal Code,[30] such criteria may include the conduct of a criminal act in the interests of a legal entity. As a result, establishing criminal liability for legal persons for corruption offences remains hopeful. Without a doubt, when criminal liability for legal entities is introduced, the Criminal Code of the Republic of Kazakhstan will undergo drastic revisions in both the General and Special Parts. Following the Criminal Code, amendments will be made to the Criminal Procedure Code, the Correctional Code, and many of the normative resolutions of the Supreme Court of Kazakhstan, i.e., not only legal acts but also established theoretical approaches to the institution of criminal liability, will be reviewed. This cannot be done without fundamental scientific research and discussion in the professional community.

Introducing new legal structures into criminal law necessitates substantial investigation into their compatibility with other criminal law provisions and scientifically justified judgements about future application practice. Unworked, hurried introduction of legal structures may upset the delicate balance of the criminal law system, leaving choices regarding a person's guilt to the discretion of investigators, including the court. However, as I previously stated, introducing criminal liability for legal entities in the near future is achievable with a thorough examination of the matter, considering the experience of advanced states. It is conceivable to criminalise offering/promising a bribe and consenting to receive a bribe, but this requires a detailed investigation of their integration into criminal law. The issue with outlawing the promise or receipt of a bribe is that the systematic sense of liability for each step of the act is destroyed. The preparation of the crime includes the commitment to give or receive a bribe. When criminalising new criminal constructs, adhering to the legal norm's standards of certainty, clarity, and unambiguity is critical to achieving uniform application.[31]

Non-property benefits as a source of illicit enrichment should be criminalised as well. The definition of bribery should be broadened in the Criminal Code. To accomplish this, non-material commodities must be introduced as the topic of bribery and the development of unfair advantages due to their acceptance. This would align the understanding of bribery with worldwide anti-corruption norms by eliminating the understanding of bribery as

29 GRECO, 'Third Evaluation Round: Evaluation Report on the Czech Republic on Incriminations (Theme I) (adoption 1 April 2011)' <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c314a> accessed 28 September 2023.

30 Criminal Code of the Republic of Lithuania no VIII-1968 of 26 September 2000 <https://sherloc.unodc.org/cld/uploads/res/document/ltu/criminal_code_of_lithuania_html/Lithuania_Criminal_Code_2000_as_amd_2010.pdf> accessed 28 September 2023.

31 Roman Kabalskyi and Olexandr Shevchyk, 'Does Normativity Contribute to the Effective Protection of Rights? Reflections on the Concept of Normativity in the Modern Ukrainian Doctrine of Law' (2021) 4(3) Access to Justice in Eastern Europe 164, doi:10.33327/AJEE-18-4.3-n000081.

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

solely for material gain. The provisions of the Criminal Code in this regard will be in accord with the standards of international law to which Kazakhstan has acceded by establishing non-property advantages as the subject of a bribe. So, the article 'Bribe Taking' covers only tangible benefits and articles 'Abuse of Office,' 'Forgery in Office,' and 'Omissions in Office' stipulate that a guilty person may receive benefits and advantages without specifying what benefits they are, thus both tangible and non-tangible ones, internal inconsistency of criminal code provisions will be eliminated. Furthermore, there will be uniformity between national laws - the anti-corruption law - and the Criminal Code. The law defines corruption as illegal property (non-property) benefits and advantages for oneself or a third party. However, the Criminal Code does not define corruption as property and non-property benefits and advantages in all circumstances.

A prohibition of exemption from criminal liability due to expiry of the statute of limitations should be introduced. This would be an example of the progressive practice of strengthening the fight against corruption by the rules of criminal law. Such a prohibition would fully implement the inevitability of punishment as an anti-corruption principle. Criminals may currently flee the nation and continue to live off unjust enrichment. They can calculate the statute of limitations to bring them to criminal responsibility and return quietly when it has expired. They stand a probability of going unpunished in any circumstance. Unfortunately, in 2018, this prohibition was abolished from the Criminal Code. Its absence contradicts the country's anti-corruption effort. This is why immunity from criminal liability should be prohibited in conjunction with the expiration of the statute of limitations for corruption offences.

Imposing a statute of limitations may incentivise criminal behaviour, particularly among government officials. With time, government officials illegally implicated the property in civil turnover, gaining legitimacy. The existence of a statute of limitations prevents the application of coercive measures against a corrupt person when the time limit has passed. Still, the state has failed to expose the corrupt person or locate their property or assets obtained through corruption. In this case, it turns out that the statute of limitations not only establishes state bodies' inability to identify corrupt officials promptly but also denies controlling institutions the opportunity to eliminate flaws in anti-corruption work and eventually legalise the corrupt official's property.

The abolition of the statute of limitations for corruption offences is an inducement for the legalisation of unlawfully acquired property. Lagutin speaks candidly about Kazakhstan's law enforcement system's extremely low efficiency in combating 'money laundering' because, on an annual basis, out of thousands of materials with signs of legalisation, only 60 crimes are officially recorded, with only a few convicted. Moreover, the potential fine as punishment is comparatively lower compared to European countries.[32]

[32] Roman Alekseevich Lagutin, 'Science-Based Approach in Establishing Sanctions for the Commission of Legalisation (Laundering) of Proceeds of Crime. Gary S Becker's "Crime Formula"' (Development of Modern Legal Science: Theory and Practice: International scientific-practical conference, Nur-Sultan, 2020) 307.

Unfortunately, incidents of undetected unlawfully acquired property and unrequited damages from criminal activities are not isolated or uncommon. For example, consider the case of a billion-dollar fraud spanning several years at the Ministry of Internal Affairs 'Kazakhstan' sanatorium. According to the investigation, in 2013, the sanatorium's director misled the bank by inflating profitability, securing a 2.6 billion tenge loan (approximately $6 million) under the premise of renovation and significant repairs to the sanatorium structure. Following that, he cashed out the funds through fake enterprises, embezzling 974 million tenge ($2.3 million) until he was apprehended in May 2020. Despite a court order demanding the co-conspirators to pay $1,124.8 billion in damages, indicative of the substantial financial harm in the billions of dollars, neither the damages were reimbursed nor any property confiscated. This outcome stemmed from the pre-trial investigative committee's failure to prove the property was acquired with unlawfully obtained funds.[33]

In many instances of corruption, including those mentioned, the statute of limitations cannot eradicate the consequent unfairness and stabilise civil turnover, which undoubtedly affects citizens' faith in justice.[34] It is not by chance that the law on the return of illegally acquired assets to the state was enacted with the establishment of criminal liability for failure to return them, but with exemption from criminal liability in the case of voluntary return of assets and fulfilment of the conditions of a procedural plea agreement.

Article 247 of the Criminal Code of Kazakhstan states that 'Receipt of illegal remuneration' should be classified as a corruption offence due to the need to extend anti-corruption rules to the private sector. Article 217, 'Creating and Managing a Financial (Investment) Pyramid)' should be entirely attributed to corruption and extended to non-public service in commercial and other organisations, in addition to Article 216, 'Committing the actions of issuing invoices in the absence of the actual performance of work, services, or shipment of goods'. The rationale behind modifying the Criminal Code on 12 July 2018, which eliminated two crimes from the list of corruption offences (Articles 216(2)(4) and 217(3)), remains unclear. These crimes were committed by a special subject, a civil servant. Corrupt officials leverage their position of public trust for personal benefit, obtaining particular benefits, privileges, advantages, or other advantages. As a result of their position, officials with discretionary authority are the targets of corruption offences. This authority establishes the conditions for the commission of corrupt offences. This is why criminal law requires, as a qualifying or compulsory component, a public official to commit the offence while acting in their official capacity.

In this scenario, the offences listed in paragraph 4 of part two of Article 216 and paragraph 3 of part three of Article 217 of the Criminal Code are classified as corrupt. However, the legislator did not publicly explain why the two aforementioned charges were removed from the list of corruption offences while meeting the requirements of corruption offences. Along with recognising as corrupt, Article 216 of the Criminal Code of the Republic of Kazakhstan

33 'Former Interior Ministry Sanatorium Director Condemned to Five Years in Prison for Embezzling Billions of Dollars' (*Sputnik*, 4 May 2021) <https://ru.sputnik.kz/20210504/sanatoriy-mvd-hisheniya-sud-16967161.html> accessed 16 October 2023.

34 Eric M Uslaner, *Corruption, Inequality, and the Rule of Law: The Bulging Pocket Makes the Easy Life* (CUP 2008) 32, doi:10.1017/CBO9780511510410.

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

'Actions on issuing an invoice without actual performance of work, rendering of services, shipment of goods' and 217 'Creation and management of a financial (investment) pyramid scheme', we consider it expedient to recognise Article 247 'Receipt of illegal remuneration' as corrupt. This expansion will enhance corruption prevention through criminal law and encompass the private sector.

Kazakhstan needs to criminalise illicit enrichment to strengthen its ability to fight corruption.[35] Such criminal liability would complement existing norms aimed at ensuring property security of ownership, prohibiting the legalisation of money and/or other property obtained by criminal means, and regulating the acquisition or sale of property known to have criminal origins. The opportunity to introduce criminalisation is when there is a political will to really promote justice in Kazakhstan. I believe it is the right moment to criminalise illicit enrichment. Even an individual earning a high salary over multiple lifetimes would struggle to accumulate the same property accumulated by some convicted citizens of Kazakhstan. Since 2018, it has become possible to confiscate property in investigating offences, but only if clear evidence demonstrates that the property has been acquired through criminal means. It is challenging to prove a causal link between the committed offence and the acquisition of property. Additionally, there is a law governing the legalisation of property.[36] If this is done before the crime is investigated, there is no recourse to uncover the illegitimate acquisition of the property. In this context, criminalising illegal enrichment could support the fight against corruption. There is no barrier to making unlawful enrichment a crime. Instead, the starting point for this is already in place – the civil servants' income declarations. The introduction of illicit enrichment will become a resource of criminal law to reduce corruption, having a preventive effect. For example, the Criminal Code of Ukraine enshrines illicit enrichment despite attracting criticism.[37] According to Ukrainian scholars, this norm introduces aspects of objective imputation[38] and contradicts the presumption of innocent premise. However, the provision is still included in the Ukrainian Criminal Code, and as with all criminal crimes, the burden of proving illegal enrichment is on the prosecution.[39] This article can serve as an example of the legislative formulation of the structure of illicit enrichment in the Criminal Code of the Republic of Kazakhstan, potentially incorporating spouses and close relatives as people to whom property can be transferred. Additionally, specifying a significant amount of the

35 Lindy Muzila and others, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (Stolen Asset Recovery (StAR), World Bank 2012) 5, doi:10.1596/978-0-8213-9454-0.

36 Law of the Republic of Kazakhstan no 213-V 'On Amnesty for Citizens of the Republic of Kazakhstan, Oralmans and Persons Holding a Residence Permit in the Republic of Kazakhstan, in Connection with the Legalization of Property by them' of 30 June 2014 <https://adilet.zan.kz/eng/docs/Z1400000213> accessed 8 June 2023.

37 Dmytro Mykhajlenko, 'Does the Norm on Illicit Enrichment Limit Human Rights in Ukraine?' (2016) 12/3 Legea şi Viaţa 53.

38 Dmytro Mykhailenko, 'Obstacles to the Implementation of the Norm on Illicit Enrichment in National Law' (2015) 4(69) Law and State 58.

39 Oleksandr Yevsieiev, 'Illegal Enrichment: Perspectives from Zhylianskaya : Commentary to the Decision no 1-r/2019 of the Constitutional Court of Ukraine from February 26, 2019' (2019) 3 Comparative Constitutional Review 137, doi:10.21128/1812-7126-2019-3-127-140.

official's legal income in the article's note, along with the specification of what qualifies as the person's legal income, could enhance the clarity of the legal framework.

In essence, this article will serve as an auxiliary article to detect corruption when there is no evidence of bribery or other illicit actions that would allow a person to unlawfully benefit oneself. Implementing illicit enrichment will not conflict with the new Article 218-1, 'Concealment of illegally acquired property from being converted into government revenue, as well as its legalisation (laundering)' because the subject of Article 218-1 is a general subject (except part 4 of this article). In contrast, the subject of illicit enrichment is only a public official. The objective aspect of illicit enrichment will be manifested in a considerable disparity between claimed income and acquired property, as well as the official's cash resources, as revealed by the tax authorities. Identification of additional money or property, the legitimacy of whose origin cannot be proven by the prosecution, provides grounds to investigate a person's activities for probable corruption or other criminal, illegal conduct. Receipt of criminal revenues by an official is an aspect of certain criminal offences' objective side. If the criminal prosecution authorities become aware of these acts, an investigation will be initiated against the individual. If they are unknown, the person is not held accountable for their actions.

It should not go unspoken, but I believe that the introduction of a prohibition on amnesty for persons whose sentences have not yet entered into legal force, as well as a restriction on amnesty for persons whose sentences have entered into legal force - they cannot be fully exempted from serving their sentences - is a positive example. It is the same with pardon. Similar introduction of such prohibitions and restrictions into Kazakhstan's criminal law would improve the effectiveness of anti-corruption efforts.

Persons who have not yet been convicted of minor or medium gravity crimes may be fully exempted from criminal liability under Kazakhstan's criminal law on amnesty, while those convicted of minor or medium gravity crimes may be exempted from punishment or have their punishment reduced or mitigated, or such persons may be exempted from additional punishment. As well as the people condemned for commitment of grave or especially grave crimes, the term of the appointed punishment can be reduced. Besides, for the people who have served punishment or are released from further serving, by the act of amnesty, the criminal record can be removed. The specifics of amnesty will be defined by the amnesty act itself. It identifies categories of people who have committed crimes of a specified category and extent, for whom exemption from criminal liability and punishment, or mitigation of punishment, will be applied, considering these people's contributions to society and the state, their health, and other circumstances.

The latest law, 'On Amnesty in Connection with the Thirtieth Anniversary of the Republic of Kazakhstan's Independence,' was implemented in 2021, granting amnesty to corrupt persons.[40] This law applies to all criminal offenders, including socially vulnerable individuals such as veterans and persons equated to them, persons under the age of eighteen

[40] Law of the Republic of Kazakhstan no 81-VII LRK 'On the Amnesty in the Respect of the Thirtieth Anniversary of the Independence of the Republic of Kazakhstan' of 7 December 2021 <https://adilet.zan.kz/eng/docs/Z2100000081> accessed 28 September 2023.

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

at the time of the criminal offence, women fifty years of age or older, men sixty years of age or older, pregnant women, women who have not been deprived of parental rights and who have children under the age of eighteen or who had a dependent child at the time of the criminal offence and conviction; men who have not been deprived of parental rights and are the sole parent of minor children, including adopted children, or who had a dependent disabled child (disabled children) or disabled person (disabled persons) from childhood, regardless of age, at the time of the criminal offence and conviction; disabled persons of the first or second group.

Amnesty provisions offer exemption from criminal liability or basic punishment for corrupt persons who committed crimes of minor or medium gravity. This applies when no damage was caused or, if it did, was fully rectified, and no civil action was initiated. Socially vulnerable groups involved in corruption offences of medium gravity are exempted from criminal liability or basic punishment regardless of the existence of damage or civil action.

However, only corrupt persons convicted of medium-gravity crimes, who do not have a negative degree of behaviour and who, on the day of enactment of the Amnesty Law, have not more than one year left to serve their sentence, qualify for exemption from the main punishment. Pending cases of corruption offences of minor or medium gravity may be subject to termination by the body conducting the criminal proceedings, leading to the release of persons from criminal liability. For persons who commit medium gravity corruption offences but do not belong to a socially vulnerable group and have not compensated for the incurred damage, the term or amount of the unexecuted or unfulfilled component of the basic punishment is reduced by one second part. The terms or amounts of the unexecuted or unfulfilled part of the basic punishment for socially vulnerable persons who are serving a sentence or have not yet executed it are reduced:

1) for serious crimes - by one second part;
2) for especially grave crimes - by one-fourth part.

In the case of full compensation for the damage caused by the criminal offence and claims brought against them, or in the absence thereof, the terms or amounts of the unexecuted or unfulfilled part of the basic sentence for persons who are serving a sentence or have not yet executed it, are reduced for all other corrupt persons, i.e. those who do not belong to socially vulnerable individuals:

1) for serious crimes - by one-third part;
2) for especially grave crimes - by one-fifth part.

For persons who are not socially vulnerable and who have not compensated for the harm caused, the duration of the unexecuted or unfulfilled part of the basic punishment will be reduced to:

1) for serious crimes - by one-fifth part;
2) for especially grave crimes - by one-sixth part. In this part, there is some inconsistency with the international legal prohibition of amnesty if it violates victims' right to an effective remedy, including reparation.[41]

[41] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (United Nations 2009) 15 <https://www.refworld.org/docid/4a953bc82.html> accessed 28 September 2023.

The portion of the unserved basic punishment will be reduced for persons convicted of grave and particularly grave crimes, provided they do not exhibit a negative degree of behaviour and have less than one year left to serve on the day the Amnesty Law came into effect.

However, the law prohibits granting amnesty to individuals who have committed corruption crimes under specified sections of articles creating accountability for the embezzlement of entrusted property, fraud, legalising (laundering) of money and (or) other property gained via unlawful methods.

Thus, the legislation on amnesty allows for sentence reductions ranging from twelve to one-sixth of the length of the unexecuted term, contingent on the nature of the crime and restitution for damages.

If we consider that in 2021, the most common corruption crime in Kazakhstan was bribery, with 568 such facts revealed, followed by bribe-taking in second place with 449 facts. Fraud claimed with 160 facts, while abuse of official powers secured the fourth spot with 123 facts. Misappropriation or embezzlement of entrusted property ranked fifth with 116 facts and the sixth place - mediation in bribery with 36.[42] Under the amnesty fell persons - providing and receiving bribes, intermediaries in bribery, and misusing official authorities.

It turns out that we fight those whom we amnesty. The question arises: can we talk about the justice of the law in this case?

Although the corruption problem has not improved, the state has forgiven corrupt officials through amnesty. In 2022, the most common corruption offence in Kazakhstan was still bribery (549 such facts), followed by bribery (446 facts), fraud (311 facts), abuse of power (110 facts), and misappropriation or embezzlement of entrusted property (87 facts).[43] It is possible to say new ones have replaced the pardoned corruptors. At the same time, it should be noted that criminal law contains incentive norms that encourage collaboration with the investigation, provide significant aid to criminal authorities in solving the corruption offence committed by them, and exempt them from criminal liability. In this regard, one cannot help but agree that amnesty undermines the force of the criminal law[44] to some extent, undermining the rule of law and public trust in the justice system.[45] Amnesty breaches the notion of the inevitability of responsibility and punishment by encouraging a sense of impunity.

42 Anti-Corruption Agency of the Republic of Kazakhstan, 'National Anti-Corruption Report 2021' (*Anti-Corruption Agency of the Republic of Kazakhstan*, 24 March 2022) <https://www.gov.kz/memleket/entities/anticorruption/documents/details/283483?lang=ru> accessed 6 October 2023.

43 Anti-Corruption Agency of the Republic of Kazakhstan, 'National Anti-Corruption Report 2022' (*Anti-Corruption Agency of the Republic of Kazakhstan*, 14 July 2023) <https://www.gov.kz/memleket/entities/anticorruption/documents/details/494573?lang=ru> accessed 6 October 2023.

44 Iñaki Albisu Ardigo, 'Judicial Clemency and Corruption' (*Transparency International*, 20 November 2017) <https://knowledgehub.transparency.org/helpdesk/judicial-clemency-and-corruption> accessed 8 October 2023.

45 Elena Zubieta, Juan Ignacio Bombelli and Marcela Muratori, 'Argentina: The Impact of Implementing Transitional Justice Measures Post Dictatorship' (2015) 15(32) Revista Psicologia Política 105.

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

According to Chêne, amnesty weakens law enforcement's work in isolating offenders from society, undermining the rule of law by allowing criminals to avoid punishment.[46] As a result, Amnesty damages the state's credibility by committing to a resilient fight against corrupt individuals, which 'ultimately undermines the legitimacy of the regime and the rule of law'.[47]

Because Kazakhstani criminal law is preoccupied with avoiding criminal responsibility,[48] amnesty for corrupt officials requires special consideration. Amnesty is viewed as a humanitarian act by the state toward criminals.[49] This is how the vast majority of Kazakhstani scientists describe it.[50] Auzhanov and Biekenov consider amnesty as a necessary compensation and insurance against mistakes, as well as deliberate falsification of the investigation and accusatory bias of the courts.[51] Nonetheless, some Kazakhstani researchers have criticised Amnesty for failing to achieve key standards of reasoning, reasonableness, and fairness. Despite Amnesty's overwhelming support, this critique is relatively rare, but it is a powerful remark.

Thus, for the first time publicly, scientists from the Republican Institute of Legislation discussed the negative role of amnesty in fighting criminal offences. They argue that it violates the principle of the inevitability of responsibility and punishment, creating an exception among individuals committing criminal offences in the hope that the state will forgive them through amnesty, allowing them to avoid responsibility.[52] In this regard, these scientists have discussed the omission of amnesty from the Criminal Code as a sort of exemption from criminal responsibility. A detailed explanation is required to substantiate this opinion if one concurs with this perspective.

---

46 Marie Chêne, 'The use of Amnesties for Corruption Offences: U4 Helpdesk Answer 2019' (*U4 Anti-Corruption Resource Centre Michelsen Institute*, 7 June 2019) 3 <https://www.u4.no/publications/the-use-of-amnesties-for-corruption-offences.pdf> accessed 8 October 2023.

47 ibid 5.

48 Sattar Mukanovic Rakhmetov, 'Criminal Legislation of our Country Needs Optimization' (Modernization of Criminal, Criminal Procedural and Penal Enforcement Legislation in the Conditions of Digital Transformation of Society: International round table, Kosshi, Academy of law enforcement agencies under the General Prosecutor's Office of the Republic of Kazakhstan, 19 May 2022) 37.

49 OHCHR (n 41) 30.

50 Nurlan Orynbasarovych Dulatbekov, 'Principle of Humanism' *Kazakhstanskaya Pravda* (Astana, 20 December 2016) <https://kazpravda.kz/n/printsip-gumanizma/> accessed 8 October 2023; Ramazan Tuyakovich Nurtayev, 'Current Problems of Compliance with the Principles of Criminal Law' (2017) 1(46) Bulletin of the Institute of Legislation of the Republic of Kazakhstan 132; Lyaziza Shaltaevna Bersugurova and Asel Bostanina Sharipova, 'Humanism and Principles of Criminal Legislation of the Republic of Kazakhstan' *Mysl* (Almaty, 17 November 2022) <https://mysl.kazgazeta.kz/news/15861> accessed 10 October 2023.

51 Ruslan Auzhanov and Nurlan Amangeldinovich Biekenov, 'To the Question of Necessity of Amnisty in Kazakhstan' (Modern Trends in the Development of Legal Science: International scientific-theoretical conf of young scientists, Karaganda Law Academy B Beisenov of Ministry of Internal Affairs, 2020) 19.

52 Institute of Legislation of the Republic of Kazakhstan, *Concept of Improvement of Criminal, Criminal Procedural Legislation and Legislation on Administrative Offenses* (Institute of Legislation of the Republic of Kazakhstan 2018) <https://www.zqai.kz/sites/default/files/ugolov_koncepciya_finish.pdf> accessed 8 October 2023.

Amnesty, in reality, undermines several of the foundations of criminal law and presents barriers to attaining the goals of punishment entrenched in criminal law. The termination of the initiated criminal case in connection with the adoption of the amnesty law leaves the crime unpunished, violates the presumption of innocence since the termination of the criminal case in connection with the issuance of the amnesty act is a non-rehabilitating ground, and makes it difficult to achieve the purposes of criminal proceedings by complicating the protection of the rights and legitimate interests of crime victims. Amnesty, among other aspects, opposes the values of legality, equality of all citizens before the law, and, paradoxical as it may sound, humanism. According to the legality principle, an act's criminality, as well as its punishability and other criminal legal repercussions, should be determined solely by criminal law. Article 1 of the Republic of Kazakhstan's Criminal Code specifies that criminal legislation consists of the Criminal Code of the Republic of Kazakhstan, and the law on amnesty is not included in its composition. Still, it affects criminal legal relations' emergence, change, and termination. It turns out that amnesty law is a "unique" normative-legal act, equating to existing normative-legal acts of criminal legislation that are contrary to criminal law norms. Thus, in addition to the mechanism of criminal law regulation of exemption from criminal liability provided for in the criminal law, amnesty is also included, resulting in criminal legal repercussions that circumvent the criminal law, directly contradicting the principle of legality.

Similarly, Zhanuzakova emphasises the contradiction of the conducted amnesties with the criteria of the criminal law, arguing that the list of crimes to which the amnesty was not extended is disproportionately long compared to the limited list of crimes established by the criminal law.[53] This is quite correct. Article 78 of the Criminal Code of the Republic of Kazakhstan contains a small list of crimes for the commission of which convicted persons are not covered by the amnesty act - these are persons who have committed crimes against sexual inviolability of minors, except in the case of committing such a crime by a minor against a minor aged fourteen to eighteen years, terrorist crimes, extremist crimes, torture, as well as persons whose punishment is imposed in case of recidivism of crimes or dangerous recidivism of crimes.

Despite this restricted list, each amnesty in Kazakhstan did not extend to individuals convicted of a considerably broader range of offences. Clearly, there is some contradiction here. Moreover, even though amnesty was limited to a few crimes, it was not extended to numerous crimes of medium or grave gravity, even in sentence reduction.[54] The excessive and unjustifiable development of the list of activities for which amnesty is not given to convicted persons in terms of reduced terms or amounts of punishment confirms a violation of both legality and citizens' equality before the law. As a result, the principle of equality of citizens before the law, which establishes that persons who have committed crimes are equal before the law and are subject to criminal liability regardless of circumstances, is the next principle of criminal legislation that the amnesty law contradicts.

53 Leila Telmanovna Zhanuzakova, 'On Some Issues of Application of Amnesty in the Republic of Kazakhstan' (2022) 17(1) Criminal Executive Law 61, doi:10.33463/2687-122X.2022.17(1-4).1.058-063.

54 ibid.

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

While the amnesty law aims to free an indefinite number of individuals from criminal liability, it identifies categories of individuals eligible for amnesty, such as women over 50, men over 60, minors, and others. It is assumed that if criminals are liable to criminal liability on equal grounds regardless of circumstances, they should also be discharged from criminal liability on equal grounds irrespective of circumstances. In other words, the amnesty law should state that first-time offenders of minor offences should be released, aligning with equality before the law for all citizens.

Including criteria connected to the perpetrator's personality, such as age, in the amnesty law is an expression of inequality compared to people of different ages who have committed identical crimes. The amnesty law should refrain from including elements that undermine citizens' equality before the law and should only include indicators of crimes unrelated to the perpetrator's personality. Furthermore, the breach of the concept of equality of citizens before the law is built in the very foundation of the amnesty law, as it only applies to offences committed prior to its enactment.

The principle of humanism that guides the state when granting amnesty takes a different form and has nothing to do with ensuring a person's safety within the framework of criminal proceedings or guaranteeing them protection from physical suffering or the humiliation of human dignity in the application of punishment and other criminal-legal measures. That is why, in the current situation, when corruption crime in Kazakhstan persists, it is prudent not to grant amnesty to corrupt officials and apply incentive norms enshrined in criminal law. Amnesty should be restricted for individuals whose sentences have been taken into legal force; such people should not be wholly excused from serving their terms.

Furthermore, following the abolition of parole for grave and especially grave corruption offences, a prohibition on the possibility of commuting the sentence to a milder one for the perpetrators of corruption offences should be introduced to ensure consistency of the norms and achieve logical consistency of the norms of criminal law to strengthen the fight against corruption offences. Because the termination of parole for severe, particularly severe corruption offences would not worsen the condition of convicted corrupt individuals, the sentence might still be commuted. The imposition of this prohibition is consistent with the unyielding fight against corruption offences.

4 CONCLUSIONS

Corruption is one of the most hazardous social phenomena that weakens national security by undermining the authority of public power and the rule of law, ridiculing and sometimes neglecting human rights in the state. Kazakhstan's criminal code is being amended and supplemented in light of the implementation of international anti-corruption norms, as well as the positive experiences of other nations.

Examining the standards of the criminal laws of Ukraine, the Czech Republic, Poland, Latvia, and Lithuania reveals that each state seeks to strengthen its norms while keeping international requirements in mind. Many criminal law norms in Kazakhstan have already been corrected to meet international requirements. Still, legal entity liability and the

offer/promise of a bribe and consent to its acceptance have yet to be criminalised. To avoid the formalistic introduction of new legal structures into criminal law, they should be preceded by extensive research into their consistency with previous criminal law norms. There is still no enshrinement in the criminal law of a broad understanding of bribery, which includes material and non-material benefits. Eliminating the existing inconsistencies in criminal law and introducing these norms into it will undoubtedly strengthen the potential of criminal law norms to eradicate corruption in Kazakhstan.

REFERENCES

1. Abilkairov MR, Kamnazarov MM and Rakhmetov SM, 'Corruption as a Socially Negative Phenomenon: Research Materials on Combating Corruption' (*Supreme Court of the Republic of Kazakhstan*, 22 April 2015) <http://sud.gov.kz/rus/content/korrupciya-kak-socialno-negativnoe-yavlenie/> accessed 28 September 2023.
2. Ardigo IA, 'Judicial Clemency and Corruption' (*Transparency International*, 20 November 2017) <https://knowledgehub.transparency.org/helpdesk/judicial-clemency-and-corruption> accessed 8 October 2023.
3. Auzhanov R and Biekenov NA, 'To the Question of Necessity of Amnisty in Kazakhstan' (Modern Trends in the Development of Legal Science: International scientific-theoretical conf of young scientists, Karaganda Law Academy B Beisenov of Ministry of Internal Affairs, 2020) 19.
4. Bersugurova LS and Sharipova AB, 'Humanism and Principles of Criminal Legislation of the Republic of Kazakhstan' *Mysl* (Almaty, 17 November 2022) <https://mysl.kazgazeta.kz/news/15861> accessed 10 October 2023.
5. Chêne M, 'The use of Amnesties for Corruption Offences: U4 Helpdesk Answer 2019' (*U4 Anti-Corruption Resource Centre Michelsen Institute*, 7 June 2019) <https://www.u4.no/publications/the-use-of-amnesties-for-corruption-offences.pdf> accessed 8 October 2023.
6. Dornbierer A, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth* (Basel Institute on Governance 2021) doi:10.2307/j.ctv2c74pzx.
7. Dulatbekov NO, 'Principle of Humanism' *Kazakhstanskaya Pravda* (Astana, 20 December 2016) <https://kazpravda.kz/n/printsip-gumanizma/> accessed 8 October 2023.
8. Dyusengulova R, 'About 100 billion dollars withdrawn from Kazakhstan - Minister Kuantyrov' (*Tengri News*, 14 April 2022) <https://tengrinews.kz/kazakhstan_news/okolo-100-milliardov-dollarov-vyiveli-kazahstana-ministr-466449> accessed 28 September 2023.
9. Kabalskyi R and Shevchyk O, 'Does Normativity Contribute to the Effective Protection of Rights? Reflections on the Concept of Normativity in the Modern Ukrainian Doctrine of Law' (2021) 4(3) Access to Justice in Eastern Europe 155, doi:10.33327/AJEE-18-4.3-n000081.

10. Kuibida R, 'Constitutional Court Strikes the Anti-Corruption System in Ukraine' (2020) 3(4) Access to Justice in Eastern Europe 283, doi:10.33327/AJEE-18-3.4-n000040.

11. Lagutin RA, 'Science-Based Approach in Establishing Sanctions for the Commission of Legalisation (Laundering) of Proceeds of Crime: Gary S Becker's "Crime Formula"' (Development of Modern Legal Science: Theory and Practice: International scientific-practical conference, Nur-Sultan, 2020) 302.

12. Letková A and Schneiderová A, 'The Value of Justice in Czechoslovak Criminal Law Norms in the 20th Century' 2021 4(2) Access to Justice in Eastern Europe 86, doi:10.33327/AJEE-18-4.2-a000062.

13. Lopez-Claros A, Dahl AL and Groff M, 'Corruption as a Destroyer of Prosperity and the Need for International Enforcement' in A Lopez-Claros, AL Dahl and M Groff, *Global Governance and the Emergence of Global Institutions for the 21st Century* (CUP 2020) 391, doi:10.1017/9781108569293.

14. Muzila L and others, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (Stolen Asset Recovery (StAR), World Bank 2012) doi:10.1596/978-0-8213-9454-0.

15. Mykhailenko D, 'Obstacles to the Implementation of the Norm on Illicit Enrichment in National Law' (2015) 4(69) Law and State 55.

16. Mykhajlenko D, 'Does the Norm on Illicit Enrichment Limit Human Rights in Ukraine?' (2016) 12/3 Legea și Viața 52.

17. Nurtayev RT, 'Current Problems of Compliance with the Principles of Criminal Law' (2017) 1(46) Bulletin of the Institute of Legislation of the Republic of Kazakhstan 128.

18. Rakhmetov SM, 'Criminal Legislation of our Country Needs Optimization' (Modernization of Criminal, Criminal Procedural and Penal Enforcement Legislation in the Conditions of Digital Transformation of Society: International round table, Kosshi, Academy of law enforcement agencies under the General Prosecutor's Office of the Republic of Kazakhstan, 19 May 2022) 37.

19. Rothstein B and Uslaner EM, 'All for All: Equality, Corruption, and Social Trust' (2005) 58(1) World Politics 41.

20. Rothstein B, 'Social Capital in the Social Democratic Welfare State' in B Rothstein, *Social Traps and the Problem of Trust* (CUP 2005) 71, doi:10.1017/CBO9780511490323.

21. Tokayev KJ, 'A Fair State. One Nation. Prosperous Society: President Kassym-Jomart Tokayev's State of the Nation Address' (*Official website of the President of the Republic of Kazakhstan*, 1 September 2022) <https://www.akorda.kz/en/president-kassym-jomart-tokayevs-state-of-the-nation-address-181857> accessed 8 June 2023.

22. Uslaner EM, *Corruption, Inequality, and the Rule of Law: The Bulging Pocket Makes the Easy Life* (CUP 2008) doi:10.1017/CBO9780511510410.

23. Yevsieiev O, 'Illegal Enrichment: Perspectives from Zhylianskaya : Commentary to the Decision no 1-r/2019 of the Constitutional Court of Ukraine from February 26, 2019' (2019) 3 Comparative Constitutional Review 127, doi:10.21128/1812-7126-2019-3-127-140.

24. Zhanuzakova LT, 'On Some Issues of Application of Amnesty in the Republic of Kazakhstan' (2022) 17(1) Criminal Executive Law 58, doi:10.33463/2687-122X.2022.17(1-4).1.058-063.

25. Zimelis A, '(Non)Determinants of Corruption: A Sceptical View From Eastern Europe' (2011) 4(2) Journal of Comparative Politics 4.

26. Zubieta E, Bombelli JI and Muratori M, 'Argentina: The Impact of Implementing Transitional Justice Measures Post Dictatorship' (2015) 15(32) Revista Psicologia Política 101.

AUTHORS INFORMATION

Elena Mitskaya
Doctor of law, Professor of the Department of Criminal Law and Criminal Procedure of M. Auezov South Kazakhstan University, Shymkent, Republic of Kazakhstan
elenamits@mail.kz
https://orcid.org/0000-0001-5210-0028

Competing interests: No competing interests were disclosed.
Disclaimer: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations.

ACKNOWLEDGEMENT

The author has confirmed that any collaboration with institutions of the aggressor state existed only until 2022 and no longer continues. The author strongly condemns aggression and human rights violations in any form. No funding or support for this study was received from institutions of the aggressor state.

ABOUT THIS ARTICLE

Cite this article
Mitskaya E, 'Non-Compliance of Kazakhstan's Criminal Law With International Anti-Corruption Standards' (2024) 7(1) Access to Justice in Eastern Europe 222-44 <https://doi.org/10.33327/AJEE-18-7.1-r000103>

Submitted on 08 Aug 2023 / Revised 22 Oct 2023 / Approved 28 Oct 2023
Published ONLINE: 01 Dec 2023 / Last Published: 01 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-r000103

Managing editor – Mag. Polina Siedova. **English Editor** – Julie Bold.

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

Keywords: *corruption, criminal law, prevention of corruption, criminal corruption offences.*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

DIGITISATION OF ADMINISTRATION AND LEGAL BASIS IN KOSOVO

Kastriot Dërmaku* and Ardian Emini

ABSTRACT

Background: *In contact with modern technologies, public administration transforms, adopting a new look and changing its legal nature to become an electronic public administration. In addition, we can also observe the use of information technologies in the activities of courts. In electronic public administration, which is based on the use of information and communication technologies and the Internet, the underlying working element is information and personal data of citizens. However, new technologies also carry numerous risks for the security of information and personal data used by administrative bodies and courts in their work, which may lead to the infringement of citizens' rights and the public interest. The demand for adequate protection of personal data in relation to administrative authorities stands out as an important need of citizens in modern society, that we tried to illustrate on the example of the Republic of Kosovo.*

Methods: *The methodology employed in this research involves the methods of description, comparison, legal analysis and analysis of data and information collected within the context of Kosovo. The legal analysis in this paper focuses on the content of the constitutional and legal framework for public administration control instruments. The legal analysis pertaining to public administration control instruments is also widely used to clarify the implementation of laws and principles in practice within Kosovo. Through this method, it is intended to highlight the problems during the applicability of the legislation. The descriptive method used in this paper was intended to reflect the current state of public administration control instruments in Kosovo.*

This article provides an overview of legal mechanisms that can be implemented to stimulate digital administration in developing countries. These legal mechanisms include the development of appropriate legal frameworks for e-administration, protection of intellectual property rights, privacy and data protection laws, and cyber security laws.

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

Results and Conclusions: *Electronic public administration in Kosovo represents an altered and modern concept of public administration that has changed the way and purpose of performing state affairs. Technically, it is based on using the Internet and information and communication technologies to conduct regular state affairs and forecast the situation in various social fields. These technical elements have also influenced its legal nature, facilitating administrative bodies in expediting their duties and enhancing the execution of their responsibilities. This evolution fosters a more direct interaction between Kosovo citizens and their state, allowing citizens to gain insight into state affairs that directly affect their rights and interests.*

1 INTRODUCTION

Electronic public administration is a new phenomenon in the Kosovo's legal system. The digitisation process (electronicization) of the public administration was developed hand in hand with the comprehensive reform of the public administration, which began in 2004. That year, the Government of Kosovo adopted a strategic document entitled 'Strategy of State Administration Reform in the Republic of Kosovo'. Its goal was to improve, make perfect, modernise and prepare the state administration for the challenges of European integration and general social progress. The main areas of reform are decentralisation, professionalisation and de-politicization, rationalisation, coordination of public policies, improvement of control mechanisms and modernisation of Kosovo's state administration. To successfully implement this strategic document, action plans, together with complementary strategies for 2008-2010, 2010-2013, 2015-2020 and 2023-2027 were approved.[1]

One of the underlying reform fields related to the wider introduction of information and communication technologies in the state administration and its preparation for digitisation. During yearlong reforms, several important laws related to electronic signatures, documents, and communications were passed. In addition, a number of laws adopted provisions that enabled the introduction of information and communication technologies in various fields of administrative activity.

During the reform period, electronic administration emerged as a focal point in public administration reform and the progress of society. Based on the analysis of the existing framework and the potential for the operation of the electronic administration, deficiencies were found. Then technical support was necessary for its development to the full capacity. During that period, Kosovo approved the regulation for the operation of electronic offices,[2] as well as the instructions for its implementation. In this reforming period, the Strategy for

1 Grupi për Hulumtimin e Politikave në Ballkan, *Reforma e Administratës Publike në Kosovë: Një Përpjekje e Vazhdueshme* (BPRG 2020); Republic of Kosovo, 'e-Government Strategy Kosovo 2023-2027' (*Republic of Kosovo Government – Office for Good Governance/Office of the Prime Minister*, 23 March 2023) <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=41798> accessed 10 June 2023.

2 'Agency for Information Society (AIS)' (*Republic of Kosovo Public Administration*, 2023) <https://mpb.rks-gov.net/ap/page.aspx?id=2,14> accessed 10 June 2023.

the Development of Electronic Administration in the Republic of Kosovo (2009-2013),[3] as well as the Strategy for the Development of the Information Society in the Republic of Kosovo (until 2020)[4] were approved. Another important step in the further development of electronic administration was the 2014 National Interoperability Framework.[5] This document highlights the position to continue to introduce electronic public administration in Kosovo. In this process, interoperability plays an important role as a key element of quality communication, providing efficient services and the rapid exchange of information between authorities within the public administration.

2 STRATEGY FOR PUBLIC ADMINISTRATION REFORM

The period of reformation brought about ongoing changes in the state administration, driven by the aspiration to extend the reform's impact across all public administration bodies. Therefore, the Strategy for Public Administration Reform in the Republic of Kosovo was approved in 2014.[6] One of the basic chapters of this strategy refers to the development of electronic administration. The importance of electronic public administration implies several levels of public administration development. Above all, it is better data input and retention, greater data reliability and updating, data interface and sharing. In this regard, electronic administration is important for strategic planning, shaping public policies and monitoring their implementation, more straightforward determination of the factual situation, monitoring the flow of issues and evidence of decisions taken during administrative and inspection procedures, and monitoring of administrative and judicial practice. Beyond these aspects, electronic administration is important for keeping records of public administration bodies and organisations, along with information about employees, such as data on vacancies, recruitment procedures, competencies, knowledge and skills, professional development, advancement in service, and termination of employment.[7]

According to the strategy, the use of information and communication systems is envisioned to enhance the efficiency and cost-effectiveness of tasks carried out by public administration bodies, as well as providing public services to citizens and legal entities. To achieve this, it is necessary to create the electronic highway (main network) of state bodies that will operate throughout the territory of Kosovo. The need to reduce the role of the human factor in the performance of electronic activities of public administration bodies and the desire to

3 Republic of Kosovo, *Electronic Governance Strategy 2009-2015* (Ministry of Public Services Department of Information Technology 2008).

4 Republic of Kosovo, *National Development Strategy 2016-2021 (NDS)* (Office of the Prime Minister 2016).

5 Republic of Kosovo, *Interoperability Framework of the Republic of Kosovo* (Ministry of Public Administration 2022).

6 Increasing Civic Engagement in the Digital Agenda, *Kosovo Digital Agenda Observatory: Country Report and Roadmap for Digital Agenda Advancement in Kosovo* (ICEDA EU 2021).

7 Kastriot Dermaku and others, 'IP Packaging Filtering in Computer Networks Using Artificial Intelligence in the Regulatory Authority of Electronic and Communications Kosovo' (2022) 17(2) Journal of Communications 134, doi:10.12720/jcm.17.2.134-142.

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

automate processes within the body were raised. The strategy also lists the main challenges in developing electronic administration in Kosovo.[8]

The challenges are of utmost importance for further developing electronic public administration in Kosovo. For information and communication systems to fully accomplish their role in public administration activities, it is necessary to create an adequate legal framework. The technical equipment must also be at the right level because, without this element, there is no digitisation of administrative activities. Electronic literacy and the preparation of human capacities (public employees) for new methods of performing work is a necessary condition for the electronicization of public administration, which can be achieved through personnel education and training. Finally, it is vital to develop the level of information security in the public administration system. Given that public administration handles diverse citizens' important personal data, the security of electronic systems and data security becomes a fundamental aspect of electronic public administration development.

3 STRATEGY FOR THE DEVELOPMENT OF ELECTRONIC ADMINISTRATION IN THE REPUBLIC OF KOSOVO

The importance of the development of electronic administration in Kosovo is proved by a strategic document dedicated entirely to the development of electronic administration. This is the Strategy for the Development of Electronic Administration in the Republic of Kosovo for 2015-2018.[9] Complementing this strategy, the Action Plan for its implementation for 2015-2016 was also approved.[10] The strategy aims to achieve the digital connection of different areas of social life in which public administration works. This concerns health, education, citizens' participation in decision-making, the public procurement sector, social policies, etc.

One of the goals of the strategy is to influence the development of the information society, ensuring the security of data and electronic transactions, safeguarding personal data in the possession of the public administration, as well as the availability and access of open data important to the broader community. Therefore, the various data exchanged with electronic means of communication take one of the central places in electronic public administration.

Electronic administration should represent an engine for the development of values and legal principles contained in the Constitution, impacting all areas of social life. These values encompass the transparency of state bodies, the rule of law, protection from discrimination, and the assurance of information security for citizens. To achieve the stated values, the

8 e-Government Strategy Kosovo 2023-2027 (n 1).

9 Regional School of Public Administration, *E-Government Analysis: From E- to Open Government* (ReSPA 2015) 75-6.

10 Republic of Kosovo, 'Electronic Governance Strategy 2009-2015' (Republic of Kosovo Government – Office for Good Governance/Office of the Prime Minister, 12 December 2008) <https://konsultimet.rks-gov.net> accessed 10 June 2023.

strategy establishes the general development goals that the electronic administration must fulfil. These are as follows:

1. Increasing the satisfaction of users of public services,
2. Reducing the administrative burden for business entities and citizens,
3. Increasing the efficiency of public administration through the use of information and communication technologies,
4. Establishing national and cross-border interoperability, especially with EU countries.[11]

The national portal for electronic government participates as the supporting pillar of electronic administration. This portal represents the main electronic highway for the electronic exchange of information with other portals and databases of all administrative bodies. Such electronic communication aims to connect public administration, citizens and the economy to execute the full potential of public services provided by administrative bodies.

The competence for standardisation and harmonisation of information and communication systems has been given to the Directorate for Electronic Administration as a body within the Ministry of State Administration and Local Self-Governance. The Directorate performs administrative, technical and professional tasks related to electronic administration. In Kosovo, apart from the Directorate, there is also the Council for the Public Administration Reform, which makes proposals for the development of public administration in general, but it also inevitably participates in electronic administration.[12]

4 ELECTRONIC ADMINISTRATION AND LEGAL BASIS

The importance of electronic administration is further underscored by special legislation, specifically, Law no. 04/L-145 on Government Bodies for the Information Society. This law regulates the use of information and communication technologies and electronic communication and data exchange among public administration bodies and citizens.[13] While various elements of electronic administration can be found in separate regulations, it is explicitly stated that issues regulated by this law cannot be regulated or amended by specific laws.[14] This underscores the need to make a thorough harmonisation of legal and sub-legal acts so that the mentioned provisions can be implemented in practice. This is of particular importance to ensure the standardisation necessary for the quality functioning of electronic administration and the appropriate degree of protection of citizens. The basic principles based on which electronic administration operates are the

11 Dermaku and others (n 7).

12 Ferid Selimi and others, 'Local Governance Comparative Reviews between the Republic of Macedonia and the Republic of Kosovo' (2018) 11(2) Acta Universitatis Danubius 70.

13 Law of the Republic of Kosovo no 04/L-145 'On Information Society Government Bodies' of 18 April 2013 (2013) 15 Official Gazette.

14 Selimi and others (n 12).

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

principle of equipment management efficiency, the principle of electronic administration security and the prohibition of discrimination. Certainly, constitutional principles and underlying principles of administrative procedure should be applied in using information and communication technologies.[15]

The principle of equipment management efficiency means that the authority should ensure efficient and economical application of information and communication technologies in accordance with technical rules and rules of administrative procedures, whether general or specific. Technologies should not be used contrary to the purpose for which they were introduced in the public administration, which is the fulfilment of the public interest and the needs of citizens. The principle of electronic administration security refers to the fact that 'information systems, electronic communication networks and equipment used to perform electronic administrative procedures should meet the conditions and standards of information security'.[16] Information security is an extremely important component of electronic administration since the execution of legal security depends on its quality. Establishing adequate protection preserves the integrity of participants in the administrative procedure and provides security for personal data used in the same procedure.

The prohibition of discrimination also extends to electronic administration, encompassing two key aspects. Firstly, all persons have the right to use electronic services and electronic administrative procedures, which means that everyone should have electronic access to the public services provided, regardless of personal characteristics. Secondly, persons who are unable, such as those with disabilities, to use electronic government services in their original form should be enabled to access services in a manner tailored to their circumstances and abilities. While the law does not specify anything about the concretisation of this principle, it is left to regulations with lower legal power and practical applications to regulate this issue in more detail.[17]

Strategic and legal documents contain general rules of conduct specified through various practical manifestations. When we factor in the continuous improvement of information and communication technologies, it becomes evident that electronic public administration is a variable category that is constantly improving and developing. Therefore, it is necessary to analyse the state of electronic public administration in practice and observe this phenomenon's real and social aspects. In this respect, the author will pay attention to the current state of electronic administration and its services in Kosovo, aiming to provide a complete overview of electronic public administration in Kosovar society.[18]

15 Dermaku and others (n 7).

16 Alsamara Tareck, 'Legal Mechanisms for the Stimulation of the Digital Economy in Developing Countries' (2023) 6(S) Access to Justice in Eastern Europe 72, doi:10.33327/AJEE-18-6S002.

17 ibid.

18 Mirlinda Batalli, 'Reform of Public Administration in Kosovo' (2012) 1(1) Thesis 5, doi:10.2139/ssrn.2627592.

5 UNDERLYING ELEMENTS OF ELECTRONIC PUBLIC ADMINISTRATION IN KOSOVO

The electronic system of public administration in Kosovo is based on two pillars. They are electronic government infrastructure and electronic administrative procedures. A special regulation has been built around the central pillars that comprise the functional electronic public administration system. As part of the electronic infrastructure of public administration, a unique information and communication network of administrative bodies was introduced through which data is transferred between administrative bodies. To enable safe and secure access to the network and guarantee data security, the competence of the Agency for Information Society, which builds the state data centre, operating as part of the government service, has been established. This authority grants access to the information and communication network and performs other network security controls.

Electronic portals represent another part of the electronic infrastructure of the public administration in Kosovo. The most important 'external' point of contact with citizens and the economy is the 'e-Kosova Portal'.[19] The portal relies on the Unified Information and Communication Network of Administrative Authorities and serves as a 'digital window' for communication between administrative authorities and citizens. Through this portal, citizens and legal entities can request digitised administration services, pay taxes, fees and other expenses, report irregularities in the work of certain bodies and the like.

Furthermore, the Authority has the capacity to establish a single electronic administration page on the Electronic Governance Portal. Another information portal is the Open Data Portal, where all interested persons can access open data relevant to society. This data is not only available to everyone but is machine-readable, allowing for use beyond its original purpose. These datasets were obtained and are in the possession of the administrative authorities, contributing to transparency and accessibility in the public domain.

Among the other infrastructural elements of electronic administration, it is necessary to mention the registers and data registers. For the sake of security, easy availability and efficient use of data from these databases, it is envisaged that they will be compiled and stored in an electronic form. In addition to the databases used in their business, this law also set out an electronic metadata registry, the Meta registry. The meta-registry is used for recording and storing data of indirect importance for the performance of public administration tasks but of immediate importance for keeping records of access and use of data necessary for the performance of these tasks. Internet presentations, i.e., websites, are mandatory in constructing electronic public administration. Every administrative body has to create and maintain an Internet presentation. In the electronic world, internet presentation is the easiest way to access services and communication with public administration bodies. This results in closer and faster contact between the administration

19 GAP Institute, *The Impact of Digitalization of Civil Status Services on Municipal Budget Revenues* (GAP 2023); *e-Kosova: Electronic Services Platform* <https://ekosova.rks-gov.net> accessed 10 June 2023.

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

and the citizens. In doing so, it achieves transparency, as one of the key principles in the functioning of the public administration.[20]

The electronic administrative procedure is the second underlying pillar around which the electronic administration in Kosovo has been built. Nowadays, more is needed for the executive body and its services to be electronically visible to citizens and legal entities. The fast pace of life and the needs of the economy demand that electronic government services become faster, more efficient and accessible. It is, therefore, necessary for public administration bodies to perform their work electronically, to provide electronic public services and to enable their communication with citizens and the economy. A number of workplaces and areas of administration need to be digitised for public administration to fulfil its role as a public service. The law recognises this and defines the conditions for receiving and transferring electronic data and documents, ways of accessing electronic requests and portals, electronic presentation and electronic communication with other authorities. For the sake of the fair application of the law, criminal provisions provide criminal responsibility for the persons liable in the administrative bodies in case of unlawful or negligent behaviour.

6 LAW ON ADMINISTRATIVE PROCEDURE

Another important regulation for the electronic activities of administrative bodies is the Law on General Administrative Procedure.[21] This law regulates the rules of the general administrative procedure, which opens up the way for electronic procedures promoted in the Law on Electronic Administration.[22] This refers to the ability of the authorities to teach applicants, to receive requests for recognition of rights or other types of submissions in administrative matters and to inform the applicant of the progress of the procedure electronically.[23] As an example of the introduction of work digitisation in administrative bodies, we hereby mention the obligation to obtain and process data since they are kept in the official record and are necessary for decision-making, according to the official duty. Such data can be exchanged electronically and by the authorities. Such a manner of action is related to the principles of efficiency and economy but also to the final provisions, which state that the provisions of specific laws require the parties to present documents proving the facts for which the authorities keep official records. Technology is, therefore, mainly used for easier and faster communication between authorities and parties (the Law on

20 OECD and SIGMA, *Monitoring Report: Kosovo – The Principles of Public Administration* (OECD EU 2021).

21 Law of the Republic of Kosovo no 05/L-031 'On General Administrative Procedure' of 25 May 2016 (2016) 20 Official Gazette.

22 Law of the Republic of Kosovo no 08/L-022 "On Electronic Identification and Trust Services in Electronic Transactions' of 6 December 2021 (2021) 11 Official Gazette.

23 Hasan Shala dhe Delushe Halimi, *Udhëzuesi për Procedurën Administrative* (Akademia e Drejtësisë së Kosovës 2019) 87.

General Administrative Procedure calls it 'electronic communication'[24]). Keeping databases and various documents in electronic form also enables one to view case files in digital form.

One of the most important actions in the administrative procedure is the service, which, although it is a form of informing the participants, considerably affects the rights, obligations and interests of the parties. All forms of (personal and indirect) delivery can also be done electronically, provided the parties have agreed to it. The delivery note can be in electronic form as confirmation that personal or indirect delivery has been made. The decision, as the most crucial document in the administrative procedure for which the administrative procedure is initiated, can be issued as an electronic document. We think there is still room for introducing digital elements in the general administrative procedure, which refers to developing the entire procedure and presenting evidence and decision-making. The Law on General Administrative Procedure recognises the organisation of video-conference sessions, but only for authorities with the technical ability to schedule and hold such sessions. This way of holding discussions digitally should be introduced slowly as a rule. Hence, the time and money necessary for all persons to address the authority for the purpose of the procedure would be saved. The bigger the digitisation of the general administrative procedure, the more space opens for introducing digital elements in special administrative procedures.[25]

7 ELECTRONIC REGISTERS AND PORTALS IN KOSOVO AND ACCESS TO THEM

The eKosova portal represents the most important form of electronic communication between citizens, legal entities and administrative bodies. This portal is a public electronic service through which citizens can seek certain digitised services provided by administrative bodies and exercise various rights and interests. As a public service, the portal serves the completion of democratic values and principles in the work of public administration. All data and information published in this service represent information of public importance so that they can be reviewed, copied and further used for personal and non-commercial purposes.[26] Certainly, citizens' personal data should not be published publicly.

Access to the portal has been simplified, as citizens can register to use the services from this portal only via their email address and the selected access code. For authorised persons in a legal entity, the procedure is similar, with the additional condition that the portal administrator receives a certificate that the person is officially authorised by the legal entity. The portal can also be accessed via an electronic certificate. By registering on the portal, the user obtains the opportunity to use the electronic services provided by the administrative bodies, to fulfil the public obligations offered in digital form, to monitor the state of their matter to the requests presented in the administrative procedure, the right to participate

24 Law no 05/L-031 (n 21).
25 ibid.
26 Dermaku and others (n 7).

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

electronically in current public discussions about laws and other general acts, as well as other actions. In this portal, at the time of research, one can find services that include more than 150 public administration bodies, with further increasing trends. Within these authorities, one can access electronic services of all state ministries, five (5) courts, over 18 cities, eight (8) city municipalities, 35 municipalities, offices, directorates, agencies, inspectorates, institutes, the central bank, administrative districts and the like.

The categorisation of services is done according to several criteria. The initial classification revolves around the entities requesting or being referred services, resulting in three main divisions:

1. Citizens,
2. Economy,
3. Administration.[27]

Each primary category is further classified according to specific aspects of life where citizens exercise certain rights, obligations or legal interests. Within the services provided to citizens, several sub-areas are offered within which there are opportunities for access to the necessary documentation, the performance of services, setting the date of waiting in the public administration bodies and the like. These areas are related to family issues (children and social assistance), education (higher education, public libraries, vocational training, training courses, education in the diaspora), health (health insurance, health care, social care, biomedicine), documentation (personal documents, certificates, registration books, instructions), traffic (vehicles, documents, campaigns), work (the employed, the unemployed, public work tenders), housing and environment (urban planning and real estate, environment, natural resources, utilities, water management, agriculture), finance (taxes, vacancies), business (registration of entrepreneurs, declarations, certificates, loans, official statistics), public law and order (States Prosecutor's Office, criminal charges, inspections), sports and youth (sports, credit), persons with disabilities (in relation to the rights of persons with disabilities, social protection, vehicles and parking lots, tax and customs benefits, laws), cadastre (real estate cadastre, water cadastre), human rights (free access to information, protection of personal data), extraordinary events (emergency situations), tourism (accommodation), agriculture and water management (land, documents) and the City of Pristina (areas for which the City of Pristina is responsible as a special unit of local self-government).

The part that deals with the economy, as an area offered within which some public administration services can be accessed electronically, are as follows; business (subareas: company registration, declarations, certificates, technical regulations, loans, official statistics), public procurement (public procurement and certificates), environment and spatial planning (urban planning, environment, mining and geology, utilities), finance (large taxpayers, taxpayers), import/export (customs, export), education (vocational training), transport (vehicles, documents), statistics (official statistics), health (health care,

27 Prishtina Institute for Political Studies and Lëvizja FOL, *Summary Report on Kosovo's Public Administration Reform* (PIPS FOL 2021).

regulation of medicines in human medicine, regulation of medicines in veterinary medicine, regulation of medical equipment), sports and youth (credit, sports), cadastre (real estate cadastre, water cadastre), energy (rational use of energy), mining (natural resources), tourism (accommodation), services of the City of Pristina (all areas covered by the City of Pristina as a separate unit of local self-government), water management and agriculture (documents).

The 'Administration' area contains a list of services provided by government bodies, which correspond with the previously mentioned areas that can be accessed through the portal. Within the areas mentioned, an internet link leads to a new internet window that explains how a particular service is provided. However, since the development of digital documentation and electronic services has been an ongoing process, not all services can be performed electronically. Therefore, services that can be performed electronically are clearly listed. Some of the services provided contain the original form, which is specifically shown.

The largest number of services is related to meeting the various demands of citizens, namely legal entities. For example, these are the requests for the issuance of the marriage certificate, the request for the registration of data changes in the single voting register, the request for the issuance of an electronic certificate for the territory of the city of Pristina, the request to extend the registration of vehicles for authorised technical checks, the request for the issuance of the tax certificate to the natural person, the request for information about the location, etc. In addition to the electronic submission of requests and access to forms, this portal enables access to special digital portals run by individual administrative bodies. These are, for example, the state geoportal 'geoKosova'.[28] It is also possible to access certain public information such as public vacancies for filling job vacancies, public calls for financing social programs and public calls to present projects published by public administration bodies. It is important to note that through this portal, it is possible to schedule appointments to obtain personal and other documents issued by public administration bodies (issuance of identity cards, issuance of qualified certificates for electronic signatures, etc.). An important segment of the eKosova portal refers to the participation of citizens in social and state life. This means citizens can electronically submit their comments, suggestions and data regarding public discussions on regulations. As said, the digital participation of citizens nowadays represents the fundamental need of any democratic society. Electronic administration, allowing citizens to participate in discussions on draft laws and other general acts, achieves the principle of transparency and strengthens democratic values.

According to available statistical data, the number of users of electronic services, which is ascertained based on the accounts opened, amounts to over 590 thousand active users. The number of services has been constantly increasing; therefore, 710 services of various public administration bodies are available on the portal. The most used services in the past were obtaining extracts from birth registers. The e-Government Portal, according to

28 Kastriot Dermaku and others, 'Planning Telecommunications Infrastructure in Kosovo through Geographic Information Systems (GIS)' (2020) 3(1) Journal of Mathematics, Computer Science and Education 16.

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

its legal nature, can be marked as the basic information system through which the most important electronic services of public administration in Kosovo are implemented. Moreover, we can say that this portal represents a 'unique digital administrative location'. Along with this portal, there are also several other special projects of information systems in certain areas of public administration. They are necessary because of the predominance of interests that should be fulfilled in that field and for improving services provided by administrative bodies.

7.1. Information System for the Management of Cases in the Courts of Kosovo

The Judicial Council of Kosovo (JCK) is the highest supervisory body of the Kosovo judicial system.[29] The primary responsibility of the JCK is to administer the judicial system as a whole, to create and maintain an independent judicial system that provides impartial judicial services to all, is accessible to all, fair and efficient in its work, is accountable for its work and is functional in all organisational and operational aspects. Within the JCK is the Secretariat that assists the Council in implementing rules and policies related to managing administrative and support personnel in courts, whereas within the Service for Administration and Personnel is the Unit for Information Technology and Communication and the Unit for Statistics. The Court System of the Republic of Kosovo consists of the Court of Appeal, the Supreme Court and the seven Basic Courts.[30] Within the Basic Courts is the Case Management Office (CMO), which ensures the implementation of case actions through the Case Management Information System (CMIL). To provide better transparent and efficient services, JCK and PCK have developed a joint project for CMIL, which system is used to manage cases in electronic form in the courts and the prosecutor's office, starting from the registration of cases for courts in CMO and the prosecutor's office in editor and forwarding them to judges and prosecutors. This system is administered by the IT Unit/Department in the JCK and the Prosecution Council of Kosovo (PCK), which have also formed a working group of users and a joint management board for project management for CMIL. Also, to support the development of statistical requirements, the Statistics Units within the JCK and the PCK are included in this system.

The guiding principles of CMIL constitute the main guide for the operation of this system and include the principles of efficiency, security, professionalism, accuracy, control, accountability, equality and transparency.[31] CMIL implements the distribution of cases for judges and prosecutors automatically. The automatic distribution of subjects through CMIL is based on the conditions and criteria previously determined and approved by the JCK and the PCK. The CMIL for each subject created in the system creates a unique number, which is given once by the system and does not change during the subject's lifetime. This number

29 *Kosovo Judicial Council* <https://www.gjyqesori-rks.org/?lang=en> accessed 10 June 2023.

30 Law of the Republic of Kosovo no 06/L-055 'On Kosovo Judicial Council' of 23 November 2018 (2018) 23 Official Gazette.

31 Regulation of the Kosovo Judicial Council no 08/2019 'On the use of the Case Information Management System' of 10 October 2019 <https://www.gjyqesori-rks.org/wp-content/uploads/lgsl/11065_KJC_Regulation_No_08_2019_CMIS_eng.pdf> accessed 10 June 2023.

contains the year of acceptance of the subject (V) and the ordinal (serial) number of the subject (Nr), which is a six-digit number and restarts from zero at the beginning of each year. Despite all that, this system is still developing its capacities further. It is noted that SMIL has Information Security Policies to ensure the secure operation of IT processing equipment referenced to ISO 27000.

7.2. Cadastre Information System

The digitalisation of services of the Cadastre represents another project through which the electronic public administration in Kosovo is executed. This project deals with the acquisition of property rights over real estate, the transfer of real estate and other issues related to the exercise of rights and obligations to real estate, where administrative bodies play an important role after the right of ownership is acquired and terminated according to notes, disputes are recorded in the books, etc. The importance of this service is proven by the statistics, according to which 1,026,165 requests were submitted in 2017 by citizens regarding rights, obligations and various interests related to real estate in the Cadastre Office, a separate administrative organisation that performs administrative and professional work of state surveying, real estate cadastre and geospatial data management at the national level. The project's main goal is digitisation of the services provided by the Geodetic Office, which will improve and accelerate the procedures related to the cadastre work. In this way, the underlying principles that the Geodetic Institute tries to achieve in the performance of its activities and the provision of services to citizens are realised.[32]

Digitisation of the geodetic and cadastral system represents a type of implementation of certain principles of the Law on State Status and Cadastre,[33] which deals with issuing documents in electronic form and providing electronic services for business transactions. Some of these principles are compliance with the Government's Digital Agenda, which tries to make services available to users through a single virtual and up-to-date counter (regular data update and user awareness of the update method), rationality of procedures and efficiency, availability of public data by implementing the concept of open data, transparency, etc. The project's primary goals have been achieved through electronic access to digitised services and databases managed by the Geodetic Institute. There are several specific segments of the institution's electronic services. The state geoportal is one of the segments that enables electronic appointments to submit requests at the counter. Within this service, application users can choose the place, date and time of submission of requests. It is also possible to schedule an appointment with the cadastre officer and check the case status electronically by entering the case number and the competent service in the application. Within the eKosova segment, it is possible to inspect the state of the real estate cadastre and submit requests electronically. To gain electronic knowledge in databases, users must register. Registered users can access the database, which represents the central real estate database maintained by the Cadastre Agency. The available data are classified

32 ibid.

33 Law of the Republic of Kosovo no 04/L-013 'On Cadastre' of 29 July 2011 (2011) 13 Official Gazette.

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

according to cadastral municipalities. Another option for eKosova is the electronic submission of requests. The Cadastral Agency can provide electronic services that allow users to request the issuance of a copy of the real estate plan, a water copy, a real estate list, a water list, a street name and house number certificate and the certificate of ownership of real estate at the municipality level.[34]

The National Geospatial Data Infrastructure is another digital service provided by the State Geoportal. Geospatial data infrastructure is an open data information system that enables users to identify and access spatial (geographic) information obtained from various sources, from local to national and to global level. The system enables and facilitates access to various geographic data, which are thus made available to citizens and business entities. They can further use them for various private and public purposes, such as sustainable development, sustainable resource management, etc. In relation to electronic services, objections to the work of the Cadastral Agency can also be raised. In this way, the service users of the Cadastral Agency are enabled to safely and easily submit objections, thus performing responsibility in the work of the public administration.

7.3. Open Data Portal

The open data portal represents an important aspect of electronic public administration, as knowledge, information and data of administrative bodies are digitised and open to the public for inspection. Open data represent knowledge stored in various documents of administrative bodies that are open to all interested parties who can freely access and continue to use them. For a piece of data to be open source, it should be freely available, accessible, machine-readable and available in open formats. Free access means that published data can be duplicated an unlimited number of times, further shared and adapted to the needs of the person using it. Accessibility means the property of data that can be accessed without meeting special conditions and by submitting a request but can be accessed directly through information and communication systems, that is, through the Internet. Machine readability means that data can be processed and used using computer programs. Availability in open formats means that the format in which the data is stored is available by using a computer and the Internet without additional conditions.[35]

The National Open Data Portal serves as an information centre, providing access to open data published by Kosovo's public administration bodies. At the time of research, the portal contains over 100 different databases. Open databases are created and published by other public administration bodies, such as ministries (Ministry of Education, Science, Technology and Innovation, Ministry of Justice, etc.), Agencies (Regulatory Authority of Electronic and Postal Communications Services, Agency for Environmental Protection, etc.), etc. This open data portal is a form of electronic public administration that publishes

34 Berat Aqifi, Petrit Nimani and Artan Maloku, 'The Right of Ownership and Legal Protection in Kosovo' (2023) 6(3) Access to Justice in Eastern Europe 221, doi:10.33327/AJEE-18-6.3-a000310.

35 'Open Data Initiative of the Government of Kosovo' (*Republic of Kosovo Public Administration*, 2023) <https://mpb.rks-gov.net/ap/page.aspx?id=2,33> accessed 10 June 2023.

information that citizens need to perform various activities, creating a more significant connection between citizens and administration. In essence, public administration bodies 'share knowledge' with citizens, thus achieving the function of a public service geared towards the overall progress of society.[36]

8 DATABASES IN THE LEGAL SYSTEM IN KOSOVO

Nowadays, personal data is collected for various purposes. They are collected by private operators and processors for business purposes but also by state authorities to perform public tasks and enable the normal development of social flows. Personal data collected by administrative authorities is stored and used, for the most part, in digital form. In such situations, databases are created by collecting a large amount of personal data, that is organised sets of personal data. These words describe more closely the importance of databases in today's information systems. There are no databases where information systems are unimaginable. Their importance is reflected in the stored information structure, which can be used quickly and easily for different purposes in different areas of social life. In theory, databases are defined as an organised set of personal data. Therefore, it is not enough to collect personal data; it is necessary to systematise and store them according to a specific form. When speaking of administrative bodies, their previous databases consisted of a large number of paper documents with personal data. The development of information and communication technologies made it possible to save time and space, so databases were digitised. Today, databases are usually stored in electronic form, computer memory, or virtual form in the 'cloud'. They represent a unique place where stored data of a certain category or type can be accessed for their download and further use for specific purposes. Because of this, databases have found their place in legal systems around the world, including Kosovo, especially in relation to electronic public administration activities.[37]

Database management should be regulated by law or by other by-laws. In Kosovo, the Personal Data Protection Act (2019)[38] does not specifically regulate the management of databases. Still, the provisions for storage and access to personal data may apply to data that constitute a basis of certain data. However, the general management of the database is subject to legal regulations, namely the Law on the Information System of the Republic of Kosovo.[39] This law regulates the procedure of administrative authorities during evidence-keeping and data management related to the information system of the Republic of Kosovo. The database consists of data whose management is provided by law, and the databases formed in this way represent the information subsystem of the social area in which personal data is stored. The definition of the term database is also found in the Law on Electronic

36 ibid.

37 ibid.

38 Law of the Republic of Kosovo no 06/L-082 'On Protection of Personal Data' of 30 January 2019 (2019) 6 Official Gazette.

39 Law of the Republic of Kosovo no 04/L-145 'On Information Society Government Bodies' of 18 April 2013 (2013) 15 Official Gazette.

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

Administration, which defines the database as an organised set of interrelated structured data that may have one or more records.[40] The Law on the Information System of the Republic of Kosovo also recognises the category of common database, which is a central register from which administrative bodies and organisations obtain data when they need it to keep special records or special databases.[41] Therefore, common databases represent an electronic highway that can be accessed under certain conditions to download individual data. It is extremely important to take care of the possibility of access to this register because there is a large number of administrative authorities; therefore, it is important to accurately define the subjects and the reason for accessing the database to avoid misuse. Each user should go through an authorisation process performed by using the user's electronic identification data. In this way, personal data protection is achieved by creating a database, since the evidence of the entities that enter the base is kept. Administrative bodies should also maintain secondary (alternative) databases that enable work continuity if problems arise in the primary database. Secondary databases should not be stored in the same location as primary databases. The rule is that all databases are stored in Kosovo and can only be taken outside the territory of the Republic of Kosovo under special security measures. Administrative bodies are also obliged to maintain data vocabularies of information subsystems. Information subsystem data vocabularies mean the description and structure of the database, registers and records within that authority's authority.

9 CONCLUSIONS

Electronic public administration represents an altered and modern concept of public administration that has changed the way and purpose of performing state affairs. Technically, it is based on using the Internet and information and communication technologies to carry out regular state affairs and forecast the situation in various social fields. Technical elements also influenced its legal nature. Administrative bodies now perform their duties more efficiently, fostering closer citizen-state contact and allowing citizens to gain insights into state affairs that directly affect their rights and interests.

This shift in the legal nature of public administration towards public service is achieved, with a primary focus on delivering quality public services and ensuring citizen satisfaction. Therefore, the development of electronic public administration enables citizens to fulfil their duties, obligations and tasks more effectively. Beyond developing relations between citizens and administrative bodies, the use of information and communication technologies and the Internet has opened up important legal issues. That is to say, information and communication technologies, in addition to countless advantages, also bring certain challenges and risks. Since the basic tool of work in today's world is information, i.e. data, it is clear that the main challenges are precisely related to their security in the digital environment. Information and data are the main tools of information technology, which, thanks to the Internet and the possibilities it offers, can

40 Law no 08/L-022 (n 22).
41 Law no 04/L-145 (n 39).

be shared quickly and easily with a wider audience. In such a state, information becomes an important tool of influence and power, so the one who possesses more information and data can perform their tasks more efficiently and quickly.

All these questions are also valid in Kosovo's legal system, where new forms of electronic public administration have been appearing and developing daily. In this plan, the Law on Electronic Administration has been approved in Kosovo, and, in practice, projects that implement the principles of electronic public administration have been appearing. Equally important are the laws regulating specific administrative areas and procedures, whose digitisation contributes to the establishment of a digital administrative environment. This environment focuses on technical and organisational issues that lead to the progress and further development of electronic public administration.

Administrative protection mechanisms operate both during and after the administrative procedure itself, specifically concerning protecting personal data used in such a procedure. The same actions with cases are carried out through SMIL, from the registration of the case, the movement of the case to the court, the movement of the case between the courts, and archiving. In the research, we concluded that the digitisation projects of the public administration are based on citizens' personal data. This personal data encompasses information about various aspects of the identity of a specific or identifiable person. They refer to physical and psychological characteristics, philosophical and religious beliefs, health conditions, amount of money in bank accounts, etc.

REFERENCES

1. Aqifi B, Nimani P and Maloku A, 'The Right of Ownership and Legal Protection in Kosovo' (2023) 6(3) Access to Justice in Eastern Europe 221, doi:10.33327/AJEE-18-6.3-a000310.
2. Batalli M, 'Reform of Public Administration in Kosovo' (2012) 1(1) Thesis 5, doi:10.2139/ssrn.2627592.
3. Dermaku K and others, 'IP Packaging Filtering in Computer Networks Using Artificial Intelligence in the Regulatory Authority of Electronic and Communications Kosovo' (2022) 17(2) Journal of Communications 134, doi:10.12720/jcm.17.2.134-142.
4. Dermaku K and others, 'Planning Telecommunications Infrastructure in Kosovo through Geographic Information Systems (GIS)' (2020) 3(1) Journal of Mathematics, Computer Science and Education 16.
5. Selimi F and others, 'Local Governance Comparative Reviews between the Republic of Macedonia and the Republic of Kosovo' (2018) 11(2) Acta Universitatis Danubius 70.
6. Shala H dhe Halimi D, *Udhëzuesi për Procedurën Administrative* (Akademia e Drejtësisë së Kosovës 2019).
7. Tareck A, 'Legal Mechanisms for the Stimulation of the Digital Economy in Developing Countries' (2023) 6(S) Access to Justice in Eastern Europe 72, doi:10.33327/AJEE-18-6S002.

AUTHORS INFORMATION

Kastriot Dërmaku*
Prof., Asoc.Dr., Professor Associate at the University "Kadri Zeka" Gjilan, Republic of Kosovo
kastriot.dermaku@uni-gjilan.net
https://orcid.org/0000-0002-6473-8288
Co-author, responsible for conceptulization article, formal analysis, data curation, funding acquisition, investigation, software analysis, supervision, visualization, writing – review & editing.

Ardian Emini
Prof., Ass. Dr., Professor Assistant at the University "Kadri Zeka" Gjilan, Republic of Kosovo
ardian.emini@uni-gjilan.net
https://orcid.org/0000-0002-4820-9917
Corresponding author, responsible for writing original draft and methodology of article, conceptualization, funding acquisition, investigation, project administration, resources, validation.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organizations.

ABOUT THIS ARTICLE

Cite this article
Dërmaku K and Emini A, 'Digitization of Administration and Legal Basis in Kosovo' (2024) 7(1) Access to Justice in Eastern Europe 245-63 <https://doi.org/10.33327/AJEE-18-7.1-a000107>

Submitted on 16 Aug 2023 / Revised 21 Aug 2023 / Approved 29 Sep 2023
Published Online 17 Jan 2024 / Last Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000107

Managing editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Keywords: *public administration, electronic public administration, personal data, data protection, law administration.*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

IMPACT FACTORS FOR IMMIGRATION TO SPAIN

Tetiana Zatonatska*, Yulia Forostiana, Vincentas Rolandas Giedraitis, Yana Fareniuk and Dmytro Zatonatskiy

ABSTRACT

Background: *Migration processes play an important role in the economic development of a country and form the human resources necessary for developing countries. Therefore, forming a favourable legislative framework for a certain category of migrants affects the attraction of the necessary human resources for the country.*
Motivation: *Generally, the level of immigration has risen over the last 50 years, and around 3.6% of the total population in the world are immigrants. Identifying the influencing factors that motivate people to migrate is very important. This understanding informs well-designed immigration and effective solutions for foreign policy.*
Aim: *To analyse and model the impact of the factors influencing the choice of the destination country, examining what attracts a person to a country or, on the contrary, why a country may not be chosen. Additionally, this paper seeks to forecast the dynamics of immigration in Spain for 2022-2024 under the impact of selected factors for analysis.*
Methods: To create a *regression model using the R-Studio software based on a data set for the 2000-2021 years. The scientific hypothesis is that the following could have an influence on the level of immigration to Spain: inflation, level of employment and education, government spending on social protection, the share of the ICT sector in the GDP of the country, as well as the economic crisis in the USA for 2007, and legal factor such as the presence of open borders for the African population in 2019, a characteristic not shared by other European countries. The last two indicators, proven significant in attracting immigrants, were incorporated into the model as dummy variables.*
Results and Conclusions: *The research proved a non-linear negative impact of a logarithm of spending on social protection expenditure and the third degree of inflation—conversely, a positive impact of the third degree of employment level. Additionally, the forecast of immigration in Spain under the impact of the above factors was discussed. The paper will be of interest to the government since migration is not only important in terms of the country's demographic structure but also has a direct impact on a country's national economy. It can either strengthen or weaken the country's economic development, making it significant to policymakers.*

1 INTRODUCTION

Today, migration processes are one of the biggest problems of the 21st century. Almost every modern person has experienced a situation where their relatives or close friends migrated abroad. While migration processes have persisted to this day, the increasing economic instability and tension in various countries' social and political situations have only intensified and accelerated migration processes. More and more often, people began to leave the Motherland not because of poverty but because of the hope of finding a safe place to live.

The concept of immigration, from the viewpoint of the country of arrival, reflects the act of moving to a country that is not the country of habitual residence or nationality. Therefore, the country of destination effectively becomes their new country of habitual residence.

Overall, the number of immigrants has grown over the past 50 years. Current global estimates put the total number of people living in another country than their birth country in 2020 at 281 million, 128 million more than in 1990 and more than three times the estimated number in 1970. That is, about 3.6% of the general population in the world are immigrants.[1]

This research considers the current situation of immigration to Spain, what factors influence it, and what measures can be taken to at least partially control it. Additionally, the prediction of immigration in Spain considers the influence of the factors present.

Such research should be of particular interest to the governments of different countries from an economic point of view because immigration processes significantly influence the demographic structure of the country's population. Moreover, they strongly influence the economic development of the country, which in turn can strengthen or, on the contrary, weaken the national economy.

2 LITERATURE REVIEW

Numerous scientific studies conducted by researchers from different countries on migration processes analyse the influence of social, political and economic factors on immigration processes.

2.1. Social Factors

In the context of immigration from North America to Israel, Israeli researchers confirm that social networks can increase a desire to immigrate.[2] This relationship mirrors the findings

1 'About Migration' (*International Organization for Migration (IOM)*, 2023) <https://www.iom.int/about-migration> accessed 10 November 2023.

2 Karin Amit and Ilan Riss, 'The Role Of Social Networks in the Immigration Decision-Making Process: The Case of North American Immigration to Israel' (2007) 25(3) Immigrants & Minorities 290, doi:10.1080/02619280802407517.

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

in a study by Facchini et al.[3] conducted in Japan. Additionally, Fischer's[4] work explains the importance of language skills when considering relationships between house prices and immigrant in-flows. The author highlights that non-common-language immigrants value amenities more than those from common-language countries, which are sensitive to house prices.

In an article by Segal et al.,[5] education and social opportunities and the presence of international connections incentivise immigration. The authors highlight that the host country may invite immigrants to serve in labour markets, making it more engaging for them. Also, the impact of education on the immigration process as a significant factor is revealed in many other works.[6]

In the study by Young et al.,[7] a multi-level analysis with mixed effects multinomial logistic regression models is presented to investigate the impact on immigration policy. The results show that the macro-level economic situation does not exhibit a significant association with immigration policy, while the socio-cultural situation detects unexpected conclusions. As for the national security domain, terrorist acts show a connection with anti-immigration policy.

González and Ortega's[8] study asserts that immigrants' location choices are significantly driven by early migrant settlements. The results of another paper by Ashby et al.[9] confirm that immigrants tend towards states with higher numbers of immigrants of the same nationality, shorter distances, higher salaries, and smaller populations.

3 Giovanni Facchini, Yotam Margalit and Hiroyuki Nakata, 'Countering Public Opposition to Immigration: The Impact of Information Campaigns' (2022) 141(C) European Economic Review 103959, doi:10.1016/j.euroecorev.2021.103959.

4 Andreas M Fischer, 'Immigrant Language Barriers and House Prices' (2012) 42(3) Regional Science and Urban Economics 389, doi:10.1016/j.regsciurbeco.2011.11.003.

5 Uma A Segal, Nazneen S Mayadas and Doreen Elliott, 'A Framework for Immigration' (2006) 4(1) Journal of Immigrant & Refugee Studies 3, doi:10.1300/J500v04n01_02.

6 Joaquín Naval, 'Wealth Constraints, Migrant Selection, and Inequality in Developing Countries' (2019) 23(2) Macroeconomics Dynamics 535, doi:10.1017/S1365100516001255; Andreea Simona Săseanu and Raluca Mariana Petrescu, 'Education and Migration. The Case of Romanian Immigrants in Andalusia, Spain' (2012) 46 Procedia - Social and Behavioral Sciences 4077, doi:10.1016/j.sbspro.2012.06.201.

7 Yvette Young, Peter Loebach and Kim Korinek, 'Building Walls or opening Borders? Global Immigration Policy Attitudes Across Economic, Cultural and Human Security Contexts' (2018) 75 Social Science Research 83, doi:10.1016/j.ssresearch.2018.06.006.

8 Libertad González and Francesc Ortega, 'How do Very Open Economies Adjust to Large Immigration Flows? Evidence from Spanish Regions' (2011) 18(1) Labour Economics 57, doi:10.1016/j.labeco.2010.06.001.

9 Nathan J Ashby, Avilia Bueno and Deborah Martínez Villarreal, 'The Determinants of Immigration from Mexico to the United States: A State-to-State Analysis' (2013) 20(7) Applied Economics Letters 638, doi:10.1080/13504851.2012.727964.

2.2. Economic Factors

Hu et al.[10] explored whether immigration decision-making is associated with the quality of urban air in the case of China. Researchers confirmed that among determinants of immigration, air quality was worse than GDP, salaries, industrial structures and public services.

A study by Lewer and Van den Berg[11] offers a regression model based on the gravity model of international trade to test the influence on immigration, showing that the attractive force between the country of immigrant's birth and destination countries depends on the difference between wages in the two countries. Another study considering immigrants to the United States uses a Tobit technique to estimate a strong correlation between immigrant flow and welfare generosity.[12]

In Boubtane et al.'s paper[13], using the panel Granger approach for causality testing of Kònya for 22 OECD countries, the authors prove that unemployment only in Portugal negatively causes immigration. Also, in four countries, economic growth positively causes immigration. Moreover, Carella, Gurrieri and Lorizio[14] corroborate these results, affirming that in Italy and Spain, immigrants' continuous and rapid growth is paralleled by a corresponding increase in non-profit organisations.

The research by Grau Grau and Ramirez Lopez[15] describes immigration and factors during the business cycle.[16] The results show the factors related to GDP and public debt significantly justify the immigration level since the start of the crisis, while the expectancy of life duration and pollution level are determining factors in all phases. Also, the paper by Rodenas et al. presents that after six years of economic recession in Spain, there has been no complete halt in the entrance of immigrants or a mass outflow of ones.

10 Zhigao Hu and others, 'Longing for the Blue Sky: Urban Air Quality and the Individual Decision to Immigrate' (2022) 79 Journal of Asian Economics 101437, doi:10.1016/j.asieco.2021.101437.

11 Joshua J Lewer and Hendrik Van den Berg, 'A Gravity Model of Immigration' (2008) 99(1) Economics Letters 164, doi:10.1016/j.econlet.2007.06.019.

12 Marvin E Dodson (III), 'Welfare Generosity and Location Choices Among New United States Immigrants' (2001) 21(1) International Review of Law and Economics 47, doi:10.1016/S0144-8188(00)00040-5.

13 Ekrame Boubtane, Dramane Coulibaly and Christophe Rault, 'Immigration, Unemployment and GDP in the Host Country: Bootstrap Panel Granger Causality Analysis on OECD Countries' (2013) 33(C) Economic Modelling 261, doi:10.1016/j.econmod.2013.04.017.

14 Maria Carella, Antonia Rosa Gurrieri and Marilene Lorizio, 'The Role of Non-Profit Organisations in Migration Policies: Spain and Italy Compared' (2007) 36(6) The Journal of Socio-Economics 914, doi:10.1016/j.socec.2007.08.001.

15 Carmen Ródenas, Mónica Martí and Ángel León, 'A New Pattern in International Mobility? The Case of Spain in the Great Crisis' (2017) 76(299) Investigación económica 153, doi:10.1016/j.inveco.2017.02.003.

16 Alfredo Juan Grau Grau and Federico Ramírez López, 'Determinants of Immigration in Europe. The Relevance of Life Expectancy and Environmental Sustainability' (2017) 9(7) Sustainability 1093, doi:10.3390/su9071093.

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

Sekiguchi et al.'s[17] paper on the connections between people's motivations to migrate to their hometowns and their evaluations of the living environments of their country and current residence using an analysis with a decision tree for the case of Japan is valuable. The critical factor for reducing U-turn motivation researchers highlight convenience-related living conditions.

The research results of Oigenblick and Kirschenbaum[18] suggest that the probability of making an immigration decision depends on the presence of well-established and supportive relatives at the destination and intentions to own property and engage in economic activities.

2.3. Political Factors

Godenau[19] proves changes in border management introduced by Spain and the EU decreased the influx of irregular immigrants.

Another study by Klimaviciute et al.[20] considers the effect of policy and the Brexit referendum 2016 on the immigration decisions of young Lithuanian and Polish migrants. The results show that the referendum had a small impact on the immigrant's decisions, giving way, instead, to work, family, and lifestyle considerations.

The opposite opinion is presented in the article by Mendoza,[21] where the state's action is a major element in considering immigration. The significant role of political institutions in considering the influx of immigrants is described in other studies.[22]

From the resources discussed above, it can be seen that the policies and actions of the chosen state play a crucial role in considering the country's attractiveness to foreign

17 Tatsuya Sekiguchi and others, 'The Effects of Differences in Individual Characteristics And Regional Living Environments on the Motivation to Immigrate to Hometowns: A Decision Tree Analysis' (2019) 9(3) Applied Sciences-Basel 2748, doi:10.3390/app9132748.

18 Ludmilla Oigenblick and Alan Kirschenbaum, 'Tourism and Immigration: Com-Paring Alternative Approaches' (2002) 29(4) Annals of Tourism Research 1086, doi:10.1016/S0160-7383(02)00023-3.

19 Dirk Godenau, 'Irregular Maritime Immigration in the Canary Islands: Externalization and Communautarisation in the Social Construction of Borders' (2014) 12(2) Journal of Immigrant & Refugee Studies 123, doi:10.1080/15562948.2014.893384.

20 Luka Klimaviciute and others, 'The Impact of Brexit on Young Poles and Lithuanians in the UK: Reinforced Temporariness of Migration Decisions' (2020) 9(1) Central and Eastern European Migration Review 127, doi:10.17467/ceemr.2020.06.

21 Cristóbal Mendoza, 'The Role of the State in Influencing African Labour Outcomes in Spain and Portugal' (2001) 32(2) Geoforum 167, doi:10.1016/S0016-7185(99)00053-6.

22 Nusrate Aziz, Murshed Chowdhury and Arusha Cooray, 'Why do People from Wealthy Countries Migrate?' (2022) 73(C) European Journal of Political Economy 102, doi:10.1016/j.ejpoleco.2021.102156; Deborah A Cobb-Clark, 'Incorporating US Policy into a Model of the Immigration Decision' (1998) 20(5) Journal of Policy Modelling 621, doi:10.1016/S0161-8938(97)00064-1; Henrik Emilsson, 'Who Gets in and Why? The Swedish Experience with Demand-Driven Labour Migration - Some Preliminary Results' (2014) 4(3) Nordic Journal of Migration Research 134, doi:10.2478/njmr-2014-0017; Ricard Zapata-Barrero, 'Perceptions and Realities of Moroccan Immigration Flows and Spanish Policies' (2008) 6(3) Journal of Immigrant & Refugee Studies 382, doi:10.1080/15362940802371697.

immigrants. As for Spain, despite being a country with a significant number of emigrants for quite a long time, the government still found methods not only to reduce the outflow of people from the country but also managed to attract a fairly large number of foreign migrants, that made it one of the leaders' positions among European countries. The study of factors influencing immigration is a significant issue, both from the viewpoint of demographic and migration policy and from the economic point of view. After all, the increase in the share of migrants creates additional demand for consumer goods and other products and services on the market that contribute to the creation of GDP and labour supply. Highly skilled labour resources have scientific and technical potential, accelerating the country's economic growth. So, this study should be of particular interest to the government.

2.4. Legal Factors

At the time of the creation of the European Union (EU), common policies were introduced, including migration legislation, which contains a critical concept of politics, which caused tensions among EU member states that continue to this day. The member states of the Schengen Agreement agreed to a common visa system, free movement of workers within the borders of the Schengen zone countries, and mutual exchange of information on border security.[23] Although this agreement provides the genesis policy on the free movement of people across borders within the Schengen area, it does not define the contours of migration policy, which later became a controversial feature of EU migration policy and a major obstacle in the way to establishing a reliable migration policy in the EU.

Following the Maastricht Treaty, the Amsterdam Treaty 1997 was influential in shaping migrant policy.[24] According to the United Nations High Commission for Refugees, the Treaty of Amsterdam was vital because it built protocols and standard procedures for immigrants and asylum seekers, protecting the rights of people from third-world countries. In general, the Treaty of Amsterdam was the first clear and visible attempt to formalise EU migration policy and procedures, depriving EU member states of their autonomy in certain aspects of immigration.

The Hague Program was introduced in 2004, which defined human rights and the rights of asylum seekers and immigrants.[25] The last significant event in EU legislation, particularly regarding EU migration policy, was the Dublin Convention in 1990, revised in 2013.[26] This

23 'Schengen Area' (*European Commission*, 2023) <https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area_en> accessed 10 November 2023.

24 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (signed on 2 October 1997) [1997] OJ C 340 <http://data.europa.eu/eli/treaty/ams/sign> accessed 10 November 2023.

25 The Hague Programme: strengthening freedom, security and justice in the European Union (adopted of November 2004) [2005] OJ C 53 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005XG0303(01)> accessed 10 November 2023.

26 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention (signed on 15 June 1990) [1997] OJ C 254 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:41997A0819(01)> accessed 10 November 2023.

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

convention is considered the most controversial and notorious EU response policy to the migration problem and has a significant framework in the EU migration crisis. This policy has created a severe problem for the EU, especially in the countries of entry, carrying a disproportionate burden on Southern Europe, which was already struggling with a huge influx of immigrants and asylum seekers. Controversial migration policies under the Dublin Convention have led to resource shortages, humanitarian problems, and inadequate refugee centres in southern Europe, including Italy, Greece, and Spain.

Considerable attention is paid to the legal regulation of the fight against illegal migration in the EU. The system of legal acts of the EU in the field of combating illegal migration is quite extensive. Strict restriction of legal methods of entry and the employment of migrants leads to an increase in illegal migrants, which, in turn, initiates the strengthening of legislation in the field of combating illegal migration.

Regulation 539/2001 dated March 15 2001 'On establishing a list of third countries whose citizens must have a visa and countries whose citizens are exempt from visas' regulates the conditions of entry of foreigners into the EU.[27] In fact, this document started the so-called "black" and "white" lists of third countries, which allowed the European Union to curb illegal migration, but not prevent it in full. Directive 2009/50/EU dated May 25 2009, 'On establishing the conditions of entry and stay of citizens of third countries for work' formulates attractive conditions for the legal entry and stay in EU countries of highly qualified specialists from third countries.[28] Compared to other legal immigrants in the EU, a simplified procedure for exercising some rights is provided for such specialists. It should be noted here that measures such as granting the most favourable migration regime to migrants who are highly qualified specialists have not been able to significantly reduce illegal migration because, for low-skilled specialists, the migration regime remained the same.

The importance of adopting a global approach to the migration process while making the best use of legal migration, ensuring the protection of those in need, combating irregular migration, and effectively protecting borders must be emphasised.

The research questions are:

— What socio-economic factors influence the decision of foreign migrants to choose Spain as their permanent residence?
— What is the projected number of immigrants to Spain, taking into account the influence of the considered factors?

27 Council Regulation (EC) 539/2001 of 15 March 2001 'Listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement' [2001] OJ L 81 <http://data.europa.eu/eli/reg/2001/539/oj> accessed 10 November 2023.

28 Council Directive 2009/50/EC of 25 May 2009 'On the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment' [2009] OJ L 155 <http://data.europa.eu/eli/dir/2009/50/oj> accessed 10 November 2023.

3 METHODS

Modelling the influence of the socio-economic factors on immigration to Spain was done by building regression models. We used the ordinary least squares (OLS) method to investigate the relationship between the selected factors and the modelled variable. Then, we checked the model for adequacy, significance of factors, autocorrelation, heteroscedasticity and multicollinearity, normality of residuals, stability and correctness of functional form. Finally, using a relevant model, we predicted future situations in Spain.

The analysed period is from 2000 to 2021 inclusive. The values of all variables were taken from databases of the EU Statistical Office (Eurostat)[29] and the World Bank.[30] Regression models were built using R-Studio software.

However, before directly reviewing the model, we analysed the indicators selected for the study.

Among a large number of possible influencing factors, the following were chosen for consideration: government spending on social protection, employment of the population, inflation, the level of education, the share of the ICT (information and communications technology) sector in the country's GDP, as well as two more factors that attracted a large number of immigrants, one of which is the economic crisis in the USA for 2007, and another is the legal factor such as the presence of open borders for the African population in 2019, which other European countries don't have. Factors were selected according to the level of correlation with the dependent variable and their significance in the model chosen. In addition, the choice was also influenced by our assumptions based on the research of other scientists. In the first stage, we consider each of them in more detail to analyse their dynamics in the selected period.

First is social protection spending, which reflects an overall measure of the expenditure on nationals and immigrants. The selected data are aggregated, including social benefits and administrative costs.

Access to social security programs that are part of the social security system is mainly based on periodic contributions. Health care, education, personal social services and social assistance operate according to the residence criterion (any person registered as a resident of Spain).

However, one drawback is the important role of the shadow economy in Spain's production system, which prevents workers from accessing the protection of contributory social security schemes. Besides, the economic crisis that began in 2008 led to a considerable reduction in social spending in Spain, including immigrants.[31] Regarding the dynamics of the indicator during the analysed period, it had a positive trend, growing moderately (Fig. 1).

29 *Eurostat* <https://ec.europa.eu/eurostat> accessed 10 November 2023.

30 *World Bank* <https://www.worldbank.org/en> accessed 10 November 2023.

31 Francisco Javier Moreno-Fuentes, 'Migrants' Access to Social Protection in Spain' in JM Lafleur and D Vintila (eds), *Migration and Social Protection in Europe and Beyond* vol 1 (Springer Cham 2020) 405, doi:10.1007/978-3-030-51241-5_27.

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

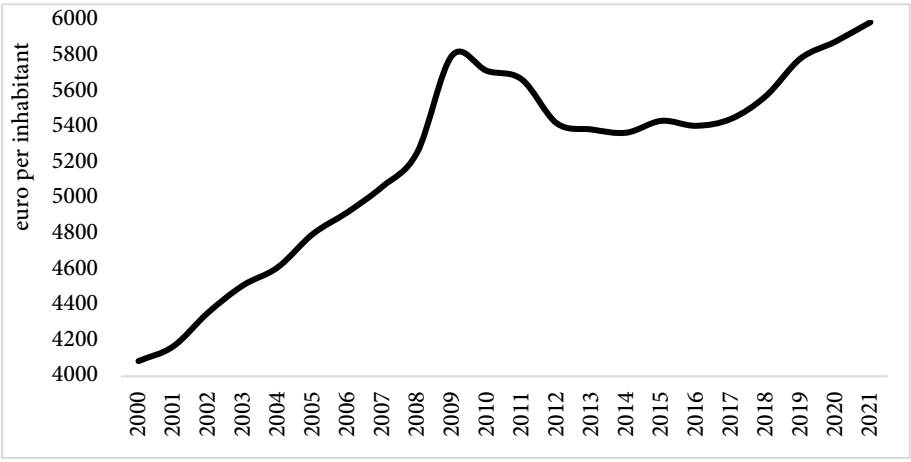


Fig. 1. Expenditure on social protection per inhabitant

Source: authors' calculations based on Eurostat (2023)

The next factor is inflation (Fig. 2). The level of consumer price inflation in Spain over the past 61 years has ranged from -0.5% to 24.5%. The subsequent nature of the inflation rate describes a change of about 2-3% every 2-3 years. The inflation rate for 2021 is calculated to be 3.2%.[32]

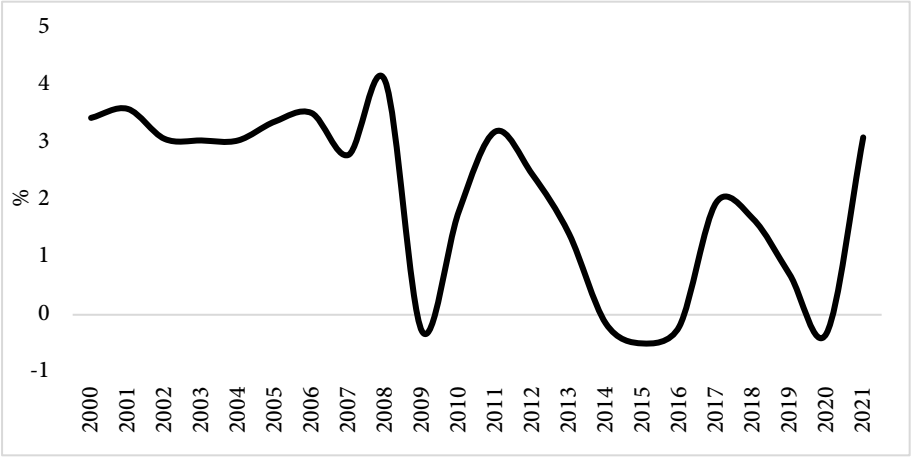


Fig. 2. Inflation rate dynamics

Source: authors' calculations based on World Bank (2023)

32 'Inflation Rates in Spain' (*World Data*, 2023) <https://www.worlddata.info/europe/spain/inflation-rates.php> accessed 10 November 2023.

Regarding employment, an indicator was chosen that reflects the number of the working population of Spain aged 20-64. A significant growing share of the employed population may indicate a demand for labour, which in most cases is the primary goal of foreign immigrants. However, it should be noted that despite improvements in the Spanish labour market, it still has serious structural problems such as susceptibility to changes, high unemployment rates, seasonality, a low level of workers skills, and a large number of discouraged young people who are neither employed nor in education.[33] During the analysed period, employed persons grew moderately, ranging from 15,000 to 20,000 (Fig. 3).

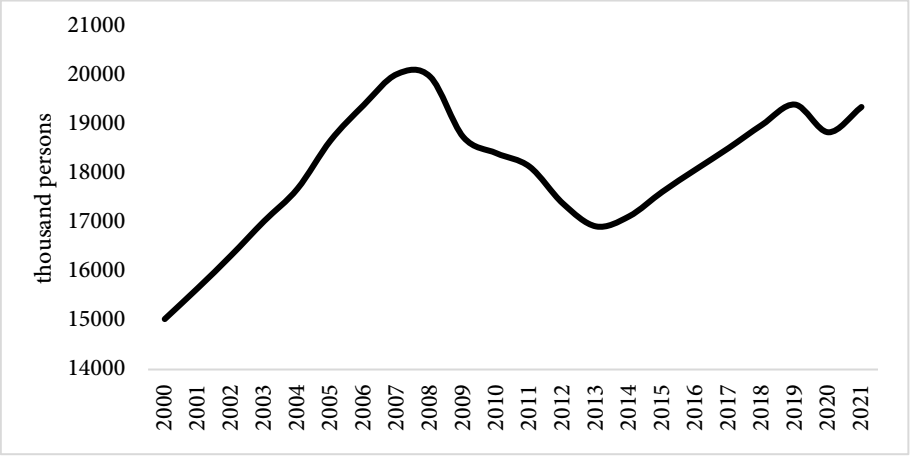


Fig. 3. Dynamics of number of employees in 2000-2021

Source: authors' calculations based on Eurostat (2023)

Today, the development of digital culture and digitalisation, in general, are quite important for the country because, with the help of digital technologies, a modern person interacts with the environment, business, and even the government. Therefore, the share of the ICT sector in Spain's GDP, in this case, acts as a kind of assessment of the country's digitisation state and is explicitly directed at the study of the impact on immigration and whether this factor will attract foreign migrants. In general, the volume of income from this sector for ten years is almost stable (Fig. 4), which may indicate either the lack of development of this industry or the lack of suitably qualified personnel, which immigrants can become.

33 'Work in Spain' (*SEPE*, 2023) <https://sepe.es/HomeSepe/en/que-es-el-sepe/comunicacion-institucional/publicaciones/publicaciones-oficiales/listado-pub-eures/trabajar-espana/trabajar-en-espana.html#menu05> accessed 10 November 2023.

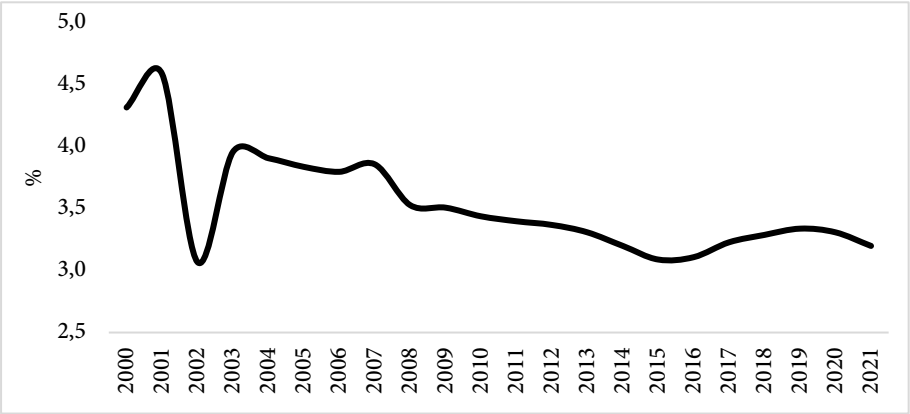


Fig. 4. Percentage of the ICT sector in GDP

Source: authors' calculations based on Eurostat (2023)

In addition to the indicators discussed above, education is a somewhat important factor for an immigrant, whether a student or a young family, when choosing a country. So, to take this factor into account, the share of education expenses that the government allocates from GDP was selected because it is from the latter that the financing of most educational projects that will contribute to the general development of education and qualifications of future employees depends. In general, the share of costs varies between 4-5% (Fig. 5). During 2007-2009, there was a rather significant increase in expenses for the analysed period, but the dynamics of 2011-2017 reflect a sharp return to the level of expenses identical to 2007.

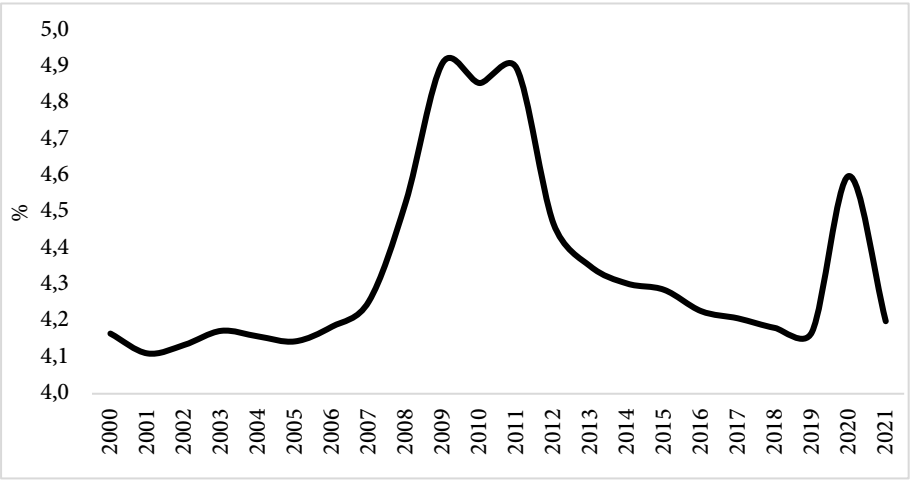


Fig. 5. Dynamics of expenditure on education in Spain

Source: authors' calculations based on World Bank (2023)

Two factors were also taken into account, which influenced a fairly significant increase in the number of immigrants in 2007 and 2019 (Fig. 6). In 2007, this is the beginning of the economic crisis in the United States,[34] and accordingly, in 2019, the main factor was the presence of open borders for the African population, which did not provide other European countries.[35]

The 2019 Africa Plan has three aspects which have legal confirmation. Firstly, it strives to go beyond perceptions of Africa as merely a passive recipient of humanitarian assistance towards treating the continent as an economic partner through strengthened trade and investment. Secondly, the plan espouses job creation for migrants in economic hubs in South Africa, Nigeria, and Ethiopia. It recognises that migration governance cannot be successful without taking into account broader governance issues, security, and economic growth. The plan strives to integrate trade, development, and security objectives. Thirdly, the plan pursues a comprehensive approach. It declares that it will look beyond migration control to embrace issues such as peace and security, political stability, economic growth, and sustainable development. The plan strives to offer more than a Eurocentric lens, recognising the importance of intra-regional mobility in Africa and that only a minority of migrants (around 15 percent) from sub-Saharan Africa travel to Europe.

Enabling greater migration within regions and between regions such as West Africa and Europe would be of great benefit in allowing people to travel legally and safely and in showing the public that governments can have in place planned migration governance structures that are both humane and address the public's invasion anxiety. Both Spain and the EU can go further on this.[36]

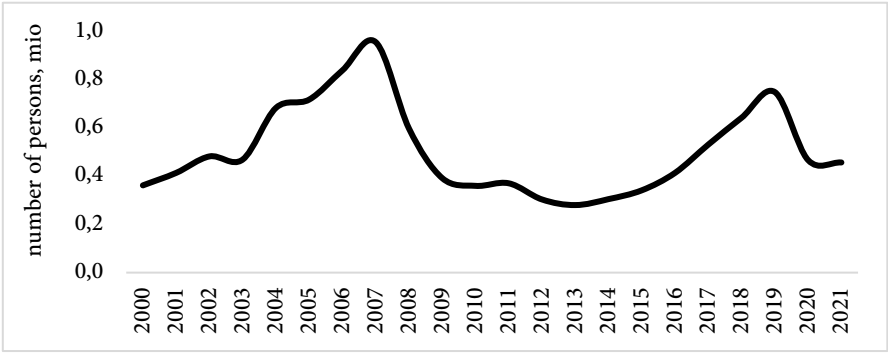


Fig. 6. Dynamics of immigration to Spain

Source: authors' calculations based on Eurostat (2023)

34 Vilmantė Kumpikaitė-Valiūnienė and others, *Migration Culture: A Comparative Perspective* (Springer Cham 2021) doi:10.1007/978-3-030-73014-7.

35 Victoria Carty, *The Immigration Crisis in Europe and the US-Mexico Border in the New Era of Heightened Nativism* (Lexington Books 2020).

36 Shoshana Fine and José Ignacio Torreblanca, *Border Games: Has Spain found an Answer to the Populist Challenge on Migration?* (Policy Briefs, ECFR 2019).

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

We note the designations of variables used in the model:

— *Immigrant* – number of immigrants, simulated indicator;

Factors:

— *Social protect* – expenses for social protection of the population;
— *Inflation* – inflation level;
— *Employment* – the number of employed persons aged 20-64;
— *ICT* – the share of the ICT sector in GDP;
— *Education* – share of education expenses in GDP;
— *A* – dummy variable, the beginning of an economic crisis outside the country;
— *B* – dummy variable, the presence of open borders.

So, for now, we have considered the characteristics of all possible factors that will be used in constructing the regression model. The conclusion is that these indicators describe a certain socio-economic attractiveness and affect the development of the country's economy.

4 RESULTS: MODELLING AND FORECASTING

After constructing various models, a trend was observed that with the growth of the degree of the employment rate, the quality of the model improved. Using this principle, a model was built that included the logarithmic values of the factor corresponding to the costs of social protection, the level of inflation, and employment in the third degree. Such a functional form of the model equation is the most relevant, considering the adjusted R^2 and model validation using the RESET test, which shows the correctness of non-linear transformation. As we can see, this model does not include factors such as the ICT sector's share in GDP, spending on education, the beginning of the economic crisis, and the openness of borders. However, with a probability of 95%, the model is adequate since the p-value = 1.433e-09, which is less than 0.05, and all coefficients are significant. The quality is high since about 90.91% is described by the factors used, and only 9.09% is due to other unexamined factors (Table 1). According to Chow's criterion, we have a stable model according to both the dispersion and modification criteria. According to Jarque-Bera's criterion, the residuals have a normal distribution, so the constructed model has high quality and can be implemented for future analysis and forecasting.

The presented regression equation describes how the number of immigrants will change under the existing relevant situation in the country, which factors improve the attractiveness of Spain for foreign migrants, and which, on the contrary, will leave it off the list of choices. To reflect the quantitative impact, elasticity coefficients were calculated for each factor.

Table 1. The results of building a regression model based on data from Fig. 1 – Fig. 6

Coefficients	Estimate	Std. Error	t-value	Pr(>|t|)	Signif.
(Intercept)	1.647e+07	1.832e+06	8.986	4.51e-08	***
Social_protect_log	-2.001e+06	2.210e+05	-9.055	4.02e-08	***
Inflation3	-3.858e+03	1.004e+03	-3.844	0.00119	**
Employment3	2.059e-07	1.616e-08	12.742	1.91e-10	***
Residual standard error: 60950 on 18 degrees of freedom					
Multiple R-squared: 0.9091			Adjusted R-squared: 0.8939		
F-statistic: 60 on 3 and 18 DF, p-value: 1.433e-09					

Source: authors' calculations in R-Studio based on the collected dataset

The regression equation has the following form:

$$Immigrant = 1.647e+07 - 2.001e+06 * Social_{protect_{\log -3.858e}} + 03 * \\ * Inflation3 + 2.059e-07 * Employment3 + e \quad (1)$$

Thus, increasing government social spending per person by 1% reduces the number of foreign migrants by 33.75%. Traditionally, the increase in social expenditure positively impacts the rise in the number of migrants. The strength of the impact may vary, but in such conditions, the reason for such a large negative impact may be that the majority of expenditures are for the payment of the social needs of the country's citizens. In contrast, expenditures for assistance to immigrants are small, increasing the competition between immigrants for social support from the government and making the procedure more complicated. Also, as discussed above, there are several reasons why immigrants are unable to receive a given number of payments, which in turn may not affect their behaviour or, on the contrary, make Spain less attractive as a possible residence.

An increase in the inflation rate by 1% provokes a decrease in immigration by 0.15%; a decline, on the contrary, stimulates their inflow by 0.15%. But, probably, one of the most important factors in choosing a country for changing the place of permanent residence is the possibility of employment. Thus, according to the obtained model, an increase in the number of employed persons, which reflects an increase in the demand for labour by 1%, increases the number of immigrants by 2.43%; that is, it stimulates foreign immigrants to decide to migrate specifically to Spain.

Having checked our model for adequacy, quality, stability, normality of residuals' distribution, etc., one should not forget important problems that may appear in the analysis of any regression model, such as multicollinearity, heteroskedasticity, and autocorrelation.

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

Thus, according to the Farr-Glauber statistical criterion, the analysed regression model has multicollinearity.

A critical issue is also checking the model for heteroskedasticity, violating the second condition regarding model disturbances, namely equality of variances. There are several criteria for its detection. Thus, the following criteria of Goldfeld–Quandt, Glaser, and White were considered in this study.

Almost all the considered criteria confirm the presence of heteroskedasticity in the analysed model, which is not good enough. After all, in this case, the method of least squares estimation is not effective; that is, they need to have the smallest variance, which leads to incorrect hypothesis testing. However, some methods will help to eliminate it; in this work, the weighted least squares method, according to White, was used (table 2).

Table 2. The results of the final regression model using the weighted least squares method

Coefficients	Estimate	Std. Error	t-value	Pr(>|t|)	Signif.
Constw	1.495e+07	1.740e+06	8.590	8.77e-08	***
Social_protect_logw	-1.818e+06	2.102e+05	-8.649	7.93e-08	***
Inflation3w	-2.900e+03	9.623e+02	-3.013	0.00747	**
Employment3w	1.951e-07	1.637e-08	11.922	5.60e-10	***
Residual standard error: 84.56 on 18 degrees of freedom					
Multiple R-squared: 0.9886			Adjusted R-squared: 0.9861		
F-statistic: 390.3 on 4 and 18 DF, p-value: <2.2e-16					

Source: authors' calculations in R-Studio based on the collected dataset

Analysing the obtained model, it should be noted that it is adequate (p-value: < 2.2e-16, which is less than 0.05), describes the modelled dependence quite well, as the coefficient of determination is greater than 0.9 ($R^2 = 0.9886$), and all variables are significant.

For now, it remains to test our model for autocorrelation of the residuals, which is also a rather important issue. After all, in her case, least squares assessments will not be effective, and the results of testing hypotheses and forecasts will be incorrect. There are also some criteria for its verification. Thus, the Breusch-Godfrey, Cochrane-Orcutt, and Durbin-Watson criteria were considered and also verified by constructing auxiliary models with lags. Most methods confirmed the fact of the absence of autocorrelation. That is, this model is suitable for practical use.

The final regression equation has the following form:

$$Immigrant = 1.495e+07 - 1.818e+06 * Social_{protect_{logw}} - 2.900e+ \\ +03 * Inflation3 + 1.951e-07 * Employment3 + e \quad (2)$$

Currently, it is possible to apply the model in practice and try to predict the situation during the years 2022-2024 regarding the number of immigrants in Spain on imaginary data (table 3). The source of the data of factors is our assumptions based on the current trend of each independent variable.

Table 3. Predicted number of immigrants in Spain 2022-2024

Year	Immigrant	Social protection	Inflation	Employment
2022	428 312.9	6 139	3.29313512	19 467
2023	510 175.7	6 239	2.09313512	19 517
2024	560 142.0	6 289	1.09313512	19 667

Source: authors' calculations in R-Studio based on the collected dataset

How can we observe the modelled relationship between the dependent variable and the regressors that actually exist? Thus, the increase in the number of employed people did not contribute to the rise in the number of immigrants to Spain in 2022 compared to 2021 since there is also an increase in government spending on social protection and the inflation rate, which harm the change in the number of immigrants, and, as discussed above, it is social benefits that have the greatest impact. With a decrease in inflation in 2023 by one percentage point, there was an increase in the number of immigrants compared to 2022 due to an increase in the number of employed people and government spending. However, the largest increase in the number of immigrants can be achieved by reducing government spending and the level of inflation while increasing the demand for labour, which is reflected in the data for 2024.

5 CONCLUSIONS

In this work, the issue of immigration was raised, namely, the possible factors affecting the choice of country, which every immigrant faces. Thus, the largest number of foreign immigrants is concentrated in Europe, among which Germany, Great Britain, Spain, Italy, and France stand out in great demand. The third most popular country - Spain - was chosen for consideration.

The following indicators were selected and characterised: social protection expenditures, inflation rate, number of employed persons, the percentage of the ICT sector in GDP, and education expenditures. It should also be noted that in the general examination of the situation that has developed in Spain over the past 20 years, two more dummy variables were identified and introduced to the model, namely the presence or onset of an economic crisis and open borders, which caused the largest influx of immigrants in 2007 and 2019. But, in the constructed model, these dummy variables were insignificant, indicating that their impact is not so important.

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

A number of both linear and non-linear models have been constructed to identify existing relationships between the number of immigrants to Spain and certain socio-economic factors. It should be noted that not all of the above factors were included in the model, including the percentage of the ICT sector in Spain's GDP, spending on education, the onset of the economic crisis, and open borders. In this case, the investigated dependence was best described by a model whose modelling variable depended on certain non-linear factors (logarithmic social protection costs, inflation rate, and the number of employed persons in the third degree). This model describes 90.91% of the studied dependence under the influence of the selected factors, and only 9.09% is due to other unconsidered factors, which is quite good. The biggest impact on the number of immigrants in Spain, and a negative one, is government spending on social protection: a 1% increase in expenditures causes a 32.44% decrease in the number of immigrants. This may be because a relatively significant share of the costs, after all, falls on Spanish citizens, as well as the fact of the complex mechanism of obtaining them. As for the inflation rate, it also has a negative effect on the modelling variable, but it is rather insignificant. Thus, when the inflation rate increases by 1%, the inflow of foreign migrants decreases by 0.12%. Only the number of employed persons characterises a positive trend towards the growth of immigrants. Their increase of 1% will attract 2.38% more immigrants. It should also be noted that autocorrelation and heteroskedasticity are absent in this model; the model is stable and adequate, all factors are significant, and residuals have a normal distribution, but multicollinearity is present, which should be kept in mind. In addition, a forecast for 2022-2024 was built, reflecting this model's operation and logic.

So, migration processes, in turn, immigration, are quite important topics when considering the country's economy because they also directly affect economic processes, which, as a result, can be accompanied by strengthening or, on the contrary, weakening of the country's economic growth. Therefore, the construction and use of such econometric models can not only predict the future situation but also help to find certain factors with the help of which certain phenomena and processes can be regulated.

The research findings hold economic significance for governments across diverse countries. Immigration processes play a crucial role in shaping the demographic structure of the country's population, strongly influencing its economic development. This, in turn, can either strengthen or, on the contrary, weaken the national economy.

But also, it is important to not forget that immigration and the influencing factors may vary across different countries. This variation warrants future consideration and presents an avenue for future research. Additionally, as a direction of future research, it is relevant to mention checking the influence of other factors, predicting immigration from other European countries and comparing the dynamics involved in these scenarios.

REFERENCES

1. Amit K and Riss I, 'The Role Of Social Networks in the Immigration Decision-Making Process: The Case of North American Immigration to Israel' (2007) 25(3) Immigrants & Minorities 290, doi:10.1080/02619280802407517.
2. Ashby NJ, Bueno A and Villarreal DM, 'The Determinants of Immigration from Mexico to the United States: A State-to-State Analysis' (2013) 20(7) Applied Economics Letters 638, doi:10.1080/13504851.2012.727964.
3. Aziz N, Chowdhury M and Cooray A, 'Why do People from Wealthy Countries Migrate?' (2022) 73(C) European Journal of Political Economy 102, doi:10.1016/j.ejpoleco.2021.102156.
4. Boubtane E, Coulibaly D and Rault C, 'Immigration, Unemployment and GDP in the Host Country: Bootstrap Panel Granger Causality Analysis on OECD Countries' (2013) 33(C) Economic Modelling 261, doi:10.1016/j.econmod.2013.04.017.
5. Carella M, Gurrieri AR and Lorizio M, 'The Role of Non-Profit Organisations in Migration Policies: Spain and Italy Compared' (2007) 36(6) The Journal of Socio-Economics 914, doi:10.1016/j.socec.2007.08.001.
6. Carty V, *The Immigration Crisis in Europe and the US-Mexico Border in the New Era of Heightened Nativism* (Lexington Books 2020).
7. Cobb-Clark DA, 'Incorporating US Policy into a Model of the Immigration Decision' (1998) 20(5) Journal of Policy Modelling 621, doi:10.1016/S0161-8938(97)00064-1.
8. Dodson ME(III), 'Welfare Generosity and Location Choices Among New United States Immigrants' (2001) 21(1) International Review of Law and Economics 47, doi:10.1016/S0144-8188(00)00040-5.
9. Emilsson H, 'Who Gets in and Why? The Swedish Experience with Demand-Driven Labour Migration - Some Preliminary Results' (2014) 4(3) Nordic Journal of Migration Research 134, doi:10.2478/njmr-2014-0017.
10. Facchini G, Margalit Y and Nakata H, 'Countering Public Opposition to Immigration: The Impact of Information Campaigns' (2022) 141(C) European Economic Review 103959, doi:10.1016/j.euroecorev.2021.103959.
11. Fine S and Torreblanca JI, *Border Games: Has Spain found an Answer to the Populist Challenge on Migration?* (Policy Briefs, ECFR 2019).
12. Fischer AM, 'Immigrant Language Barriers and House Prices' (2012) 42(3) Regional Science and Urban Economics 389, doi:10.1016/j.regsciurbeco.2011.11.003.
13. Godenau D, 'Irregular Maritime Immigration in the Canary Islands: Externalization and Communautarisation in the Social Construction of Borders' (2014) 12(2) Journal of Immigrant & Refugee Studies 123, doi:10.1080/15562948.2014.893384.
14. González L and Ortega F, 'How do Very Open Economies Adjust to Large Immigration Flows? Evidence from Spanish Regions' (2011) 18(1) Labour Economics 57, doi:10.1016/j.labeco.2010.06.001.

15. Grau Grau AJ and Ramírez López F, 'Determinants of Immigration in Europe. The Relevance of Life Expectancy and Environmental Sustainability' (2017) 9(7) Sustainability 1093, doi:10.3390/su9071093.

16. Hu Z and others, 'Longing for the Blue Sky: Urban Air Quality and the Individual Decision to Immigrate' (2022) 79 Journal of Asian Economics 101437, doi:10.1016/j.asieco.2021.101437.

17. Klimaviciute L and others, 'The Impact of Brexit on Young Poles and Lithuanians in the UK: Reinforced Temporariness of Migration Decisions' (2020) 9(1) Central and Eastern European Migration Review 127, doi:10.17467/ceemr.2020.06.

18. Kumpikaitė-Valiūnienė V and others, *Migration Culture: A Comparative Perspective* (Springer Cham 2021) doi:10.1007/978-3-030-73014-7.

19. Lewer JJ and Van den Berg H, 'A Gravity Model of Immigration' (2008) 99(1) Economics Letters 164, doi:10.1016/j.econlet.2007.06.019.

20. Mendoza C, 'The Role of the State in Influencing African Labour Outcomes in Spain and Portugal' (2001) 32(2) Geoforum 167, doi:10.1016/S0016-7185(99)00053-6.

21. Moreno-Fuentes FJ, 'Migrants' Access to Social Protection in Spain' in JM Lafleur and D Vintila (eds), *Migration and Social Protection in Europe and Beyond* vol 1 (Springer Cham 2020) 405, doi:10.1007/978-3-030-51241-5_27.

22. Naval J, 'Wealth Constraints, Migrant Selection, and Inequality in Developing Countries' (2019) 23(2) Macroeconomics Dynamics 535, doi:10.1017/S1365100516001255.

23. Oigenblick L and Kirschenbaum A, 'Tourism and Immigration: Com-Paring Alternative Approaches' (2002) 29(4) Annals of Tourism Research 1086, doi:10.1016/S0160-7383(02)00023-3.

24. Ródenas C, Martí M and León Á, 'A New Pattern in International Mobility? The Case of Spain in the Great Crisis' (2017) 76(299) Investigación económica 153, doi:10.1016/j.inveco.2017.02.003.

25. Săseanu AS and Petrescu RM, 'Education and Migration. The Case of Romanian Immigrants in Andalusia, Spain' (2012) 46 Procedia - Social and Behavioral Sciences 4077, doi:10.1016/j.sbspro.2012.06.201.

26. Segal UA, Mayadas NS and Elliott D, 'A Framework for Immigration' (2006) 4(1) Journal of Immigrant & Refugee Studies 3, doi:10.1300/J500v04n01_02.

27. Sekiguchi T and others, 'The Effects of Differences in Individual Characteristics And Regional Living Environments on the Motivation to Immigrate to Hometowns: A Decision Tree Analysis' (2019) 9(3) Applied Sciences-Basel 2748, doi:10.3390/app9132748.

28. Young Y, Loebach P and Korinek K, 'Building Walls or opening Borders? Global Immigration Policy Attitudes Across Economic, Cultural and Human Security Contexts' (2018) 75 Social Science Research 83, doi:10.1016/j.ssresearch.2018.06.006.

29. Zapata-Barrero R, 'Perceptions and Realities of Moroccan Immigration Flows and Spanish Policies' (2008) 6(3) Journal of Immigrant & Refugee Studies 382, doi:10.1080/15362940802371697.

AUTHORS INFORMATION

Tetiana Zatonatska*
Doctor of Economic Sciences, Professor, Department of Economic Cybernetics, Faculty of economics, Taras Shevchenko National University of Kyiv, Ukraine
tzatonatska@gmail.com
https://orcid.org/0000-0001-9197-0560

Yulia Forostiana
Student, Department of Economic Cybernetics, Taras Shevchenko National University of Kyiv, Ukraine
yulia.forostiana@knu.ua
https://orcid.org/0000-0003-0301-6617

Vincentas Rolandas Giedraitis
Dr., Professor, Department of the Theoretical Economics, Faculty of Economics and Business administration, Vilnius University, Lithuania
vincas.giedraitis@evaf.vu.lt
https://orcid.org/0000-0002-0293-0645

Yana Fareniuk
Ph. D. (Economics), Department of Economic Cybernetics, Taras Shevchenko National University of Kyiv, Ukraine
yfareniuk@gmail.com
https://orcid.org/0000-0001-6837-5042

Dmytro Zatonatskiy
Ph. D. (Economics), SESE «Academy of Financial Management», Ukraine
dzatonat@gmail.com
https://orcid.org/0000-0002-4828-9144

Corresponding author, solely responsible for the manuscript preparing.
Conceptualization - Tetiana Zatonatska, Yana Fareniuk, Dmytro Zatonatskiy
Data curation - Yulia Forostiana, Yana Fareniuk
Formal Analysis - Yulia Forostiana, Yana Fareniuk
Funding acquisition - Tetiana Zatonatska, Yulia Forostiana, Vincentas Rolandas Giedraitis, Yana Fareniuk, Dmytro Zatonatskiy

Investigation - Tetiana Zatonatska, Yulia Forostiana, Yana Fareniuk, Dmytro Zatonatskiy
Methodology - Tetiana Zatonatska, Yana Fareniuk, Dmytro Zatonatskiy
Project administration - Tetiana Zatonatska
Resources - Yulia Forostiana, Vincentas Rolandas Giedraitis
Software - Yulia Forostiana, Yana Fareniuk, Dmytro Zatonatskiy
Supervision - Tetiana Zatonatska, Yana Fareniuk
Validation - Tetiana Zatonatska, Yana Fareniuk
Visualization - Yulia Forostiana, Yana Fareniuk, Dmytro Zatonatskiy
Writing – original draft - Tetiana Zatonatska, Yulia Forostiana, Vincentas Rolandas Giedraitis, Yana Fareniuk, Dmytro Zatonatskiy
Writing – review & editing - Tetiana Zatonatska, Yulia Forostiana, Vincentas Rolandas Giedraitis, Yana Fareniuk, Dmytro Zatonatskiy

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free of any impact of any organizations.

ABOUT THIS ARTICLE

Cite this article
Zatonatska T, Forostiana Yu, Giedraitis VR, Fareniuk Ya and Zatonatskiy D, 'Impact Factors for Immigration to Spain' (2024) 7(1) Access to Justice in Eastern Europe 264-84 <https://doi.org/10.33327/AJEE-18-7.1-a000119>

Submitted on 14 November 2023 / Revised 4 December 2023 / Approved 08 January 2024
Published: 1 February 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000119

Managing editor – Dr. Ganna Kharlamova. **English Editor** – Julie Bold.

Keywords: *immigration, econometrics, Spain, employment, social-economic indicators.*
JEL: *F22, O15, C01*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

THE LEGAL IMPLICATIONS OF THE AVIATION INDUSTRY'S ENTRANCE TO THE METAVERSE

Meera Abdulla Alshamsi* and Attila Sipos

ABSTRACT

Background: *Technological growth allows aviation companies to embrace practices and applications that improve their approaches. A concept that is fast gaining attention from firms in this area is the Metaverse. This technology, driven by Artificial Intelligence (AI), improves consumer services, particularly by allowing passengers to travel virtually. Various entities already use this feature, and organisational and scholarly reports suggest that such establishments record positive outcomes. The primary goal of this analysis is to describe why operators must watch out for possible legal implications of using this tool.*

An important point is that they must prevent data security breaches that might violate consumers' privacy rights. A few enterprises in this sector have become victims of infringements that resulted in data loss. Subsequently, some of these issues may proceed to court, and organisations spend many resources handling such cases. Another vital message relating to the utilisation of this innovation is that it could cause unfair competition. Particular establishments, especially those yet to deploy this idea, may claim groups that use Metaverse for exposing vital personal data to cyber attackers. Besides, the sector witnesses legal proceedings whereby some airlines blame competitors for indulging in unfair competition.

While no specific Metaverse laws exist, a suitable remedy for operators is to follow legislations and policies that define AI use for commercial purposes. It is necessary to abide by regulations safeguarding consumers' data privacy. Another solution is that corporations can adhere to international provisions such as the General Data Protection Regulation (GDPR) that have a global effect. Moreover, non-compliance could cause devastating legal repercussions that harm business practices. This paper introduces these challenges and pays more attention to the practical and legal aspects.

Methods: *This paper retrieves data from secondary sources, encompassing websites and journal articles. The approach entails reviewing what the authors of selected works present about the topic and taking relevant information for this project. The approach saves time and is cost-effective.*

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

Results and conclusion: *Various firms in the aviation sector already use Metaverse to enhance their consumer experience. Companies feel attracted because of the many merits associated with the technology. However, they must watch out for the potential limitations of using this concept. In addition, users should consider the legal aspects of the innovation.*

1 INTRODUCTION

Operators in the aviation sector deploy various forms of Metaverse to appeal to buyers, appearing to be switching to modern forms, which most consumers look for today. Metaverse refers to a network of worlds formed via augmented and three-dimensional virtual reality based on social interactions.[1] The innovation allows people to experience life in different forms they cannot encounter. Hence, operators should settle on forms that suit their practices and available resources. Otherwise, not knowing what a firm wants may lead to postponements and delays that could derail an organisation's desire to become influential in its sector.

The evolution of the Metaverse and other digital innovations are causing significant changes in the aviation/tourism industry. Metaverse is a decentralised platform based on blockchain technology intended to build a virtual world of digital assets and identities. The Metaverse is 'a three-dimensional virtual space enabled by Internet 3.0 and focuses on social connections.'[2] However, besides enhancing social connections, the Metaverse's ability to create a sense of presence attracts significant attention from the aviation and hospitality industry. The Metaverse is bound to transform the travel industry in significantly new ways that can downgrade the current aviation industry since individuals can travel anywhere worldwide by simply being online from their workplaces and homes.[3] The Metaverse and its associated virtual experiences have radically changed people's perspectives on the technology's future and its potential impact on the aviation and hospitality industry. Generally, businesses in the aviation industry are increasingly exploring ways to leverage or capitalise on the Metaverse and develop virtual travel and hospitality experiences as well as products and services.

The aviation industry is exploring the limitless potential of the Metaverse in different ways. Accordingly, consumers across the world are increasingly considering and opting for Metaverse-enabled travel and hospitality/tourism experiences, products, and services. Airlines are embracing the Metaverse in organising virtual meetings and conferences

1 Jess Brownlow, 'How is the Metaverse Being Used in Aviation?' (*World Aviation Festival*, 27 September 2022) <https://worldaviationfestival.com/blog/airlines/how-is-the-Metaverse-being-used-in-aviation> accessed 5 November 2023.

2 Dogan Gursoy, Suresh Malodia and Amandeep Dhir, 'The Metaverse in the Hospitality and Tourism Industry: An Overview of Current Trends and Future Research Directions' (2022) 31(5) Journal of Hospitality Marketing & Management 1, doi:10.1080/19368623.2022.2072504.

3 Alden Fernandes and Sunetra Chatterjee, 'Possibilities of Metaverse: The Second Life' (2022) 12(4) International Journal of Engineering and Management Research 79, doi:10.31033/ijemr.12.4.12.

to expand the client base and actively engage customers. More importantly, many of these Metaverse applications are revolutionising the aviation and hospitality industry, transforming how consumers select accommodations and destinations, make bookings and attend concerts, meetings, and conferences. This paradigm shift unfolds through virtual destinations, hotels, and tours. Airlines are also using Metaverse to give customers personalised experiences by allowing them to personalise their travel and access relevant information. It is evident that the Metaverse is slowly becoming an integral part of the aviation industry, augmenting the overall travel and hospitality experiences in multiple ways.

However, as the Metaverse fundamentally changes the aviation industry, many stakeholders are concerned about the legal implications of this technology. In particular, since the technology is new, the legal consequences associated with the Metaverse are complicated and continually developing. Besides the content and technical challenges related to the Metaverse, the regulatory aspects must be addressed. Although the Metaverse is virtual and hence separate from the real world, the actions and activities in the virtual world can significantly affect the real world. At the same time, the Metaverse has an independent economic system to support the virtual world's rules.[4] Nevertheless, legislative obstacles are imminent, particularly regarding who will establish regulations and create the code of conduct and whether the transfer of information, money laundering, and different types of fraud will be sufficiently monitored.

Most of the legal implications of the Metaverse in the aviation industry relate to privacy and security concerns. Despite the extensive studies on virtual world innovations, concerns about privacy and security in the Metaverse have been the subject of few studies. Consequently, security and privacy issues are of the utmost importance in the Metaverse, as they are in social media networks. For example, biometrics, such as facial expressions in real-time, pose grave privacy concerns, and malevolent users can covertly monitor and collect Metaverse users' behaviour data, including purchase actions and interactions. Since the Metaverse operates in a digital environment, cyber security and privacy concerns must be considered for the aviation industry to provide customers with expedient travel services efficiently and securely. Therefore, it is crucial that the aircraft industry's cyber security and privacy protection strategies offer a range of practical countermeasures and solutions to guarantee that its customers and systems are secure against a variety of threats and weaknesses.

4 Jie Huang, Pingjin Sun and Weijie Zhang, 'Analysis of the Future Prospects for the Metaverse' (Proceedings of the 2022 7th International Conference on Financial Innovation and Economic Development (ICFIED 2022), March 2022) 1899, doi:10.2991/aebmr.k.220307.312.

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

2 VIRTUAL STORES AND REALITY

Virtual stores and reality are some approaches corporations use to elevate their Metaverse experience. Virtual stores are online avenues that display merchandise to target consumers.[5] The application's controller may offer live text chats through which buyers interact with an organisation's representative in real time. Virtual reality, on the other hand, entails using special headsets to experience computer-generated simulations of 3D images or environments. Further exploration of these approaches helps to understand how they allow aviation firms to improve their customers' experience.

2.1. Virtual Stores

Airlines and other operators in the aviation sector are developing virtual stores that increase their consumers' experience. An example of an entity that already deploys this approach is London Heathrow Airport (LHR), which collaborated with Chanel and their 'beauty spaceship' – a leading multinational luxury fashion company – to create an environment whereby customers could try their products and selections virtually.[6] In particular, the Airport's management relied on Chanel's beauty spaceship, which gives passengers a unique experience of not having to be physically present in a purchasing store to buy certain goods. The London-based entity invests in this innovation, believing it will appeal to more travellers and strengthen its position globally.

2.2. Virtual Reality

One of the widely applicable technologies is Virtual Reality (VR), which positions corporations in the aviation sector as pioneers in Metaverse utilisation. According to Brownlow, VR refers to a simulated 3D setting that enables users to interact with and explore a virtual environment in a manner that imitates reality.[7] The adoption of VR gains inspiration from the fact that globally, consumers are considering and choosing more travel, hospitality and tourism-related experiences, goods, and services that function according to the principles of the Metaverse.[8] Similarly, operators use the Metaverse to foster air traffic control, permitting controllers to become competent in handling air traffic without jeopardising real-life flights – a sentiment supported by Gursoy et al., who affirm the growing popularity of using virtual reality as a Metaverse in the aviation/tourism industry is gaining popularity.[9]

According to the authors, it is conceivable to program virtual reality to simulate various scenarios and circumstances encountered by trainee personnel, facilitating learning by giving them a sensation of the real-world workplace. Notably, virtual reality's capacity to vividly recreate the airport's complex surroundings, particularly during ground operations

5 Aashish Pahwa, 'What is a Virtual Store? How Does It Work?' (*Feedough*, 12 February 2023) <https://www.feedough.com/what-is-virtual-store> accessed 5 November 2023.
6 Brownlow (n 1).
7 ibid.
8 Gursoy, Malodia and Dhir (n 2) 1-2.
9 ibid 1.

and training, positions it as a crucial Metaverse tool in aviation. Firms also use VR to identify and mitigate possible threats of flying. For operations, maintenance, repairs and overhaul, the engineering department can apply the technology and gain awareness of how to address possible glitches or faults in the aircraft. Regarding safety, the concept can provide the aviation industry with cutting-edge detectors, 3D imaging – formation of a three-dimensional view or image of an object[10] – and current data that staff members can utilise when examining an aircraft.

The preciseness achieved through this technology is of paramount importance. The innovation provides clear and detailed visuals of the vessel, allowing even slight damages to attract the engineering team's attention. Concisely, cutting-edge concepts like VR for training and other organisational-related practices can produce excellent outcomes with considerably fewer resources and time.

Furthermore, virtual tourism has immense potential for airlines that use VR as a Metaverse. Virtual tourism covers a wide area of digitally aided reality, encompassing VR, augmented, and mixed reality.[11] Gursoy et al. claim that the idea can significantly encourage buyers who may have mixed feelings about making reservations.[12] Buying, snapping pictures, and engaging in other fun activities while relaxing in the comfort of one's office or home and then sharing the experience on social networks is becoming increasingly tempting to many individuals. For example, the Japan-based business First Airlines currently provides its customers virtual trips from Tokyo. As a result, First Airlines registers a 100% reservation for its virtual journeys to various and numerous sites worldwide, notably New York City, the Italian city of Rome, the French capital Paris, and Hawaii, among others.

Moreover, airlines are utilising the Metaverse to host virtual conferences and gatherings to increase their clientele and actively involve their clients. More significantly, many of these Metaverse applications are altering the travel and hospitality sectors by changing how consumers select travel locations, hotels, and excursions, as well as how they book tickets for events like meetings, conventions, and performances.[13] Innovators should develop new forms to allow operators to choose from a wide range of options while considering the increasing demand for this application.

Nonetheless, such developments require considerable research and investment, given the intricacy of the technology involved. Collaborative efforts are essential for developers to create similar productions, prioritising collaboration that would make it easier to share key concepts. While innovators may have varying views and desires, the area would significantly improve by changing information and working collaboratively. However, this calls for further assessment and research to increase awareness of how this field works. Persistent production will allow operators in the aviation sector to incorporate better and more advanced forms of Metaverse, ultimately revolutionising their operations.

10 ibid 3.
11 ibid 3.
12 ibid 5.
13 ibid 1-2.

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

3 FIRMS ALREADY DEPLOYING METAVERSE

Various aviation industry firms (see examples in this article) have already been deploying Metaverse, proving how much entities are committed to embracing and using the emerging technology that many expect will revolutionise operations. Those firms that have already adopted the Metaverse and are enjoying the benefits of this technology should motivate others to move in the right direction to create a competitive environment. Otherwise, some companies, already using innovation, are revolutionising their operations, intending to make significant strides. In contrast, others need help with conventional approaches to appealing to buyers and stakeholders.

3.1. Emirates Airlines

Emirates Airlines is an example of a firm already venturing into this challenging area. With its headquarters in Dubai, the airline is now hiring additional cabin crew employees to meet the growing demand for travel.[14] Thanks to the Metaverse, the corporation's in-person training bodies can handle this duty well. The company's Chief Operating Officer (COO), Adel Ahmed Al Redha, stated at an event held in Dubai that this breakthrough would allow crewmembers to receive the appropriate VR training and even participate in realistic-looking simulations of real-life tasks.[15]

Towards the end of 2023, the company expects to have trained at least 3900 additional employees in the Metaverse. The COO stated that the firm currently has thousands of cabin attendants in training, but by the second quarter of next year, it intends to increase this number. Al Redha, the COO, added that whether it is the cuisine the group serves or how it interacts with customers, the team aspires to improve onboard services continuously. With this technology, the COO repeated, the business could provide its workforce with the necessary instruction effectively and precisely. The company anticipates that the Metaverse lessons will enhance the practical training situations involving medical emergencies and rescue simulations.

The COO explained that the technology protects the company's relationship with younger customers and encourages the training processes. He emphasised the importance of cultivating a suitable environment for youthful travellers and recognising how consumers in their 30s engage with one another because, ultimately, they are the industry's future.[16] As one of the leading operators throwing themselves into this emerging idea, the airline is exploring other applications for the technology, namely the removal of intermediaries ("middleman"). The COO claims the elimination will improve training procedures, business operations, sales, and the general shopping experience. We support the leader's argument because incorporating intermediaries often require additional financial

14 Jess Brownlow, 'How Emirates is Capitalising on the Metaverse' (*World Aviation Festival*, 19 October 2022) <https://worldaviationfestival.com/blog/airlines/how-emirates-is-capitalising-on-the-metaverse> accessed 5 November 2023.

15 ibid.

16 ibid.

resources and an in-depth assessment of the situation to ensure everything runs as expected. The company also intends to provide Non-fungible Tokens (NFTs) – unalterable digital proof of ownership and authenticity of a particular asset[17] – and traveller-specific Metaverse experiences, including the ability to select terminals, sitting positions, resorts, and shops across the Metaverse. These endeavours suggest Emirates' significant investments in this area and its dedicated commitment to further exploring and advancing the technology to elevate its practices.

In addition to elevating the training procedures, Emirates hopes that venturing into this technology presents a suitable opportunity to extend its leading experiences for workers and buyers into the newly emerging digital spaces. The airline that enjoys the reputation of an influential operator announced in April 2022 plans to formulate signature brand encounters in the Metaverse and utility-based and collectable NFTs.[18] The initial projects are ongoing, with a launch expected in the coming months. The company also informed that its Emirates Pavilion at the Expo 2020 station would change into a site for innovation, introducing talent from all over the world to bring to life the company's future initiatives, including those relating to Web3, which refers to a series of interlinked decentralised applications functioning based on the principles of blockchain computing, NFTs, and Metaverse. The firm's Chairman and Chief Executive, Sheikh Ahmed bin Saeed Al Maktoum, reported that Dubai and the UAE are leading the path in the digital economy, having a focused intention backed up by practical directives and regulatory structures in areas such as data protection, artificial intelligence, and virtual space.[19] In addition, the Chairman reported that the company has always adopted enhanced technologies to elevate its business practices, improve consumer offerings, and elevate staff members' experiences and skills.

3.2. Qatar Airways

Another airline that has made significant strides towards incorporating Metaverse is Qatar Airways. The business introduced a fully immersive environment for customers to try out various services and goods before they go on a trip. The business is considering using virtual cabin staff to deliver a dynamic, digital customer experience.[20] With the aid of a 3D virtual production, which shows the distinctive elements in the cabins while sticking to a predesigned code, passengers can virtually navigate the executive facilities and centres at the airport and traverse the cabin interior, as well as the high-end suits and economy-class seats in the plane. The enterprise first investigated its ambitions before creating the foundation for its interactive services. The firm subsequently implemented a value-driven

17 ibid.

18 'Emirates to Launch NFTs and Experiences in the Metaverse' (*Emirates*, 14 April 2023) <https://www.emirates.com/media-centre/emirates-to-launch-nfts-and-experiences-in-the-metaverse/> accessed 5 November 2023.

19 ibid.

20 'How Qatar Airways is Transforming Air Travel with the QVerse' (*Fast Company*, 6 July 2023) <https://www.fastcompany.com/90905905/how-qatar-airways-is-transforming-air-travel-with-the-qverse> accessed 5 November 2023.

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

and platform-neutral strategy, such as absorbing technologies that influential firms use.[21] To attain precision, the formation procedure required that all elements be photographed and transformed into 3D. The agency also examined construction blueprints for lobbies and layouts of aircraft compartments to ensure high levels of realism for each component and atmosphere. The developments at Qatar Airways show how much Metaverse continues to receive support from multiple operators in the aviation and airline sectors.

Thierry Antinori, the Chief Commercial Officer of Qatar Airways, underlined that the company employs Epic Games' Unreal Engine, which it regards as the most cutting-edge 3D creation apparatus obtainable for creating immersive VR experiences and optimising landscapes for the Internet. The Chief Commercial Officer (CCO) and the supporting team believe focusing on this area will bring experience to life. The company used a cloud-based innovation that procedures intricate smart creations, enabling the virtual helper's manufacturing.[22] The organisation considers its consumer and cabin crew experience a vital component of its success, and through 'Sama', its virtual assistance, it anticipates demonstrating how its cabin crew helps buyers throughout their journey. Antinori reinstated that the company was inspired to form an all-around digital form that embodies the cabin crew's attitudes and values towards travellers. According to the administrator, the business plans for innovation will be fully AI-projected into the near future, capable of answering questions and providing help. Besides, the company aspires to achieve vertical value in addition to what it provides and permits consumers to have augmented and virtual experiences. According to a statement by the company's Chief Executive Officer (CEO), Qatar Airways acknowledges that forming VR content is problematic and that the real test lies in developing services and ideas that expand consumers' digital understanding and elevate sales via a highly inclusive VR illustration.[23] Nonetheless, it is committed to excelling in this area, hoping that focusing on it will have lucrative outcomes.

3.3. Etihad Airways

Etihad Airways, the national airline of the UAE and one of the nation's two leading airways together with Emirates, increasingly pay attention to enhancing its use of Metaverse to increase operations and consumer experience. The business, in particular, introduces VR to the actual airport, enabling terminal customers to communicate and amuse themselves with specially designed headgear prior to departure. In addition, Etihad introduced an NFT collection known as EY-ZERO01, which is the initial utility-powered NFT collection by a carrier featuring various intricate 3D aircraft models.[24] It includes NFTs of the Boeing 787 Dreamliner operated by Etihad Airways with intricate 3D aircraft designs. Each NFT bearer gets a momentary registration to the Etihad Guest stage, and only some of them may be eligible to win free trips. The membership guarantees early reach for the company's future Metaverse experiences and NFT collections. Etihad's CEO informed us that the company

21 ibid.
22 ibid.
23 ibid.
24 Valeria Goncharenko, 'Etihad Airways Issues NFTs' (*Metaverse Post*, 22 July 2022) <https://mpost.io/etihad-airways-issues-nfts> accessed 5 November 2023.

is enthusiastic about announcing its original NFTs, which make them available for consumers and other key stakeholders to experience the distinctive artistic creations and offer lifestyle reimbursements and trips with the company. The NFTs and other Metaverse innovations are changing the digital economy. Staff members are happy to be one of the initial airlines globally to explore its capacity to offer additional utility to consumers.[25] Etihad's commitment to improving its application of Metaverse confirms the innovation has a significant impact on their aviation sector and that it is set to become more applicable in the future.

3.4. Other Companies

Outside the UAE and the Gulf region, other aviation companies have made significant strides toward incorporating the idea. For instance, Boeing is actively working on creating digital imitations of aircraft to enhance tests and simulations.[26] This approach allows new crew members to familiarise themselves with an aircraft's amenities without the need to physically enter one. In addition, the company aspires to design planes in the Metaverse, aiming to alter its design and production processes by incorporating aspects of the Metaverse. The corporation is set to transform within the next two years, involving a fully integrated electronic data environment and more dependence on automation.[27] In the next ten years, the corporation plans to invest USD 15 billion in digital improvement.[28] Greg Hyslop, Boeing's Chief Engineer, believes the enacted approaches will improve communication and quality.[29] The employees and others behind the program are confident the change will elevate financial performance when the group starts doing things differently. Another company that has made substantial strides in this area is Singapore Airlines. The organisation collaborates with like-minded establishments, such as the Agency for Science, Technology and Research and the Civil Aviation Authority of Singapore (CAAS), to foster digital transformation.[30] The national carrier hopes that such cooperation, created under its 'Digital Innovation Blueprint', which is a component of the company's continuous transformation plan and a vital aspect that boosts its digital capabilities, will enable it to cope with the escalating industry rivalry, which subjects it to considerable financial losses. Some of the collaborations under this new framework encompass using the Internet of Things, which describes a series of physical components

25 ibid.

26 'Utilization of Metaverse in the Aviation Industry' (*Antier Solution*, 10 October 2022) <https://www.antiersolutions.com/utilization-of-Metaverse-in-the-aviation-industry> accessed 5 November 2023.

27 ibid.

28 'Boeing Wants to Build Its Next Airplane in the "Metaverse"' (*Civil Aviation Authority*, 27 December 2021) <https://caa.gov.qa/en/news/boeing-wants-build-its-next-airplane-metaverse> accessed 5 November 2023.

29 ibid.

30 Shawn Lim, 'Singapore Airlines Embarks on Digital Transformation Drive as it Seeks to Remain a Preferred Choice' (*The Drum*, 29 January 2018) <https://www.thedrum.com/news/2018/01/29/singapore-airlines-embarks-digital-transformation-drive-it-seeks-remain-preferred> accessed 5 November 2023.

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

with software, sensors, and other forms to link and exchange information with other apparatuses and systems over the Internet.[31] Other applications include augmented reality, VR, and data analytics that assist Singapore Airlines in determining when essential parts of aircraft need fixing or replacement. Adopting the technology by such influential operators in the airline sector shows that the idea is quickly gaining prominence, and firms must turn their attention to this area if they wish to become influential in the industry and defend their positions.

4 APPLYING THE DIFFUSION OF INNOVATIONS THEORY

Many questions are raised about these new activities and challenges. First, how these different companies apply Metaverse to elevate their operations illustrates how the diffusion of innovations theory works. The concept outlines how new ideas spread among groups of people and cultures.[32] The way innovations move to various sectors of society and the subjective views relating to these developments facilitate the speed with which the dissemination happens. The model applies when firms create a new marketing plan for increasing market share and developing new services and products. The leading players in this framework are innovators, first adopters, early and late majorities, and those who come much later, typically known as laggards. Hence, for Metaverse, individuals and firms responsible for its production embody the innovators, while those who have already deployed this application are categorised as adopters. Laggards, on the other hand, comprise organisations yet to use this technology to elevate their operations and provide customers with a distinctive experience.[33] Often, firms or other users will embrace a particular innovation when it is apparent its use will have positive implications.

Companies, including those already using Metaverse and those yet to embrace this idea, will likely use it and record satisfying results by understanding the key provisions of the diffusion of innovations theory.

5 STRENGTHS AND LIMITATIONS OF APPLICATION

The concept is an exciting and promising innovation, but it has its hitches like any other emerging technology. While the Metaverse can change how people engage with digital technology, it is still in the early phases of development. Operators must get through a number of ethical, societal, and technological obstacles before it becomes possible. Knowing the strengths and weaknesses of using Metaverse would allow users in the aviation sector to take decisive measures when considering implementing its components.

31 ibid.

32 Michael Frank, MJ Jadick, Cynthia Minnick and Roger Williams, 'Diffusion of Innovation Theory' (*The University of Oklahama*, nd) <https://www.ou.edu/deptcomm/dodjcc/groups/99A2/theories.htm> accessed 5 November 2023.

33 ibid.

5.1. Strengths

Using Metaverse to elevate practices in the aviation sector has several strengths that are most beneficial to users. These strengths are the main reason why operators in the aviation sector are fast embracing the idea. However, implementers may find new benefits when they continue using the innovation.

5.1.1. New Idea

One notable strength of this technology is that it can change the Internet by providing a more interactive online experience beyond conventional browsing and travelling. Monaco and Sacchi refer to the Metaverse as a new form of engaging with reality, whether real, mixed, virtual, or augmented.[34] Consequently, people can indulge in various digital encounters such as gaming, social interactions, aviation, and non-aviation-related commerce.

5.1.2. Upkeep and Repairs

Using virtual visualisations and simulations by engineers to solve and identify problems streamlines the process of performing aircraft upkeep and repairs. Machine learning-based systems are slowly eradicating manual labour, which allows for better and more efficient maintenance practices.[35] Additionally, the technology enables real-time surveillance of planes, staff, and belongings. This improves airline and airport services. The approach improves the entire client experience by reducing downtime and increasing efficiency. Therefore, the strength should compel more operators to embrace the idea.

5.1.3. Advertising and Promotions

Airlines may reach out to international consumers appealingly and creatively thanks to the Metaverse, an innovative vehicle for advertising and promotion. To reach new customers, the strategy comprises cooperating with other Metaverse businesses to create virtual experiences.[36] The Metaverse may open up new avenues for airlines to make money through endorsements, virtual advertisements, and the selling of online goods and services. More airlines think this merit offers corporations a better chance to strengthen their global market position.

34 Salvatore Monaco and Giovanna Sacchi, 'Travelling the Metaverse: Potential Benefits and the Main Challenges for Tourism Sectors and Research Applications' (2023) 15(4) Sustainability 3348, doi:10.3390/su15043348.

35 Yirui Jiang, Trung Hieu Tran and Leon Williams, 'Machine Learning and Mixed Reality for Smart Aviation: Applications and Challenges' (2023) 111 Journal of Air Transport Management doi:10.1016/j.jairtraman.2023.102437.

36 Monaco and Sacchi (n 34).

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

5.1.4. Traveller Experience

Airlines use the Metaverse to improve the travelling experience for customers by letting them virtually tour the airport, their aircraft, final places of interest, and forthcoming trips. The concept offers travellers a chance to go beyond physical environments without moving physically.[37] Technology in aviation can also help airlines stand out from the competition and improve client happiness. The continued application will permit aviation firms to develop more practices that strengthen passenger experience. The more firms take measures to improve the traveller experience, they increase their chances of being appealing, which directly influences revenue production and competitiveness. Nonetheless, finding out from passengers how and what they would want the company to introduce or do to provide a customised experience will enrich the process. While the initiative requires users to know how virtual and augmented reality work, the ultimate effect will enhance organisational design and, prototyping and virtual training practices.[38] Such plans might only excel through proper planning and dedication. Thus, the management should assess the situation before embarking on the initiative to avoid unwanted implications.

5.1.5. Internet-Based Training

VR for pilots and, similarly, air traffic control officers (ATCO) training is one potential Metaverse use for aviation. These simulators can provide cockpit crew (pilots) an affordable and secure opportunity to practice crucial abilities, including emergency (such as evacuation) procedures.[39] Similarly, the technology presents a chance to improve air traffic control, permitting supervisors to advance their skills in handling air traffic without flying a real aircraft.[40] The intervention could increase efficiency and safety by acquainting pilots with new airports and aircraft architectures.

5.1.6. Online Meetings

Aviation firms can save valuable time and lessen the need for physical travel by enabling online communications between flight attendants and ground staff via the Metaverse. The aviation sector can use innovation through online discussions and trade demonstrations, allowing professionals to link and share concepts and abilities without travelling. The method can expand accessibility to events for individuals unable to travel and lessen the environmental damage (carbon footprint) caused by flying.[41] Carriers should welcome technology if they want to host online meetings.

37 ibid.

38 'Metaverse Aviation: How Aviation Industry Can Use the Potential of Metaverse?' (*Shamla Tech Solution*, 20 February 2023) <https://shamlatech.com/Metaverse-aviation> accessed 5 November 2023.

39 ibid, 2 virtual training.

40 Monaco and Sacchi (n 34).

41 Metaverse Aviation (n 38) 3 virtual conferences.

5.1.7. Design and Prototyping

By creating 3D models for their designs and simulating different situations, aircraft designers can test the performance and structure of their creations. The idea may offer an opportunity to spot possible drawbacks at the beginning of the design process, leading to more economically and productively produced goods.[42] It allows architects and engineers worldwide to collaborate and communicate in real time while working together virtually. The technique can speed up the design procedure and reduce the desire to travel, thus saving time and funds. Additionally, it inspires many incidents related to the manufacture of aircraft, providing personnel with an immersive and engaging learning environment. Further, this could advance their knowledge and abilities, leading to effective production processes.

5.2. Limitations

While the Metaverse use has its strengths, operators must watch out for limitations that could influence its effects on an organisation. The primary concern is the need for more structures to encourage its use. Therefore, users must be familiar with the following challenges to formulate practical working guidelines.

5.2.1. Absence of Standards

Nonetheless, the idea has several limitations that require considerable attention from users and other stakeholders. A considerable challenge is the absence of standards, which Monaco and Sacchi consider a barrier for the Metaverse sector. There are yet to become universal principles for creating and operating virtual worlds within the concept. The gap implies that diverse platforms and creators may use different procedures, tools, and technologies to form virtual experiences.[43] Consequently, it can be hard for users to develop immersive experiences that function across diverse avenues and for organisations to navigate between them flawlessly. This absence of standardisation also generates constraints for collaboration and interoperability within the Metaverse. Virtual platforms and environments might be able to connect and communicate with one another successfully with the use of a shared set of procedures and terminology. The possibility of creating common experiences and generating a unified Metaverse ecosystem may fail to perform well due to susceptibility. To address the lack of laws, industry parties like standards bodies, aircraft companies, and designers must coordinate and collaborate. It will be necessary to develop and implement standardised guidelines for building and managing virtual worlds within the Metaverse to realise the full potential of this emerging sector. Currently, some territories have regulations that define how companies safeguard personal data. For instance, in Australia, the Privacy Act (1998) and the Privacy Act Review (2020)

42 Monaco and Sacchi (n 34).

43 Khushboo Goyal, 'Challenges Businesses and Users Face in Adopting the Metavers' (*Coforge*, 25 April 2023) <https://www.coforge.com/blog/challenges-businesses-and-users-face-in-adopting-the-Metaverse> accessed 5 November 2023.

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

regulate firms' handling of personal information. The Privacy Act (1988) particularly pushes for stiffer penalties for those who violate the law.[44] Such limits show that businesses are making significant progress in limiting the breach of individual rights. However, none of these legal frameworks makes direct reference to the Metaverse.

Developing standards that guide operations in this field would require developers to consider specific essential components during the process. In particular, it is a good idea to consider how the law might mitigate tort-related lawsuits by users against other users and groups encompassing users against Augmented Reality (AR) and Virtual Reality (VR) environment handlers and outsiders against users.[45] Moreover, the developers of such standards should consider how the regulations would treat or perceive changes in other users' avatars or the development of their avatars that imitate another entity or person's likeness or name. Furthermore, the creators of such directives should consider how such creations might handle the likely pervasive storage and handling of all the sensory data that AR and VR components provide to their users. Considering such vital factors would allow room for creating applicable legal components.

5.2.2. Cost and Technical Hurdles

Businesses that embrace the Metaverse often run into financial and technological barriers. It can be costly and complex to produce immersive virtual interactions. Operators and stakeholders in the aviation sector may need to take advantage of vital machinery to form virtual environments that can sustain considerable numbers of users and give surety on a high measure of engagement.[46] Businesses, especially developing companies with limited resources, may face difficulties due to the technical expertise needed to create and manage virtual environments within the Metaverse. Developing expertise in game development, coding, and 3D modelling may be necessary, which can be difficult and expensive. The need to stay up-to-date with new trends and technology is another factor that contributes to the elevated expenses and technical obstacles. Companies wishing to remain viable in this industry might have to invest in ongoing research and development, which can be expensive and lengthy. To overcome these obstacles, organisations may consider collaborating with technology vendors, designers, and other key players in the Metaverse context. Such ways of working together make it possible to reach needed assets, structure, and proficient personnel that may not be easy for operators in the aviation sector to obtain when functioning without engaging others.[47] Additionally, as opposed to creating their online encounters from the start, airlines and other aviation industry operators might think about utilising the channels and resources that already exist. The technique can reduce expenses and technical obstacles while enabling executioners to use the Metaverse's benefits.

44 'Review of the Privacy Act 1988' (*Australian Government*, 16 February 2023) <https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988> accessed 5 November 2023.

45 Mark A Lemley and Eugene Volokh, 'Law, Virtual Reality, and Augmented Reality' (2018) 166 (5) University of Pennsylvania Law Review 1052.

46 Metaverse Aviation (n 38).

47 ibid.

5.2.3. Limited Use Cases

Many players in the aviation sector may be unaware of what Metaverse can do and how it influences business and consumer experiences. Considering the concept is still new, there are not many real-world applications that businesses may use to understand the innovation's capabilities. In particular, some companies lack the mechanisms to incorporate Metaverse in their operations due to a lack of resources and skill, illustrating how the technology is yet to become rampant. The impediment can make it hard for air carriers to determine how the idea can enrich their operations or sector.[48] Operators and aviation stakeholders must take the time to learn about the technology and understand its potential to deal with this obstacle. The approach may entail working with experts in Metaverse formation, participating in industry events, and learning from case studies from corporations that may have already adopted the technology and made significant strides in implementation. In addition, Metaverse may not be appropriate for all sectors, making it difficult for aviation operators to gain information and skills from other fields. A suitable way to mitigate this challenge is to carefully evaluate a firm's operations and find how the technology can benefit their sector or relevant use cases. Finding testimonials from companies in connected industries, working with Metaverse development professionals, and conducting market research are all possible components.

5.2.4. Limited Access

Access to technology can substantially hinder adopting and implementing a Metaverse in aviation operations. The concept needs high-end software, hardware, and networking skills, encompassing fast-functioning computers, reliable Internet connections, and superior virtual reality machinery.[49] Corporations that cannot access this concept may need help incorporating the idea into their activities. For instance, commercial airlines operating in less developed or interior places may have constrained access to reliable Internet, making it problematic to get and use the Metaverse. Similarly, enterprises with fewer assets could need to invest additional funds in the systems required to employ the technology. Airlines and other aviation sector operators can successfully lower the barrier by allocating adequate cash for infrastructure and technology improvements or by developing partnerships with service and technology vendors to assist them in acquiring the needed resources. Promoting innovation access and developing the skills required to support the commercialisation of new ideas are both tasks that the government and other organisations may help with. Therefore, operators in the aviation industry wishing to use the technology to elevate their practices and consumer experience must identify possible barriers to access and develop effective remedies.

48 ibid.
49 ibid.

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

6 LEGAL ASPECTS

While different organisations in the aviation industry are increasingly embracing virtual reality applications to improve activities and obtain an edge over their competitors, there needs to be more regulatory standards to guide the use of this invention. Since companies gather identifiable information from customers while employing Metaverse, it is critical to follow laws requiring groups to respect confidentiality when dealing with sensitive information. Executioners must recognise and be acquainted with the relevant laws in the countries where they operate. They must also conform to all requirements to prevent legal ramifications that might damage or interfere with company procedures.

Additional proof indicates that the virtual reality world, including the Metaverse, is rapidly evolving. However, adequate laws regulating the privacy of data and cyber security still need revision. The difficulties with maintaining privacy and stored data in the Metaverse relate to the volatility of figuring out the precise spot of an avatar during the transfer of data and analysis based on the physical vicinity of the person managing the Metaverse structure or devices, such as the digital personality or its location.[50] As an outcome, establishing the jurisdiction for various Metaverse uses can be time-consuming, posing significant legal problems. Such issues frustrate the aviation industry's worldwide endeavours to regulate this innovation. Therefore, supervision is necessary to handle the Metaverse, guarantee security throughout the virtual world, and establish suitable legal structures.

Businesses could profit more if there were thorough legal regulations regulating virtual reality technological advances. No established regulations currently limit how firms can use this breakthrough technology. Corporations may exploit the weakness to set restrictions and regulate their application. The present regulations only define how businesses should protect their customers' information when utilising discoveries requiring the acquisition of personal data. The General Data Protection Regulation (GDPR),[51] in particular, acts as an essential component of security and privacy law, expressing People's fundamental freedoms in today's world of technology while also establishing the accountability of those accountable for confidential information analysis.[52] Furthermore, the rule outlines how to attain conformity and penalises both businesses and people who violate regulations.

Other jurisdictions' laws demand companies to handle data gathering effectively to meet present requirements. The California Consumer Protection Act (CCPA)[53] protects customers' rights to privacy and allows all residents to understand how businesses employ

50 Goyal (n 43).

51 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119.

52 What is GDPR, the EU's New Data Protection Law?' (*GDPR.EU*, 2023) <https://gdpr.eu/what-is-gdpr/> accessed 5 November 2023.

53 California Consumer Privacy Act of 2018 (CCPA) [1798.100 - 1798.199.100] (Title 1.81.5 added by Stats 2018, ch 55, sec 3) <https://oag.ca.gov/privacy/ccpa> accessed 5 November 2023.

their data.[54] The Personal Information Protection Law (PIPL)[55] of the People's Republic of China seeks to regulate how businesses keep and use information about individuals, such as classification and international data transfer. The Personal Data Protection Law (PDPL) was implemented in Saudi Arabia (2021) and was later modified in March 2023 to comply more with international data protection standards, such as the European Union's GDPR.[56] In the European Union legislation, the Brussels I Regulation[57] safeguards e-commerce consumers – at a very high level – regarding recognition and enforcement of foreign judgement in conflict of laws and protects them against misappropriation of personal data.[58] Many stakeholders feel the newly enacted EU AI Act[59] will protect businesses from unintended consequences when using Metaverse. The directive provides guidelines for using applications that utilise AI but does not mention the Metaverse. Whereas the framework could serve as a comprehensive direction, it is still under thorough analysis to see if it will become fully applicable. Businesses must still be aware of the rules that regulate their interactions with artificial intelligence-driven platforms such as Metaverse. Consequently, more effort is required to avoid unwanted outcomes because a lack of specific requirements leads to data security concerns such as phishing and ransomware attacks.

Failure to comply with existing directives is a serious crime, and organisations that fail to pay particular attention to this matter will probably face legal consequences. Multiple businesses have had to go through lengthy legal procedures for failing to follow ordinances that establish how they ought to handle customer details when dealing with large amounts of data. Such organisations typically pay a fine and have their reputations harmed. In one instance, British Airways paid approximately USD 230 million following a directive by regulators in England for infringing on private data.[60] The largest fine ever levied on an organisation for violating privacy rights shows the level of importance with which privacy

54 Stuart L Pardau, 'The California Consumer Privacy Act: Towards a European-style Privacy Regime in the United States?' (2018) 23(1) Journal of Technology Law & Policy 68.

55 Law of the People's Republic of China 'Personal Information Protection (PIPL)' of 20 August 2021 <www.personalinformationprotectionlaw.com> accessed 5 November 2023. The official text of the Law is only available in Chinese.

56 Personal Data Protection Law (PDPL) <https://www.dataguidance.com/jurisdiction/saudi-arabia> accessed 5 November 2023. Saudi Arabia's Law implemented by Royal Decree M/19 of 9/2/1443H (16 September 2021) approving Resolution No. 98 dated 7/2/1443H (14 September 2021).

57 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] *OJ L 351*.

58 See, the Articles 17-19 (jurisdictions) and Article 45 (1) (e). Zlatan Meskic, Mohamad Albakjaji, Enis Omerovic and Hussein Alhussein, 'Transnational Consumer Protection in E-Commerce: Lessons Learned From the European Union and the United States' (2022) 13(1) International Journal of Service Science Management Engineering and Technology 4, doi:10.4018/IJSSMET.299972.

59 'EU AI Act: First Regulation on Artificial Intelligence' (*European Parliament News*, 14 June 2023) <https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence> accessed 5 November 2023.

60 Adam Satariano, 'After a Data Breach, British Airways Faces a Record Fine' *The New York Times* (New York, 8 July 2019) <https://www.nytimes.com/2019/07/08/business/british-airways-data-breach-fine.html> accessed 5 November 2023.

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

entitlements deserve protection. The firm gained notoriety after permitting unauthorised individuals to misappropriate passengers' data to limit flow to the airline's official website. The fraudulent transaction exposed important details such as airline reservations, information about credit cards, usernames, and passwords.[61] While the incident does not resemble Metaverse, it serves as an appropriate cautionary incident of the dangers of not safeguarding the data used to create online experiences. Thus, users must create protections that safeguard private data from getting into the hands of unapproved individuals to avert legal ramifications.

A suitable way to enhance processes in this field is for lawmakers and professionals to collaborate and create rules that establish how technological innovation operates to streamline organisational undertakings and customer service. Identifying organisations that have made major advances in this area and finding techniques to exchange needed concepts is a suitable strategy. Furthermore, involving specialists in this domain will yield helpful ideas that will change how players in the aviation sector employ Metaverse to improve the customer experience. Investing significantly in this particular area will close the legal gap in Metaverse usage. Nonetheless, not succeeding in focusing on this facet could end up in some service providers using Metaverse in a way that violates the right to privacy, potentially leading to legal repercussions.

7 CONCLUSION

Various factors make this new area worth exploring. A considerable aspect is that it familiarises aviation industry actors with a technology that can revolutionise the sector. Today, for example, Monaco and Sacchi argue that being able to deploy cutting-edge technology determines how a business remains competitive.[62] Therefore, elaborating on how the Metaverse functions and highlighting its strong and weak elements allows establishments to make wise decisions. Another significance of this topic is how it creates an impression of how innovations change rapidly, requiring flexible entities. Being able to adjust so fast depicts an enterprise as being committed to meeting consumers' changing needs and having the capability to triumph over industry rivals. Therefore, more researchers should conduct additional studies on this topic and develop ideas to elevate aviation firms' experience deploying this technology.

Undoubtedly, the carriers and aviation stakeholders should improve the consumer experience through Metaverse. Assessing their capacity to install the feature into their operations is the initial step, as overlooking this aspect may lead to unpredicted effects that could harm implementation. Hence, in addition to acquiring needed resources to facilitate implementation, it is imperative to seek information from different sources on how this idea works and the easiest ways to record positive outcomes. Moreover, looking into the strong and weak aspects of this technology enables firms to determine whether to proceed

61 Metaverse Aviation (n 38).
62 Monaco and Sacchi (n 34).

with execution or not. More fundamentally, it is recommended that organisations have a distinct body to oversee the implementation and assessment of Metaverse and give suggestions on what must happen to improve. However, disregarding these vital considerations could derail how an establishment installs, manages, and benefits from this technology.

In summary, the Metaverse transforms the operational landscape of aviation companies, emphasising the need for users to understand its strengths and weaknesses. The technology's capacity to provide virtual experiences to customers compels firms to incorporate various applications such as virtual stores and virtual reality, with leading airlines such as Emirates Airlines, Qatar Airways, and Etihad Airways in the Gulf region and establishments encompassing Boeing and Singapore Airlines in other regions already making significant strides. Implementing this concept by leading airlines is adequate proof that the Metaverse is fast gaining eminence, and operators must focus on this development if they desire to defend their position. Increased use of this idea illustrates the main idea behind the diffusion of innovations theory, which explains how new technology becomes widely applicable. More enterprises will adopt this innovation when considering its benefits, such as its novelty, enhanced aircraft upkeep and repairs, increased marketing capability, better traveller experience, improved online experiences, and developed designing and prototyping capabilities.

However, potential threats, including a lack of regulatory guidelines, high operational costs, and limited installations and access, should not deter further exploration of the Metaverse. Corporations are encouraged to continuously learn about the technology, implement appropriate mechanisms for successful deployment, enact proper mechanisms to achieve successful implementation and consider potential legal ramifications for not adhering to existing frameworks. Policymakers play a crucial role in formulating specific guidelines to regulate the implementation of the Metaverse in the aviation industry.

REFERENCES

1. Brownlow J, 'How Emirates is Capitalising on the Metaverse' (*World Aviation Festival*, 19 October 2022) <https://worldaviationfestival.com/blog/airlines/how-emirates-is-capitalising-on-the-metaverse> accessed 5 November 2023.
2. Brownlow J, 'How is the Metaverse Being Used in Aviation?' (*World Aviation Festival*, 27 September 2022) <https://worldaviationfestival.com/blog/airlines/how-is-the-Metaverse-being-used-in-aviation> accessed 5 November 2023.
3. Fernandes A and Chatterjee S, 'Possibilities of Metaverse: The Second Life' (2022) 12(4) International Journal of Engineering and Management Research 79, doi:10.31033/ijemr.12.4.12.
4. Frank M and others, 'Diffusion of Innovation Theory' (*The University of Oklahoma*, nd) <https://www.ou.edu/deptcomm/dodjcc/groups/99A2/theories.htm> accessed 5 November 2023.

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

5. Goncharenko V, 'Etihad Airways Issues NFTs' (*Metaverse Post*, 22 July 2022) <https://mpost.io/etihad-airways-issues-nfts> accessed 5 November 2023.

6. Goyal K, 'Challenges Businesses and Users Face in Adopting the Metavers' (*Coforge*, 25 April 2023) <https://www.coforge.com/blog/challenges-businesses-and-users-face-in-adopting-the-Metaverse > accessed 5 November 2023.

7. Gursoy D, Malodia S and Dhir A, 'The Metaverse in the Hospitality and Tourism Industry: An Overview of Current Trends and Future Research Directions' (2022) 31(5) Journal of Hospitality Marketing & Management 1, doi:10.1080/19368623.2022.2072504.

8. Huang J, Sun P and Zhang W, 'Analysis of the Future Prospects for the Metaverse' (Proceedings of the 2022 7th International Conference on Financial Innovation and Economic Development (ICFIED 2022), March 2022) 1899, doi:10.2991/aebmr.k.220307.312.

9. Jiang Y, Tran TH and Williams L, 'Machine Learning and Mixed Reality for Smart Aviation: Applications and Challenges' (2023) 111 Journal of Air Transport Management 1, doi:10.1016/j.jairtraman.2023.102437.

10. Lemley MA and Volokh E, 'Law, Virtual Reality, and Augmented Reality' (2018) 166 (5) University of Pennsylvania Law Review 1051.

11. Lim S, 'Singapore Airlines Embarks on Digital Transformation Drive as it Seeks to Remain a Preferred Choice' (*The Drum*, 29 January 2018) <https://www.thedrum.com/news/2018/01/29/singapore-airlines-embarks-digital-transformation-drive-it-seeks-remain-preferred> accessed 5 November 2023.

12. Meskic Z and others, 'Transnational Consumer Protection in E-Commerce: Lessons Learned From the European Union and the United States' (2022) 13(1) International Journal of Service Science Management Engineering and Technology 1, doi:10.4018/IJSSMET.299972.

13. Monaco S and Sacchi G, 'Travelling the Metaverse: Potential Benefits and the Main Challenges for Tourism Sectors and Research Applications' (2023) 15(4) Sustainability 3348, doi:10.3390/su15043348.

14. Pahwa A, 'What is a Virtual Store? How Does It Work?' (*Feedough*, 12 February 2023) <https://www.feedough.com/what-is-virtual-store> accessed 5 November 2023.

15. Pardau SL, 'The California Consumer Privacy Act: Towards a European-style Privacy Regime in the United States?' (2018) 23(1) Journal of Technology Law & Policy 68.

16. Satariano A, 'After a Data Breach, British Airways Faces a Record Fine' *The New York Times* (New York, 8 July 2019) <https://www.nytimes.com/2019/07/08/business/british-airways-data-breach-fine.html> accessed 5 November 2023.

AUTHORS INFORMATION

Meera Abdulla Alshamsi*
LL.M. (Law), University of Sharjah, College of Law, Sharjah, United Arab Emirates
u21106281@sharjah.ac.ae
https://orcid.org/0009-0006-9978-5988
Corresponding author, responsible for writing and research.

Attila Sipos
PhD (Law), University of Sharjah, College of Law, Sharjah, United Arab Emirates
asipos@sharjah.ac.ae
https://orcid.org/0000-0002-8518-0826
Co-author, responsible for writing and research.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that the opinions and views expressed in this manuscript are independent of any influence from organisations.

ABOUT THIS ARTICLE

Cite this article
Alshamsi M and Sipos A, 'The Legal Implications of the Aviation Industry's Entrance to the Metaverse' (2024) 7(1) Access to Justice in Eastern Europe 285-306 <https://doi.org/10.33327/AJEE-18-7.1-a000111>

Submitted on 13 Oct 2023 / Revised 28 Nov 2023 / Approved 01 Dec 2023
Published Online 17 Jan 2024 / Last Published 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000111

Managing editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Keywords: *Metaverse, data security, data privacy, AI technology, legal protection.*

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

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

COVID-19 PANDEMIC IN THE ARAB COUNTRIES: CASE OF MOROCCO

Cherif Elhilali*

ABSTRACT

Background: *The research aims to highlight the effectiveness of public financial policy in Morocco, an Arab country, during the COVID-19 pandemic, focusing on the extent of its contribution to reducing the repercussions, including financial, economic and social aspects. Additionally, it seeks to determine the extent to which this policy will contribute to coping with the effects of the post-epidemic.*

Methods: *This article was based on the analytical descriptive approach to study the budgetary policy adopted by the government during this crisis, analysing national and international references, studies and reports to develop results and recommendations related to the extent of the success of this policy in limiting the effects of the health crisis.*

Results and Conclusions: *The study came to conclusions and recommendations which are manifested in the fact that while the State's financial policy has contributed to limiting the repercussions of the COVID-19 pandemic by mitigating its impact on the finances of large balances and businesses and the vast majority of citizens, it has not completely limited its negative effects on all economic sectors, low-income citizens and private sector workers. This underscores the State's need to take other more effective measures to emerge from the crisis with minimal damage and effectively face post-pandemic challenges at all levels.*

1 INTRODUCTION

Since the beginning of 2020, the world has been facing the most severe crisis that humanity has known since the 1940s, linked to the COVID-19 pandemic, also known as Coronavirus. The rapid spread of this virus and the unwillingness of countries, including developed countries, to confront it have led to significant repercussions and raised multiple problems of a financial, economic, and social nature.

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

While these problems are not new, especially in most Arab countries, they are quite different in exceptional circumstances. The virus's rapid spread has led these countries to take exceptional decisions and measures to deal with the crisis.[1] The Kingdom of Morocco, like other Arab countries, faced COVID-19 with its capacities, taking a set of measures to mitigate the repercussions of the epidemic at all levels, including financial, economic and social.[2] These measures had a dual focus: firstly, to mitigate the impact of the pandemic on public finances, the major balances and companies; and secondly, to reduce its repercussions on broad categories of citizens, especially those in a situation of vulnerability, such as the unemployed, families working in the informal sector and the elderly, among others.

Thus, it can be said that the government focused its efforts on achieving social justice for the benefit of fragile groups exposed to risks, not only to health but also to livelihood, which immediately suffered from the negative repercussions of the epidemic.

In this context, our objective is to find the main effects of the pandemic on the Kingdom of Morocco while trying to answer the following questions:

- What is the impact of COVID-19 on state finances? And what are the most important measures that have been taken, particularly financial ones?
- To what extent can we say that the financial measures have contributed to limiting the effects of the pandemic on the economic and social levels?
- Is it possible to speak of a fundamental change in the state's financial policy after the end of the Coronavirus pandemic?

To address these and other questions, we will address three main axes: the first one concerns the manifestations of financial policy in the face of the health crisis, the second axis concerns its economic and social repercussions, and the last axis deals with its challenges for the post-pandemic period of the Coronavirus.

2 MANIFESTATIONS OF THE STATE'S FINANCIAL POLICY IN LIGHT OF THE HEALTH CRISIS: IN ORDER TO AVOID A "FINANCIAL PANDEMIC!"

To confront the exceptional situation facing the public finances, the government took several measures to control state expenditures and search for the necessary resources. These measures included establishing a fund for managing and confronting the Coronavirus epidemic, rationalising public expenditures, resorting to external financing as a proactive measure, and taking measures by the banking system.

1 Mehdi Abid and others, 'Covid-19 Pandemic and Economic Impacts in Arab Countries: Challenges and Policies, Research in Globalization' (2022) 5(3) Research in Globalization 1, doi:10.1016/j.resglo.2022.100103.

2 'COVID-19: Mesures prises par le Comité de Veille Economique et par le Ministère' (*Ministre de l'Economie et des Finances*, 2020–2022) <https://www.finances.gov.ma/fr/Nos-metiers/Pages/news-dispositions-cve.aspx> consulté le 10 Octobre 2023.

2.1. Establishing a Special Fund to Manage and Overcome the Effects of the Coronavirus Epidemic

A dedicated account called 'Special Fund for Management and Fight against the Corona Virus Epidemic' was established[3] to set up the conditions for financing preventive measures to confront the virus and limit its effects. A total of 10 billion dirhams was allocated from the general state budget.[4] In addition to this contribution, the authorities contributed 1.5 billion dirhams, and various organisations and institutions, such as the Hassan II Fund, contributed a further one billion dirhams.

Furthermore, various forms of solidarity from several individuals[5] led to the mobilisation of significant additional financial resources through donations. The total resources of this fund stand at approximately 33 billion dirhams.

This fund was established to:

- bear the costs of rehabilitating health mechanisms and means, both in terms of adequate infrastructure, equipment and additional means that urgently need to be acquired to treat people infected with the virus in good conditions;
- support the national economy to deal with the repercussions of the epidemic through the measures proposed by the Economic Vigilance Committee (created for monitoring the Coronavirus outbreak and new developments and identifying accompanying measures) to mitigate the social repercussions in particular.

2.2. Rationalisation of Public Expenditure

In the context of rationalising public spending and directing available resources towards the priorities imposed by managing the effects and repercussions of the spread of the Coronavirus epidemic in Morocco, a decision was made during the exceptional period extending from March 2020 until the end of June 2020.,[6] This decision involved reducing or cancelling unnecessary expenses such as transportation expenses and dependent vehicle

3 Decree No 2-20-269 of 16 March 2020 'Establishing a Special Account Bearing the Name "Special Fund for Managing the Coronavirus Pandemic Covid 19"' [2020] Official Gazette 6866, art 1.

4 Hicham Ait Mansour, *Morocco's Social Policy Response to Covid-19: A Special Fund and a Structural Reform Proposal* (CRC 1342 Covid-19, Social Policy Response Series 33, University of Bremen 2021).

5 In this regard, it should be noted the government's decision requiring State employees and agents, local authorities and employees of public establishments to contribute to the special fund for managing the coronavirus pandemic, with a salary for three days of work over a period of three months (April, May and June, 2020).

6 Prime Minister's Circular No 5-20-cab of 14 April 2020 'Relating to the Optimal Management of Expenditure Commitments of the State and Public Establishments During the Health Emergency Period' <http://bdj.mmsp.gov.ma/Fr/Document/10428-Circulaire-n-5-20-cab-du-20-cha%C3%A2bane-1441-14-avr.aspx?KeyPath=594/710/711/10428> accessed 10 October 2023.

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

expenses for government interests, as well as expenses for national and international parties and meetings, etc. While necessary expenses, such as employee wages, investment expenses, expenses allocated to managing the Coronavirus pandemic, expenses designated to reduce the effects of drought, as well as expenses that were committed before the Government and related to the settlement of some social files, were retained during this period.[7]

It was also decided to postpone other expenses, such as paying dues resulting from employee promotions,[8] with the exception of the categories of employees and agents of the departments in charge of internal security and health sector employees, given their presence on the front line to confront the epidemic. It should be noted here that the Moroccan Government chose at this stage to adopt a voluntary and comprehensive rationalisation process, not an austerity process.[9]

Given the exceptional circumstances imposed by COVID-19, the possibility of resorting to an amended finance law was also necessary. The assumptions upon which the annual financial law was built became outdated in light of the new economic and social conditions imposed by the pandemic.

2.3. Recourse to External Financing

In the context of a proactive policy, the government issued Decree-Law No. 2.20.320 related to exceeding the ceiling of foreign funding.[10] This decree authorises the Government to exceed the ceiling of foreign funding, specified under Article 43 of Finance Law No. 70.19 for the fiscal year 2020,[11] allowing the government to resort to international financial institutions and markets to obtain external finances crucial for the acquisition of goods and services such as basic materials, medical equipment and supplies, medicines, food, energy and others.

7 ibid.

8 Prime Minister's Circular No 3-20-cab of 25 March 2020 'Relating to the Postponement of Promotions and the Cancellation of Recruitment Competitions Until Further Notice' <http://bdj.mmsp.gov.ma/Fr/Document/10409-Circlaire-n-3-20-CAB-du-30-rejeb-1441-25-mars-20.aspx?KeyPath=594/710/711/10409> accessed 10 October 2023. This decision to postpone promotions is only considered a temporary measure, due to its financial impact, and in no way affects the acquired rights of the groups targeted by this measure.

9 Speech by the Moroccan Prime Minister during the monthly public policy session of the House of Councillors on the theme: "The reality and prospects of dealing with the repercussions of the Corona crisis" on April 21, 2020. *Kingdom of Morocco Head of Government* <https://cg.gov.ma/en> accessed 10 October 2023.

10 Decree-law No 2-20-320 of 7 April 2020 'Relating to Exceeding the External Financing Ceiling' [2020] Official Gazette 7184.

11 Royal Decree No 1-19-125 of 13 December 2019 'Implementing Finance Law No 70-19 for the Fiscal Year 2020' [2019] Official Gazette 6838.

Under this license, on April 7 2020, the government resorted to using the Prevention and Liquidity Line (LPL)[12] to withdraw an amount equivalent to approximately $3 billion, repayable over five years, with a grace period of three years. These proactive measures anticipated potential financial market pressures as the health crisis deepened and the increasing demand for external financing by many countries affected by the Coronavirus pandemic. This heightened demand was expected to harm the supply available in the international financial market, as well as liquidity and the financial conditions for borrowing.[13]

2.4. Measures Taken by the Banking System

In this context, the central bank (Bank Al-Maghrib) adopted a set of measures, both in the field of monetary policy and at the prudential level, to facilitate the access of families and businesses to bank credit, in particular:

- Reducing the key rate from 2.25% to 2%;
- Giving banks the possibility to use all available means of refinancing in dirhams and foreign currencies;
- Extending the range of bonds and securities accepted by the Central Bank in exchange for refinancing operations granted to banks to a very wide range;
- Extending deadlines for refinancing operations;
- Integrating operating and investment credits within the framework of business refinancing.

3 THE IMPACTS OF THE FINANCIAL POLICY OF THE STATE: MEASURES TAKEN BETWEEN EFFICIENCY AND THE REQUIREMENT OF JUSTICE

The health crisis resulting from the outbreak of the new Coronavirus had major repercussions of economic and social dimensions,[14] which necessitated a financial policy approach to confront these repercussions and mitigate their effects.

12 As part of the proactive policy in the face of the Covid19 pandemic crisis, Morocco resorted, on April 7, 2020, to the Liquidity and Prevention Line (LPL) by withdrawing an amount equivalent to approximately $3 billion, reimbursable over 5 years, with a grace period. 3 years old. This withdrawal is part of the agreement relating to the prevention and liquidity line concluded with the International Monetary Fund in 2012, which was renewed for the third time in December 2018, for a period of two years, with intending to use it as insurance against serious shocks, such as those we are currently witnessing.

13 As a reminder, this amount was not intended to finance the public treasury but was made available to the Central Bank of Morocco and will mainly be used to finance the current account deficit of the balance of payments. *Bank Al-Maghrib* <https://www.bkam.ma/en> accessed 10 October 2023.

14 Michel Bouvier, 'Vers un ordre politique des autonomies relatives: une question de méthode' (2021) 154 Revue française de finances publiques 163.

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

3.1. At the Economic Level and Supporting Companies

Naturally, the government's precautionary measures significantly affected economic movement, production and services. In particular, due to the drop in external demand directed towards Morocco, the drop in tourist receipts and foreign direct investment, along with the drop in domestic demand[15] and consumption, negatively affected macroeconomic balances, as well as the balance of trade and balance of payments.

In response to these challenges, the government endeavoured to support companies facing difficulties due to the repercussions of the pandemic. This support aimed to ensure the continuation of their productive activities, preserve jobs, and enable them to perform their duties while giving priority to vital sectors to ensure the continuity of their operational and production capacity.

In addition to the support directed to the employees of certain companies to maintain the jobs they provide, the government took other measures for the benefit of companies,[16] divided into three components related to:

- reducing the weight of trade receivables;
- providing financial support for companies;
- supporting investment and facilitating access to public procurement.

a. Reducing the Debt Burden

The reduction in the expense of receivables resulted in:

- suspension of the execution of social security contributions during the first stages of the health crisis, in particular, the period from March 1 2020 to June 30 2020 for companies in difficult circumstances;
- postponing, until June 30 2020, the repayment of fees or fines, bank loans and those related to leasing credits in terms of contracting, at their request and after study of the requests;
- allowing companies whose transaction number for the 2019 financial year is less than 20 million dirhams to postpone the filing of tax declarations until June 30 2020, if they so wish;
- suspending tax audits and notifications of non-holders until June 2020.

b. Financial Support for Companies

This procedure aimed to:

- ensure the acceleration of the payment of project management contributions to relieve the pressure on its cash flow so that it could meet its financial obligations and preserve jobs;

15 Tareck Alsamara and Farid Khalidi, 'Review Of Covid-19 And E-Commerce In The Moroccan Legal System: Challenges And Opportunities' (2020) 23(6) *Journal of Legal, Ethical and Regulatory Issues* 6.

16 Éric Heyer et Xavier Timbeau, 'Évaluation de la pandémie de Covid-19 sur l'économie mondiale' (2020) 166(2) Revue de l'OFCE 94, doi:10.3917/reof.166.0059.

- create a new guarantee mechanism at the level of the Central Guarantee Fund, under the name 'Oxygen Guarantee' to facilitate access for companies whose cash flow deteriorated due to the decline in their activity and whose number of annual transactions did not exceed 200 million dirhams or fluctuates between 200 and 500 million, with additional bank financing, while extending this mechanism to the real estate sector;
- provide auto-entrepreneurs affected by the COVID-19 crisis with an interest-free loan of up to 15,000 dirhams. This loan, whose effective date was set for April 27 2020, as repayable over three years with a grace period of one year. The related services were entirely the responsibility of the insurance sector. This sector also contributed 100 million dirhams to the guarantee mechanism set up by the State through the Central Guarantee Fund.

c. Supporting Investment and Facilitating Access to Public Procurement

Achieving this objective consisted of the implementation of several measures, including:

- launching the 'Technological Excellence' program, dedicated to supporting the investments of very small, small and medium-sized companies that invest in the manufacture of products and equipment used in the face of the epidemic. These companies could benefit from financing of 30% of the total investment amount, capped at 10 million dirhams for small and medium-sized companies and 1.5 million dirhams for very small companies;
- introducing supportive measures for public establishments and contracting authorities to ensure management flexibility, particularly concerning budgets, the commitment of investment and management expenditure, and the conclusion and execution of contracts, to preserve the contribution of these establishments and companies to the revitalisation of economic life;
- simplifying procedures for companies to access public transactions and orders via the electronic portal intended for this purpose and dematerialise these procedures.

d. Facilitating Digital Services For Companies

This procedure aimed to provide many services remotely to meet the needs of the private sector, including:

- streamlining the filing of business lists and remote access to commercial and legal files on the 'mahakim.ma' portal, as well as remote access to legal files to limit the movement of litigants to courts or accomplices to the central administration;
- activating the Electronic National Register of Movable Collateral System to simplify administrative procedures, achieve speed, efficiency, and transparency and facilitate the procedures for registering movable collateral regarding loans benefiting businesses, especially small, medium and very large ones;

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

- implementing intangible management procedures related to the filing and study of applications for licenses, housing permits and certificates of conformity and their issuance through an interactive and unified digital platform at the level of the entire national territory;[17]
- simplifying the reporting procedures for employees affiliated with the National Social Security Fund and temporarily suspended from work.

3.2. Measures Taken to Mitigate Social Impacts

To take care of vulnerable groups strongly affected by the Coronavirus pandemic, the government took a number of measures for the benefit of employees and families working in the informal sector, as well as vulnerable groups who needed special care under these exceptional circumstances.

a. Measures in Favour of Employees and Families Working in the Informal Sector

For the employees and families working in the informal sector[18] affected by the slowdown or suspension of some economic activities due to the Coronavirus pandemic, the government introduced a series of decisions and measures.

b. The Employees

Two measures were taken for the employees:

- Granting a lump sum monthly compensation of 2000 dirhams for the benefit of wage earners and employees under the merger contracts, seafarers and fishermen temporarily suspended from work, belonging to the companies involved in the National Social Security Fund facing difficulties, and who declared to the said fund by drawing for February 2020 and this compensation concerns the period extending from March 15 to June 30 2020;
- Benefiting from compulsory health coverage (AMO) services and family allowances for the same period of time.

To implement these two important measures, the government approved draft law n°25.20 (approved by Parliament on April 21 2020)[19] enacting exceptional measures for the benefit of employers affiliated with the National Social Security Fund and their authorised employees affected by the repercussions of the Coronavirus epidemic.

17 Decree No 2-18-577 of 12 June 2019 'Approving the General Construction Regulations which Specifies the Form and Conditions of Submission of Authorizations and Documents Prescribed by the Legislative Texts Relating to Construction, Subdivisions, Housing Groups, as Well as the Texts Taken for their Application' [2019] Official Gazette 6874.

18 Based on the proposals of the Economic Vigilance Committee created on March 11, 2020 at the level of the Ministry of Economy and Finance, in order to monitor the repercussions of the Coronavirus epidemic and determine the support measures to deal with it, whether at the economic or social level. See: 'Covid-19' (n 2).

19 Law No 25-20 of 21 April 2020 'Enacting Exceptional Measures in Favor of Operators Involved in the National Social Security Fund and their Approved Employees, who are Affected by the Repercussions of the Appearance of the Corona Virus Pandemic Covid-19' [2020] Official Gazette 6877.

It should be noted in this respect that these measures supported suspended companies, preserved the jobs available to them, and prevented employees from losing their jobs for economic reasons.[20]

d. Direct Support to Families Working in the Informal Sector

In this regard, the government decided to disburse support to this category in two phases:

- The first phase concerned families benefiting from the 'Ramid' service, a card that allows its bearer access to various public state services free of charge, such as health services, and families working in the informal sector, deprived of income due to quarantine.[21] However, some shortcomings of this process should be noted here, including the delay in the care of some families, and the number of families affected by this delay increases each time they were in rural and mountainous areas due to a lack of agencies to disburse aid. To address this, the government adopted mobile agencies. In addition, it should be noted that some families, due to having a 'Ramid' card, benefited from support and did not experience pandemic-related hardships.
- The second phase concerned families who do not benefit from the 'Ramid' service, who work in the informal sector and were forced to stop working due to the health quarantine.

Financial aid for the two categories combined, which was granted from the resources of the 'Corona Virus Pandemic Fund', was set at 800 dirhams for a family of two people or less, 1,000 dirhams for a family of three or four people and 1,200 dirhams for a family of more than four people.[22]

In this respect, Law No. 72.18, relating to the system for targeting beneficiaries of social support programs and creating the unified social register and the National Archives Agency, is highly important. These measures enable the government to have a database of groups eligible for aid in the future.[23]

20 For reference, and in order to facilitate the convening of the deliberative bodies of joint-stock companies in order to tally the accounts related to the fiscal year 2019 in accordance with the requirements of Law No 95-17, the government has prepared draft law No 27-20 to enact special provisions related to the conduct of the work of the management bodies of joint-stock companies and the procedures for holding their general assemblies during the period of validity of the state. Health emergencies, with the aim of adopting flexible management procedures for the benefit of public and private institutions and companies to maintain the continuity of vital sectors (this is the project presented to Parliament for approval).

21 The payment of financial aid to beneficiaries actually began, as of April 6, 2020. The number of beneficiaries on a daily average reached 200,000, according to the speech of the Moroccan Prime Minister during the monthly session devoted to public policies at the House of Representatives, April 21, 2020.

22 The receipt of declarations related to this category began on April 10, 2020 via an electronic portal created for this purpose, according to the speech of the Moroccan Prime Minister during the monthly session devoted to public policies at the House of Representatives, April 21, 2020.

23 Law No 72-18 of 8 August 2020 'On the System of Targeting Beneficiaries of Social Support Programs and the Creation of the National Agency for Records' [2020] Official Gazette 6908.

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

e. Attention to the Situation of Vulnerable Groups

Faced with the health crisis, the government took several measures in favour of vulnerable groups, in particular the elderly, women in difficult circumstances, and people in street situations:

First of all, with a focus on the elderly, 'Operation Salama' was launched to support this vulnerable social group and people with disabilities. Recognising them as the demographic most susceptible to the risks associated with the Coronavirus epidemic, the objective was to provide a 'safety bag' containing hygiene essentials for COVID-19 prevention within social institutions. This initiative aimed to promote the health of this social group and offer them essential care and support appropriate to their new needs in the context of the pandemic. The provision of Protection Kits was accompanied by the dissemination and publication of a number of advertising links for this category.

Secondly, special attention was given to women in difficult circumstances. The government took a series of urgent measures to support women in challenging circumstances, including victims of violence, women with disabilities, and the elderly, among others. A digital awareness campaign was launched, including various targeted awareness links. In addition, reported cases of abuse were tracked through various means and coordinated with perpetrators to expedite interventions and accommodate cases or return them to the marital home. Continuous monitoring of the health and social situation of workers and beneficiaries of accommodation services for women in difficult circumstances within the framework of coordination with the National Mutual Aid Institution.

Lastly, people experiencing homelessness were given assistance to mitigate the risk of spreading the new Coronavirus pandemic. This involved mobilising, preparing, and equipping spaces to accommodate and care for them,[24] encompassing services such as reception, accommodation and catering.

Through collective efforts involving various actors (National Mutual Aid Institution, Red Crescent, Local Authorities, Territorial Authorities, Civil Society and philanthropists), several homeless people received care until April 19 2020 (initially 230 people at the start of the operation), while 1,699 people were reunited with their families.[25]

Despite these efforts, given the multiplicity of people concerned and the lack of resources to support and continue the operation, there was still room for improvement concerning measures.

24 According to the speech of the Moroccan Prime Minister during the monthly session devoted to public policies at the House of Representatives, April 21, 2020.

25 ibid.

4 POST-PANDEMIC FINANCIAL POLICY CHALLENGES: TOWARDS FINANCIAL "IMMUNITY"

Morocco, like most countries in the world, faced serious economic and financial challenges during the post-coronavirus pandemic period,[26] necessitating the implementation of various measures, especially those of a financial nature. Hence, the stakes of the state's financial policy are some of which we will attempt to address.

4.1. Adopt New Financial Approaches

One of the challenges of the state's financial policy in the post-coronavirus pandemic era is to register a considerable budget deficit. To address this exceptional deficit, the government could consider adopting an exceptional deficit in the budget law forecasts for the coming years to respond to the current exceptional situation and allow the financing of budgetary needs justified by public investment in priority sectors through reasonable recourse, both external and internal borrowing.

In addition, public savings must be mobilised to finance the general budget by launching tax-free 'public treasury bonds', with the need to limit transfers of hard currencies abroad, in particular by encouraging the consumption of the proceeds nationally, without neglecting to reduce allocations to non-priority private accounts.

It is also worth stressing here the need to effectively move from the approach by means to the approach by results in the management of public finances.[27] This shift is vital to ensure optimal management of the available financial resources, to devote the governance of expenditure with the reform of the partnership system between the public and private sectors, and to encourage the latter to contribute to the financing of major structuring projects.[28]

Furthermore, results-based budgeting must be strengthened from a gender perspective because it is clear that the lack of mobilisation of the capacities available to women has a significant economic cost and deprives the country of creativity and added value of half of its population.[29]

26 Considering that most forecasts issued by national and international institutions have confirmed a significant drop in the growth rate, in addition to external influences on the national economy, due to the contraction of the world economy, notably of the countries with which Morocco maintains economic and commercial relations, like the countries of the European Union.

27 Cherif Elhilali, 'Public Administration Reform and Development Stakes in Morocco' (2022) 25(S4) Journal of Legal, Ethical and Regulatory Issues 6.

28 Pascal Petit, 'De la crise financière globale à celle de la COVID-19 : quelques leçons pour éviter les aléas de tels enchainements' [2021] Hors-série Transformation, Revue Interventions économiques 52, doi:10.4000/interventionseconomiques.14805.

29 Olivier Bargain et Maria Lo Bue, *Coûts économiques des inégalités de genre dans le marché du travail au Maroc* (Directi on des Etudes et des Prévisions Financières 2021).

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

Given this untapped resource and the risks created by the COVID-19 crisis, It has become necessary to develop the gender approach at the heart of public policies to revive the economy and promote social inclusion.

This measure will undoubtedly have a very beneficial impact and place the country's development path on solid foundations and durability.

4.2. Provide Financial Resources to Control the Deficit and Support the National Companies

The temporary suspension of the activity of a set of vital economic sectors such as tourism, textiles and the automotive industry has resulted in a notable decline in resources, in particular, fiscal resources such as corporate tax and income tax. Additionally, the decline in external demand directed towards Morocco led to a decrease in customs revenue and value-added tax resources.

Furthermore, the decline in remittances from Moroccans residing abroad, coupled with a decrease in foreign direct investment, has contributed to a reduction in foreign exchange reserves.

In response to this crisis, the government prepared a medium-term economic take-off plan to be drawn up under the workshops of the new development model, as well as an economic recovery plan until the end of 2021.[30] The latter constituted a lever to support the gradual return of the various sectors of the Moroccan economy to exercise their activities and provide the appropriate conditions for a promising and integrated economic recovery, considering the specificities of each sector once the crisis phase has passed. As part of the economic recovery plan, the focus was on supporting supply and stimulating demand and setting up a financing mechanism to ensure the availability of the capital needed for the resumption of activities of large and small, medium and very small companies.[31]

In 2020, two new guarantee mechanisms were launched, namely 'Take Off Guarantee' and 'Take Off Very Small Enterprises', with the aim to relaunch project management activity by guaranteeing borrowings allocated to financing the needs of the Treasury. These loans are repayable over seven years, with a deferred recovery period set at two years.

This plan is expected to lay the foundations for a strong and integrated economy that will open up new horizons for Morocco and strengthen its position in the post-Coronavirus crisis.[32]

30 Response from the Prime Minister during the monthly session linked to public policy on the central question: "Government policy for the period after the lifting of the quarantine: what plan to revive the economy and deal with the social effects of the crisis", House of Councilors on June 16, 2020.

31 Statement by the Minister of Economy, Finance and Administration Reform during his response to questions from parliamentary teams and groups of the Chamber of Councillors concerning financial and economic measures to deal with the crisis resulting from the Corona pandemic "Covid-19", May 19, 2020. See: 'Covid-19' (n 2).

32 Response from the Prime Minister (n 30).

However, economic growth, as previously mentioned, has been affected by the COVID-19 pandemic. Projections indicate a decline in the added value of the agricultural sector due to the lack of irregular precipitation and a significant decrease in the resources of the public treasury. This situation necessitates a review of assumptions based on which the Finance Law 2020 was prepared, leading to the development of an amended financial law project.

4.3. The Amending Financial Law: A Mechanism to Overcome the Crisis or a Basis for Implementing the Economic Take-Off Plan?[33]

As was pointed out before, the repercussions of the crisis resulting from the Coronavirus pandemic led to a major imbalance between resources and expenditures. This imbalance is anticipated to result in an increased deficit rate attributed to the suspension of fiscal resources, a decline in tourism revenues and remittances from Moroccans residing abroad, limited contracting contributions, reduced exports, and weak demand. As a result of the suspension of all services, the shrinking of hard currency reserves, and the state's keenness to maintain a large number of wages in the public sector in exchange for an increase in public spending due to the requirements of the pandemic.

Faced with this situation, the Finance Law 2020 underwent a comprehensive review. The primary objectives included controlling major economic balances, rearranging priorities, directing credits according to the requirements of the stage, and reviewing expectations and indicators on which this law was based. This includes considerations related to the anticipated decline in the growth rate, elevated deficit and inflation rates, and the imperative of capitalising on the positive indicator of reduced oil prices.

In addition, public expenditures related to management must be rationalised and reallocated according to the priorities imposed by the pandemic, in addition to postponing non-essential sectoral investments and transferring the allocated funds for them to priority sectors. Appropriations for non-essential private accounts can also be reduced for the time being.

With regard to the use of the liquidity and credit line referred to earlier, it must be used productively for the benefit of the national economy in profitable areas. It should also create encouraging incentives for bank savings, as well as take measures to ensure tax fairness.

33 As part of the financial and economic measures aimed at tackling the crisis resulting from the Corona pandemic, the government has prepared, on the one hand, a medium-term economic recovery plan, drawn up according to the new model of development workshops economic, and on the other hand, an economic recovery plan until the end of 2021 (see the Prime Minister's response during... the monthly public policy session on the central question: "Government policy for the period after the lifting of quarantine": what is the plan to revive the economy and deal with the social repercussions of the crisis?, Advisory Council, June 16, 2020).

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

4.4. Consecration of Tax Fairness

Consolidating tax fairness is urgently necessary through comprehensive and fair reform and the optimal implementation of the tax framework law.[34] This measure aims to fight against tax evasion and evasion, particularly the low invoicing of imported goods, and to create incentive conditions for gradually integrating informal activities into the formal economy.

On the other hand, the tax base must be broadened equitably by adopting new rates and sections for income tax, particularly for very high salaries, and by making other taxes more equitable, including value-added tax and corporation tax.

The tax exemption system should also be abolished after five years from the company's creation, except for social activities, or of a public utility nature, or for companies that do not benefit from a legal monopoly or effective and that record increases in their self-funding.

In addition, a common contribution must be imposed on insurance companies and economic and financial establishments that benefit from a de jure or de facto monopoly, such as the Office Chérifien de Phosphates or the National Railways Office, among others.

The urgent need for financial resources necessitates searching for other resources within reasonable limits by imposing new fair taxes, such as wealth and inheritance taxes.

5 CONCLUSIONS

Morocco, unlike certain Arab countries, has been able to act proactively and rationally to deal with the economic and social repercussions of COVID-19. This involved leveraging its capacities and adopting a financial policy based on the rationalisation of public expenditure and the search for the necessary financial resources.

Described as an austerity measure, this policy particularly targeted general budget expenditures, specifically those related to investment, as well as management expenses. These funds were then reallocated based on the priorities imposed by the pandemic.

Given the great impact on financial resources due to the pandemic, the country utilised the previously mentioned liquidity and credit line. However, its use had to be done productively to benefit the national economy in terms of productivity and profitability.

However, as preparations for the post-pandemic period unfolded, a more effective financial policy approach was deemed essential by amending the 2020 Finance Law to correct the assumptions on which it was based and respond to the priorities imposed by the health crisis. Additionally, a plan for economic recovery and confronting the social effects of this crisis was developed.

34 The summary of the recommendations resulting from the third national debate on taxation held in Skhirate, Morocco, on May 3-4th, 2019.

Yet the question remains: To what extent will the financial policy pursued achieve financial 'immunity' and overcome the catastrophic effects of the Coronavirus epidemic or, potentially, a new outbreak in the future?

REFERENCES

1. Abid M and others, 'Covid-19 Pandemic and Economic Impacts in Arab Countries: Challenges and Policies, Research in Globalization' (2022) 5(3) Research in Globalization 1, doi:10.1016/j.resglo.2022.100103.
2. Alsamara T and Khalidi F, 'Review Of Covid-19 And E-Commerce In The Moroccan Legal System: Challenges And Opportunities' (2020) 23(6) *Journal of Legal, Ethical and Regulatory Issues 1*.
3. Bargain O et Lo Bue M, *Coûts économiques des inégalités de genre dans le marché du travail au Maroc* (Directi on des Etudes et des Prévisions Financières 2021).
4. Bouvier M, 'Vers un ordre politique des autonomies relatives: une question de méthode' (2021) 154 Revue française de finances publiques 163.
5. Chtatou M, '*Coronavirus in Morocco: Economic and Social Implications*' (*Fikra Forum Washington Institute*, 23 April 2020) <https://www.washingtoninstitute.org/policy-analysis/coronavirus-morocco-economic-and-social-implications> accessed 10 October 2023.
6. Elhilali C, 'Public Administration Reform and Development Stakes in Morocco' (2022) 25(S4) Journal of Legal, Ethical and Regulatory Issues 1.
7. Heyer É et Timbeau X, 'Évaluation de la pandémie de Covid-19 sur l'économie mondiale' (2020) 166(2) Revue de l'OFCE 59, doi:10.3917/reof.166.0059.
8. High Commission for Planning, *Study on the impact of the coronavirus on the economic, social and psychological household* (High Commission for Planning 2021).
9. Mansour HA, *Morocco's Social Policy Response to Covid-19: A Special Fund and a Structural Reform Proposal* (CRC 1342 Covid-19 Social Policy Response Series 33, University of Bremen 2021).
10. Mohammed M and Jacobs A, 'Can Morocco Effectively Handle the COVID-19 Crisis?' (*Chatham House*, 6 April 2020) <https://www.chathamhouse.org/2020/04/can-morocco-effectively-handle-covid-19-crisis> accessed 10 October 2023.
11. Organization of Islamic Cooperation. S*ocio-Economic Impacts of the COVID-19 Pandemic in OIC Countries: Pathways for Sustainable and Resilient Recovery* (SESRIC 2022).
12. Petit P, 'De la crise financière globale à celle de la COVID-19 : quelques leçons pour éviter les aléas de tels enchainements' [2021] Hors-série Transformation, Revue Interventions économiques 51, doi:10.4000/interventionseconomiques.14805.

AUTHORS INFORMATION

Cherif Elhilali
PhD (Law), Associate Professor, College of Law, Prince Sultan University, Riyadh, Mena, Kingdom of Saudi Arabia
celhilali@psu.edu.sa
https://orcid.org/0000-0003-4601-3686

Corresponding author, solely responsible for the manuscript preparing.
Competing interests: No competing interests were disclosed.
Disclaimer: The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

ABOUT THIS ARTICLE

Cite this article

Elhilali C, 'Covid 19 Pandemic in the Arab Countries: Case of Morocco' (2024) 7(1) Access to Justice in Eastern Europe 307-22 <https://doi.org/10.33327/AJEE-18-7.1-a000112>

Submitted on 14 October 2023 / Revised 27 November 2023 / Approved 5 December 2023
Published: 1 February 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000112

Managing editor – Mag. Polina Siedova. **English Editor** – Julie Bold.

Keywords: *Financial Policy, Impacts of the health crisis, Financial measures, Repercussions of the pandemic, Special Fund, the Corona virus epidemic.*

RIGHTS AND PERMISSIONS

RESEARCH ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Research Article

ECONOMIC AND LEGAL BASIS OF IMPLEMENTATION OF COMPLIANCE IN BUSINESS PROCESSES OF ENTERPRISES

Liliia Amelicheva*, Maryna Savchenko, Larysa Shaulska, Valentyna Yehorova and Iryna Holubenko

ABSTRACT

Background: *In today's economic world, an effective compliance doctrine is a mandatory component of the management portfolio of any reputable business structure.*
Currently, compliance strategy is being implemented in all countries of the globalised world, but in different ways: in some countries, actively and comprehensively, and in others, passively and fragmentedly. This study, using analytical and statistical methodological approaches, explains why compliance is implemented differently in businesses around the world. The authors evaluate the effectiveness of the leading types of compliance (anti-corruption, criminal law, environmental, financial, and labour) in the economies of OECD countries and other countries. The authors also substantiate that to strengthen the political will of governments, especially those of developing countries, to extend compliance into the national business environment, it is necessary to develop a national strategic document on the phased implementation of the compliance system in business processes of enterprises, as well as to develop an international document of general application (in the form of a UN Convention) to promote more active implementation of all types of compliance by governments around the world.
Methods: *The methodological apparatus of legal and economic sciences was used to study the compliance doctrine. The methodological apparatus of the study included mathematical calculation methods and graphical methods for assessing the degree of compliance implementation in countries of the world, probabilistic methods for providing recommendations for management actions and testing for clustering countries of the world.*
The study also uses special legal methods: formal legal methods for classifying the main features of the compliance phenomenon, comparative legal methods for comparing compliance regulation in different countries, and logical legal methods for improving legal regulation of compliance as a means of the economic well-being of enterprises.

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

Results and Conclusions: *The article reveals the content of business process compliance; assesses the effectiveness of this instrument in the economies of OECD member states, the EU and other countries in priority areas; develops proposals for regulation, including legislative regulation and implementation of compliance at the international, national and enterprise levels in the context of digitalisation and sustainable development.*

1 INTRODUCTION

In today's economic world, an effective compliance doctrine is a mandatory component of the management portfolio of any respectable business structure.

The doctrine of compliance stipulates that this tool is introduced into the business processes of an enterprise as a set of preventive measures aimed at monitoring potentially dangerous factors (external and internal) and trends that may harm the economic security of the enterprise.

The extent to which this tool can cover elements of the company's management system is up to its top management. The key factor is that top management should be aware of the benefits of compliance and have the will to make virtuous changes by developing appropriate compliance policies and documents at the private law level of business process regulation and inspire all staff to implement and use this tool. It has long been a postulate in pedagogy that behaviour, not words, is the first to be copied. If words are at odds with behaviour, the behaviour is perceived as a role model.[1] Therefore, if management promotes compliance in good faith through its actions, then, according to the law of fractality, staff will also do so.

With the development of economic relations in a globalised and information society, various risks (corruption, sanctions, tax, environmental, etc.) have been growing in enterprises' business processes. These risks are caused by external and internal factors. External factors include:

1) insufficiently fair competitive business environment in the current climate,
2) the impact of the crime situation on the business landscape, which is being improved over time by changing the methods and means of offences,
3) instability and volatility of international financial relations, which significantly affect the business landscape through the application of sanctions,
4) growing uncertainty (demand volatility) in the business environment at the national level under the influence of globalisation of the world economy, which reduces the financial capacity to implement the compliance doctrine at enterprises,
5) low level of awareness of small and medium-sized enterprises about the benefits of implementing compliance in business processes.

1 Oleksandr Okunev, Olegh Boyko and Serghij Lukin, *Manual for the Training Program for Persons Responsible for the Implementation of the Anti-Corruption Program* (Professional Association of Corporate Management 2018) 55.

Internal factors that contribute to strengthening management control include the following:

1) corporate and labour conflicts,
2) insufficiently good business reputation of the enterprise and its management in the business environment,
3) increased economic losses of the company due to the dynamism and unpredictability of changes in tax and sanctions legislation,
4) unprofessionalism or low level of professional training of compliance staff,
5) insufficient level of legal culture of the company's top managers.

The key trends that can harm the economic security of an enterprise are currently associated with increased globalisation and aggressive enforcement of existing rules at both the international and national levels.

The global reach of business process regulation has created new challenges generated by relocating businesses abroad. Focusing on the headquarters and a few hotspots that are the nuclei of economic activity for a large organisation (e.g., a multinational company) is no longer sufficient. Enforcement requires vigilance throughout the organisation. It also means that organisations now face potentially conflicting regulatory schemes when moving from country to country and must be prepared to adjust their compliance programme to respond to these differences.[2]

Regulation problems, including legal regulation of business processes and control over them, are currently one of the key trends for enterprises, which can reduce efficiency. Organisations must manage existing and emerging risks, including anti-competitive behaviour, industry regulation, international trade and economic sanctions, bribery and corruption, and data protection.[3]

Considering that the main purpose of compliance is to safeguard the economic interests of an enterprise from factors that may adversely affect its financial components and reputation,[4] the role of compliance is expected to become increasingly important in the risk management of business structures in developed countries. Moreover, in developing countries, this tool will likely actively spread, further strengthening its already significant role. The need to substantiate the growing role of compliance in countries around the world is one of the main objectives of this economic and legal study.

2 Stuart Altman and others, 'Developing an Effective Compliance Strategy: Roundtable' (2015) 3(March) Financier Worldwide <https://www.financierworldwide.com/roundtable-developing-an-effective-compliance-strategy> accessed 15 October 2023.

3 ibid, Eastwood.

4 TV Romanchik, 'Place of Compliance in Ensuring Economic Security of the Enterprise' (Actual Issues of Organization and Management of Enterprises' Activities in Modern Economic Conditions: 7th Scientific and Practical Conference, National Guard Military Academy of Ukraine, Kharkiv, 29 November 2017) 154.

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

The purpose of this study is to highlight the essence of business process compliance and assess the effectiveness of this tool in the economies of OECD member states, the EU and others in priority areas. Employing a synergistic approach characterised by a combination of methodological achievements of legal and economic sciences, the study seeks to develop proposals for regulation, including legal regulation, of compliance implementation at the international, national and enterprise levels in the context of digitalisation and sustainable development.

The issue of implementing compliance into business processes is the subject of study by practitioners and scholars of many sciences, but primarily economic and legal ones. Thus, modern scholars and specialists have studied the theoretical and methodological foundations of the compliance doctrine, substantiation of methodological approaches and practical recommendations for ensuring compliance security of an industrial enterprise.[5]

The authors describe the legal framework and analyse the content of the definitions of compliance available in the specialised literature.[6] They investigate the essence of its main types - anti-corruption compliance,[7] tax compliance,[8] labour compliance[9] and others. Additionally, they clarify the role of security-oriented management tools in ensuring the economic security of an enterprise[10] and propose a methodology for assessing the effectiveness of compliance implementation at an individual enterprise.[11] However, without detracting from the value of these scientific works, there has not yet been a comprehensive study of compliance as a means of increasing the efficiency of enterprises in countries that are important players in the global economy, have membership in the OECD, EU, etc., using the methodology of economic and legal sciences. At present, further research and scientific substantiation of criminal law issues, environmental and labour functions of compliance, and compliance monitoring are needed.

1.1. Legal Aspects

The study of the introduction of compliance into the business processes of an enterprise in the legal discourse is relevant in various areas.

5 TO Kobielieva, *Industrial Enterprise Compliance-Security: Theory and Methods* (Planeta-Prynt 2020).

6 Danylo Ghloba, 'Compliance in FPG: Features and Legal Aspects' (*YouControl Blog*, 22 May 2023) <https://youcontrol.com.ua/articles/komplaiens-v-fph-2> accessed 15 October 2023.

7 Richard A Posthuma, 'High Compliance Work Systems: Innovative Solutions for Firm Success and Control of Foreign Corruption' (2022) 65(2) Business Horizons 205, doi:10.1016/j.bushor.2021.02.038.

8 Emin Abliaiev, 'Tax Compliance as a Tool for Ensuring the Financial Security of Enterprises' (Results of the Development of Scientific Thought - 2022: 2nd International Student Scientific Conference, Youth Scientific League, Sumy, 23 December 2022) 24.

9 Liliia Petrivna Amelicheva, 'Anti-Corruption Compliance as an Important Element of Private Law Regulation of Labor Relations' (2021) 10 Actual Problems of Social Law 8.

10 Larysa Serghijivna Liubokhynets, 'Flexible Management in the Ensuring of the Economic Security of Industrial Enterprises' (DPhil (Econ) thesis, Khmelnytskyi National University 2022).

11 Tetiana Oleksandrivna Kobielieva, 'Development of Recommendations by Formation of the Integrated Indicator Complex Safety Industrial Enterprise' (2018) 48 Bulletin of the National Technical University "Kharkiv Polytechnic Institute": Economic Sciences 46.

Firstly, given that the compliance doctrine is constantly being improved and its theoretical provisions are being developed and reflected in legal acts, it is important to identify and study the modern system of categories in compliance at the legislative level. After all, it is now fully possible to state that compliance has been institutionalised in international standards, in the legislation of many countries, at the level of an individual enterprise whose business processes comply with the principles of compliance and integrity. The lexical and semantic field of compliance used in legislative techniques today includes the following concepts: 'compliance management', 'compliance risk', 'compliance policies', 'integrity', 'compliance officer', 'compliance department', etc. The study of this issue is important for the universalisation of the system of categories in compliance as a multidimensional and multifunctional phenomenon in the future.

Secondly, in the context of economic globalisation, the convergence of legal regulation of implementation of various types of compliance into business processes of enterprises in many countries of the world, which are parties to numerous bilateral and multilateral agreements in the economic and financial spheres in the international arena, is difficult. Given that many of these countries are members of various respected international institutions that produce international compliance standards, the problems of this convergence are even more acute. The lack of research on this issue in the legal discourse also directs the authors of this study to identify some of the main problems and find ways to solve them in compliance implementation in enterprises' business processes.

Thirdly, the issue of giving preference to a particular type of compliance (anti-corruption, financial, criminal, labour, environmental, etc.) at the national legislative level and the enterprise level is debatable. This issue is particularly acute for enterprises in developing countries, as compliance is not a cheap management tool.

Fourthly, according to the authors of the study, it is now important to assess the effectiveness of the application of the most leading types of compliance (anti-corruption, criminal law, environmental, financial, labour) in the economies of OECD member states and other countries, using a synergistic approach characterised by a combination of methodological achievements of legal and economic sciences. This author's approach may be controversial. However, the development of high-quality content of regulatory legal acts in the field of compliance must have an economic empirical basis. Therefore, the need for this study seems reasonable.

1.2. The Growing Role of Compliance in Countries Around the World

In the modern world, compliance strategies are implemented in all globalised countries, but in different ways. In some countries, it is active and comprehensive, while in others, it is passive and fragmented. In this study, it is important to use analytical and statistical methodological approaches to find out why compliance is implemented in different ways in enterprises around the world.

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

In terms of meaning and etymology, compliance (derived from the English word compliance – agreement, conformity) is derived from the verb to comply – 'to comply, to obey'.[12]

The economic and legal phenomenon of compliance first emerged in the 1930s, when the Agency of the US Department of Health and Human Services began to function. The Agency began to carry out legal compliance regulation, developing rules that entrepreneurs (employers) in the pharmaceutical and food industries and their staff, especially top management, had to follow. After massive corruption scandals involving managers of American companies and government officials in the 60s and 70s of the twentieth century, the Foreign Corrupt Practices Act was adopted in 1977. This document established strict rules for controlling the anti-corruption behaviour of the staff of US employers both within the US and abroad. It introduced strict requirements for accounting and financial documentation. In other words, the legislator has made compliance more structured and systematic. Under this law, anti-corruption compliance extended to the employment relations with government officials and the relations between them and managers of companies that lobbied for certain business interests. Subsequently, the corruption scandals of the 1980s directed the development of anti-corruption compliance not only to comply with the mandatory provisions of anti-corruption legislation but also with ethical business rules.[13] Compliance as a tool for security-oriented enterprise management has gradually been implemented in all sectors of the economy and in various areas of business processes of enterprises, where new positions of compliance officers (compliance managers) were introduced, or separate compliance departments were created as independent structural units.

Currently, professional associations of compliance officers (compliance managers) are already operating in many countries. One of the largest of them, the SCCE & HCCA (Society for Corporate Compliance and Ethics & Healthcare Compliance Association), which operates in the United States, already has 19,000 members worldwide as of the end of 2022. The SCCE & HCCA exists to advocate for ethical practice and compliance standards and to provide the necessary training, publications, certification and other resources for ethics and compliance professionals.[14]

Another international association of professionals in this field is the International Compliance Association (ICA), a company established in the UK in 2001. It is represented in more than 50 jurisdictions, has regional offices in Dubai and Singapore, and has more than 10,000 members who exchange information and experience on the ICA's website.[15]

12 'Compliance, Comply' (*Cambridge Dictionary*, 2023) <https://cutt.ly/Ynkd97I> accessed 15 October 2023.

13 Natalija Smetanina and Dar'ja Popova, 'The Importance of Implementing Compliance Programs to Increase the Transparency of Ukrainian Business' (2018) 3 Law Review of Kyiv University of Law 267-8.

14 Society of Corporate Compliance and Ethics and Health Care Compliance Association, *Annual Report 2022* (SCCE HCCA 2023).

15 Natalija Smetanina, 'International Experience of Implementing Corporate Compliance as a Means of Preventing Corruption in the Private Sector' (Effective Criminal Justice System as a Factor of Sustainable Economic Development: III Panel Discussion of the Second Kharkiv International Legal Forum, Yaroslav Mudryi National Law University, Kharkiv, 27 September 2018) 110.

Such organisations are created not only in developed countries. The Ukrainian Network of Integrity and Compliance (UNIC), established in Ukraine in 2017 at the initiative of Ukrainian business, is a community of practitioners in various areas of compliance and ESG to share global challenges, knowledge, and tools to address new problems with unfair business practices. The Business Ombudsman Council of Ukraine, the Organisation for Economic Cooperation and Development, and the European Bank for Reconstruction and Development supported the initiative to create UNIC in Ukraine. The purpose of the UNIC community is to promote compliance and business integrity and, accordingly, improve the business environment in Ukraine.[16]

There is a problem with the official recognition of the compliance officer profession in countries around the world. As a rule, this profession is officially recognised in developed countries such as the United States, Canada, etc. and is among the most prestigious. This is because the compliance officer is perceived as a courageous and incorruptible defender of the business, endowed with the ability to make balanced and strong-willed decisions, with organisational design skills and the ability to develop his or her people.[17]

In developing countries, the profession of 'compliance officer' is not included in the nomenclature of professions, and HR departments are forced to use the names of professions that are directly related to the internal/external control of the organisation's activities, the development of corporate standards or are characterised by certain labour functions inherent in the compliance system. In Ukraine, for example, the following professions replace the title 'compliance officer': manager (administrator) of administrative activities (CP code 1475.4); corporate governance professional (CP code 2413.2); corporate governance specialist (CP code 3411).[18]

In developing countries, compliance remains a relatively new concept for businesses. Introducing a compliance function allows participants in all business segments to operate more efficiently. It contributes to an atmosphere of trust and transparency both in the domestic market and on the global stage. Incorporating compliance measures into daily operational processes will help to minimise risks and introduce the right business culture in accordance with both national and international legislation.[19]

To help businesses worldwide, the International Organisation for Standardisation (ISO) has developed ISO 37301:2021 'Compliance management system - Requirements with guidance for use'. Implementing such a standard in an enterprise is a responsible and expensive undertaking. Therefore, the introduction of an effective compliance system is primarily

16 'About the Network' (*Ukrainian Network of Integrity and Compliance (UNIC)*, 2023) <https://unic.org.ua/en/about-us/about-the-network> accessed 15 October 2023.

17 Olena Lynnyk, 'Work in Compliance' (2017) 7/8 Ukrainian Lawyer 18.

18 DK 003:2010 National Classifier of Ukraine: Classifier of Professions <https://zakon.rada.gov.ua/rada/show/va327609-10#Text> accessed 15 October 2023.

19 Olena Dubovsjka, Anatolij Udivanov and Olena Boghusheva, 'Compliance in Agribusiness' (2019) 12 UNIC Digest of Business Integrity <https://www.kernel.ua/wp-content/uploads/2020/01/unic-digest-12_ukr.pdf> accessed 15 October 2023.

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

carried out by large businesses (corporations, banking financial groups, holdings, etc.) with an extensive corporate structure and many divisions and employees worldwide. Small and medium-sized businesses with an effective compliance control system are also significantly protected in the economic and legal sphere. However, this is unacceptable to everyone, as compliance is not a cheap tool. To help small and medium-sized businesses implement it, it is necessary to provide interested entrepreneurs with the opportunity to master this tool on favourable terms through business incubators. It is also necessary to assist such businessmen in calculating the cost of implementing compliance in the most problematic areas of business processes and, importantly, to standardise this tool based on ISO 37301:2021 'Compliance Management System - Requirements with Guidelines for Use'.[20]

G. Shaw, Chairman of the Technical Committee of the International Organisation for Standardisation (ISO), rightly notes that 'compliance is not only about avoiding fines and should not be limited to one department. It is everyone's business. Organisations want to work with companies they can trust. And trust is based on a corporate culture of doing the right thing, where every employee contributes because they understand the importance of doing so and believe in its importance. The key to this is good leadership and clear values that must come from the top'.[21]

Thus, there is already an international standard based on which compliance can be implemented in the business processes of an enterprise in any country. It should be noted that governments, especially those of developing countries, do not always have the political will to extend this tool to the national business environment to develop a strategic document on the phased implementation of the compliance system, especially at state-owned enterprises engaged in foreign economic activity and contributing to the creation of an internationally respected image of their country in the world.

1.3. Theoretical Framework

The theoretical foundations for forming and developing the modern compliance doctrine are diverse and multifunctional. Such principles include the concept of sustainable development, the most promising ideology of the 21st century, supported by all world leaders of the UN member states at the Millennium Summit in New York in September 2000 and the UN Summit on Sustainable Development in September 2015.[22] Global Sustainable Development Goals aimed at ultimately ensuring the balanced development of civilisation through a careful attitude to natural resources and the internalisation of external environmental influences by taking into account the economic reporting of enterprises (environmental

20 ISO 37301:2021 Compliance Management System: Requirements with guidance for use <https://www.iso.org/standard/75080.html> accessed 15 October 2023.

21 Serghij Lysenko, 'The New Standard in the Field of Compliance Systems ISO 37301:2021' (*GRACERS*, 2021) <https://gracers.com/pres-centr/iso-373012021-novyy-standart-v-oblasti-komplaens-sistem/> accessed 15 October 2023.

22 Liliia Petrivna Amelicheva, *Theoretical and Axiological Principles of Legal Regulation of Decent Work in Modern Conditions of State Formation* (Tvory 2020) 50-1.

component), through responsible consumption and production, decent work and economic growth, in particular, at the enterprise level, which is achieved through moderate management, one of the means of which is compliance management (economic component), through the fair distribution of goods, including through the payment of fair decent wages to employees at the enterprise level (social component).

In the context of the transformation of post-industrial society into information and the increased digitalisation of business processes, the theory of financial policy of the enterprise is of great importance. This theory is based on the balance between the transparency of financial reporting and the information security of the enterprise.[23] When implementing compliance and developing compliance policies (the ideological component), a modern enterprise must be based on the principles of both sustainable development and decent work.

Developing compliance policies at any enterprise is based on Lindenberg's Goal-Setting Theory (GFT), which ensures the formation of multi-purpose benefits.[24] This theory allows us to formulate new compliance goals and change the traditional ones from time to time, which allows this tool to constantly improve and respond to new challenges and threats to economic relations in the business environment in a timely manner.

Since the doctrine of compliance is centred on the theory of risk, which is implemented for enterprises through a few risk management mechanisms,[25] it should be noted that this doctrine is closely linked to the theory of economic security,[26] in which the risk theory is also the core. Ensuring the economic security of enterprises as competitive entities involves implementing a certain aspect of management aimed at the formation, development and realisation of their competitive advantages.[27] The development of competitive advantages is the most important condition for an enterprise to get super profit and strengthen its economic security.[28] In addition, the specialised literature notes that compliance as a set of

23 Svitlana Bevz and others, 'Confidential Information and the Right to Freedom of Speech' (2021) 10 International Journal of Criminology and Sociology 648, doi:10.14505//jarle.v11.4(50).12.

24 Julien Etienne, 'Compliance Theory: A Goal Framing Approach' (2011) 33(3) Law & Policy 305, doi:10.1111/j.1467-9930.2011.00340.x.

25 MV Savchenko and VYu Vyshnevskyi, 'Directions for Increasing the Effectiveness of Risk Management in the Context of Integrated Risk Assessment of Enterprises in the Electric Power Industry' (2023) 1 Economic Bulletin of Dnipro University of Technology 114, doi:10.33271/ebdut/81.090.

26 Tetiana Tkachenko, 'The Genesis of the Development of Economic Security Theory and a Systemic Approach to its Treatment' (2021) 19 Economic Bulletin of National Technical University of Ukraine "Kyiv Polytechnical Institute" 20, doi: doi:10.20535/2307-5651.19.2021.240451.

27 MV Savchenko and OV Shkurenko, 'Management of the Competitiveness of the Enterprise in the Context of Provision of Economic Security' (2019) 3 Visnik of the Volodymyr Dahl East Ukrainian National University 156.

28 Larysa Shaulska and others, 'Strategic Enterprise Competitiveness Management under Global Challenges' (2021) 20(4) Academy of Strategic Management Journal <https://www.abacademies.org/articles/strategic-enterprise-competitiveness-management-under-global-challenges-10917.html> accessed 15 October 2023.

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

preventive measures aimed at monitoring potentially negative factors and trends that can cause economic damage to an enterprise is currently considered a promising direction for developing economic security theory.[29]

Management theory, which considers an organisation as a system in the unity of its parts and links with its external environment, has an equally important influence on the formation of the compliance doctrine[30] and the theory of fractality, according to which any subsystem also has the characteristic properties of the system.[31] These theories allow the business environment to form an understanding that there is only one enterprise management system, into which standards-based tools are integrated to improve it, such as compliance, implemented based on ISO 37301:2021, 'Compliance Management System - Requirements with Guidelines for Use'. Also, these theories contribute to maintaining axiological values in the enterprise that are important for compliance (integrity, openness, transparency, social responsibility, and zero tolerance for corruption). If senior management strongly supports compliance policies based on such axiological principles, then the same positive attitude will be towards these policies and the entire staff.

Important theoretical provisions are currently formed in the compliance doctrine itself. Specialist literature notes three structural (organisational) models of compliance management existing in practice.[32] This literature substantiates the importance and necessity of introducing an independent compliance unit into the organisational structure of an industrial enterprise, the functioning and management of which is carried out based on a centralised, decentralised, or combined structure.[33]

The first model of compliance is a centralised structure, the specificity of which is that one compliance officer is responsible for the entire compliance function, regardless of its scope.[34] In such circumstances, compliance controllers report to business unit managers or directly to the head of the compliance function. In this case, the head of the compliance service is responsible for the effectiveness of the organisation and operation of the compliance system, the fulfilment of its tasks and powers, and the implementation of compliance policies. The head of the compliance function may be a separate structural and personnel unit or may combine this position with another, for example, the head of the legal or accounting department.

29 TV Romanchyk, 'Compliance Risks in the System of Ensuring Economic Security of the Enterprise' in OV Prokopenko, VYu Shkola and VO Shcherbachenko (eds), *Management of the Innovative Component of Economic Security: Management of the Innovative Basis of the Financial and Investment Component of Economic Security*, vol 3 (Trytorija 2017) 270.

30 Hubert Spahn, 'Effective Compliance Management Reduces Liability Risks' (*DQS Holding GmbH*, 26 January 2022) <https://www.dqsglobal.com/intl/learn/blog/effective-compliance-management-reduces-liability-risks> accessed 15 October 2023.

31 LD Garmider, 'Fractal approach to staff potential development of trading enterprise' (2014) 3 Scientific Bulletin of Poltava University of Economics and Trade: Economic Sciences 154.

32 Tetiana Oleksandrivna Kobielieva, 'Organizational Compliance Structure in Industrial Enterprises' (2018) 47 Bulletin of the National Technical University "Kharkiv Polytechnic Institute": Economic Sciences 127.

33 Kobielieva (n 5) 313.

34 Okunev, Boyko and Lukin (n 1) 50.

The second model of compliance is a decentralised structure, which is characterised by the fact that the head of the compliance service is responsible for one or more components of the system, for example, only anti-corruption compliance issues (for him/her, compliance is an additional function).[35] Labour law compliance is handled by the HR department, tax compliance is handled by the finance or accounting department, antitrust and corporate governance compliance is handled by the legal department, etc. Each of the department heads is responsible for risk assessment, preparation and implementation of policies and procedures, and staff training.

The third model of compliance is a combined structure based on a combination of positive features and qualities of centralised and decentralised structures. Under this structure, the chief compliance officer is responsible for general management, organising training for management and staff, organising interaction with all company units on compliance issues, monitoring compliance, organising and participating in internal investigations, and communicating with external partners on compliance issues. Each department head is responsible for risk assessment, preparation and implementation of policies and procedures in their respective priority areas.[36]

Often, more profitable and experienced companies prefer a combined structure. After all, it can combine the positive and diverse characteristics and qualities of both centralised and decentralised structures, which in turn allows to minimise the disadvantages inherent in the organisation of compliance at enterprises to a negligible level.

Specialist literature also suggests that there is no ready-made compliance model.[37] Each company should create a model that meets its needs and risks. The form of such a compliance group should reflect both the risks faced by the company and its internal business and organisational structure.

The compliance doctrine identifies the stages of implementation of compliance in the business processes of the enterprise.[38]

In the first stage, an external compliance audit of the company's processes and internal and external documentation is conducted by independent compliance specialists. Next, in the second stage, a compliance officer is appointed and their work is coordinated, or alternatively, the the functions of compliance may be delegated to the legal department. Following this, the third stage involves the implementation of tolls to eliminate/minimise identified risks, the development/improvement of internal policies, acts and procedures, amendments to corporate and labour documents, adjustments to contracts, and the

35 ibid 51.

36 ibid 51-2.

37 ICC Commission on Competition, *The ICC Antitrust Compliance Toolkit: Practical Antitrust Compliance Tools for SMEs and Larger Companies* (ICC 2013).

38 Ukrainian Network of Integrity and Compliance (UNIC), 'Compliance: Basic Principles of Risk Identification and their Minimization: Instruction' (*UNIC*, 25 October 2022) <https://unic.org.ua/en/news/proponuyemo-dostupnu-instrukciyu-osnovni-principi-viyavlennya-rizikiv-ta-yih-minimizaciyi-376/> accessed 15 October 2023.

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

conducting of training (both internal and external - for the company's counterparties). After that, the fourth step entails implementing a system for assessing and managing compliance risks through the documents mentioned above, job responsibilities and control mechanisms. In the fifth stage, the focus shifts to systematically training existing and new employees, as well as key counterparties, to comply with the rules set out in compliance policies, considering the specifics of their functions. In the sixth stage, the effectiveness of internal compliance documents is regularly monitored, with periodic reviews and updates (at least once a year) to accommodate changes in legislation, law enforcement practices of state authorities, and the emergence of new risks.

In the specialised scientific literature, compliance theory defines many different types of compliance. This variety depends on the specifics of the business processes in which the tool is used. Compliance may be aimed at 1) prevention of money laundering; 2) counteraction to financial support of terrorism; 3) security of banking activities; 4) protection of intellectual property and innovation activities of the enterprise; 5) preservation of natural and production environment; 6) ensuring antitrust policy of the enterprise; 7) ensuring stability and efficiency of the insurance, securities market, listing.[39]

Based on the purpose of implementing compliance in business processes, the following special types of compliance can be identified (Tab. 1).[40]

***Table* 1. Special types of compliance and their purpose**

Type	Purpose
Anti-corruption	employees' compliance with anti-corruption rules and regulations
Antimonopoly	prevention of collusion between market participants, state bodies, unfair competition, procurement violations
Bank	compliance with the requirements of financial monitoring, anti-corruption and currency legislation
Ecological	compliance by the enterprise with the requirements of environmental legislation, reduction of environmental and legal risks
Informative	ensuring proper protection of personal data, cyber security
Criminal and law	analysis of the company's business processes from the point of view of signs of theft, crime prevention
Tax	preventing problems during tax audits
Sanctioned	preventing connections with counterparties that are under sanctions
Labour	prevention of violations of labour legislation by the company and employees, work with personnel

39 Mykyta Mozharovskyi, 'Business Entity Compliance: Concepts, Types and Principles' (2021) 2 Law Review of Kyiv University of Law 205-6.

40 Compiled by the authors on the basis of Mozharovskyi (n 39); 'Types of Compliance and when it may be Needed' (*YouControl Blog*, 9 November 2020) <https://youcontrol.com.ua/articles/compliance_guide/> accessed 15 October 2023.

This typology of compliance is sufficient to identify priority areas, but it should be noted that the typology of compliance is constantly being improved. Currently, there is a need to study another type of compliance - sales compliance.

Business processes and the business environment are constantly changing; some types of compliance are becoming more popular, while others are already playing a secondary role.

1.4. Overview of Compliance Legislation and Regulations

International acts, extraterritorial legislation (legislative acts of general action) and regulatory acts are the basis that mediates organisational, legal and methodological requirements for the implementation and use of compliance in business processes of enterprises.

1. International acts from influential global institutions regulating compliance issues include the following:

1) The UN Convention against Corruption of October 31 2003, which for the first time obliged UN Member States to establish criminal liability in their national legislation for the following acts: bribery of national and foreign public officials and officials of intergovernmental organisations; theft, misappropriation or other misuse of property by a public official; abuse of influence (pressure, promise of favour, etc.); abuse of office; illicit enrichment of a public official; bribery in private,[41]
2) The UN Declaration on Combating Corruption and Bribery in International Business Transactions of December 16 1996, the provisions of which are aimed at promoting the social responsibility of private and public corporations, including transnational corporations, and individuals engaged in international business transactions. The declaration emphasises the application of appropriate ethical standards, in particular by complying with the laws and regulations of the countries in which they conduct their business operations and taking into account the economic and social consequences of their activities. To this end, the Declaration states that UN Member States, both individually and through international and regional organisations, will take measures consistent with the constitution and fundamental legal principles of each State and relevant national laws. These measures are intended to be effective and concrete in combating all forms of corruption, bribery and other corrupt practices in international commercial transactions,[42]

41 United Nations Convention against Corruption (UNGA Res 58/4 of 31 October 2003) <https://www.refworld.org/docid/4374b9524.html> accessed 15 October 2023.

42 United Nations Declaration against Corruption and Bribery in International Commercial Transactions (UNGA Res 51/191 of 16 December 1996) <https://www.refworld.org/docid/5290addf4.html> accessed 15 October 2023.

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

3) The OECD Conventions are important conventional mechanisms for combating bribery of foreign public officials in international business transactions and combating base erosion and profit shifting within the OECD.[43] The main document in this group is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of December 17 1997, according to which each OECD Member State will take all necessary measures to establish that, under national law, the knowing offer, promise or giving, directly or indirectly, of any material, pecuniary or other advantage by any person or entity to or for the benefit of a foreign public official is illegal.[44] This group also undoubtedly includes the Convention on Mutual Administrative Assistance in Tax Matters of January 25 1988, as amended by the Protocol of May 27 2010,[45]and the Multilateral Convention for the Implementation of Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting of November 24 2016.[46] The provisions of these documents were adopted to establish an effective taxation mechanism in the OECD member states and other signatory states,
4) The Council of Europe Criminal Law Convention on Corruption ETS No. 173 of January 27 1999[47] is an important anti-corruption standard primarily for European countries. The document's provisions oblige the member states of the Council of Europe and other signatories to the Convention to implement a common criminal policy aimed at protecting society from corruption, including the adoption of relevant regulations and preventive measures, as a matter of urgency.

2. Extraterritorial legislation includes several important laws that, although adopted at the national level in some highly developed countries, have a significant impact on other countries whose businesses are closely interconnected and develop based on compliance.

It is well known that the first law to provide for criminal liability for corruption offences abroad was the Foreign Corrupt Practices Act (FCPA), which was enacted in the United States in 1977 to prevent and deter bribery of foreign government officials, increase transparency in financial reporting, and create a competitive environment for companies operating abroad. The FCPA considers corruption offences committed by publicly traded

43 Anatolij Petrenko, 'Conventional Regulation of International Cooperation within the Framework of the OECD' (2020) 2 Law Review of Kyiv University of Law 478.

44 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted on 17 December 1997) <https://www.oecd.org/corruption/oecdantibriberyconvention.htm> accessed 15 October 2023.

45 OECD Convention on Mutual Administrative Assistance in Tax Matters <https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm> accessed 15 October 2023.

46 OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (adopted on 24 November 2016) <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> accessed 15 October 2023.

47 Council of Europe Criminal Law Convention on Corruption (ETS 173 adopted on 27 January 1999) <https://rm.coe.int/168007f3f5> accessed 15 October 2023.

companies to be particularly dangerous, as such actions undermine the stability of the US financial system.[48]

Another significant law in the field of corruption prevention is the UK Bribery Act, which came into force on July 1 2011.[49] Given that this law was adopted much later than the FCPA and taking into account the experience of FCPA enforcement, its differences from the FCPA are quite understandable and predictable: 1) it has similar objectives but stricter provisions; 2) it has a broader interpretation of violations; 3) it provides for liability not only for bribery of government officials but also for commercial bribery.[50]

Another important piece of legislation is the Sarbanes-Oxley Act, passed on July 30 2002, which set new or improved standards for all US public company boards, management and audit firms.[51]

It is also important to note the French legislative framework (group of laws) on anti-corruption SAPIN II, adopted on October 10 2016.[52] The main provisions of the SAPIN II Law provide for the mandatory implementation of an anti-corruption compliance programme for French companies of a certain size. Companies may be fined for non-compliance. In addition, SAPIN II Law introduced a criminal settlement procedure, expanded the extraterritorial application of French criminal law in matters of international corruption and strengthened the protection of whistleblower status.

3. Regulatory acts include:

1) The Basel II of June 26 2004, document of the Basel Committee on Banking Supervision 'International Convergence of Capital Measurement and Capital Standards: New Approaches', which contains methodological recommendations in the field of banking regulation. The main goal of the Basel II Accord is to improve the quality of risk management in banking, which, in turn, should help strengthen the stability of the financial system as a whole,[53]
2) The Health Insurance Portability and Accountability Act (HIPAA), adopted on August 21 1996 to modernise the flow of health information and to provide for how personal information held by healthcare providers and health insurance industries should be protected from fraud and theft,[54]

48 US Foreign Corrupt Practices Act 1977 <https://www.justice.gov/criminal/criminal-fraud/foreign-corrupt-practices-act> accessed 15 October 2023.

49 UK Bribery Act 2010 <https://www.legislation.gov.uk/ukpga/2010/23/contents> accessed 15 October 2023.

50 Okunev, Boyko and Lukin (n 1) 21.

51 Sarbanes-Oxley Act 2002 <https://sarbanes-oxley-act.com> accessed 15 October 2023.

52 Sonia Cabanis, 'The Fight Against Corruption: The Sapin II Act, its pillars and their implementation' (*Deloitte*, February 2023) <https://www2.deloitte.com/content/dam/Deloitte/fr/Documents/risk/Book_Loi_Sapin_II_UK_V3.pdf> accessed 15 October 2023.

53 Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework (comprehensive version) <https://www.bis.org/publ/bcbs128.htm> accessed 15 October 2023.

54 Health Insurance Portability and Accountability Act 1996 <https://www.govinfo.gov/app/details/PLAW-104publ191> accessed 15 October 2023.

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

3) standards and codes of practice, such as the 1996 Guide to Supply Chain Operations (SCOR),[55] an inter-industry standard and diagnostic tool in supply chain management of the Supply-Chain Council (a global non-profit consortium), ISO 9000:2015 'Quality management systems - Fundamentals and vocabulary', that describes the fundamental concepts and principles of quality management that can be universally applied to organisations seeking sustainable success through the implementation of a quality management system,[56]
4) contracts with business partners,
5) corporate (internal) rules of local action (e.g., ethical standards of behaviour that are established and relevant to a particular area of activity).

A very important and widely discussed event was the adoption and entry into force of ISO 37301:2021 'Compliance Management System - Requirements with guidance for use',[57] which established a single international standard for anti-corruption compliance in business. On the one hand, the document is often criticised, noting that the conditions of different businesses in different countries are so different that any standard in this area is currently incorrect. On the other hand, for companies established and operating in transition economies, such a standard is an excellent guide for developing and implementing their own anti-corruption programme, a "hint" both in terms of its structure and the content of certain measures to be implemented.[58]

Such compliance with legal norms and requirements of legislation, standards and ethical norms (codes of conduct) may relate, in particular, to combating corporate fraud and corruption (anti-corruption compliance), antitrust regulation (antitrust compliance), personal data protection (information compliance), labour relations (labour compliance), etc.

2 METHODOLOGY

The information base of the study includes statistical data from analytical agencies, factual data from monographic and periodical literature, reports of international organisations, in particular the Organisation for Economic Co-operation and Development (OECD), regulatory documents, legislative acts that form the regulatory framework for compliance implementation in countries around the world, etc.

Due to the general scientific synergistic approach to the study of compliance, the work combines the methodological achievements of economic and legal sciences.

55 Sarah K White, SK 'What is SCOR? A Model for Improving Supply Chain Management' (*CIO*, 13 August 2021) <https://www.cio.com/article/222381/what-is-scor-a-model-for-improving-supply-chain-management.html> accessed 15 October 2023.

56 ISO 9000:2015 Quality Management System: Fundamentals and Vocabularu <https://www.iso.org/obp/ui/en/#iso:std:iso:9000:ed-4:v1:en> accessed 15 October 2023.

57 ISO 37301:2021 (n 20).

58 Okunev, Boyko and Lukin (n 1) 21.

The methodological apparatus of the study includes such methods as methods of mathematical calculations and graphical methods for assessing the degree of compliance implementation in countries around the world; probabilistic methods for providing recommendations for management actions and testing for clustering countries around the world.

The study uses special legal methods: formal legal methods for classifying the main features of the compliance phenomenon, comparative legal methods for comparing compliance regulations in different countries, and logical and legal methods for improving legal regulation of compliance as a means of the economic well-being of enterprises.

3 AN EMPIRICAL STUDY OF THE EFFECTIVENESS OF THE USE OF COMPLIANCE IN THE COUNTRIES OF THE WORLD

The authors of the article grouped countries of the world to summarise the patterns and main trends in the use of compliance in different countries using cluster analysis tools.

Cluster analysis allows us to substantiate the trends in the development of compliance in countries of the world based on multidimensional data. The study proposes the following hypothesis: since any model determines certain rules for the development of business processes of enterprises and predicts trends in the development of the national economy, the application of clustering results will help enterprises in making management decisions on the selection of strategic partners and mitigating threats to economic security.

Countries are divided into clusters based on data generated from official statistics, recognised international ratings and indices.

The objects of classification for the cluster analysis of the effectiveness of compliance were the OECD countries, China and Ukraine.

The author's research methodology is based on a variety of types of compliance and their corresponding global indices: Corruption Perceptions Index (CPI)[59] for anti-corruption compliance, Global Organized Crime Index (GOCI)[60] for criminal law compliance, Environmental subindex Legatum Prosperity Index (EsLPI)[61] for environmental compliance,

59 Transparency International, 'Corruption Perceptions Index' (*Transparency International*, 2022) <https://www.transparency.org/en/cpi/2022> accessed 15 October 2023.

60 Global Initiative, 'Global Organized Crime Index' (*Global Initiative*, 2023) <https://globalinitiative.net/initiatives/ocindex/?f_article_type=article&f_region=&f_crime_type=&f_content_type=&f_publication_type> accessed 15 October 2023.

61 Legatum Institute, *The 2023 Legatum Prosperity Index™: A tool for transformation* (16th edn, Legatum Institute Foundation 2023) <https://www.prosperity.com/download_file/view_inline/4789> accessed 15 October 2023.

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

Basel Anti-Money Laundering Index (Basel AML Index)[62] for financial compliance, Social Progress Index (SPI)[63] for labour compliance.

3.1. Anti-Corruption Compliance

CPI was chosen by the authors of the article to compare countries in terms of the effectiveness of anti-corruption compliance.[64] The CPI measures perceived corruption in the public sector in 180 countries and territories and is based on surveys of experts and businesspeople. The CPI is based on 13 independent data sources and uses a scale from 0 to 100 points, where 0 points mean a high level of corruption and 100 points mean zero tolerance for corruption.

Despite the joint efforts and numerous achievements, the CPI in 2022 reflects the enormous scale of corruption in countries around the world. For eleven years in a row, the global average has remained unchanged at 43 out of 100 points. More than two-thirds of countries (68%) had CPI scores below 50. The lion's share of countries (90%) had a stable CPI level.

A study of the correlation between CPI and GDP per capita for OECD countries, China, and Ukraine revealed a significant relationship between these indicators according to Chaddock's scale (the coefficient of determination was 0.5327) (Fig. 1).

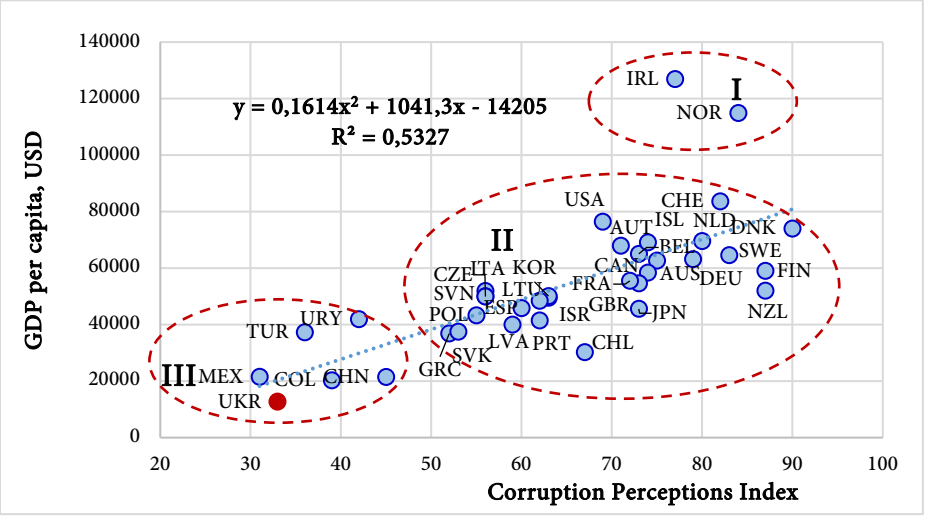


Fig. 1. **Paired regression of the dependence of the level of economic development on the CPI of OECD countries, China and Ukraine, 2022**

62 Basel Institute on Governance, *Basel AML Index 2022: Ranking money laundering and terrorist financing risks around the world* (11th edn, Basel Institute on Governance 2022) <https://index.baselgovernance.org/download> accessed 15 October 2023.

63 Social Progress Imperative, 'Social Progress Index 2022: Executive Summary' (*Social Progress Imperative*, 2023) <https://www.socialprogress.org/global-index-2022overview> accessed 15 October 2023.

64 Transparency International (n 59).

Fig. 1,[65]: Countries with strong institutions and a well-functioning democracy top the ranking. However, it should be noted that the CPI for 2022 showed that efforts to fight corruption as a priority area of anti-corruption programmes are not effective enough, which did not contribute to the improvement of the CPI in more than half of the countries.

In 2022, Denmark topped the CPI ranking with a score of 90. It is followed by Finland and New Zealand with 87 points. The high CPI scores in these countries are due to successful anti-corruption practices, a key element of anti-corruption compliance. Ukraine (33 points) and Mexico (31 points) had the worst scores in 2022 among the analysed countries, which placed them at the bottom of the ranking. The reason for this is the underdeveloped culture of anti-corruption compliance in these countries.

Fig. 1 clearly shows that countries are divided into three groups. The first and second groups consist of highly developed countries. The average group level of the CPI was 80.5 points for Ireland and Norway, which were in the first group. The second group includes the largest number of countries studied - 29, 78.4% of the total analytical data set. The average level of the CPI for the second group of countries was 72.8 points. The average level of GDP per capita in the second group was more than twice as low as in the first group, amounting to USD 5,530. The third group includes six developing countries, including Ukraine. The average CPI for the third group of countries was 37.6 points, almost half as much as for the second group. A similar trend can be observed for the average GDP per capita. In the third group, GDP per capita averaged USD 25855, more than twice as low as the corresponding indicator for the second group of countries.

3.2. Criminal and Law Compliance

In the context of the study, the authors propose using the GOCI as a basis for substantiating the effectiveness of countries' use of criminal law compliance.[66] The GOCI is a multidimensional tool that assesses the level of crime and resilience to organised crime in three key pillars - criminal markets, criminal actors and resilience to organised crime. The GOCI uses a scale from 0 to 10 points, where 0 points represent the highest level of resilience to organised crime and 10 points represent the lowest level of resilience.

A study of the correlation between GOCI and GDP per capita for OECD countries, China and Ukraine, revealed a weak relationship between these indicators (the coefficient of determination was 0.2156) (Fig. 2).[67]

65 ibid. Built by the authors based on the CPI in 2022.

66 Global Initiative (60).

67 ibid. Built by the authors based on the GOCI in 2022.

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

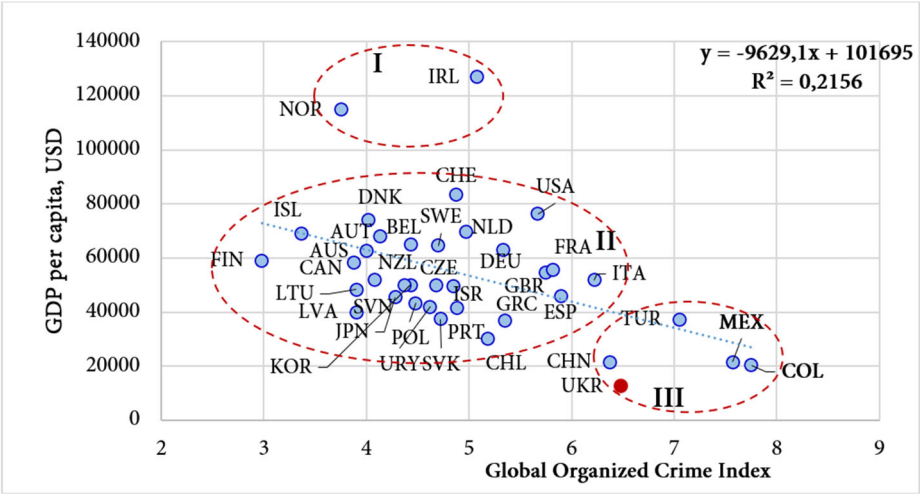


Fig. 2. **Paired regression of the dependence of the level of economic development on the GOCI of OECD countries, China and Ukraine, 2022**

Fig. 2 also shows that countries are divided into three groups:

- the first group (Ireland and Norway) with an average GOCI score of 4.5 points;
- the second group of countries (30 OECD countries) - 4.7 points;
- the third group (less developed OECD countries, China and Ukraine) - 7.0 points.

The data obtained suggests that the more efficiently the country's enterprises use the tools of criminal legal compliance, the higher the level of economic security and the level of economic well-being of the country.

3.3. Environmental Compliance

The effectiveness of using environmental compliance tools was substantiated with the help of EsLPI.[68] The EsLPI measures the environmental aspects of the environment and the level of environmental protection. The EsLPI uses a scale from 0 to 100 points, where 0 points means the lowest level of use of environmental compliance instruments, and 100 points means the highest level of use.[69]

A study of the correlation between EsLPI and GDP per capita for OECD countries, China, and Ukraine revealed a weak relationship between these indicators (the coefficient of determination was 0.2807) (Fig. 3).[70]

68 Legatum Institute (n 61).

69 'Index Methodology' (*The Legatum Centre for National Prosperity Home of the Legatum Prosperity Index™*, 2023) <https://www.prosperity.com/about/methodology> accessed 15 October 2023.

70 Built by the authors based on the EsLPI in 2022: Legatum Institute (n 61).

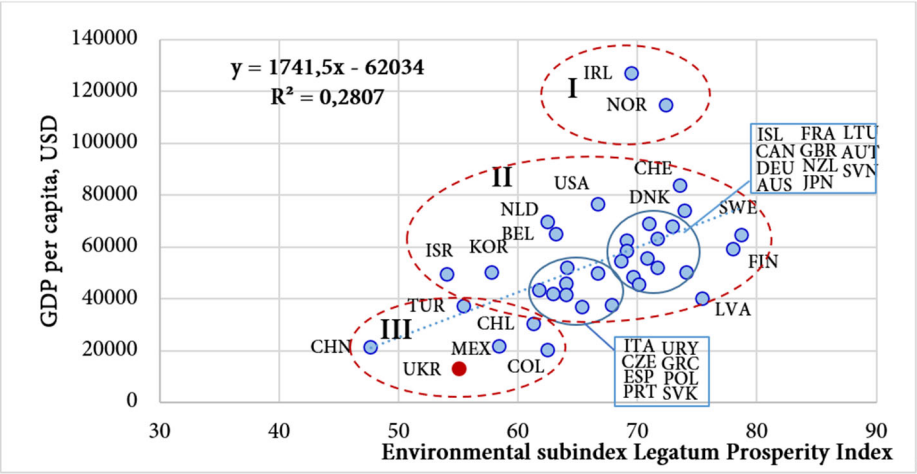


Fig. 3. **Paired regression of the dependence of the level of economic development on the EsLPI of OECD countries, China and Ukraine, 2022**

Fig. 3 also shows that countries are divided into three groups according to the level of efficiency of environmental compliance. The countries of the first group, Ireland and Norway, obtained an average EsLPI score of 71 points. The 29 OECD countries in the second group received 69.8 points. The six countries that formed the third group received 54.2 points.

The grouping results indicate that countries with high economic prosperity use environmental compliance instruments more effectively.

3.4. Financial Compliance

Basel AML Index is used to substantiate the effectiveness of countries' use of financial compliance instruments.[71] The Basel AML Index is a generalised composite indicator determined by the Basel Institute on Governance to identify and assess the risks of corruption in the financial sector, the involvement of a country in money laundering, and the financing of terrorism. It is measured on a scale from 0 to 10 points, where 0 points indicate minimal financial risks and 10 points are the maximum value of these risks. The Basel AML Index rating is based on five sub-indices: the quality of the anti-money laundering and counter-terrorist financing system (65%), corruption and bribery risks (10%), financial transparency and standards (10%), public transparency and accountability (5%), and political and legal risks (10%).

71 Basel Institute on Governance (n 62).

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

A study of the correlation between the Basel AML Index and GDP per capita in OECD countries, China and Ukraine, revealed a weak relationship between these indicators (the coefficient of determination was 0.2026) (Fig. 4).[72]

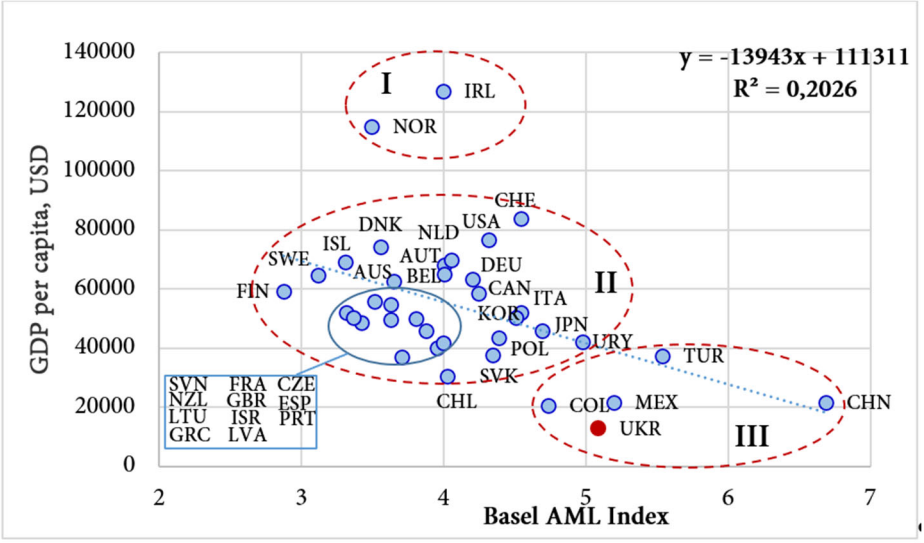


Fig. 4. **Paired regression of the dependence of the level of economic development on the Basel AML Index of OECD countries, China and Ukraine, 2022**

By visualising the pairwise regression of the dependence of a country's economic development level on the Basel AML Index (Fig. 4), the authors have identified three groups of countries. The first group traditionally includes two of the most developed countries (Ireland and Norway), with an average Basel AML Index score of 3.75 points in the group. The second group includes 30 OECD countries with an average Basel AML Index score of 3.91 points. The third group was formed by countries whose financial systems are most vulnerable to the risks of money laundering, terrorist financing and related crimes (China, Turkey, Mexico, Ukraine and Colombia). The average Basel AML Index score for the third group was 5.37 points.

Thus, more effective use of financial compliance tools ensures the minimisation and elimination of the risk of corruption and the country's involvement in money laundering and terrorist financing.

3.5. Labour Compliance

The Social Progress Index (SPI) has been used to substantiate the effectiveness of implementing labour compliance elements by countries around the world.[73] The SPI is a

72 ibid. Built by the authors based on the Basel AML Index in 2022.
73 Social Progress Imperative (n 63).

multifunctional tool for measuring a country's social performance across 60 indicators. The SPI uses a scale from 0 to 100 points, where 0 points mean a low level of labour compliance efficiency, and 100 points mean a high level of application of this tool.

The study of the correlation between the SPI and the level of GDP per capita in the countries under study revealed a moderate relationship between these indicators (the coefficient of determination was 0.4722) (Fig. 5).[74]

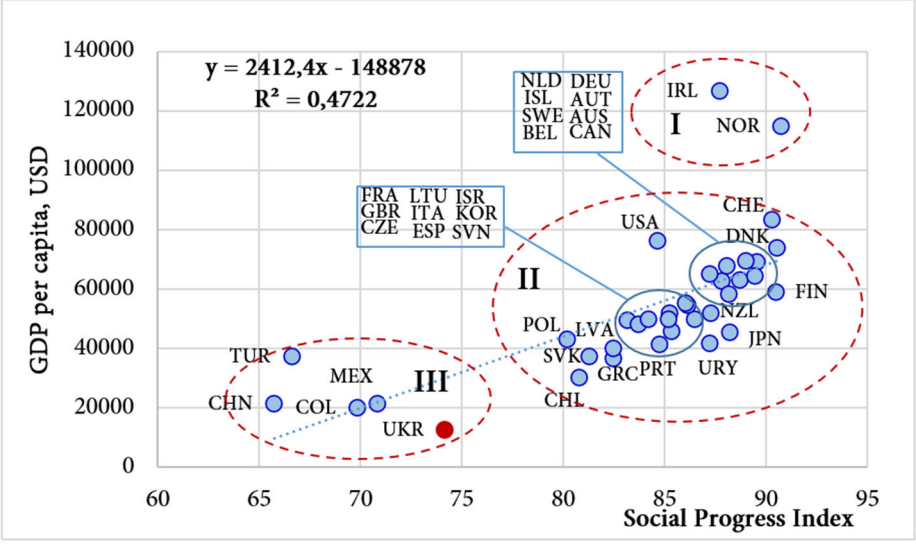


Fig. 5. **Paired regression of the level of economic development of a country on the SPI of OECD countries, China and Ukraine, 2022**

Fig. 5 clearly shows that the countries are divided into three groups. The first and second groups consist of highly developed countries. In particular, the first group includes two countries (Norway and Ireland) with an average SPI score of 89.2 points. Norway became the leader in the SPI in 2022 with a score of 90.7 points. The second group includes 30 of the 37 countries surveyed, with an average SPI score of 86.1 points. The third group includes five developing countries, including Ukraine. Ukraine is the leader among the countries in the third group, scoring 74.17 points. The average SPI level for the third group of countries was 69.4 points.

All the above makes it possible to state the importance and leading role of labour compliance in ensuring the economic security of enterprises through the fair and responsible application of compliance policies by staff and management.

74 ibid. Built by the authors based on the SPI in 2022.

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

3.6. Clustering of the Countries of the World

The clustering of countries by the degree of use of compliance types in the business processes of enterprises was carried out in the Statistica software with the construction of a dendrogram using the Ward method (Fig. 6).[75] The developed dendrogram allows us to identify and summarise countries in which the degree of efficiency of using compliance tools in all priority areas is similar. This allows business structures to identify safer strategic partners and countries to implement and develop compliance policies to ensure economic security.

The dendrogram (Fig. 6) and Tab. 2 show that countries belong to a certain cluster, which allowed us to identify these clusters as:

1) countries with a high level of compliance effectiveness, which include 18 highly developed countries that actively implement compliance at all levels of economic entities and in all priority areas,
2) countries with an average level of compliance effectiveness, which include 14 countries where compliance is implemented in a fragmented manner (for some types of compliance),
3) countries with a low level of compliance effectiveness, including 5 countries where compliance is at the initial stage of implementation.

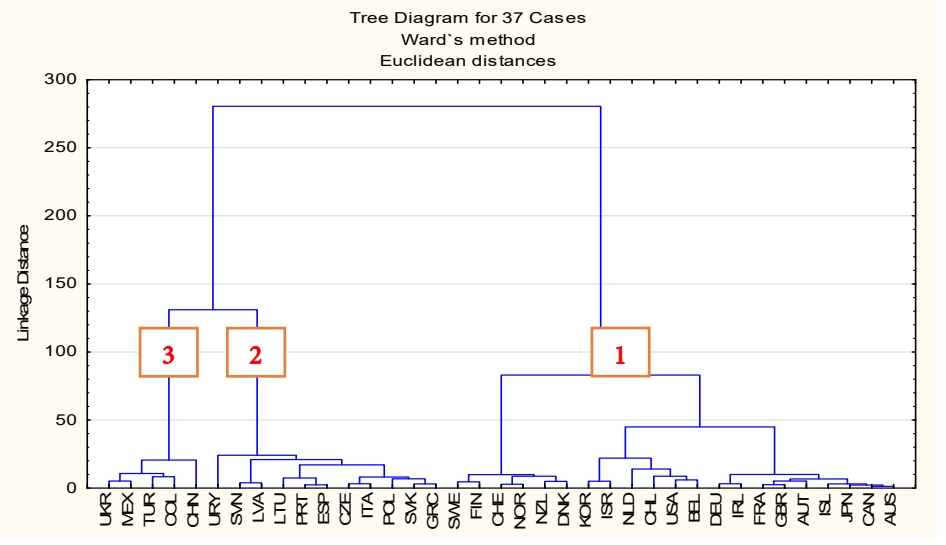


Fig. 6. **Dendogram of countries by key predictors into clusters, 2022**

75 Built by the authors in Statistica based on the CPI, GOCI, EsLPI, Basel AML Index, SPI in 2022: Transparency International (n 59); Global Initiative (60); Legatum Institute (n 61); Basel Institute on Governance (n 62); Social Progress Imperative (n 63).

Identifying country clusters allows for a deeper understanding of the specifics of the use of compliance tools in countries with different levels of compliance culture. It also identifies challenging and promising areas for the development of compliance for different classification groups of countries and becomes the basis for compliance programmes, etc.

The cluster analysis conducted only for the OECD countries, China and Ukraine cannot claim to be complete, but it should be recognised as satisfactory, especially given the fact that countries with quite different economic development characteristics were selected, which can be considered the basis for clusters joined by other countries of the world. The hierarchical cluster formation procedure ensures that such extended clusters will be formed automatically around the clusters already built around the most representative countries.

Tab. 2 presents statistical metrics (Euclidean distances between the resulting clusters and average values) for each of the studied predicates of the formed clusters.[76]

***Table* 2. Results of cluster analysis**

Names of clusters	countries with a high level of efficiency in the application of compliance			countries with an average level of efficiency in the application of compliance			countries with a low level of efficiency in the application of compliance		
Number of countries in the cluster	18			14			5		
Countries	Australia, Austria, Belgium, Canada, Denmark, Ireland, Iceland, Germany, Netherlands, Norway, Finland, France, Switzerland, Sweden, Great Britain, USA, Japan			Greece, Israel, Spain, Italy, Korea, Lithuania, Latvia, Poland, Portugal, Slovakia, Slovenia, Hungary, Czech Republic, Chile			China, Colombia, Mexico, Turkey, Ukraine		
Characteristics of the cluster	Mean	Standard	Variance	Mean	Standard	Variance	Mean	Standard	Variance
CPI	77,94	6,28	39,47	57,57	6,22	38,73	36,80	5,50	30,20
GOCI	4,51	0,82	0,68	4,82	0,67	0,44	7,04	0,62	0,39
EsLPI	70,77	4,18	17,47	64,95	5,73	32,83	55,83	5,42	29,35
Basel AML Index	3,81	0,50	0,25	4,04	0,46	0,21	5,45	0,75	0,56
SPI	88,33	1,70	2,88	83,74	2,13	4,52	69,43	3,40	11,57

76 Compiled and calculated by the authors in Statistica 12 based on the CPI, GOCI, EsLPI, Basel AML Index, SPI in 2022: Transparency International (n 59); Global Initiative (60); Legatum Institute (n 61); Basel Institute on Governance (n 62); Social Progress Imperative (n 63).

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

Tab. 2 shows that the clusters differ most in terms of the CPI prediction, followed by the EsLPI and that the average for the SPI is insignificantly different.

Thus, the clustering of the OECD countries, China and Ukraine, allowed us to identify common features in the effectiveness of compliance tools in the following priority areas: anti-corruption, criminal law, environmental, financial and labour compliance. Clustering is only the first step in strengthening the economic security of countries. Identification of common features in the use of compliance in different countries is the basis for forming a set of mechanisms to improve compliance programmes and accelerate the economic development of these countries.

4 VALIDITY OF THE RESULTS OF THE STUDY ON THE EFFECTIVENESS OF COMPLIANCE IMPLEMENTATION IN EASTERN EUROPEAN COUNTRIES

According to the results of the cluster analysis (Table 2), almost all of the Eastern European countries under study, unfortunately, belong only to the cluster of «countries with an average level of compliance effectiveness» (the second cluster). This is because they are OECD and EU countries with economies in transition. However, due to the active implementation of international standards of compliance control in the business processes of companies, the Euclidean distances between the countries under study and those with a high level of compliance efficiency (the first cluster) are rapidly decreasing.

Fig. 6 shows that Eastern European countries such as Poland, the Czech Republic and Slovakia formed a subcluster in the second cluster by statistical metrics, which indicates common features in the use of compliance tools, which is not always highly effective in the context of economic security. This encourages these countries to develop reform programmes with the same focus on implementing universal supranational compliance practices.

Ukraine is one of the Eastern European countries. The dendrogram (Fig. 3) and (Tab. 2) show that Ukraine belongs to the cluster of «countries with a low level of compliance efficiency». This is because almost the entire period of independent Ukraine's existence has been characterised by permanent reforms of both the public administration with its insufficiently effective judicial system and the systems of state healthcare, education, etc. and the economic sector, which suffers from shadowing and oligarchisation.[77] The convergence of Ukrainian legislation with EU legislation, OECD international instruments, and regulations of other developed partner countries such as the United States and the United Kingdom, including on compliance issues, is also too slow.

The Russian aggression has become a catalyst for large-scale operational risk for most companies, which includes, in particular: 1) business continuity risk (losses associated with material damage, losses associated with intangible assets, personnel-related losses, lost income (profit) or lost profits, losses associated with the loss of investment opportunities);

77 Amelicheva (n 9) 8.

2) the risk of interaction with third parties, jeopardising contracts, delivery times, and cybersecurity of companies. If realised, this risk may result in both loss of services/goods and default; 3) cyber risk has become even more relevant in times of war due to ideological motives, making it more difficult to track the target of an attack; 4) the risk of financial crime due to export controls and bans, and the scrutiny of regulators. This risk is particularly relevant to the financial sector. The risk of corporate fraud in companies also remains relevant, as in any crisis, some people will want to take advantage of the situation and make money. Companies should continue to review their processes, such as those related to charitable contributions, financial assistance, procurement, etc. [78]

As the situation in Ukraine is changing very rapidly amid the armed aggression of the Russian invaders, compliance must be as flexible and responsive as possible to help businesses cope with threats in times of turbulence. The areas on which the compliance function should focus will depend on the business area. However, the above risks should be considered by all companies regardless of industry, with more attention paid to anti-corruption, financial, criminal, labour and environmental compliance.

Ukraine needs to develop a National Programme on State Support for the Implementation of Compliance by Small and Medium-Sized Enterprises for 2024-2029 and adopt it as a law. This programme should include state measures to introduce compliance in small and medium-sized businesses in the above priority areas.

The process of Ukraine's accession to the OECD is currently important for overcoming corruption and establishing sustainable and secure economic relations with the member states of this well-known global organisation. To do so, Ukraine needs to ratify the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[79]

The author's approach to studying the effectiveness of the implementation of compliance tools using mathematical calculations and probabilistic and graphical methods allowed us to diagnose the countries of Eastern Europe and determine their belonging to certain clusters by the level of compliance implementation effectiveness. This allows these countries to develop compliance policies aimed at ensuring economic security.

78 Kateryna Safronenko, 'The Role of Compliance in Wartime: The Main Directions of Compliance Activities in Ukraine' (*KPMG*, 2 August 2022) <https://kpmg.com/ua/uk/blogs/home/posts/2022/08/rol-komplayensu-pid-chas-viyny.html> accessed 15 October 2023.

79 '"The process of Ukraine's integration to the OECD is important not only for overcoming corruption but also for ensuring peace in the world", – Head of the NACP Oleksandr Novikov' (National Agency on Corruption Prevention, 30 August 2022) <https://nazk.gov.ua/en/the-process-of-ukraine-s-integration-to-the-oecd-is-important-not-only-for-overcoming-corruption-but-also-for-ensuring-peace-in-the-world-head-of-the-nacp-oleksandr-novikov/> accessed 15 October 2023.

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

5 CONCLUSIONS

All the above leads to the following conclusions.

The transnationalisation of global economic relations necessitates introducing modern tools in enterprises that minimise legal, economic and reputational risks and promote the establishment of sustainable and fair business relations. Among these tools, compliance is currently the most effective and influential.

The study highlights the essence and purpose of business process compliance and its growing role. It also identifies external and internal factors and trends that can harm the economic security of an enterprise.

Based on the synergistic approach, the author establishes that the definition of 'compliance' is inconsistent with conceptual and categorical apparatuses of economic and legal sciences. The legal and economic nature of this category is not clearly defined and has not been studied by scholars. In jurisprudence, this concept tends to be related to the conceptual apparatus of labour, civil, commercial, corporate, criminal, administrative, and environmental law, which confirms its multidimensional and multifunctional nature in legal discourse. In the economy, compliance has also enriched the categorical apparatus of many sciences and is actively used as an effective means of implementing measures to ensure the economic security of any socio-economic systems (enterprises, industries, regions, countries, etc.), and contributes to strengthening the economic goodwill of any country and its business structures that understand its value and share the principles of integrity.

The authors evaluate the effectiveness of applying the leading types of compliance (anti-corruption, criminal law, environmental, financial, and labour) in the economies of OECD and other countries.

As a result of the empirical study of the pairwise correlation of the indices corresponding to the leading types of compliance and GDP per capita, it was proved that the level of GDP per capita in the entire analytical array of countries was significantly influenced by the Corruption Perceptions Index (the coefficient of determination was 0, 5327), moderate influence - Social Progress Index (coefficient of determination - 0.4722), weak influence - Environmental subindex Legatum Prosperity Index (coefficient of determination - 0.2807), weak influence - Global Organised Crime Index (coefficient of determination - 0.2156), weak influence - Basel AML Index (coefficient of determination - 0.2026).

Based on the cluster analysis of OECD countries, China and Ukraine, three clusters of countries were identified by the effectiveness of compliance. Countries with a high level of compliance effectiveness, including Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Iceland, Japan, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom, the United States and the United States, formed the first cluster. These countries focus their policies on actively using compliance tools at all levels, in all priority areas, and on developing and implementing joint compliance programmes. The second cluster includes the following countries: Chile, Czech Republic,

Greece, Hungary, Israel, Italy, Korea, the Baltic States, Poland, Portugal, Slovakia, Slovenia, Spain, Spain and Hungary, which use compliance tools in a fragmented manner. The third cluster was formed by countries with a low level of compliance effectiveness, which includes the following countries: China, Colombia, Mexico, Turkey, and Ukraine, where compliance is still in its infancy.

It is substantiated that to strengthen the political will of governments, especially in developing countries, to extend compliance into the national business environment, to develop a national strategic document on the phased implementation of the compliance system in business processes of enterprises, an international instrument of general action (in the form of a UN Convention) should be developed, which will facilitate more active implementation of all types of compliance by governments.

Considering the limited financial resources of small and medium-sized businesses, especially in developing countries, it is proposed that governments provide small and medium-sized businesses with the opportunity to master compliance through business incubators on favourable terms, based on ISO 37301:2021 'Compliance Management System - Requirements with Guidelines for Use'.

It is recommended that the profession of 'compliance officer' (compliance manager) be in the classification of professions at the national level. This profession directly relates to the internal/external control of the organisation's activities, allocating certain labour functions and competencies inherent in the compliance system.

It is proposed that Ukraine develop a National Programme to Support the Implementation of Compliance by Small and Medium-Sized Enterprises for 2024-2029 and adopt it as a law. This programme should include state measures aimed at implementing compliance in small and medium-sized businesses in the above priority areas.

The process of Ukraine's accession to the OECD is currently important for overcoming corruption and establishing sustainable, secure economic relations with the member states of this well-known global organisation. For this purpose, Ukraine needs to ratify the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

REFERENCES

1. Abliaiev E, 'Tax Compliance as a Tool for Ensuring the Financial Security of Enterprises' (Results of the Development of Scientific Thought - 2022: 2nd International Student Scientific Conference, Youth Scientific League, Sumy, 23 December 2022) 24.
2. Altman S and others, 'Developing an Effective Compliance Strategy: Roundtable' (2015) 3(March) Financier Worldwide <https://www.financierworldwide.com/roundtable-developing-an-effective-compliance-strategy> accessed 15 October 2023.

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

3. Amelicheva LP, 'Anti-Corruption Compliance as an Important Element of Private Law Regulation of Labor Relations' (2021) 10 Actual Problems of Social Law 8.

4. Amelicheva LP, *Theoretical and Axiological Principles of Legal Regulation of Decent Work in Modern Conditions of State Formation* (Tvory 2020).

5. Bevz S and others, 'Confidential Information and the Right to Freedom of Speech' (2021) 10 International Journal of Criminology and Sociology 648, doi:10.14505//jarle.v11.4(50).12.

6. Cabanis S, 'The Fight Against Corruption: The Sapin II Act, its pillars and their implementation' (*Deloitte*, February 2023) <https://www2.deloitte.com/content/dam/Deloitte/fr/Documents/risk/Book_Loi_Sapin_II_UK_V3.pdf> accessed 15 October 2023.

7. Dubovsjka O, Udivanov A and Boghusheva O, 'Compliance in Agribusiness' (2019) 12 UNIC Digest of Business Integrity <https://www.kernel.ua/wp-content/uploads/2020/01/unic-digest-12_ukr.pdf> accessed 15 October 2023.

8. Etienne J, 'Compliance Theory: A Goal Framing Approach' (2011) 33(3) Law & Policy 305, doi:10.1111/j.1467-9930.2011.00340.x.

9. Garmider LD, 'Fractal approach to staff potential development of trading enterprise' (2014) 3 Scientific Bulletin of Poltava University of Economics and Trade: Economic Sciences 154.

10. Ghloba D, 'Compliance in FPG: features and legal aspects' (*YouControl Blog*, 22 May 2023) <https://youcontrol.com.ua/articles/komplaiens-v-fph-2/> accessed 15 October 2023.

11. Kobielieva TO, 'Development of Recommendations by Formation of the Integrated Indicator Complex Safety Industrial Enterprise' (2018) 48 Bulletin of the National Technical University "Kharkiv Polytechnic Institute": Economic Sciences 46.

12. Kobielieva TO, 'Organizational Compliance Structure in Industrial Enterprises' (2018) 47 Bulletin of the National Technical University "Kharkiv Polytechnic Institute": Economic Sciences 121.

13. Kobielieva TO, *Industrial Enterprise Compliance-Security: Theory and Methods* (Planeta-Prynt 2020).

14. Liubokhynets LS, 'Flexible Management in the Ensuring of the Economic Security of Industrial Enterprises' (DPhil (Econ) thesis, Khmelnytskyi National University 2022).

15. Lynnyk O, 'Work in Compliance' (2017) 7/8 Ukrainian Lawyer 18.

16. Lysenko S, 'The New Standard in the Field of Compliance Systems ISO 37301:2021' (*GRACERS*, 2021) <https://gracers.com/pres-centr/iso-373012021-novyy-standart-v-oblasti-komplaens-sistem/> accessed 15 October 2023.

17. Mozharovskyi M, 'Business Entity Compliance: Concepts, Types and Principles' (2021) 2 Law Review of Kyiv University of Law 205.

18. Okunev O, Boyko O and Lukin S, *Manual for the Training Program for Persons Responsible for the Implementation of the Anti-Corruption Program* (Professional Association of Corporate Management 2018).

19. Petrenko A, 'Conventional Regulation of International Cooperation within the Framework of the OECD' (2020) 2 Law Review of Kyiv University of Law 477.

20. Posthuma RA, 'High Compliance Work Systems: Innovative Solutions for Firm Success and Control of Foreign Corruption' (2022) 65(2) Business Horizons 205, doi:10.1016/j.bushor.2021.02.038.

21. Romanchik TV, 'Place of Compliance in Ensuring Economic Security of the Enterprise' (Actual Issues of Organization and Management of Enterprises' Activities in Modern Economic Conditions: 7th Scientific and Practical Conference, National Guard Military Academy of Ukraine, Kharkiv, 29 November 2017) 152.

22. Romanchyk TV, 'Compliance Risks in the System of Ensuring Economic Security of the Enterprise' in OV Prokopenko, VYu Shkola and VO Shcherbachenko (eds), *Management of the Innovative Component of Economic Security: Management of the Innovative Basis of the Financial and Investment Component of Economic Security*, vol 3 (Trytorija 2017) 266.

23. Safronenko K, 'The Role of Compliance in Wartime: The Main Directions of Compliance Activities in Ukraine' (*KPMG*, 2 August 2022) <https://kpmg.com/ua/uk/blogs/home/posts/2022/08/rol-komplayensu-pid-chas-viyny.html> accessed 15 October 2023.

24. Savchenko MV and Shkurenko OV, 'Management of the Competitiveness of the Enterprise in the Context of Provision of Economic Security' (2019) 3 Visnik of the Volodymyr Dahl East Ukrainian National University 156.

25. Shaulska L and others, 'Strategic Enterprise Competitiveness Management under Global Challenges' (2021) 20(4) Academy of Strategic Management Journal <https://www.abacademies.org/articles/strategic-enterprise-competitiveness-management-under-global-challenges-10917.html> accessed 15 October 2023.

26. Smetanina N, 'International Experience of Implementing Corporate Compliance as a Means of Preventing Corruption in the Private Sector' (Effective Criminal Justice System as a Factor of Sustainable Economic Development: III Panel Discussion of the Second Kharkiv International Legal Forum, Yaroslav Mudryi National Law University, Kharkiv, 27 September 2018) 108.

27. Smetanina N and Popova D, The Importance of Implementing Compliance Programs to Increase the Transparency of Ukrainian Business' (2018) 3 Law Review of Kyiv University of Law 266.

28. Spahn H, 'Effective Compliance Management Reduces Liability Risks' (*DQS Holding GmbH*, 26 January 2022) <https://www.dqsglobal.com/intl/learn/blog/effective-compliance-management-reduces-liability-risks> accessed 15 October 2023.

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

29. Savchenko MV and Vyshnevskyi VYu, 'Directions for Increasing the Effectiveness of Risk Management in the Context of Integrated Risk Assessment of Enterprises in the Electric Power Industry' (2023) 1 Economic Bulletin of Dnipro University of Technology 114, doi:10.33271/ebdut/81.090.

30. Tkachenko T, 'The Genesis of the Development of Economic Security Theory and a Systemic Approach to its Treatment' (2021) 19 Economic Bulletin of National Technical University of Ukraine "Kyiv Polytechnical Institute" 20, doi: doi:10.20535/2307-5651.19.2021.240451.

31. White, SK 'What is SCOR? A Model for Improving Supply Chain Management' (*CIO*, 13 August 2021) <https://www.cio.com/article/222381/what-is-scor-a-model-for-improving-supply-chain-management.html> accessed 15 October 2023.

AUTHORS INFORMATION

Liliia Amelicheva*
Dr. Sc (Law), Professor, Professor of the Department of Civil Law and Process, Vasyl' Stus Donetsk National University, Ukraine
amelicheva@donnu.edu.ua
https://orcid.org/0000-0003-0526-5393
Co-author, responsible for data curation, writing – review & editing, investigation, formal analysis, translation of article

Maryna Savchenko
Dr. Sc (Economics), Professor, Head of the Department of International Economic Relations, Vasyl' Stus Donetsk National University, Ukraine
m_savchenko@donnu.edu.ua
https://orcid.org/0000-0002-9063-3551
Corresponding author, responsible for writing abstract and methodology of article, writing – review & editing, visualization

Larysa Shaulska
Dr. Sc (Economics), Professor, Professor of the Department of Business Economics, Taras Shevchenko National University of Kyiv, Ukraine
shaulska@knu.ua
https://orcid.org/0000-0002-7919-6733
Co-author, responsible for writing – review & editing, project administration, investigation, conceptualization of article, conclusions

Valentyna Yehorova
PhD, Associate Professor, Associate professor of the Department of lntellectual Property and Private Law, Faculty of Sociology and Law, National Technical University of Ukraine «Igor Sikorsky Kyiv Polytechnic Institute», Ukraine
egorova.kpi@gmail.com
http://orcid.org/0000-0001-8485-430X
Co-author, responsible for writing original draft, conceptualization of article, investigation, validation, conclusions

Iryna Holubenko
PhD, Senior Lecturer of the Department of lntellectual Property and Private Law, Faculty of Sociology and Law, National Technical University of Ukraine «Igor Sikorsky Kyiv Polytechnic Institute», Ukraine
holubenko.iryna.kpi.law@gmail.com
https://orcid.org/0000-0002-1632-5585
Co-author, responsible for writing original draft, methodology of article, investigation, conclusions

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinions and views expressed in this manuscript are free of any impact of any organizations.

ABOUT THIS ARTICLE

Cite this article

Amelicheva L, Savchenko M, Shaulska L, Yehorova V and Holubenko I, 'Economic and Legal Basis of Implementation of Compliance in Business Processes of Enterprises' (2024) 7(1) Access to Justice in Eastern Europe 323-56 <https://doi.org/10.33327/AJEE-18-7.1-a000120>

Submitted on 13 Nov 2023 / Revised 21 Dec 2023 / Approved 9 Jan 2024
Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000120

Managing editor – Dr. Ganna Kharlamova. **English Editor** – Julie Bold.

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

Keywords: *compliance doctrine, compliance legislation, business process, clustering.*

RIGHTS AND PERMISSIONS

REVIEW ARTICLE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Review Article

WHISTLEBLOWER'S RIGHTS IN A LEGAL INVESTIGATION: EXPLORING THE CHALLENGES AND OPPORTUNITIES IN ALBANIA

Alban Koçi*

ABSTRACT

Background: *This article examines the issues, possibilities, and methods associated with whistleblowing in Albania. Transparency and accountability became increasingly important as the country moved from communist rule to democracy. The passage of the Whistleblower Protection Law in 2016 laid the groundwork for recognising and protecting whistleblowers. This article discusses the legal framework of Law No. 60/2016, as well as other legal initiatives, in the light of the rights and protection provided for whistleblowers, following up with an administrative investigation and criminal proceeding. However, despite these legal strides, whistleblowing is hindered by several issues, including a lack of public awareness, a continuing fear of retaliation, limited legislative safeguards, and resource restrictions among whistleblower-handling organisations. As Albania continues to grapple with these challenges and seize the opportunities at hand, the challenge stands in strengthening the culture of integrity, transparency, and accountability. Commitment to this critical part of governance not only strengthens whistleblower practices but also adds to the fight against corruption and the rule of law. This article concludes with recommendations on turning challenges into opportunities and strengths through the right governance and tools, aligning with the best international practices.*

Methods: *The methodology applied for exploring whistleblowing practices in Albania included a thorough assessment of relevant legal texts, legislative frameworks, and academic literature. Primary sources included a careful review of Albanian whistleblower legislation, emphasising clauses covering rights, safeguards, and processes. This legal research offered a solid grasp of the statutory systems in place to facilitate whistleblowing practices in the nation. Furthermore, a thorough assessment of academic papers, reports from international organisations, and case studies was carried out to capture the practical consequences and obstacles faced by whistleblowers in Albania. This multidimensional approach enabled a full analysis of the theoretical underpinnings as well as real-world uses of whistleblower mechanisms in the Albanian setting.*

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

Results and conclusions: *The whistleblower practice in Albania has encountered many challenges, but improvements have been made to guarantee access to justice. The main problem that the whistleblower faces is retaliation, which creates such a fear that most will choose to stay silent in the face of injustice or illegal acts. Another issue is certainly job insecurity because many can't afford to switch jobs or find jobs that meet their criteria. Some recommendations for improving whistleblowing practices and guaranteeing more protection for vulnerable subjects include whistleblower training, strengthening the whistleblower network, evaluating results often and putting financial safeguards in place.*

1 INTRODUCTION

Law No. 60/2016 'On Whistleblowers and Whistleblower Protection'[1] was adopted as a necessary tool for progress in fighting corruption in light of the new justice reform undertaken by Albania in the next couple of years. Even though the justice reform may have yielded some good results, there is still much to be done. In this fight against corruption, various individuals, including journalists, independent social media, social activists, employees, clerks, and citizens, have played a significant role as whistleblowers.

People who work in private or public institutions where corruption occurs are often witnesses to gifts, bribes, unlawful influence, and other violations of the law. These people, who may be employees or visitors, can be concerned about reporting these events because they may feel powerless and fear retaliation. There have been instances, and still happen, that those who blow the whistle instead of praises have faced angry feedback, have been dismissed, bullied, or intimidated and harassed. To break this cycle, different measures should be taken, among amending legislation; it is also necessary to inform and educate the public on the negative impact of corruption in their life and the benefits of holding those who break the law accountable.

Measuring the effects and impact of whistleblower protection is a complex task, especially when it is usually a practice followed in corruption cases. The results of whistleblowing depend on multiple factors that should be integrated to tackle the issues and apply the best practices. These factors include the legal framework, cultural context, support for the whistleblower process from the government and the education and support from the society. In Albania, there has yet to be an important case from whistleblower practices or cases that have yielded promising results. However, whistleblowing protection and procedures are regulated by law, and society is educated on it through different projects. This has resulted in the first cases coming by the public in different areas of administrative functions, primarily in medicine, university, etc.

1 Law of the Republic of Albania no 60/2016 of 2 June 2016 On Whistleblowers and Whistleblower Protection 'Për sinjalizimin dhe mbrojtjen e sinjalizuesve' <https://arsimi.gov.al/ligj-nr-60-2016-per-sinjalizimin-dhe-mbrojtjen-e-sinjalizuesve> accessed 12 November 2023.

The second part of this article explores the legal framework of whistleblowing protection in Albania. Albania has made significant gains throughout its history in recognising the necessity of whistleblower protection and developing a legislative framework to help individuals who dare to reveal corruption and wrongdoing. These achievements, however, should not overshadow the persistent challenges that whistleblowers and the system confront in the country.

The historical setting of Albania's transition from communism to democracy was critical in shaping whistleblower legislation. With the demise of the communist dictatorship came a renewed yearning for openness and accountability. However, in the early years of the transition, whistleblower protection was not adequately prioritised, and it took until 2016 for a complete Whistleblower Protection Law to be implemented.

The third part analyses the whistleblower's protection and rights during administrative investigations and criminal proceedings, considering specific regulations on administrative investigations and legal provisions on criminal law in Albania. Government agencies or organisations often conduct administrative investigations to ensure compliance with laws, rules, and standards. Whistleblowers who disclose administrative misbehaviour can start these investigations, leading to probes into unethical behaviour, abuse of money, or violations of the legislation inside public organisations. Whistleblower information is a critical beginning point for administrative investigations, aiding authorities in finding misconduct and implementing proper remedial steps.

In parallel, whistleblowing helps criminal investigations in Albania tremendously. Whistleblowers who disclose illicit acts such as bribery, embezzlement, or organised crime give law enforcement and prosecutors crucial information. They frequently serve as critical witnesses, offering testimony and evidence that can lead to the accused's prosecution. The legal system in Albania protects whistleblowers engaged in criminal cases by securing their anonymity, protecting them from reprisal, and allowing them to actively participate in the processes.

Whistleblowers are invaluable allies in the pursuit of justice and maintaining integrity in the public and private sectors, both in administrative and criminal investigations. Albania's dedication to respecting whistleblower rights and protections in these investigations is critical in encouraging openness and accountability, eventually contributing to the nation's progress in combating corruption and criminal activity.

The fourth section explores the challenges and opportunities related to Albania's legal framework on whistleblowing practice, as well as the role of public education and government initiatives in this context. In the search for openness and accountability, whistleblowing practices in Albania bring both obstacles and opportunities. The public and staff are often unaware of their rights and reporting methods, exacerbated by a fear of reprisal due to the restricted legal safeguards. Another difficulty is cultural reluctance, which is firmly established in traditional norms and causes people to be reluctant to disclose misbehaviour involving family members or close colleagues. Resource constraints among

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

institutions that handle whistleblower complaints can damage the process's efficacy, and political influence can jeopardise accountability.

On the other hand, from these challenges arise opportunities to further regulate and strengthen the whistleblowing practice. Legal reforms provide an opportunity to enhance whistleblower protection by explicitly identifying whistleblowers and broadening the extent of their rights. Initiatives focused on public awareness and educating individuals on the value of whistleblowing can affect society's views. Improved reporting procedures, legislative measures ensuring anonymity and secrecy, and the formation of whistleblower support organisations all provide practical instruments to empower potential whistleblowers. International collaboration and information sharing keep Albania up to date on best practices in the sector. Addressing these difficulties and seizing these opportunities can foster a culture of integrity and accountability in Albania by tackling these difficulties and capitalising on these possibilities, contributing to the larger battle against corruption and supporting the rule of law.

To conclude, the paper presents an overview of rethinking legal and technical measures to ensure whistleblower rights and protection related to administrative and criminal investigation to educate the public on the necessity and effectiveness of whistleblowing practices.

2 THE DEVELOPMENT OF ALBANIAN LEGAL FRAMEWORK ON WHISTLEBLOWER PROTECTION

Whistleblowing is a critical method for uncovering corruption, fraud, and wrongdoing inside organisations, increasing transparency, and protecting the public interest. This study dives into the history of whistleblower law in Albania, charting it from an embryonic notion to a more thorough legal structure. The article investigates the circumstances that created the need for whistleblower protection, important legislative milestones in Albania, and the influence on the country's governance and anti-corruption initiatives.

The whistleblower legislative framework in Albania is an important component of the country's continuous efforts to enhance transparency, accountability and the fight against corruption and misconduct. Whistleblowing, the act of individuals revealing unethical or unlawful activity within organisations, has grown in popularity as a powerful tool for discovering and correcting wrongdoing. In this context, Albania has taken major measures to create a legislative framework that recognises and protects whistleblowers, as well as their critical role in the pursuit of justice and good governance.

Albania's legislative trajectory reflects a nation in change, transitioning from a legacy of secrecy during the communist era to a democracy that emphasises transparency and honesty. This transformation has highlighted the importance of robust whistleblower

protection. Albania's legislative framework seeks to find a balance between safeguarding whistleblowers' rights and identities while ensuring that the information is used effectively to combat corruption and other misbehaviour.

Albania's communist dictatorship, led by Enver Hoxha, lasted nearly four decades, from the conclusion of World War II until 1992. Albania was characterised by isolationism, a culture of secrecy, and the suppression of opposition throughout this period. Whistleblowing, as we know it now, was almost non-existent since the administration harshly punished any resistance or revelation of state secrets.

A new era began with the fall of communism and Albania's transition to democracy in the early 1990s. Transparency and accountability in government and other sectors of society became obvious. However, throughout the early years of the transition, whistleblower protection was generally ignored as a component of governance.

Albania did not take a substantial step towards statutory whistleblower protection provisions until 2016. The passing of the Whistleblower Protection Act that year was a watershed moment. This statute specified the rights and safeguards of those who, in good faith, revealed corruption and misconduct.[2] While this was a significant achievement, it was only the first stage of a much larger process. This law upholds the values of a democratic society, human rights and dignity, equality before the law and freedom of expression. Law No. 60/2016 'On Whistleblowers and Whistleblower Protection' aims to guarantee and ensure employees can speak up about misconduct or corrupt practices responsibly and safely.

Under Law No. 60/2016[3], a whistleblower is defined as someone who reports on acts of corruption or misconduct. This person reveals or discloses information on someone who is abusing their power or engaged in corruption. Usually, the delinquent is employed in private or public institutions but can also involve someone not employed formally yet implicated in active corruption alongside a person in a position of power. The Council of Europe[4] defines a whistleblower as someone who reports on a threat to public interest or the rule of law based on the context of their work relationship.

Any person can be a whistleblower, and anyone violating the law can be reported; however, the disclosed information should be reliable. No one is legally obligated to whistleblow if they witness illegal acts like corruption, misconduct, or unlawful influence. If someone reports an act of corruption without reliable information or if it is proven that they are abusing the whistleblowing guidelines, they can be held accountable on the grounds of false accusations or misleading legal authorities.

However, there is a thin line between choosing not to blow the whistle and choosing not to report a criminal offence. The difference between both stands in the knowledge about the

2 ibid, art 3, para 13.

3 ibid, art 5.

4 Committee of Ministers of the Council of Europe, *Protection of Whistleblowers: Recommendation CM/Rec(2014)7 adopted 30 April 2014 and explanatory memorandum* (Council of Europe 2014) <https://rm.coe.int/16807096c7> accessed 12 November 2023.

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

crime. A whistleblower does not need hard proof to report, nor do they need to prove their doubts. Rather, the requirement is for the report to be based on reliable information and enough evidence that the person who blows the whistle honestly believes that a crime was committed.[5] On the other hand, choosing not to report a crime is a choice made by someone fully aware that a crime has been committed, either because the person was present at the scene of the crime, witnessed the crime, or because they know second-hand after the crime was committed.

If a person suspects that corrupt practices are carried on in their workplace, they can report these activities to the head of their department (internal whistleblowing) or directly to the High Inspectorate of Declaration and Audit of Assets and Conflicts of Interest (external whistleblowing), if their workplace does not have a department that investigates whistleblower reports. The institution or the department that administers the report will investigate further. However, in the case when the whistleblower believes that they can not submit a report to their department, they can disclose the information to the High Inspectorate, along with the reason for choosing so.[6]

The whistleblower's report is considered valid if it discloses information on whistleblower identification data and a full report on facts and circumstances of the suspected corrupt practice. Confidentiality of information and data is guaranteed; a whistleblower may not reveal their identity, and their report is still considered valid if the information disclosed justifies the need for anonymity and sufficient ground is provided for the administration to investigate the corrupt practices.[7]

While whistleblowing might be confused with journalists' reports, it is recommended that whistleblowers refrain from disclosing their information to journalists or other entities, except for the Head of the department or the High Inspectorate. Whistleblowing guarantees that the information disclosed will be investigated by competent people. The whistleblower will be informed of the proceedings, allowed to partake in the administrative investigation, and protected from victimisation or retaliation. The investigation's outcomes may lead to criminal prosecution or restitution of consequences of corruption. These guarantees are not provided to journalists or the whistleblower who disclose the information to a journalist.

The whistleblower may disclose information to a police officer, in which case the officer will immediately follow up with the legal procedures and investigation. The whistleblower may also take the case to court if the administration where the information was disclosed fails to take action or protect the whistleblower from retaliation. However, the involvement of a lawyer is not typically part of whistleblower practices as the goal is to strengthen the capacity of employees to report crimes confidentially, facilitating a quick administrative investigation and avoiding the judicial system.

5 Law no 60/2016 (n 1) art 3, para 15; art 6.
6 ibid, art 11.
7 ibid, art 15.

Law No. 60/2016 'On Whistleblowers and Whistleblower Protection' provides three key elements of whistleblowing:

a. Procedure to report corruption or corrupt acts.[8] The mechanisms offer the whistleblower protection of confidentiality and protection from harassment. The job contract can not contain clauses that prevent the employee from blowing the whistle or that aim to limit his rights and protection if he becomes a whistleblower.
b. Procedure to investigate the whistleblowing report.[9] The whistleblower should have reasonable cause to disclose information, which means that he should be sure that a misconduct has occurred, is occurring or is likely to, and he shall be keeping in mind the public interest and rule of law rather than some other motive. The administrative investigation follows up on the whistleblower's information, and if it is proven that a crime was committed, or there is reasonable doubt that a crime was committed, the case is referred to the criminal prosecution office.
c. Procedure to protect from retaliation.[10] In this case, the person who chooses to retaliate against the whistleblower will be legally responsible for his or her actions. Retaliation can take many forms: dismissal from office, suspension, transfer to a lower-paying position, demotion, loss of status, negative evaluation, etc. The whistleblower can not be dismissed from his job on this basis, but the reason behind the act can be justified, so the whistleblower is protected by having the option to choose to be transferred to another workplace to save himself. If there is retaliation by someone in a higher position towards the whistleblower, the fine can be up to 5000 euros, and if someone discloses the information on the whistleblower's identity, the fine is up to 1000 euros.

Law No. 60/2016 created a much-needed legal framework for the protection of whistleblowers and the implementation of whistleblowing mechanisms. However, the effectiveness of the law relies not just on its existence but on the presence of procedures and tools in place that translate it into practical action. The Network of Anti-Corruption Coordinators, re-conceptualised in terms of organisation and operation through Decision No. 618 on 20 October 2021 of the Council of Ministers, titled 'On the creation, organisation and operation of the Network of Coordinators against Corruption'[11] as amended, is headed by the National Coordinator against Corruption. The network comprises coordinators appointed within affiliated institutions and responsible structures against corruption in the Ministry of Justice.[12]

8 ibid, art 5–9.

9 ibid, art 12–16.

10 ibid, art 18.

11 Vendim i Këshillit të Ministrave Nr 618 datë 20/10/2021 'Për Krijimin, Organizimin e Funksionimin e Rrjetit të Koordinatorëve Kundër Korrupsionit' <http://www.akbn.gov.al/wp-content/uploads/2023/01/VKM-nr-618-datë-20.10.2021.pdf> accessed 12 November 2023.

12 ibid, sect IV, art 1.

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

The recent anti-corruption structure founded by the Ministry of Justice[13] aims to tackle corruption and misconduct at its roots and carry on an administrative investigation right away. The project of building this wide network of coordinators against corruption[14] aims to strengthen the whistleblower practice and guarantee whistleblower rights and protection.

The Ministry of Justice, acting in the role of the National Coordinator against Corruption, coordinates the work for the drafting of policies and the preparation of legal and by-laws for the prevention and fight against corruption, the creation of structures responsible for anti-corruption issues as well as the verifications and administrative investigations carried out.[15]

The Network of Anti-Corruption Coordinators has powers of control and administrative investigation in 44 institutions[16] at the central level as well as in every local directorate of the State Cadastre Agency, in the Regional Directories of the Operator of Health Care Services, in the Regional Directories of Pre-university Education and regional hospitals.

The General Directorate of Anti-corruption in the Ministry of Justice, tasked with addressing anti-corruption issues, is committed to several missions. These include conducting administrative investigations of denunciations/complaints for abusive, corrupt or arbitrary practices for the implementation of legality, as well as the identification of employees of institutions, part of the Network of Coordinators, who, by actions or inactions, have committed violations of legal or sub-legal acts in force. Concurrently, the Directorate is involved in developing projects and programs in the field of anti-corruption, as well as planning, coordinating and determining the necessary instruments for implementing anti-corruption policies.

The General Directorate of Anticorruption is composed of three directorates,[17] namely:

a. Directorate of the Network of Anticorruption Coordinators, responsible for supporting the activities of Coordinators appointed in the institutions of the Network; monitoring and conducting performance evaluation for each coordinator; conducting the administrative investigation; analysing and evaluating the risk of corruption in institutions that are part of the Network's activity; preparing Control Plans based on corruption risk assessment; maintaining, administering and updating the Register of complaints and denunciations; maintaining, administering and updating the Register of Final Reports and Criminal Reports; following the progress of the implementation of the measures and recommendations given by the National Coordinator against Corruption for the institutions subject to control; carrying out periodic analyses of the activity of the General Directorate of Anticorruption.

13 ibid, sect II.
14 ibid, sect III.
15 ibid, art 1.
16 ibid, sect II, art 2.
17 'Rrjeti i Koordinatorëve kundër Korrupsionit' (*Ministria e Drejtësisë*, 23 shkurt 2021) <https://www.drejtesia.gov.al/rrjeti-i-koordinatoreve-anti-korrupsion/> accessed 12 November 2023.

b. The Operational Directorate for Anticorruption Issues conducts in-depth investigations in institutions that are part of the network, according to the provisions of the Decision of the Council of Ministers. It supports the activity of Coordinators appointed in the institutions of the Network for complex administrative investigations and conducts field checks according to the Order of the National Anti-Corruption Coordinator.
c. The Directorate of Anticorruption Programs and Projects is the technical structure that plans, coordinates and defines the necessary instruments for the implementation of policies in the field, the solution and development of programs in the anticorruption field, as well as the creation of the infrastructure base that will precede this development. The Directorate leads the framework of preventive anti-corruption policies, monitors the implementation of regulatory acts, drafts policies and other institutional interventions in the field, increases public awareness, and ensures internal and external inter-institutional communication of the field. However, even if it has been up and running for the past few years, the project has not given the expected results. The Helsinki Committee in Albania has found that a great number of the anti-corruption units are not fully operative because they have to carry different duties of different roles while working in the same position, the workload is immense, there is no reward to motivate them, and they do not trust other unit's workers.[18]

3 THE WHISTLEBLOWERS' RIGHTS IN AN ADMINISTRATIVE AND CRIMINAL INVESTIGATION

One of the biggest cases involving a whistleblower who disclosed information led to the incarceration of the former Minister of Interior. Dritan Zagani, a Fier police official, exposed the participation of Saimir Tahiri's cousins in narcotics trafficking in 2014.[19] According to Zagani, the drug kingpin Moisi Habilaj and his ring members sold narcotics using a private automobile acquired from Tahiri. For a long time, the Albanian prosecutors ignored Zagani's charges. Instead, the whistleblower, Zagani, was imprisoned and fled to Switzerland, where he was given political refuge.

Only in 2018 did Italian authorities apprehend Habilaj and his gang. Tahiri was found guilty and sentenced to five years in jail for abuse of office a year later. The sentence was lowered to 3.4 years, followed by three years on probation.

18 Komiteti Shqiptar i Helsinkit, *Sinjalizimi i Korrupsionit në Shqipëri: Sfidat e Zbatimit të Kuadrit të Ri Ligjor : Raport Monitorimi, Referuar gjetjeve të monitorimit të kryer gjatë periudhës Nëntor 2018 – Nëntor 2019* (KShH 2020) 23.

19 Jérôme André, 'Lanceur D'alerte En Albanie : Le Long Combat Du Policier Zagani Contre Le Cannabis' (*Les Courrier des Balkans*, 11 décembre 2017) <https://www.courrierdesbalkans.fr/Albanie-le-lanceur-d-alerte-Dritan-Zagani> accessed 12 November 2023.

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

However, this case shows that whistleblowers are always at risk unless there are proportionate measures to protect them and effective tools to guarantee their rights and protection.

Administrative investigations are a critical component of Albania's whistleblower practices, acting as the principal vehicle for combating corruption, fraud, and misconduct in public and commercial organisations. Whistleblowing, or individuals disclosing unethical or unlawful workplace practices, has evolved as a potent weapon for exposing wrongdoing and encouraging openness and accountability. Albania's commitment to building an integrity culture and tackling corruption is inextricably related to its ability to execute administrative investigations spurred by whistleblower claims.

The administrative investigation is projected to guarantee the rights and protection of whistleblowers, incorporating measures to protect those who wish to come forward but fear potential retaliation.

Initially, whistleblowers are encouraged to disclose information to their department at their workplace. This department is called 'internal whistleblowing'[20] and is specialised and trained to handle such cases. Law No. 60/2016 requires every public or private entity to create a special department with qualified employees to handle cases that come from whistleblowers. The technicalities are thoroughly previsioned in the Decision by the Council of Ministers no. 816 dated 16 November 2016 'On the structure, selection requirements, and work relations for the employees of the competent unit in the public authorities, on Law No. 60/2016'. However, in cases when the whistleblower's workplace does not have such a department or specialised unit, or there is a concern that their department will dismiss the case, the whistleblower has the option to go straight to the High Inspectorate, also known as 'external whistleblowing'.[21]

The High Inspectorate has drafted a standard form[22] for internal and external whistleblowing, aiming to uniformise the practice and simplify the disclosure of information for whistleblowers. In the internal whistleblowing form, whistleblowers are required to provide their name and contact information, work position and workplace. However, they also have the option to remain anonymous, provided they can justify this choice.

From this standardised form, there are only two ways to follow the administrative investigation. If the whistleblower chooses to remain anonymous, and the reason is objectively justified, the administration proceeds with the investigation without disclosing their identity. Alternatively, if the whistleblower has to share personal data, their data remains anonymous during the investigation.

20 Law no 60/2016 (n 1) art 10.

21 ibid, art 11.

22 Urdhër ILDKPKI Nr 1222 datë 11/07/2017 'Për miratimin e formularëve dhe regjistrave të sinjalizimit dhe mbrojtjes së sinjalizuesve' <https://arsimiparauniversitar.gov.al/wp-content/uploads/2021/12/Urdher-nr.1222-dat%C3%AB-11.07.2017.pdf> accessed 12 November 2023.

The form then prompts whistleblowers to outline the facts they wish to disclose, specifying the specific criminal code article they believe has been violated. Whistleblowers are encouraged to submit any evidence they possess along with the form or indicate where such evidence can be obtained.

The other standardised form is the 'external whistleblowing' one. The initial data is the same as the internal one, where the whistleblower can either provide their personal data or opt to protect their identity and be an anonymous whistleblower. Then, the whistleblower has to justify why they are disclosing information directly to the High Inspectorate, surpassing their own work unit or department. This option clarifies that blowing the whistle directly to the High Inspectorate is an exception to the rule.

The form further delves into the reasons for choosing to disclose information directly to the High Inspectorate. The whistleblower is asked to justify by choosing among options:

A. My workplace does not have such a specialised department or
B. The department or unit that administers whistleblowing cases has not started the administrative investigation or refused to investigate, the head of the unit is implicated in the criminal act, there is doubt regarding the integrity and impartiality of the unit/ department, or the evidence for this particular whistleblowing can only be accessed near the unit or persons who can be involved in the criminal act thus risking the evidence to be destroyed or manipulated.

The rest of the form follows the same requirements on evidence attached to the form or guidance on where to find the evidence.

These standardised forms, along with other regulations[23] by the High Inspectorate, ensure that whistleblowers can provide comprehensive information necessary for the case. The external whistleblowing forms offer more guarantees for the whistleblower by requesting details on the reasons they chose to disclose information directly to the High Inspectorate. This makes ground for an administrative investigation not only upon the information shared by the whistleblower but also considers the reason why the whistleblower found it necessary to surpass their own work unit. Such an approach enhances protection and guarantees for whistleblowers, encouraging them to come forward without fear of intimidation or possible retaliation.

On the other hand, in Albania, the legal framework specifically addressing the position of whistleblowers in a criminal proceeding is not regulated; however, their rights and protection can be drawn by the rights and proceedings of calling a witness to testify or calling the whistleblower to report as a person who has information on the subject. Criminal procedures are an important aspect of the country's whistleblower practices, providing a significant channel for addressing and correcting criminal activity such as corruption, fraud, and other illegal actions.

23 Rregullore për Hetimin Administrativ të Kërkesës së Sinjalizuesit për Mbrojtjen nga Hakmarrja në ILDKPKI (Shtator 2016) <http://www.urgjenca.gov.al/sinjalizimiDoc/RREGULLORE-Kerkesa-per-mbrojtje.pdf> accessed 12 November 2023.

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

Whistleblowing, or individuals revealing illegal and unethical conduct within their organisations, is critical in uncovering criminal wrongdoing, increasing transparency, and supporting the rule of law in Albania. The country's commitment to accountability and combating illegal activity is inextricably linked to its capacity to undertake successful criminal investigations prompted by whistleblower disclosures. In this aspect, the whistleblower will be requested to disclose information related to the case based on their knowledge.[24] However, whistleblowers are not permitted to testify on morality, ethics and other personality tracks of the subject being investigated unless such information is linked or can impact the judgement related to the subject's personality regarding the criminal act committed and their social danger.

Whistleblowers can be asked about their relation to the subject and any information they have acquired through this relationship, often stemming from a direct work relationship in the private or public sector. They are obligated to disclose information they have personally encountered as well as information relayed by a third party, even if it may not be considered conclusive evidence unless the third party is unable to testify on their own behalf.[25]

The whistleblower can not be forced to testify or disclose information that is protected by confidentiality laws or state secret laws. However, there are some exceptions in this case. The whistleblower can not disclose more information than necessary for the case, and only under certain circumstances can confidential information relevant to the case be disclosed.

State secret information is subject to a separate procedure, wherein the court must seek permission to access state-protected documents by requesting certain information directly from relevant institutions. If the state secret is deemed unnecessary for the case, it will not be disclosed. If the information is deemed necessary, the court may administer only the parts of the documents and information relevant to the case while guaranteeing that other parts of the information are not disclosed to any party, including the court, by the institutions handling such information.[26]

The whistleblower retains the option to maintain anonymity when disclosing information to their department or the High Inspectorate. However, the same protection is not guaranteed during a criminal investigation for individuals exposing corruptive practices, misconduct, or abuse of power. The Criminal Proceedings Code of Albania has specifically predicted that only the witnesses of criminal acts, like crimes against the state and the rule of law, have the option to protect their identity and testify anonymously in court.[27]

The legislator has not deemed it necessary to provide the same protection for whistleblowers, considering that they have the option to disclose information anonymously

24 Criminal Proceeding Code of the Republic of Albania no 7905 of 21 March 1995 'Kodi i Procedurës Penale i Republikës së Shqipërisë' art 153 <https://qbz.gov.al/preview/b4819f4d-c246-49b3-87a9-2e6c8512c975> accessed 12 November 2023.

25 ibid, art 154.

26 ibid, art 160.

27 ibid, art 165/a para 1.

if they choose to do so. Even when choosing anonymity, their information undergoes processing and investigation by the administration or the High Inspectorate.

Among the rights and protection afforded to whistleblowers are corresponding duties. The whistleblower can be sued if the disclosed information is classified as a state secret or confidential information protected by legal norms. The whistleblower can also be sued and legally responsible if the disclosed information, while true, is done so in an abusive manner or with the intent to harm someone.[28]

4 CHALLENGES AND OPPORTUNITIES

Whistleblowing practice in Albania has not been easy or has not produced any noticeable results. Despite the implementation of various measures and tools to advance the practice, barriers persist, stemming either from societal culture and mentality or the inadequacy of supporting tools aimed at strengthening the whistleblowing practice.

In Albania, whistleblowers are afraid of losing their employment, being harassed, or even being physically harmed, leading many to remain silent. Additionally, the current legal safeguards exacerbate the problem since there are loopholes in the present legal framework that expose whistleblowers to retaliation. Cultural norms, including traditional notions of loyalty and fear of social stigmatisation, discourage individuals from reporting crimes, especially involving close acquaintances.

Furthermore, limitations in resources among organisations responsible for handling whistleblower allegations further weaken the process's efficacy. Political involvement can also jeopardise accountability efforts.

However, the challenges can be corrected and present opportunities for improvement with the right commitment and tools.

1. Inadequate Awareness: One of the most significant difficulties in Albania is a lack of knowledge and comprehension about whistleblowing. Many individuals and workers are uninformed of their rights or the reporting tools available. A lack of understanding not only discourages potential whistleblowers from coming forward but also promotes a culture of silence inside organisations and institutions.
2. Fear of Retaliation:[29] In Albania, potential whistleblowers are deterred by the threat of reprisal. Individuals are concerned about losing their employment, being harassed, or even being physically harmed if they reveal corruption or misconduct.

28 Criminal Code of the Republic of Albania no 7895 of 27 January 1995 'Kodi Penal i Republikës së Shqipërisë' art 305 <https://qbz.gov.al/preview/a2b117e6-69b2-4355-aa49-78967c31bf4d> accessed 12 November 2023.

29 Arjan Dyrmishi, Elira Hroni and Egest Gjokutaj, *Whistleblowers Protection in Albania: An Assessment of the legislation and Practice* (Institute for Democracy and Mediation 2013) 13 <https://idmalbania.org/whistleblowers-protection-in-albania-an-assessment-of-the-legislation-and-practice> accessed 12 November 2023.

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

Fear of retaliation frequently leads to silence, making it critical to address this issue through solid legislative safeguards and processes that ensure anonymity and protect whistleblowers.

3. Inadequate Legal Protections: Albania has passed legislation to protect whistleblowers, but the legal structure still contains gaps and restrictions. The regulations do not sufficiently cover all industries, and the concept of whistleblowers might be fairly ambiguous. To remedy this issue, legal safeguards must be strengthened, coverage expanded, and precise definitions provided.
4. Inadequate Reporting Mechanisms: Another key difficulty is the lack of sufficient reporting methods. Whistleblowers lack transparent, accessible, and confidential methods for reporting misconduct, which may deter them from coming forward or jeopardise their anonymity. For a certain period during the justice reform in 2017, different applications were created for whistleblowers, such as 'Stop Korrupsionit,'[30] to report corruption and misconduct. However, most of them were later removed. Today, there is a platform[31] where individuals can blow the whistle while maintaining anonymity. However, for the whistle-blow practice to be effective, there is a need for more user-friendly and readily available reporting channels inside organisations and via government bodies. This can include dedicated reporting hotlines, secure web platforms, and postal channels to facilitate reporting.
5. Cultural Aversion:[32] In Albania, a longstanding cultural resistance to reveal wrongdoing might also block whistleblower practices. Individuals may be discouraged from reporting wrongdoing if it affects family members or close colleagues due to traditional notions of loyalty and fear of societal stigmatisation.' To address this cultural barrier, legal safeguards and educational programs aimed at shifting society's views are required. Raising public knowledge regarding whistleblowing can help foster a culture where disclosing wrongdoing is not only accepted but encouraged. Citizens can be educated about their rights as whistleblowers and the importance of their participation in combatting corruption through public awareness initiatives. In conjunction with civil society organisations, the government can plan and conduct public awareness campaigns using different media channels such as television, radio, social media, and community outreach. These campaigns can be developed to explain the advantages of whistleblowing, give information on reporting channels, and highlight successful situations in which whistleblowers had a beneficial influence.

30 *STOP Korrupsionit* <https://stopkorrupsionit.al> accessed 20 September 2023.

31 *Për Shqipërinë Që Duam: Platforma e Bashkëqeverisjes* <https://shqiperiaqeduam.al> accessed 12 November 2023.

32 Caitlin Maslen, 'Responses to Common Challenges Encountered when Establishing Internal Whistleblowing Mechanisms' (*U4 Anti-Corruption Resource Centre Chr Michelsen Institute*, 26 February 2023) <https://www.u4.no/publications/responses-to-common-challenges-encountered-when-establishing-internal-whistleblowing-mechanisms> accessed 12 November 2023.

6. Resource Constraints: Resource constraints within the institutions responsible for handling whistleblower disclosures might weaken the process's efficacy. These organisations may lack the people, training, and resources to effectively investigate and respond to concerns. As a result, whistleblowers may believe their revelations are ineffective, deterring future reporting. International collaboration and information sharing can help Albania develop its whistleblowing practices. Collaboration with international organisations like the United Nations, the European Union, or other nations that have well-established whistleblower protection frameworks can give useful insights and best practices. Participating in international forums and conferences on whistleblowing might assist Albania in staying current on advancements in the subject.

5 CONCLUSIONS AND RECOMMENDATIONS

To conclude, whistleblowing in Albania is a dynamic and changing endeavour, with both great accomplishments and continuing obstacles. Albania has made significant gains throughout its history in recognising the necessity of whistleblower protection and developing a legislative framework to help individuals who dare to reveal corruption and wrongdoing. These achievements, however, should not overshadow the persistent challenges that whistleblowers and the system confront in the country.

Despite this improvement, whistleblower practices in Albania continue to face various setbacks or blockages along the way. A significant difficulty is a lack of understanding among the general public and employees about their rights and the reporting tools available. The threat of reprisal remains a powerful deterrent, with people concerned about losing their jobs, enduring harassment, or being physically harmed if they expose wrongdoing. This worry has been heightened by the fairly limited legal safeguards, as the legal system still has holes.

Given the obstacles and opportunities, Albania has reached a fork in the road towards effective whistleblower protection and a culture of openness and accountability. The country's dedication to improving this vital part of government is admirable, and the path ahead, while difficult, is not insurmountable. Albania can foster a culture of integrity and accountability in both the public and private sectors by continuing to enact legal reforms, raise public awareness, improve reporting mechanisms, protect anonymity and confidentiality, provide whistleblower support, and engage in international cooperation.

Recommendations on strengthening the whistleblowing practice in Albania:

1. Whistleblower Education and Training: Provide training and educational programmes to enlighten potential whistleblowers, workers, and the general public about whistleblowing principles and processes. Workshops, seminars, and Internet materials may be used to keep people aware of their duties and rights.

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

2. The Whistleblower Network: Create networks or organisations that provide counselling, legal advice, and protection to whistleblowers. These organisations can act as go-betweens for whistleblowers and the authorities in charge of handling their reports, giving crucial assistance throughout the process.
3. Evaluation and improvement regularly: Evaluate and enhance the whistleblowing mechanism regularly. Periodic evaluations of the efficacy of legislative provisions, reporting procedures, and support services should be carried out to detect and rectify any deficiencies or new difficulties.
4. Financial safeguards: Investigate the idea of offering financial incentives, such as monetary prizes, to whistleblowers in circumstances of significant financial malfeasance. Additionally, strengthen legal safeguards for whistleblowers to ensure they are protected from any negative consequences.

REFERENCES

1. André J, 'Lanceur D'alerte En Albanie : Le Long Combat Du Policier Zagani Contre Le Cannabis' (*Les Courrier des Balkans*, 11 décembre 2017) <https://www.courrierdesbalkans.fr/Albanie-le-lanceur-d-alerte-Dritan-Zagani> accessed 12 November 2023.
2. Dyrmishi A, Hroni E and Gjokutaj E, *Whistleblowers protection in Albania: An assessment of the legislation and practice* (Institute for Democracy and Mediation 2013) <https://idmalbania.org/whistleblowers-protection-in-albania-an-assessment-of-the-legislation-and-practice> accessed 12 November 2023.
3. Maslen C, 'Responses to Common Challenges Encountered when Establishing Internal Whistleblowing Mechanisms' (*U4 Anti-Corruption Resource Centre Chr Michelsen Institute*, 26 February 2023) <https://www.u4.no/publications/responses-to-common-challenges-encountered-when-establishing-internal-whistleblowing-mechanisms> accessed 12 November 2023.

AUTHORS INFORMATION

Alban Koçi
Dr.Sc. (Law), Full Professor of Criminal Law Department, Faculty of Law, University of Tirana, Tirana, Albania
albankoci11@gmail.com
https://orcid.org/0000-0001-7743-2598

Corresponding author, responsible for writing, reviewing and editing of this article.

Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations.

ABOUT THIS ARTICLE

Cite this article
Koçi A, 'Whistleblower's Rights in a Legal Investigation: Exploring the Challenges and Opportunities in Albania' (2024) 7(1) Access to Justice in Eastern Europe 357-73 <https://doi.org/10.33327/AJEE-18-7.1-a000114>

Submitted on 11 Nov 2023 / Approved 08 Dec 2023
Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000114

Managing editor – Mag. Yuliia Hartman**. English Editor** – Julie Bold.

Keywords*: whistleblower, corruption, influence, investigation, access, Albania.*

RIGHTS AND PERMISSIONS

CASE NOTE

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Case Note

PROVISION OF DENTAL CARE: CERTAIN ASPECTS OF COURT PRACTICE SIGNIFICANT FOR MEDICAL LAW

Oksana Soroka*, Nataliia Kozan, Oksana Popadynets, Nataliia Fedosenko, Serhii Repetskyi, Valentyna Lampel and Taras Kotyk

ABSTRACT

Background: *In Ukraine, a notable trend is emerging wherein judicial practice plays an increasingly significant role in regulating medical-legal relations. Recently, our attention has been drawn to a court case on compensation for pecuniary and non-pecuniary damage resulting from improper medical services provided to a patient in a private dental clinic in Ivano-Frankivsk City. After considering this case, the Supreme Court, the highest court in the judicial system of Ukraine, made a decision that, in our opinion, is a landmark in medical law - a complex branch of law that includes a set of legal norms regulating public relations in the field of medical activity.*

The purpose of this study is to analyse the court proceedings in a civil case of an action involving a dispute related to the application of the Law of Ukraine 'On Protection of Consumer Rights' on compensation for pecuniary and non-pecuniary damage in the context of the possibility of its further consideration as a landmark case in medical law and as a judicial precedent which provides for the role of an additional regulator of medical-legal relations and the role of a source of medical law.

Methods: *In the study, a combination of general scientific and special scientific approaches was used, along with analytical, synthetic, complex and generalisation methods.*

Results and Conclusions: *The results of the study indicate that court practice has the potential to demonstrate flexibility, efficiency, connection with everyday life and rapid adaptation to difficult social circumstances, in particular those related to patient access to quality healthcare. The Supreme Court, based on the circumstances of a particular case, the nature of the disputed legal relationship and the content of the claims, may provide not only a model interpretation of a regulatory prescription that is mandatory for lower courts to take into account when resolving similar cases but also has every reason to serve as a guide for healthcare professionals in the course of their professional activities.*

1 INTRODUCTION

According to the World Health Organization (WHO), five patients die every minute as a result of inadequate provision of health care,[1] which in total reaches 2.6 million patients per year in low- and middle-income countries.[2] Patient safety is one of the cornerstone issues of ensuring the quality of the healthcare system, as even in high-income countries, inadequate provision of health care accounts for more than 10% of all hospital admissions.[3] The most common malpractices include inappropriate medication prescriptions, treatment planning errors or deviations from the chosen plan, and incorrect diagnosis. At the same time, diagnostic errors lead to both the choice of incorrect treatment tactics (for example, in surgery, dentistry, traumatology) and prescriptions (family medicine, neurology, etc.).[4] Not only is it a threat to the health and lives of patients, but it also causes significant financial losses for healthcare providers.[5]

The issue of legal assessment of a doctor's actions in criminal or civil proceedings concerning the provision of health care to patients has become particularly relevant. Thus, according to the literary data, the so-called 'medical cases' most often concern obstetricians and gynaecologists, surgeons, and emergency physicians.[6] Legal claims against dentists have also increased in recent years.[7] This is probably due, firstly, to the high cost of dental services. Secondly, poor quality dental care leads to dysfunction of the stomatognathic complex, respiratory and digestive systems, along with aesthetic defects, which affect the quality of life in social and psychological aspects.[8] In addition, the risk of legal claims leads to additional stress and burnout of dentists,

1 'Five Avoidable Deaths Per Minute Shows Urgent Need for Action on Patient Safety' (*UN News*, 17 September 2019) <https://news.un.org/en/story/2019/09/1046552> accessed 5 August 2023.

2 'WHO Calls for Urgent Action to Reduce Patient Harm in Healthcare' (*World Health Organization*, 13 September 2019) <https://www.who.int/news/item/13-09-2019-who-calls-for-urgent-action-to-reduce-patient-harm-in-healthcare> accessed 5 August 2023.

3 'Patient Safety' (*World Health Organization*, 9 March 2019) <https://www.who.int/news-room/facts-in-pictures/detail/patient-safety>accessed 5 August 2023.

4 Nicole Dimetman, '35+ Medical Malpractice Statistics for 2022' (*JustGreatLawyers*, 26 January 2022) <https://www.justgreatlawyers.com/legal-guides/medical-malpractice-statistics> accessed 5 August 2023; Martin Makary and Michael Daniel, 'Medical Error – the Third Leading Cause of Death in the US' (2016) 353 BMJ i2139, doi: 10.1136/bmj.i2139.

5 Rachel Ann Elliott and others, 'Economic Analysis of the Prevalence and Clinical and Economic Burden of Medication Error in England' (2021) 30(2) BMJ Quality & Safety 96, doi: 10.1136/bmjqs-2019-010206.

6 Eva Bergamin and others, 'Medical Professional Liability in Obstetrics and Gynecology: A Pilot Study of Criminal Proceedings in the Public Prosecutor's Office at the Court of Rome' (2023) 11(9) Healthcare 1331 doi: 10.3390/healthcare11091331; Christina Schumann and Stephanie Wiege, 'Medical Liability and Criminal Law in Emergency Medicine' (2022) 117 Med Klin Intensivmed Notfmed 312, doi: 10.1007/s00063-022-00920-w.

7 Suliman Alsaeed and others, 'Dental Malpractice Lawsuit Cases in Saudi Arabia: A National Study' (2022) 34(8) The Saudi Dental Journal 763, doi: 10.1016/j.sdentj.2022.11.002; King-Jean Wu and others, 'Court Decisions in Criminal Proceedings for Dental Malpractice in Taiwan' (2022) 121(5) Journal of the Formosan Medical Association 903, doi: 10.1016/j.jfma.2021.09.023.

8 Falk Schwendicke and Sascha Rudolf Herbst, 'Health Economic Evaluation of Endodontic Therapies' (2023) 56(S2) International Endodontic Journal 207, doi: 10.1111/iej.13757.

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

which creates a 'vicious circle' and increases the risk of medical errors.[9] Therefore, a proper legal assessment of the dentist's actions is important for all stakeholders in the healthcare system.

According to the Ivano-Frankivsk Regional Bureau of Forensic Medical Examination, the number of forensic medical examinations regarding the quality of dental services has increased from 1-2 to 4-5 per year. The questions posed by the investigating authorities and the court to the experts mainly concern the quality of dental services, the appropriateness of certain interventions, and the assessment of the severity of injuries caused by the doctor.[10]

A distinction should be made between medical malpractice, which is a bona fide act of a doctor that does not involve criminal intent and is associated with certain shortcomings in diagnosis (examination), treatment or organisation of the treatment process, and crimes committed by medical personnel, for which criminal liability is provided for in the Criminal Code of Ukraine (CrC). Quite often, the line between them is very thin, and it is difficult or impossible for investigators or court officials to distinguish between them without the help of forensic medical experts. For this purpose, a forensic medical examination is appointed. Its appointment is preceded by the painstaking work of the investigator to seize all medical documentation related to the case, interrogation of the parties, witnesses, etc. An important document is the Clinical Expert Commission meeting minutes, which contain data on the medical component of the precedent. The final stage is the appointment of a commission forensic medical examination and the formation of a commission of experts, which must include specialists in the field of the case. The conclusion of the commission forensic medical examination is an important piece of evidence in a case, so it is subject to high requirements: objectivity, reliability, scientific validity, and accessibility of presentation. However, even if they reach the court, 'medical cases' can usually last for years and often end in either acquittal or closure due to the statute of limitations. However, the number of convictions of doctors has recently increased significantly due to the development of medical law, a complex branch of law that includes a set of legal norms regulating social relations in the field of medical activity.[11]

2 JUDICIAL PRACTICE AND MEDICAL-LEGAL RELATIONS

Ukrainian legislation does not contain the term 'judicial precedent', as our legal system belongs to the Romano-Germanic (continental) legal system, which provides that laws, not individual court cases, have legal force, unlike the Anglo-Saxon legal system, in which the formal priority belongs to the law, but in fact, everything depends on the discretion of the judge, on how they interpret and apply the law.

9 Nadya Avramova, 'Self-Perceived Sources of Stress and Burnout Determinants in Dentistry – A Systematic Review' (2023) 30(1) Galician Medical Journal E202317, doi: 10.21802/gmj.2023.1.7.

10 Natalia Kozan and others, 'Analysis of Commission Forensic-Medical Examinations Performed in Cases Concerning the Responsibility of Surgical Professional Doctors' (2020) 27(2) Galician Medical Journal E2020210, doi: 10.21802/gmj.2020.2.10.

11 Natalia Kozan and others, 'The Structure of Forensic Examinations Regarding the Prosecution of Surgical Doctors' (Legal Problems of the Modern Transformation of Health Care: conference, Zaporizhzhia, 27-28 May 2021) 46.

The explanatory dictionary of the Ukrainian language contains a definition of 'precedent in law - a court decision in a particular case, which is subsequently used as a model for courts in resolving similar cases'.[12] The most common understanding of a judicial precedent is a decision made by a higher judicial authority in a particular case that is binding on other courts when considering a similar case.

However, after the adoption in 2006 of the Law of Ukraine 'On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights', the situation in the country began to change. Article 17 of this law states that the courts shall apply the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case law of the European Court of Human Rights (ECtHR) as a source of law in their consideration of cases.[13]

The significance of the case under consideration in this study is due to the fact that in Ukraine, judgments of the ECtHR, judgments of the Constitutional Court of Ukraine (CCU) and resolutions of the Supreme Court (SC) currently have the status of an additional regulator of social relations, providing judicial precedent with the actual role of a source of Ukrainian law and gradual formalisation of this status. In addition, there is a tendency in Ukraine to increase the importance of judicial practice in regulating social relations in medical-legal relations, and the number of so-called 'medical' cases opened in courts based on patients' claims is growing.

According to the Constitution of Ukraine, every citizen has the right to healthcare, medical care and medical insurance. Part 4 of Article 55 of the Constitution guarantees everyone the right to protect their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law.[14]

The right to healthcare encompasses a standard of living, which includes access to food, clothing, housing, medical care and social services that are necessary to maintain human health; qualified medical and rehabilitation care, including free choice of a physician and rehabilitation specialist, selection of treatment and rehabilitation techniques in alignment with the recommendations of a physician and rehabilitation specialist, choice of a healthcare provider; accurate and in time data regarding a one's well-being and the well-being of the population; compensation for damage caused to health; appealing against unlawful decisions and actions of employees, healthcare institutions and bodies and other rights provided for in Article 6 of the Law of Ukraine 'Fundamentals of the Legislation of Ukraine on Healthcare.'[15] 'The provision of high-quality healthcare

12 *Academic Explanatory Dictionary of the Ukrainian Language* (2023) <http://sum.in.ua> accessed 5 August 2023.

13 Law of Ukraine no 3477-IV 'On the Execution of Judgements and Application of the Case Law of the European Court of Human Rights' of 23 February 2006 (as amended of 2 December 2012) <https://zakon.rada.gov.ua/laws/show/3477-15> accessed 5 August 2023.

14 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (as amended of 01 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 5 August 2023.

15 Law of Ukraine no 2801-XII 'Fundamentals of the Legislation of Ukraine on Health Care' of 19 November 1992 (as amended of 21 July 2023) <https://zakon.rada.gov.ua/laws/show/2801-12> accessed 5 August 2023.

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

services is important for the whole world, as non-compliance with standards in this area is one of the main causes of injury, other health damage and death not only in the countries of the former Soviet Union but also in the European Community, Asia and the United States of America. Since the inalienable human rights in the medical sphere are subject to encroachment, they require special protection and the involvement of legal liability mechanisms, namely criminal and civil liability.'[16]

S. Buletca and M. Mendzhul noted that

> 'liability for a civil offence is one of the important issues considered by the theory of civil law, and civil liability in the field of public health is also important. Civil liability is the means of ensuring the protection of personal non-property rights (life and health) of patients in the provision of medical care (services). In case of violation of the right to health, a person may be limited in their actions, need outside support, cannot move without someone else's help, perform work in the usual way, suffer from severe pain, cannot dress or wash themselves, and cannot cope with their daily routine. In most cases, injured patients sue the healthcare facility to obtain compensation for the damage to their health caused by medical malpractice.'[17]

In judicial practice, these claims are usually referred to as non-contractual (tort) liability. They are regulated under Article 80 of the Fundamentals of Legislation of Ukraine on Healthcare and the provisions of the Civil Code of Ukraine.

From the perspective of Ukrainian legislation, the interaction between a patient and a healthcare facility or a physician who is an individual entrepreneur is considered a legal relationship between a consumer and a provider of medical services. The consumer has the right to receive quality healthcare services, free elimination of defects, compensation for pecuniary and non-pecuniary damage, and the provider (the healthcare facility where the doctor works or the doctor him/herself if he/she is engaged in entrepreneurial activity) is obliged to compensate for damage caused to the patient as a result of unlawful decisions, actions or inaction.[18]

Legal conflicts play an important role in protecting the rights of subjects of medical-legal relations. The possibility of their occurrence in the field of medical activity is due to the fact that the purpose of a contract for the provision of medical services is to provide the service itself and not to achieve the result of recovery,[19] which is often forgotten by patients, especially when the provision of such services does not result in the expected improvement in their health.

16 TM Yamnenko and IF Litvinova, 'Judical Domestic Practice in Medical Criminal Proceedings and Civil Cases' (2018) 4(62) State and regions, Series: Law 51.

17 SB Buleca and MV Mendzhul (eds), *Medical Law* (RIK-U 2021) 640.

18 Law of Ukraine no 1223-XII 'On the Protection of Consumer Rights' of 12 May 1991 (as amended of 19 November 2022) <https://zakon.rada.gov.ua/laws/show/1023-12> accessed 5 August 2023.

19 Roman Maydanyk, 'The Issue of Civil Liability under the Contract for the Provision of Medical Services' (2011) 11/12 Law of Ukraine 82.

In Ukraine, there is currently a tendency to increase the importance of judicial practice in regulating social relations in general and in the field of medical relations in particular. The highest court in Ukraine's judicial system is the Supreme Court, which ensures the consistency and unity of judicial practice in the order and manner prescribed by procedural law and considers disputes of the most important significance for society and the state.

After analysing the data from the Unified State Register of Court Decisions, it was established that in the period from 2019 to 2022, the Supreme Court considered only one civil case of claim proceedings in disputes related to the application of the Law of Ukraine 'On Consumer Protection' regarding compensation for pecuniary and non-pecuniary damage for the improper provision of medical (dental) services, which became the subject of our study and has grounds to be considered as a landmark in medical law.[20]

There is no doubt that disputes related to the protection of personal non-pecuniary human benefits to life and health, the process of providing health care and the result of its receipt, as objects of medical-legal relations, are of fundamental importance for society and the state in general and the medical law branch in particular. The practice of judicial consideration of the so-called 'medical' cases is riddled with complex practical issues due to its multidisciplinary nature. It requires the search for and implementation of legal innovations in protecting human rights in the healthcare field.

This is confirmed by the fact that in 2021, the Supreme Court published a review of judicial practice in cases of disputes arising in the healthcare field. The review includes several important legal opinions of the Civil Court of Cassation of the Supreme Court, which will be important for forming a unified law enforcement practice.

Among these conclusions, the court singled out disputes related to the application of legislation on information and personal data protection; disputes arising from appeals against decisions of heads of educational institutions on the legality of suspending students who are not vaccinated; disputes arising from contractual relations; disputes regarding the provision of certain types of health care; disputes on compensation for medical services.[21]

Such decisions of the Supreme Court not only form a well-grounded legal position on the application by all courts of a particular substantive law rule or compliance with a procedural law rule that was incorrectly applied in the future but also direct the practice towards uniform and correct application of the law. The Supreme Court explains the content of a legislative act in terms of its understanding and implementation in practice in other cases, indicating the circumstances that must be considered when applying a particular legal provision, using a specific case as an example.

20 Overview of the data on decisions made by the Supreme Court from 2019 to 2022 in disputes related to the application of the Law of Ukraine 'On Protection of Consumer Rights'. *Unified State Register of Court Decisions* (2019-2022) <https://reyestr.court.gov.ua> accessed 25 July 2023.

21 GhS Kolomijecj (ed), *Review of the case law of the Civil Court of Cassation within the Supreme Court in cases of disputes arising in the field of healthcare: Decisions entered into the Unified State Register of Court Decisions for February 2018 – July 2021* (Supreme Court 2021) <https://supreme.court.gov.ua/supreme/pres-centr/news/1235015/> accessed 25 July 2023.

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

According to Judge of the Grand Chamber of the Supreme Court D. Hudyma, with whom the authors team agree,

> 'the fact that Ukrainian legislation does not contain a formalised concept of 'precedent' does not mean that it does not exist de facto. It is not necessary to consider precedent in the so-called classical sense, linking it to the sources of law in the Anglo-Saxon legal system. The Supreme Court, based on the circumstances of a particular case, the nature of the legal relationship in dispute and the content of the claims, provides a model for interpreting a regulatory provision. There is no consensus in the academic community as to whether such an interpretation creates a new regulatory prescription. However, given that the logical scope of interpretation of regulatory provisions is not only literal, it is possible to justify that the Supreme Court, by giving a narrowing or expanding interpretation of a regulatory provision, creates a new rule that has not been formalised in this way before'.[22]

3 JUDICIAL PRECEDENTS SIGNIFICANT FOR MEDICAL LAW

In light of mentioned above, we propose to consider the decision of the Supreme Court adopted on 30 November 2022 in civil case No. 344/3764/21 in a dispute related to the application of the Law of Ukraine 'On Consumer Protection' on compensation for pecuniary and non-pecuniary damage for the improper provision of medical (dental) services as a landmark.[23]

The content of the claim established that in March 2021, the applicant (patient) appealed to the court with a claim against the dentist (as an individual entrepreneur) for compensation for pecuniary and non-pecuniary damage for the improper provision of medical services. She motivated her claims by the fact that from February to August 2020, she received dental services at the 'Lichnytsia Tkachuka' ('Tkachuk's medicine cabinet') in Ivano-Frankivsk City, but the doctor performed the prosthetics poorly, which resulted in pain and facial appearance defects. The applicant paid 64,930 UAH (€ 1,995) for the services received, but the doctor-entrepreneur did not issue her any payment documents. Subsequently, the applicant had to see another dentist and spent additional funds of 35,430 UAH (€ 1,047) for further treatment and prosthetics. She estimated the non-pecuniary damage at 400,000 UAH (€ 11,819). In addition, she asked to recover another 133,000 UAH (€ 3,930) from the defendant for repeated prosthetic treatment.

In support of her claims, the applicant submitted to the court correspondence between her and the defendant via mobile messenger 'Viber' in March and August 2020 regarding the provision of medical services. At the same time, the defendant's mobile phone number

22 "Ukrainian Legislation Does not Enshrine the Concept of Precedent, but this Does not Mean that it Does not Exist de Facto' – Dmytro Hudyma' (*Supreme Court*, 4 March 2019) <https://supreme.court.gov.ua/supreme/pres-centr/news/659262> accessed 25 July 2023.

23 Case no 344/3764/21 Court proceedings no 61-2466sk22 (Civil Cassation Court of the Supreme Court of Ukraine, 30 November 2022) <https://reyestr.court.gov.ua/Review/107878096> accessed 25 July 2023.

corresponds to the one listed on the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations website.

The applicant also submitted to the court the conclusion of a clinical expert assessment conducted by the commission in accordance with the order of the Department of Health of the Ivano-Frankivsk Regional State Administration of 18 September 2020 No. 335, which established the diagnosis and recommended removing the bridges from the upper and lower jaws and repeating prosthetic treatment with aesthetic fixed prostheses. The witness, who was the chairman of the Clinical Expert Commission, was interrogated at the court hearing and confirmed that it was the defendant who provided the applicant with dental services. In particular, the witness explained that the defendant had personally asked them to meet at the university department to discuss the situation. During the meeting, the defendant admitted that he had provided dental prosthetics services to the applicant. At the same time, the defendant noted that he did not have the relevant qualifications in 'Prosthetic dentistry'.

In its turn, the defendant denied the existence of contractual relations between the parties and did not refute the fact that he provided poor-quality dental services to the applicant.

The decision of the Ivano-Frankivsk City Court of Ivano-Frankivsk Region on 5 October 2021 dismissed the claim.[24]

In dismissing the claim, the court of first instance proceeded from the fact that the applicant had not proved that the defendant had provided her with poor quality dental and prosthetic services, their cost, the fact of payment, and had not proved the causal link between the defendant's actions and the damage caused to her. From the evidence examined at the court hearing, it is impossible to establish the person who caused the applicant's damage and, accordingly, the causal link between the unlawful behaviour of such a person and the damage caused to the applicant. At the same time, the court considered that the fact of payment for services could not be confirmed by witnesses' testimonies and screenshots of the phone screen showing the correspondence between the applicant and the defendant.

On 11 January 2022, the Ivano-Frankivsk Court of Appeal overturned the decision of the first instance and issued a new judgment, which partially satisfied the claim.[25] 64,730 UAH (€ 2080) of pecuniary and 10,000 UAH (€ 321) of non-pecuniary damages were recovered from the defendant in favour of the applicant. This amount of pecuniary damage was correlated with the prices set by 'Lichnytsia Tkachuka' ('Tkachuk's medicine cabinet') in accordance with the clinic's price list. In determining the amount of non-pecuniary damage, the court proceeded from the fact that the defendant did not refute the presumption of his guilt in the negative consequences of the applicant's health deterioration and was guided by the principles of reasonableness, deliberation and fairness. In addition, the defendant was ordered to pay the court fee and legal aid costs. According to the Court of Appeal, the parties had a contractual relationship on the merits of the dispute, confirmed by witnesses'

24 Case no 344/3764/21 Court proceedings no 2/344/2294/21 (Ivano-Frankivsk City Court of Ivano-Frankivsk Region, 5 October 2021) <https://reyestr.court.gov.ua/Review/100211355> accessed 25 July 2023.

25 Case no 344/3764/21 Court proceedings no 22-c/4808/27/22 (Ivano-Frankivsk Court of Appeal, 11 January 2021) <https://reyestr.court.gov.ua/Review/102616292> accessed 25 July 2023.

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

testimonies and screenshots of the phone screen showing the correspondence between the applicant and the defendant.

On 30 November 2022, the Supreme Court dismissed the cassation appeal and upheld the Ivano-Frankivsk Court of Appeal decision.[26]

The court noted that in the case under review, the subject of the dispute is compensation for pecuniary damage and non-pecuniary damage for the improper provision of medical services, which involves a set of necessary, sufficient, bona fide, appropriate professional actions of a medical professional (contractor) aimed at meeting the needs of the patient (customer, consumer of services). Failure to provide or improper provision of medical care may result in injury, other damage to health, pecuniary or non-pecuniary damage, which will trigger the tort mechanism. Damages caused to the customer by non-performance or improper performance of the agreement for the provision of services for a fee shall be reimbursed by the contractor if the contractor is at fault, in full, unless otherwise provided by the agreement. A contractor who has breached a fee-for-service agreement in the course of carrying out its business activities is liable for this breach unless it proves that proper performance was impossible due to force majeure unless otherwise provided by the agreement or law (Article 906 (1) of the Civil Code of Ukraine).

Regarding causation. The Court noted that if a patient suffers harm and claims that it is the result of the responsible person's failure to fulfil the duty of professionalism and care, the failure to fulfil the duty of professionalism and care, as well as the causal link between this breach and the resulting harm, are presumed. The impossibility of establishing a causal link 'with the emergence of complaints after the provision of dental treatment and prosthetics due to the lack of primary medical documentation' was indicated in the conclusion of the commission forensic medical examination, which was appointed by a court order.

Regarding medical records. The court stated that considering the principle of reasonableness, it is evident that the medical services provider is obliged to maintain appropriate medical records of treatment. According to Art. 39 of the Law of Ukraine 'Fundamentals of the Legislation of Ukraine on Health Care', a patient who has reached the age of majority has the right to receive reliable and complete information about his or her health, including to review relevant medical documents relating to his or her health. Such documentation should include, in particular, information collected from previous conversations with the patient, research or consultations, information about the patient's consent and information related to the services provided.

Regarding contractual legal relations. The court noted that if the parties have not concluded a transaction in writing and one of the parties denies the fact of its conclusion, the party seeking to prove the fact of the transaction (agreement) may do so with the help of written evidence, audio, video recording and other evidence. Evidence is formed on any relevant data upon which the court determines the existence or absence of facts that support the claims and objections made by the parties involved in the case and other relevant circumstances important to the case's resolution. The testimony of witnesses cannot be

26 Case no 344/3764/21 Court proceedings no 61-2466sk22 (n 23).

background for the court's decision. Since the defendant denied the fact that it had a contractual relationship with the applicant (patient), the defendant was obliged to prove the absence of such a relationship by means of evidence (written evidence, audio and video recording, etc.).

Regarding the specifics of the burden of proof in such cases. The court noted that patients cannot be expected and required to have precise medical knowledge. They do not have an accurate understanding of the treatment processes and the necessary qualifications to analyse and provide the circumstances of the case in dispute. To properly participate in civil proceedings, a party does not need to have professional medical knowledge. In this regard, a party to the proceedings, who is a patient, has the right to limit him/herself to a report that will allow assuming violations on the part of the medical staff due to the consequences that have occurred for the patient. Therefore, taking into account the principle of reasonableness, a patient who has applied to the court for protection of violated rights, which consist of causing damage to health, should only point out the violation, and then the burden of proof is on the medical institution or doctor. At the same time, this does not violate the principle of discretionary judicial process but rather serves to ensure procedural equality of the parties.

Regarding contradictory judicial practice. The Court found the cassation appeal's arguments that the conclusion of the court of appeal contradicts the legal position of the Supreme Court set out in the resolutions (a list of resolutions was provided) to be unfounded since the legal relations in the said cases and the case under review are not similar, and the factual circumstances in these cases are different from the circumstances in the case under review; therefore the conclusions on the consideration of the cases are different. The Court emphasised that similarity of legal relations means, in particular, the identity of the object and subject of legal regulation, as well as the conditions for applying legal norms. The content of legal relations to determine their similarity in different decisions of the court of cassation is determined by the circumstances of each case. Thus, the Supreme Court introduces a practice when, in the text of the resolution, it demonstrates the differences between the case under consideration and the case in which a particular conclusion was previously formulated and does so to make it clear why different decisions were made.

V. Krat, judge of the Civil Court of Cassation of the Supreme Court, drew attention to certain aspects faced by courts when considering cases on the provision of medical services at the scientific and practical conference dedicated to the 30th anniversary of the adoption of the Law of Ukraine 'Fundamentals of Healthcare Legislation of Ukraine'.[27] Using the example of the court case that is the subject of our study, he pointed out that the court of first instance proceeded from the fact that the applicant had not proved that she had entered into a contract with the business entity for the provision of medical services, and this made it impossible to protect her interests in a civil law manner. Since there was no contract, the court considered the case under tort liability. Instead, the appellate court considered evidence such as the witness's explanations and screenshots of the applicant's phone screen

27 'Vasyl Krat Spoke about the Contract and Tort in the Provision of Medical Services' (*Supreme Court*, 21 November 2022) <https://supreme.court.gov.ua/supreme/pres-centr/news/1348838/ > accessed 25 July 2023.

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

showing the correspondence between the applicant and the defendant. It concluded that the parties had a contractual relationship and that the applicant suffered damage due to the defendant's fault. The panel of judges further qualified the relationship as a tort relationship and ruled to recover pecuniary and non-pecuniary damage from the defendant in favour of the applicant.

As for the combination of contract and tort, the judge proposes to distinguish between the spheres: the contract should be the first, and in exceptional cases - the tort, and noted that it would be logical to provide a contract for the provision of medical services in the relevant chapter of the Civil Code of Ukraine. The judge believes that such a contract has a civil nature and can be subject to separate rules, with more requirements for a doctor or a medical institution, for example, regarding the maintenance of medical records. In his opinion, the patient is always the weaker party in such relationships, so it is necessary to create mechanisms that will help protect the patient's rights in case of improper performance of the contract or even a transition to tort. The judge suggests that the contractor should be obliged to keep appropriate medical records of treatment. Such documentation should include, inter alia, information collected from previous conversations with the patient, research or consultations, information on the patient's consent and information relating to the services provided.[28]

Highlighting certain issues related to pre-trial investigation and court proceedings in medical cases, I. Senyuta notes that

> 'the field of health care is vulnerable due to both the risks associated with medical practice, the complexity of the human body, and the permanent transformations of the healthcare sector, which give rise to new challenges, conflicts and gaps: from lawmaking to law enforcement and law application. The study on the healthcare sector is very illustrative, reinforced by the severity of the consequences, the sensitivity of values and the complexity of restoring justice'. [29]

The range of issues highlighted with a focus on medical cases, where human rights are particularly relevant, as the most important values - life and health - balance on the scales of justice demonstrates the need for systemic and comprehensive changes in Ukrainian legislation and professional law enforcement.[30]

4 CONCLUSIONS

The analysis suggests that today, lawmaking cannot objectively foresee all the nuances that require legal regulation in the healthcare sector and will arise while providing medical care. Instead, the Supreme Court, based on the circumstances of a particular case, the nature of the disputed legal relationship and the content of the claims, can provide not only a sample interpretation of a regulatory prescription, which is mandatory for lower courts to take into

28 ibid.

29 Iryna Senyuta, 'Selected Issues of Pre-Trial Investigation and Court Proceedings in Medical Cases' (2020) 3 Law of Ukraine 11, doi: 10.33498/louu-2020-03-011.

30 ibid.

account when resolving similar cases but also has every reason to serve as a guide for healthcare professionals in their professional activities aimed at preventing, diagnosing and treating patients. The court focused on several key responsibilities of a healthcare professional, such as demonstrating professionalism and care for the patient, proper medical records, and obtaining informed consent for medical intervention.

Thus, judicial practice has the potential to demonstrate flexibility, efficiency, connection with everyday life and rapid adaptation of law to changing social circumstances. There are circumstances when judicial practice shapes law enforcement practice and indirectly influences rulemaking practice. Such mechanisms have been used to protect human rights not so long ago but are gradually gaining ground. Each decision in such a case becomes a precedent and plays a prominent role in the progressive movement for human rights and developing a relatively young branch of law - medical law.

The analysis of the court dispute concerning compensation for pecuniary and non-pecuniary damage for improper provision of medical services gives grounds to consider the decision of the Supreme Court - the highest court in the judicial system of Ukraine - in civil case No. 344/3764/21 in the context of a landmark case in medical law, as an additional regulator of medical-legal relations and as a judicial precedent that responds to important problems in society and the state and puts on the agenda the issue of applying precedent in Ukraine as a source of law.

In the authors' opinion, the National Health Service of Ukraine will become one of the parties in court disputes over the improper provision of medical care to patients as a newly created central executive body that implements state policy regarding the state financial guarantees of healthcare and manages budget funds for the purchase of medical services (in the interests of patients). Perhaps, then, society will observe a completely different picture, which will likely be of interest to scholars and practitioners and will be the subject of further scientific research.

REFERENCES

1. Alsaeed S and others, 'Dental Malpractice Lawsuit Cases in Saudi Arabia: A National Study' (2022) 34(8) The Saudi Dental Journal 763, doi: 10.1016/j.sdentj.2022.11.002.
2. Avramova N, 'Self-Perceived Sources of Stress and Burnout Determinants in Dentistry: A Systematic Review' (2023) 30(1) Galician Medical Journal E202317, doi: 10.21802/gmj.2023.1.7.
3. Bergamin E and others, 'Medical Professional Liability in Obstetrics and Gynecology: A Pilot Study of Criminal Proceedings in the Public Prosecutor's Office at the Court of Rome' (2023) 11(9) Healthcare 1331 doi: 10.3390/healthcare11091331.
4. Buleca SB and Mendzhul MV (eds), *Medical Law* (RIK-U 2021).
5. Dimetman N, '35+ Medical Malpractice Statistics for 2022' (*JustGreatLawyers*, 26 January 2022) <https://www.justgreatlawyers.com/legal-guides/medical-malpractice-statistics> accessed 5 August 2023.

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

6. Elliott RA and others, 'Economic Analysis of the Prevalence and Clinical and Economic Burden of Medication Error in England' (2021) 30(2) BMJ Quality & Safety 96, doi: 10.1136/bmjqs-2019-010206.

7. Kolomijecj GhS (ed), *Review of the case law of the Civil Court of Cassation within the Supreme Court in cases of disputes arising in the field of healthcare: Decisions entered into the Unified State Register of Court Decisions for February 2018 – July 2021* (Supreme Court 2021) <https://supreme.court.gov.ua/supreme/pres-centr/news/1235015/> accessed 25 July 2023.

8. Kozan N and others, 'Analysis of Commission Forensic-Medical Examinations Performed in Cases Concerning the Responsibility of Surgical Professional Doctors' (2020) 27(2) Galician Medical Journal E2020210, doi: 10.21802/gmj.2020.2.10.

9. Kozan N and others, 'The Structure of Forensic Examinations Regarding the Prosecution of Surgical Doctors' (Legal Problems of the Modern Transformation of Health Care: conference, Zaporizhzhia, 27-28 May 2021) 46.

10. 'Krat V Spoke about the Contract and Tort in the Provision of Medical Services' (*Supreme Court*, 21 November 2022) <https://supreme.court.gov.ua/supreme/pres-centr/news/1348838/ > accessed 25 July 2023.

11. Makary M and Daniel M, 'Medical Error – the Third Leading Cause of Death in the US' (2016) 353 BMJ i2139, doi: 10.1136/bmj.i2139.

12. Maydanyk R, 'The Issue of Civil Liability under the Contract for the Provision of Medical Services' (2011) 11/12 Law of Ukraine 82.

13. Schumann C and Wiege S, 'Medical Liability and Criminal Law in Emergency Medicine' (2022) 117 Med Klin Intensivmed Notfmed 312, doi: 10.1007/s00063-022-00920-w.

14. Schwendicke F and Herbst SR, 'Health Economic Evaluation of Endodontic Therapies' (2023) 56(S2) International Endodontic Journal 207, doi: 10.1111/iej.13757.

15. Senyuta I, 'Selected Issues of Pre-Trial Investigation and Court Proceedings in Medical Cases' (2020) 3 Law of Ukraine 11, doi: 10.33498/louu-2020-03-011.

16. Wu KJ and others, 'Court Decisions in Criminal Proceedings for Dental Malpractice in Taiwan' (2022) 121(5) Journal of the Formosan Medical Association 903, doi: 10.1016/j.jfma.2021.09.023.

17. Yamnenko TM and Litvinova IF, 'Judical Domestic Practice in Medical Criminal Proceedings and Civil Cases' (2018) 4(62) State and regions, Series: Law 51.

AUTHORS INFORMATION

Oksana Soroka*
Cand. of Public Administration (Equiv. Ph.D.), Assoc. Prof., Department of Forensic Medicine, Medical and Pharmaceutical Law, Ivano-Frankivsk National Medical University, Ivano-Frankivsk, Ukraine
oksoroka@ifnmu.edu.ua
https://orcid.org/0000-0002-9510-2936
Corresponding author, responsible for investigation, methodology and writing.
Competing interests: The author, on behalf of the Authors Team, declares that there are no potential conflicts of interest related to financial support, commercial, legal, professional, or any other relationship with organisations, institutions, state bodies, or with individuals collaborating alongside the Authors Team, that could influence the views and opinions of the Authors Team as presented in this manuscript.
Disclaimer: The author declares that her opinions and views expressed in this manuscript are independent of any influence from organisations.

Nataliia Kozan
Dr. Sc. (Medicine), Prof., Head of the Department of Forensic Medicine, Medical and Pharmaceutical Law, Ivano-Frankivsk National Medical University, Ivano-Frankivsk, Ukraine
nkozan@ifnmu.edu.ua
https://orcid.org/0000-0003-1017-5077
Co-author, responsible for conceptualisation, project administration and supervising.
Competing interests: No conflicts to declare.
Disclaimer: The author declares that her opinions and views expressed in this manuscript are independent of any influence from organizations.

Oksana Popadynets
Dr. Sc. (Medicine), Prof., Head of the Department of Human Anatomy, Ivano-Frankivsk National Medical University, Ivano-Frankivsk, Ukraine
opopadynets@ifnmu.edu.ua
https://orcid.org/0000-0002-2093-5984
Co-author, responsible for formal analysis, conceptualization, and supervising
Competing interests: No conflicts to declare.
Disclaimer: The author declares that her opinions and views expressed in this manuscript are independent of any influence from organizations.

Nataliia Fedosenko
Assist. Prof., Department of Forensic Medicine, Medical and Pharmaceutical Law, Ivano-Frankivsk National Medical University, Ivano-Frankivsk, Ukraine
nfedosenko@ifnmu.edu.ua
https://orcid.org/0000-0001-5071-8457
Co-author, responsible for writing, formal analysis, review and editing.
Competing interests: No conflicts to declare.
Disclaimer: The author declares that her opinions and views expressed in this manuscript are independent of any influence from organizations.

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

Serhii Repetskyi
PhD in Law, Assoc. Prof., Department of Law and Public Administration at the King Danylo University, Ivano-Frankivsk, Ukraine
repetskyi.serhii@ukd.edu.ua
https://orcid.org/0000-0003-0683-659X
Co-author, responsible for writing, formal analysis, review and editing.
Competing interests: No conflicts to declare.
Disclaimer: The author declares that her opinions and views expressed in this manuscript are independent of any influence from organizations.

Valentyna Lampel
Deputy Director at the Scientific and Research Expert-Criminalistic Center of the Ministry of Internal Affairs of Ukraine, Ivano-Frankivsk, Ukraine
ndekc_ifr@ukr.net
https://orcid.org/0000-0002-7838-4716
Co-author, responsible for resources, data curation, formal analysis and validation.
Competing interests: No conflicts to declare.
Disclaimer: The author declares that her opinions and views expressed in this manuscript are independent of any influence from organizations, including the affiliated SRECC of the Ministry of Internal Affairs of Ukraine.

Taras Kotyk
MDent, Cand. of Medical Science (Equiv. Ph.D.), Assoc. Prof. at the Department of Human Anatomy, Ivano-Frankivsk National Medical University, Ivano-Frankivsk, Ukraine
tkotyk@ifnmu.edu.ua
https://orcid.org/0000-0002-3585-2356
Co-author, responsible for writing, data curation and formal analysis.
Competing interests: No conflicts to declare.
Disclaimer: The author declares that his opinions and views expressed in this manuscript are independent of any influence from organizations.

ABOUT THIS ARTICLE

Cite this article
Soroka O, Kozan N, Popadynets O, Fedosenko N, Repetskyi S, Lampel V and Kotyk T, 'Provision of Dental Care: Certain Aspects of Court Practice Significant for Medical Law' (2024) 7(1) Access to Justice in Eastern Europe 374-89 <https://doi.org/10.33327/AJEE-18-7.1-a000103>

Submitted on 18 Aug 2023 / Revised 11 Oct 2023 / Approved 12 Nov 2023
Published ONLINE: 1 Dec 2023 / Last Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-a000103

Managing editor – Mag. Polina Siedova. **English Editor** – Julie Bold.

Keywords: *medical law, healthcare, medical-legal relations, case law, Supreme Court, Ukraine.*

RIGHTS AND PERMISSIONS

CASE STUDY

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Case Study

HUMAN TRAFFICKING IN WESTERN BALKAN: CASE STUDY OF KOSOVO

Fidair Berisha*, Astrit Dema, Mensut Ademi and Islam Qerimi

ABSTRACT

Background: *The object of this paper is the criminal offence of human trafficking in Kosovo, addressing the negative and illegal phenomenon of this activity. It aims to pay special attention to the detection and prosecution of the perpetrators and the imposition of sentences and other criminal sanctions against them, with the sole purpose of combating and preventing it in society. Also, in this paper, some basic legal-criminal and criminological features of the criminal offence of human trafficking are analysed and treated. Given that this criminal offence represents a serious type of criminality, this study explores how it manifests itself in its consequences on the individual and society. This research conducted on human trafficking in Kosovo is of crucial importance because by studying this negative phenomenon, we can slowly conclude whether the victims were innocent or contributors to the issues leading to their trafficking.*

Methods: *In preparing this research-scientific paper, very significant content for our country is presented using the following methods: comparative, statistical, graphic, historical, analytical, survey and case studies from 1999 to now. Through these research methods and techniques, we have recognised and addressed multiple aspects of the crime of human trafficking. Contrary to the common belief that there are enough studies on the victims of human trafficking and other criminal acts, this is not true. In many cases, the states have quantified the victims of various crimes and other criminal acts solely through numerical measures. The extracted statistics form the basis of data identification and conclusion, as well as determining the recommendations contained in this paper.*

Results and Conclusions: *Trafficking in human beings is one of the most significant crimes of our time and a violation of human rights in itself, and in our work, we have encountered difficulties in coming up with the most adequate and concrete data to prevent and combat this phenomenon. Human beings are trafficked for the purpose of forced labour, illegal employment, the entertainment industry, forced and fake marriage, forced prostitution, etc. and this, in our case in the Western Balkans countries, is generally encountered because of*

socio-economic problems and freedom of movement. Human trafficking is a form of profitable organised crime and is believed to be important because the risk is low and the payoff is high; after drug and weapons trafficking and the prostitution trade comes as a great benefit, in our case, Kosovo, we have come across data from 1999 on how war refugees are abused and how narcotic substances are trafficked and used. The most common form of human trafficking is the trade of human beings for sexual exploitation or the purposes of forced prostitution. This is a challenge in our country because we do not have an adequate law to legalise prostitution. In this case, we have a lot of good organised in the region and Kosovo that abuse, especially minors, for prostitution and the purpose of the work is to issue an adequate law regarding the decriminalisation of prostitution to manage, control, prevent and combat human trafficking. The most frequent victims of this form of trafficking are children and women, who belong to the most vulnerable social groups, according to the data presented in the paper.

1 INTRODUCTION

In this paper, the techniques used and realised during this part of this look or study are known, including all their elements and the ways they can be combined to get the right results. In fact, methodological and research approaches are presented here to better explain the suitability of these methods to the research topic. Thus, a study plan is also presented in this paper; where and how the necessary information was obtained; data collection methods are also provided; procedures and institutions used; the procedures used to ensure the reliability and validity of the required results, as well as the limitations of the methodology used in this formative research, thus continuously giving it an even more scientific character. The methodological point of view is inevitably determined based on the very purpose of the paper.[1] In this paper, we describe the criminalistic view of human trafficking in Kosovo, then look at some phenomenological characteristics of human trafficking, the volume, dynamics and structure of human trafficking, some personal and social characteristics of the perpetrators, age, gender, their nationality and educational level, marital and social status, the aspect of recidivism of the perpetrators of this criminal offence in a case study of the Western Balkan country, Kosovo. The problem in the Western Balkans is that we cannot harmonise the laws and rules common to the EU and the countries from which people trafficked for prostitution come, with the sole purpose of preventing and fighting this phenomenon, as against people who are part of organised crime and to those who help in recruitment. Adequate educational institutions and institutions implementing laws must harmonise strategies and proper measures against this pathological phenomenon.

In our work, we have tried to reach a hypothesis that if we legalise, that is, we have adequate laws for allowing public prostitutes to work with legal prostitution, that is, the offering of the body for minor intercourse, the trafficking of human will fall, especially the trafficking of minors and according to of the data we have analysed that YES the trafficking of human beings will fall. The adequate institutions of law enforcement, health, and education will

[1] Josip Pavliček and Lana Milivojević, 'Criminal Methodology in the Function of Nature and Environmental Protection' (2014) 1(1) Criminal Theory and Practice 55.

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

have sufficient control and management of national strategies for preventing and combating this pathological phenomenon.

2 SPECIAL CHARACTERISTICS OF THE CRIMINAL OFFENSE OF HUMAN TRAFFICKING IN KOSOVO

Law enforcement services and agencies provide analysis of developments in areas of importance for national and international security and provide early warning of impending crises to national and international crisis management bodies and, in our case, human trafficking.[2] State institutions must have information for planning protection systems and protect classified information about their resources and activities and those belonging to other government agencies because human trafficking is the challenge of challenges in our contemporary time. Given the possibilities of communication through many electronic channels,[3] these services can act secretly to influence the outcome of events in favour of national interests "the whole art of the fight against organised crime consists in deep intelligence".[4] It is necessary that the persons who take responsibility for monitoring and detecting criminal groups whose scope is trafficking in human beings should develop simultaneous methodologies such as open, closed, secret and doctrinal with the aim of predicting their steps in the future regarding the prevention and combating of this phenomenon. Informative security activities in the prevention and fight against criminality, in general, must meet at least some conditions, such as[5]

- Trafficking people, in most cases, is done with the agreement of the individual with their will by being misinformed about jobs and professional frauds;
- The very name "trafficking in people" clearly shows that with this criminal offence, there is trade in people, buying and selling of people and that the main goal is the realisation of financial gain;
- With this criminal offence, people are treated as objects, in which case human dignity, freedom and fundamental rights are severely violated because, in most cases, people are degraded and treated like animals;
- Likewise, the exploitation of victims of trafficking requires a longer time;
- In human trafficking, there is a high probability that victims of trafficking will be recruited into criminal activities;
- In trade, a special dependency is created between the victim of trafficking and the organised criminal group itself, using violence and intimidation as a means of making profits;
- The victim can, but it is not said that he must cross the border;
- The victim can be trafficked even within a country;
- The purpose of trafficking is the exploitation of the victim.

2 Veton Vula and Mensut Ademi, *Organized Crime* (2nd edn, Association of Criminology and Victimology of Kosovo in Kosovo 2020).

3 Veton Vula and Mensut Ademi, *Cyber Criminality* (Kolegjit AAB 2018).

4 Ramo Maslesa and Andrej Anžič, *Theories and Systems of Security* (Magistrat 2001) 138.

5 Ragip Halili, *Victimology* (University of Prishtina 2016) 56.

3 CRIMINAL TYPOLOGY OF HUMAN TRAFFICKING

According to the opinions of criminologists, external criminogenic factors, especially socio-economic factors, play an important role in the appearance of criminal typology. According to them, external or exogenous factors represent the conditions and circumstances determining criminal behaviour; they directly affect the appearance of criminal activities in society. There are many external or objective factors, each with its own importance and role in the appearance of criminal behaviour. From empirical criminological research such as fear of crime, and especially considering the results of records and statistical data on criminality by minors as delinquents and adults as part of organised crime, in many countries, some objective or external factors are observed, those have a greater impact than other factors related to human trafficking as a pathology of prostitution. Thus, the following are treated as factors with a significant impact on the appearance of criminal behaviour: economic-social factors, ideological-political factors, sociopathological factors and others. However, in the framework of factors, internal subjective factors are divided into psychological or psychic factors and biological factors.

We look at the recognition, treatment and analysis of the basic phenomenological features of the criminal offence of human trafficking by examining and analysing the volume, dynamics and structure of this type of criminality, place, time and means of commission. Thus, this criminal offence, also sees some essential social features such as the perpetrators' age, gender, affiliation, educational level, marital status, nationality, recidivism, etc.[6]

4 VOLUME, DYNAMICS, AND STRUCTURE OF THE CRIMINAL OFFENSE OF HUMAN TRAFFICKING IN KOSOVO

The presentation of these data on the criminal offence of human trafficking, which as a criminal offence was part of the chapter on criminal offences against humanity and values protected by international law, is considered the most severe type of criminal offence within this chapter.

However, despite this, we will rely only on data that reflect the criminal offence of this type foreseen by the all-powerful judicial decisions issued by the court. This allowed us to gain an accurate overview of the volume of this type of crime that occurred.

In the period 2015-2022, according to the volume of the presentation of the criminal offence of human trafficking in Kosovo, it was present at a fairly high level. Thus, in the measured period of time, the number of persons convicted for the criminal offence of human trafficking provided for by Article 165 of the Criminal Code of the State of the Republic

[6] Ragip Halili, *Victimology* (XHAD Studio 2011) 102.

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

of Kosovo was significantly higher than in previous years.[7] Age and gender are also important characteristics of the criminal phenomenon. Because of the numerous statistical data from judicial practice and the records of empirical-criminological research, they say that people of different ages are mainly involved in criminal actions and behaviours. As is known, the age of the perpetrators of criminal offences is divided into minors and adults. In the criminological literature and practical research, the division and categorisation of the ages of adults are usually done over decades. In support of the statistical data related to the persons convicted for the criminal offence of human trafficking in Kosovo, persons aged 25-35 years mostly participate in the commission of this type of crime.[8] During the research, it was found that among the trafficked people, a large percentage are women. According to the survey with a total of 2063 cases taken from the period of 2015 to the end of June 2022, the vast majority of trafficked women[9] were from Moldova, 214 cases or 45%, from Romania, 89 cases or 19%, from Ukraine, 58 cases or 12%, from Kosovo, 53 cases or 11%, from Bulgaria, 28 cases or 6%, from Albania, 24 cases or 5%, from Russia, 3 cases or 1%, from Serbia, 3 cases or 1%, etc. If it is proven that the age of trafficked victims during this period, the following picture emerges: female victims aged 14-18 were 16 cases, or 26%; those aged 18-24 were 53, or 58% aged 25-30 years old were 22, or 15% and victims over the age of 30 were 6.96%[10].

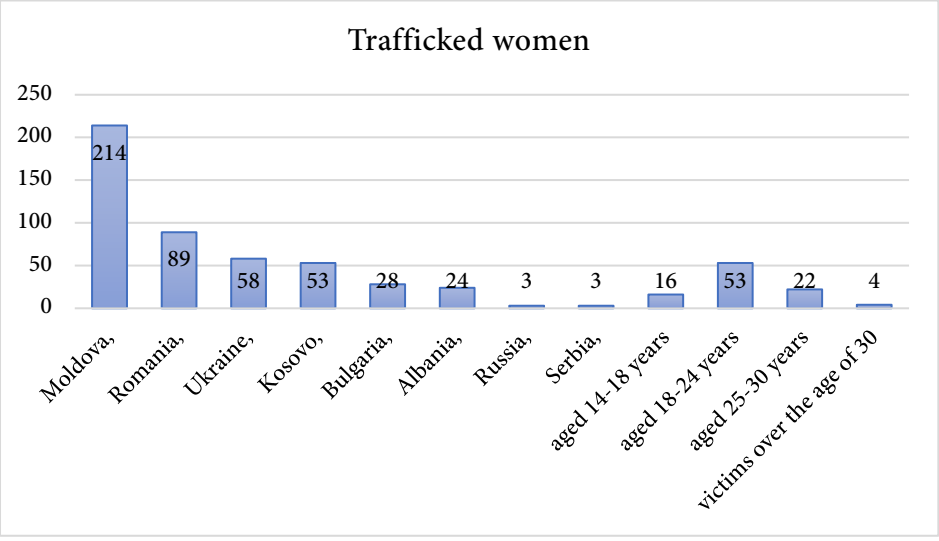


Fig. 1. Trafficked women

7 *Kosovo Police* <https://www.kosovopolice.com> accessed 20 October 2023; *Kosovo Agency of Statistics* <https://ask.rks-gov.net> accessed 20 October 2023.

8 ISRD3 Technical report M. Ademi, see Ragip Halili, *Criminology* (University of Pristina 2011) 129. About International Self-Report Delinquency see *ISRD* <https://isrdstudy.org> accessed 20 October 2023.

9 ISRD4 Study Protocol: Background, Methodology and Mandatory Items for the 2021/2022 Survey Kosovo (Technical report M. Ademi and others) see *ISRD* (n 8).

10 Ministry of Education, Science and Technology of the Republic of Kosovo, *Preventing Trafficking in Human Beings: Teacher's Manual* (IOM 2022) 7.

During the interview, the most frequent motives or reasons that the victims mentioned that led them down the path of trafficking were the desire and the promise that they would be employed, at 76.09%. 2.02% cite "offers" for marriage, and 9.31% express the desire to travel, tourism and entertainment. Among the cases, a significant 83.56% of victims entered trafficking through personal contacts that they had with the persons who offered them these services. Alternatively, 7.21% of cases made contacts through advertisements in newspapers or other means of information, and 0.23% of cases were encouraged or pushed by family members or close relatives. From this overview, it is interesting to mention who the most direct recruiters are in these cases. In 56.53% of the cases, according to the mentioned interviews, the recruiter is a person unknown to the victim; in 12.16% of the cases, the recruiter is the victim's friend; in 4.28% of the cases, the recruiter is the victim's boyfriend, in 2.03% of the cases the recruiter is known relative, in 0.68% of cases a type of female tutor appears as a recruiter. According to the mentioned interviews, the beneficiaries of the services of the victims are local residents, but some of them are also foreigners. During the time that female victims were trafficked in Kosovo, in 81.31% of cases, they offered sexual services; in 6.76% of cases, they were forced to work in various jobs. Victims who have once fallen into the trap of traffickers or criminal networks find it very difficult to free themselves from this situation.[11]

The pressure on the trafficked persons that we have encountered is that they are given personal documents, passports, money or items with which they could be identified, and in this way, their freedom of movement is limited; they are confined all day and compelled to provide sexual services to customers at night. In these ways, they become slaves and hostages of their owners or brokers of premises where they have to provide sexual services or perform other work. According to the data from the research or findings made by the Association of Criminology and Victimology of Kosovo in Kosovo, the price of buying female victims for prostitution varies from 1000 euros to 5000 euros.[12] According to the legislation in force, the qualifying circumstances in the criminal offence of trafficking are provided for in the Criminal Code of Kosovo in the paragraph that 'Anyone who participates in human trafficking is punished with a fine and imprisonment of five (5) to twelve (12) years.'[13]

11 Paula Krol, Emine Kabashi and Ardita Ramizi Bala, *Mapping Support Services for Victims of Violence Against Women in Kosovo: Council of Europe project "Reinforcing the fight against violence against women and domestic violence in Kosovo"* (Council of Europe 2017).

12 'The Students of the Faculty of Law of AAB Published the Research Data "Fear of Crime"' (*Kolegji AAB*, 26 December 2014) <https://aab-edu.net/studentet-e-fakulteti-juridik-te-aabse-publikuan-te-dhenat-e-hulumtimit-frika-nga-kriminaliteti/> accessed 20 October 2023.

13 Criminal Code of the Republic of Kosovo no 06/L-074 (2019) <https://www.refworld.org/docid/6012e70d4.html> accessed 20 October 2023.

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

According to the data of the police and the prosecutor's office, from year to year, there has been a decrease in the number of foreign victims of trafficking. Still, on the other hand, there has been an increase in domestic victims of trafficking, especially after the declaration of independence in 2008, including here. According to the above statistical data based on the Republic of Kosovo, we notice that minor victims between the ages of 15 and 17 are primarily targetted due to external factors such as socio-economic and internal family and pathological factors such as:

- inadequate parental and family care,
- difficult economic and social conditions (poverty)
- dropping out of school
- high level of unemployment
- gender inequality and violence against women
- conflict and post-conflict situations
- lack of social integration
- Lack of access to education.

The nature of the crime of human trafficking in Kosovo is considered to be hidden, and most of the victims are threatened, blackmailed, intimidated and deceived by being systematically exploited by the traffickers. Therefore, the victims do not self-declare (do not report the cases to the police) or have the courage to talk about their situation when other forces of the law get in contact with them, according to the data during the interview and survey of some of the victims and their families. Also, the public generally perceives this type of crime as committed against the victims' will and wishes.

5 THE MAIN FORM OF EXPLOITATION OF TRAFFICKING VICTIMS

Based on the data obtained and presented above, our findings indicate that prostitution in Kosovo is the primary form of exploitation among trafficking victims. In contrast, another form of exploitation is pornography, alms, services, and forced labour. Examining the issue in the context of child trafficking, it is noteworthy that despite a government-approved approval strategy, the trend of this criminal activity is increasing. Children are particularly vulnerable, with sexual exploitation being the predominant concern. In response, proactive measures have been taken through campaigns, targeting person-to-person information in schools and meetings with civil society to raise the alarm. Recognising child trafficking as a societal threat, the prevention of such activities is seen as one of the main challenges and priorities in the country.

Over several years, we have been in the prism of the teacher as a university professor and the students of the faculty of law. We have conducted several interviews and surveys which match the data obtained from our work. We have concluded that in the Republic of Kosovo, there is an urgent need to compile and approve a law for the decriminalisation of prostitution,

to approve the law for reasons of management, control, verification and prevention of human trafficking, the destination of which victims is prostitution.[14]

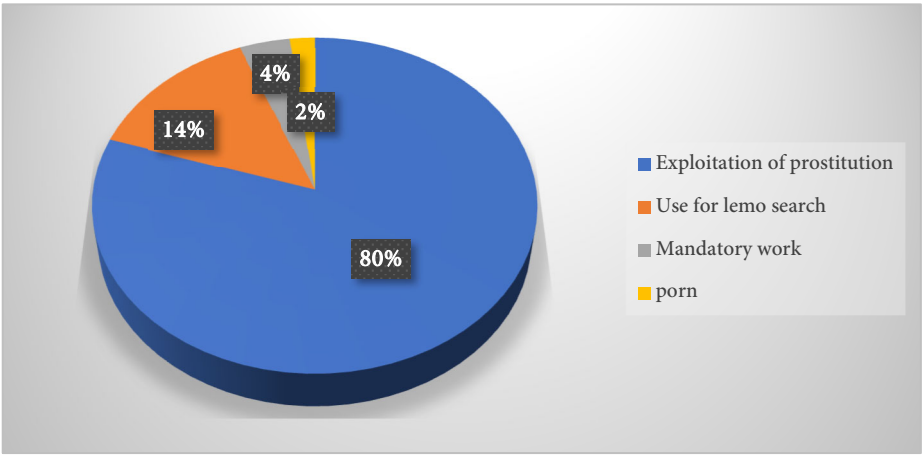


Fig.2. Exploitation of victims of trafficking

6 RECRUITMENT METHODS IN HUMAN TRAFFICKING CASES

Recruitment methods differ significantly from each other and depend on the mode of operation and level of organisation of the traffickers, as well as on the type of target group (women/children/orphans/members of minorities), etc. Traffickers mainly use the following methods of recruitment:

- Offers for jobs - (waitresses, dancers, bartenders, etc.) where good monthly salaries are promised.
- False promises about marriage or cohabitation.
- Deception by means of half-truthful promises, such as the opportunity to work in illegal conditions, but not in severe exploitative or slave conditions, or to remove organs or body parts, but without informing about the possible health consequences.
- Contact through websites (Facebook, Twitter, Instagram, Badoo, etc.) - Young women are contacted by different people.[15]

According to the data obtained from the statistics agency of Kosovo with the data presented in the table below, it appears that the victims of trafficking are mainly 16-18 years old, correlating with individuals at a higher educational level (9-12), constituting a total of 40 cases. 10 cases involve victims with no formal education, 7 with primary education (1-5),

14 Mensut Ademi, Avdi Berisha and Qazim Reka, 'Siguria e qytetareve ne Republiken e Kosoves, zonat Urbane' (1-st ICBLAS First International Conference on Business, Law, Administration and Social Sciences, Tirana, Albania, 17 January 2015) 543.

15 *Kosovo Police* (n 7).

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

and 20 with a low level of education (6-8). Notably, there is 1 case involving a victim at the university level. The presentation of the profession of persons convicted for this type of criminality will be followed according to the number of persons who exercise activity and those who do not exercise this activity. Over the period 2017-2021 in Kosovo, of the adults convicted for the criminal offence of human trafficking, the vast majority (13.4%) were individual farmers by profession, while among those who were active, the majority were unemployed (7.7%), pupils and students (7.1%) and housewives (5%), and so on.[16]

Such a high participation of individual farmers in committing this type of crime should be explained by the fact that some of them come from those who have lived in deep and poor villages, where agriculture is their primary profession. These individuals often have a low level of education and, through long migration to big cities, have fallen prey to criminal groups that deal with prostitution.

However, in daily life, some phenomena are observed that more or less speak of greater participation in the performance of certain criminal behaviours of persons who belong to certain professions or trades. This is because education and timely notification of prevention related to criminal activities are well-organised flues in the Western Balkans. In the daily judicial practice and from the data of the criminal statistics, it can be seen that these are the key persons who are very involved in the commission of this criminal offence of human trafficking, whose purpose is illegal prostitution in the Balkan countries, in this case, Kosovo. Therefore, it is rightly emphasised in the criminological literature that the profession or craftsmanship alone does not create criminals but offers them more favourable conditions and greater opportunities to commit crimes more easily than people of crafts and other professions. In our identified cases, these criminal events were carried out through open, legitimate businesses, and their activity is criminal.[17]

7 SOCIAL CONDITION AND SOCIAL STATUS

In the criminological literature, for a long time, the opinion that criminality is characteristic of the lower classes, especially for the category of workers and unemployed people and poor economic conditions, has dominated. However, these findings are based on notes on the number of persons against whom criminal charges have been filed, indictments have been filed, or sentences pronounced by the court. Thus, it is proven that the category of perpetrators of the criminal offence of human trafficking constitutes a mixed mixture of two layers. Still, the lower or poor layer dominates with close to 2%, while the rich are close to 7%, referring to court decisions. Based on the data, the court's participation of persons or professionals in the commission of this criminal offence presents as a target the lowest stratum, compared to the highest, in contrast to other strata of the population in our country[18]. However, in the decisions taken as the object of this research, it appears that the

16 See the decisions taken by the *Basic Court in Gjilan, Department for Serious Crimes* <https://gjilan.gjyqesori-rks.org> accessed 20 October 2023.

17 Halili (n 8) 252.

18 ibid 133.

court has only received information about a small number of the perpetrators and their social status. In these conditions, it is not possible to reach an accurate conclusion about the social and family situation of the perpetrators of this criminal offence.[19]

8 FACTORS THAT CHARACTERISE TRAFFICKING

Looking at both the local and the international strategies aimed at combating and preventing the criminal offence of human trafficking, along with its complex transnational expansion caused by many factors such as poverty, lack of democratic culture, gender inequality, violence against women, various conflicts, various economic crises and depressions, unemployment, lack of social integration, difficult living conditions, lack of education, discrimination, several conclusions can be drawn. A critical recommendation emerging from criminological and legal approaches and various empirical studies of this criminal phenomenon is the necessity for a law decriminalising prostitution. It becomes evident that the causes of human trafficking in Kosovo are primarily related to objective and subjective factors, amplifying the spread of this increasingly prevalent criminal activity and giving even more power to organised crime.[20]

Therefore, it is crucial to employ established theories from anthropology, biology, psychology, and sociology to comprehensively examine these factors. Analyses aimed at understanding the causes of victimisation emphasise the need to explore not only the victim's biopsychological or sociocultural circumstances but also her environment. Universities and scientific research should intensify their research and analysis even more. In the following, we see the economic and social factors that play a pivotal role in the largest number of cases of victims of trafficking in women, trafficking and abuse of children, refugees, asylum seekers, immigrants, vagrants, beggars, victims of prostitution, and other victims. Kosovo, in particular, serves as an ideal case study for these organised crime groups, given that the people of Kosovo have been without freedom of movement for years as the only country in the western Balkans. Noteworthy economic and social factors contributing to trafficking include poverty, unemployment, economic crises, housing crises, migration and movement of the population, discrimination against foreigners, corruption, and fraud. These factors, often presented as opportunities for a better life, such as employment and family support, are singled out and ultimately lead individuals into trafficking for prostitution.[21] Another factor that is directly related to human trafficking is the political factor and various political conflicts, which are considered influential factors of victimisation.[22]

19 Nexhat Korajlic and Driton Muharremi, *Criminalistics* (Riinvest Institute 2009).

20 Driton Muharremi and Mensut Ademi, 'The Role of the Police in Reducing the Fear of Crime in the Community' (2023) 2(19) Access to Justice in Eastern Europe 242, doi:10.33327/AJEE-18-6.2-n000225.

21 Vula and Ademi (n 2); Veton Vula and Mensut Ademi, 'Impact of COVID-19 on the Increase of Violence against Women' (2020) 9 Perspectives of Law and Public Administration 103.

22 Halili (n 6) 118-9.

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

9 CONCLUSIONS

The name "trafficking in human beings" clearly indicates that this criminal offence includes the trafficking of human beings; it means buying or selling, with the sole primary purpose of realising financial gain in illegal forms and ways through the provision of sexual satisfaction. In Kosovo, victims of trafficking are mainly young and middle-aged women, where the most preferred are women due to prostitution and other illegal actions. But this does not happen only in Kosovo because most of the victims around the globe are trafficked with the sole purpose of exploiting them in the most severe forms possible, even to perform various jobs such as domestic services, involvement in forced labour, armed conflicts, restaurant services, various bars, factories, agriculture, construction, wandering or begging, etc.

In Kosovo, prostitution does not happen publicly, but in most cases, it is camouflaged in various bars, such as cafes, nightclubs, casinos, massage parlours, etc. According to the Kosovo Police, recently, it has been taking place in various private apartments and houses. Trafficking of women and prostitution, in particular, insults and severely violates human dignity and the fundamental rights and freedom of the person himself and causes divorces and unpredictable family problems. Fighting this phenomenon is in everyone's interest. The cities of Kosovo, including Prishtina, Prizereni, Gjilani, Ferizaj, and Mitrovica, are active in the organisation of prostitution in different forms and ways where the law enforcement institutions have difficulty in fighting and preventing them because the camouflage and the activity are professional.

However, all the data obtained underscores that the primary criminogenic factor behind the criminal offence of trafficking in human beings is poverty, stemming from the high unemployment recorded in the Western Balkans and the case of R. Kosovo. Expanding on this, the paper highlights the impact of migration and the significant movement of the population from one place to another in different village-city ratios, as well as underdeveloped and deteriorated areas in every aspect. The examination allows for analysis of the theory of cultural conflict and the resulting financial, familial and mental burdens vulnerable individuals bear as a consequence.

From all the data obtained by the Police, Courts and Prosecutions in Kosovo, the characteristics of the perpetrators of human trafficking and the aspect of prostitution are gender, age, family status, criminal status, failure to adapt to the new environment, poor success in secondary and higher education, contacts with many people, various family conflicts, the moral decline of the family, encouraging and pushing them on the path of error, etc.

This study shows that the tactics used by traffickers to coerce women to engage in this criminal activity are among the most diverse. Yet, the form of mediation or instigation and pushing of women into prostitution is considered unique. This is particularly pertinent when considering the push and enticement of minors to deal with this negative socio-pathological phenomenon. Therefore, institutions such as the Police, the Prosecutor's Office and the Courts must be maximally engaged and take all the necessary positive measures to guarantee this value effectively. Moreover, they should strive to protect against the negative phenomenon of human trafficking and, at the same time, protect and promote human rights for all victims of trafficking, regardless of race, nationality, gender, or destination.

In conclusion, our hypothesis posits that if we have an adequate law, drawing upon the comparison and analysis with EU countries such as the Netherlands, Germany, and Spain, which have decriminalised prostitution, would result in better control over human trafficking. Adequate institutional measures would contribute to preventing and combating this phenomenon, minimising health risks and infections, and decreasing the intensity of violence within families, given that legislation and sanctions against perpetrators would be much significantly more stringent in accordance with the law in force.

REFERENCES

1. Ademi M, Berisha A and Reka Q, 'Siguria e qytetareve ne Republiken e Kosoves, zonat Urbane' (1-st ICBLAS First International Conference on Business, Law, Administration and Social Sciences, Tirana, Albania, 17 January 2015) 543.
2. Halili R, *Criminology* (University of Pristina 2011) 129.
3. Halili R, *Victimology* (University of Prishtina 2016) 56.
4. Halili R, *Victimology* (XHAD Studio 2011) 102.
5. Korajlic N and Muharremi D, *Criminalistics* (Riinvest Institute 2009).
6. Krol P, Kabashi E and Bala AR, *Mapping Support Services for Victims of Violence Against Women in Kosovo: Council of Europe project "Reinforcing the fight against violence against women and domestic violence in Kosovo"* (Council of Europe 2017).
7. Maslesa R and Anžič A, *Theories and Systems of Security* (Magistrat 2001) 138.
8. Muharremi D and Ademi M, 'The Role of the Police in Reducing the Fear of Crime in the Community' (2023) 2(19) Access to Justice in Eastern Europe 242, doi:10.33327/AJEE-18-6.2-n000225.
9. Pavliček J and Milivojević L, 'Criminal Methodology in the Function of Nature and Environmental Protection' (2014) 1(1) Criminal Theory and Practice 55.
10. Vula V and Ademi M, 'Impact of COVID-19 on the Increase of Violence against Women' (2020) 9 Perspectives of Law and Public Administration 103.
11. Vula V and Ademi M, *Cyber Criminality* (Kolegjit AAB 2018).
12. Vula V and Ademi M, *Organized Crime* (2nd edn, Association of Criminology and Victimology of Kosovo in Kosovo 2020).

AUTHORS INFORMATION

Fidair Berisha*
Dr.Sc.(Law), Professor in Law and Criminal Justice, ASKK Institute Pristina, Republic of Kosovo
fidair.berisha@hotmail.com
https://orcid.org/0000-0002-3378-5882.
Co-author, responsible for the conceptualization and writing.

Astrit Dema
Dr.Sc.(Law), Professor in Criminal Law, AAB College, Pristina, Republic of Kosovo
astrit.dema@universitetiaab.com
https://orcid.org/0000-0002-7079-5860.
Co-author, responsible for writing and data curation.

Mensut Ademi
Dr.Sc.(Law), Professor in Law and Criminal Justice, AAB College, Pristina, Republic of Kosovo
mensut.ademi@universitetiaab.com
https://orcid.org/0000-0001-6591-168X.
Corresponding author, responsible for the conceptualization, methodology and writing.

Islam Qerimi
Prof.asoc., Professor in Criminal Law, University of Mitrovica "Isa Boletini", Mitrovica, Republic of Kosovo
islam.qerimi@uibm.com
https://orcid.org/0000-0002-1645-079X.
Co-author, responsible for writing and data curation.

Competing interests: Any competing interests were declared by authors.

Disclaimer: The authors declare that their opinions 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.

ABOUT THIS ARTICLE

Cite this article
Berisha F, Dema A, Ademi M and Qerimi I, 'Human Trafficking in Western Balkan: Case Study of Kosovo' (2024) 7(1) Access to Justice in Eastern Europe 390-403 <https://doi.org/10.33327/AJEE-18-7.1-a000101>

Submitted on 22 Aug 2023 / Revised 17 Oct 2023 / Approved 1 Nov 2023
Published ONLINE: 1 Dec 2023 / Last published: 1 Feb 2024
DOI: 10.33327/AJEE-18-7.1-a000110

Managing editor - Mag. Yuliia Hartman, **English Editor –** Julie Bold.

Keywords: *Trafficking in human beings, organised crime, recruitment, transfer, exploitation, harboring, sexual exploitation, Kosovo, Western Balkans.*

RIGHTS AND PERMISSIONS

CASE STUDY

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Case Study

CRIMINAL RESPONSIBILITY OF ACCOMPLICES IN COMMITTING A CRIMINAL OFFENCE: ALBANIAN EXPERIENCE

Naim Mecalla and Erjola Xhuvani*

ABSTRACT

Background: *When a criminal offence is committed by a single person, the problem of criminal responsibility is clear, whereas when the criminal offence is committed jointly by two or more people, the problem of responsibility is discussed. In this paper, the issues related to the problems of the responsibility of accomplices participating in a criminal activity will be addressed, such as the special subject, the excess of the executor, the cooperation and complicity of the case, the use of irresponsible persons in the commission of the criminal offence, and cooperation with unidentified persons. This article will answer the question of whether the criminal offence committed in cooperation would qualify in cases of cooperation with unidentified or irresponsible persons. The conclusions deal with the fact that if the criminal offence is carried out with the will, desire, and joint contribution, it is a product of the joint criminal behaviour, so the persons will be held accountable as accomplices. Also, collaborators are not responsible for other actions of the executor during the commission of the criminal offence, or for actions that go beyond the agreement. Albanian criminal law does not accept objective responsibility in the commission of a criminal offence, it also requires the subjective element. Regarding acceptance of cooperation, there is no cooperation with irresponsible persons. It would not be enough to prove only that in the commission of the crime other persons also participated, be they all adults, but it must be proven simultaneously that the unidentified persons are criminally responsible.*

Methods: *In this study, a comprehensive legal analysis approach was employed to delve into the intricate issues surrounding the criminal responsibility of accomplices engaged in joint criminal activities. The methodology involved a meticulous examination of Albanian criminal law, jurisprudence, and relevant legal principles. The study focused on various aspects, including the special subject, the concept of cooperation, the excess of the executor, cooperation, complicity within specific cases, the utilisation of irresponsible individuals in the commission of criminal offences, and collaboration with unidentified persons. This method allows for gaining a profound understanding of the legal framework governing joint criminal behaviour and accomplice liability.*

Results and conclusions: *The findings of the research shed light on the complex issues surrounding the criminal responsibility of accomplices in cases of joint criminal activities. Through an in-depth analysis of Albanian criminal law and jurisprudence, answers to critical questions concerning the qualification of criminal offences committed in cooperation, especially in cases involving unidentified or irresponsible persons, are provided. The results confirm that when a criminal offence is executed with the shared intent, desire, and joint contribution of individuals, it unequivocally constitutes joint criminal behaviour, leading to accountability for all involved accomplices. Furthermore, the research elucidates that collaborators cannot be held responsible for actions by the principal offender that exceed the scope of their agreement. Additionally, emphasis is given regarding Albanian criminal law adhering to a subjective element requirement for criminal responsibility, ruling out objective responsibility in the commission of criminal offences. Regarding the acceptance of cooperation, the findings underscore that the mere participation of other individuals in the commission of a crime, even if they are adults, does not establish criminal responsibility for unidentified persons. Instead, it necessitates the concurrent demonstration of their individual criminal liability. The results provide valuable insights into the legal principles governing the responsibility of accomplices in joint criminal activities within the Albanian legal context.*

1 INTRODUCTION

For the determination of criminal responsibility and that of the punishment of accomplices in the execution of the criminal offence, the exact definitions of the circle of accomplices, their role, and the level of participation of each in the relevant criminal activities are of particular importance. In this context, the term "autonomy of responsibility of accomplices who participate in the execution of a criminal offence" is often used in legal literature, linking the principle of autonomy with the influence of guilt, personal, and real circumstances in the assessment of responsibility and its degree.[1] The problem of the autonomy of responsibility is discussed when the criminal offence is committed in collaboration by two or more people, where the need arises to determine the criminal activity of each one, since the degree of participation and the role of collaborators are generally different, and even more so when the forms of cooperation themselves provided for in the law differ. In this paper, some issues related to the problems of the responsibility of participants in a criminal activity will be addressed, such as the special subject, the excess of the executor, cooperation, and complicity of the case. It will also clarify issues such as:

- If it is proven that the criminal offence was committed by two or more persons, of whom only one has been identified, will the offence committed in cooperation without identifying the second person, or the other persons if there are several, qualify?
- Will it be considered a criminal offence committed in cooperation, given a lack of identification of the accomplice or the use of irresponsible persons in the commission of the criminal offence and cooperation with unidentified persons?

1 Vllado Kambovski, *E Drejta Penale: Pjesa e Përgjithshme* (Furkan ISM 2007) 381.

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

2 THE CONCEPT OF COOPERATION AND CRIMINAL RESPONSIBILITY FOR ACCOMPLICES

Referring to the Albanian Criminal Code, cooperation is considered the commitment of a criminal offence by two or more persons with an agreement between them, as well as the types and duties of collaborators.[2] In order to have cooperation in the execution of a criminal offence, the objective element is not enough. The subjective element is also required, consisting of the existence of an agreement between the participating persons for its performance. The autonomy of the criminal responsibility of the accomplice means the individual responsibility that lies within the limits of his guilt, in those dimensions and to the extent of the contribution he made in the commission of the crime. This definition is underlined because national or international criminal law do not recognize collective guilt and responsibility. No one is responsible for another, but only for his actions or omissions committed with guilt.

As a rule, the responsibility of accomplices, in the sense of the legal definition of the criminal offence, is the same for everyone regardless of the designation as organiser, executor, instigator, or assistant. The degree of responsibility or, in other words, the measure of punishment, can vary depending on the degree of participation and the role played by each party in the commission of the criminal offence or with other circumstances provided for in the law, such as the exemption from punishment or its reduction due to the assistance it provides for the recognition of other collaborators, for the discovery of their wealth derived from criminal activity, and organised criminal structures, etc. The accomplice bears criminal responsibility regardless of the responsibility or degree of responsibility of the other accomplices.[3] In this regard, there are some specific problems with the limits of participants' responsibility in a criminal activity, when the responsibility is not the same for everyone, but is either different, or extends only to some of them, or only to him or those who committed the criminal act.

2.1. Responsibility in terms of cooperation between the general and the special subject

In the investigative and judicial practice, there are cases when, for different collaborators who participate in a criminal offence, different legal qualifications of the offence are made, and therefore different responsibilities also arise. This situation is created or complicated due to the peculiarities of the subjects of the criminal offence, particularly when among the accomplices there are also persons with special qualities (special subjects), for whom the criminal law provides for a special figure of the same criminal offence. That is, when we are simultaneously for one or several accomplices before the general figure, and for one or several other accomplices before those figures who are called special or specific figures of the criminal offence (delictum proprium).

2 Criminal Code of the Republic of Albania 'Kodi Penal i Republikës së Shqipërisë' Law no 7895 of 27 January 1995 (as amended of 4 May 2021) arts 25-26 <https://qbz.gov.al/preview/a2b117e6-69b2-4355-aa49-78967c31bf4d> accessed 22 October2023.

3 Shefqet Muci, *E Drejta Penale: Pjesa e Pergjithshme* (Dudaj 2017) 222.

In the conditions of cooperation between the general subject and the special subject, when for these subjects their work is provided by special provisions, the question arises as to which provision will be applied, the one that provides for the performance of the work by the general subject, the special provision, or if the relevant provision will be applied to each subject?

There are different opinions regarding this issue.[4] According to one point of view, priority is given to the special provision that, as a rule, provides for heavier punishment. Its supporters base their reasoning on the fact that the actions or omissions of the perpetrators aim at the same criminal result and that the offence is one, indivisible, which dictates and requires the unity of their responsibility. The joint criminal activity cannot be separated and leads to the same criminal responsibility, otherwise differentiated and unfair attitudes would be held towards the accomplices and the principle that the accomplices are equally responsible would be violated.

2.2. Albanian judicial jurisprudence regarding the liability of accomplices

The jurisprudence of recent years on the responsibility in the conditions of cooperation between the general subject and the special one refers to the view that the definition of the offences will depend on the subject type of the criminal offence. Therefore, even though the work is done in cooperation between them, different settings will be made.[5] The special subject, in accordance with the general principles of the criminal law doctrine, will in any case answer based on the provision that punishes the offence committed by him, while the others according to the general provision. Partisans of this view rely on the difference between the criminal offence and its figures, underlining that a criminal offence can be envisaged with several figures and that the legal definition must be made according to the relevant figure. Its special figures can be formed both due to objective circumstances and subjective elements or entities that participate in the commission of the offence, both in cases where the criminal offence is committed in cooperation by general entities, and when its performance also includes subjects with special qualities. For example, an offence that is provided for in two or more figures is smuggling, specifically in articles 171 - 179/ç of the Criminal Code, where article 175 provides for smuggling by employees related to customs activity, that is, by a special subject.

This issue is regulated by a unifying decision of the United Colleges of the Supreme Court, where it is justified that "*the legislator has included the smuggling activity carried out by customs employees or employees related to customs activity in Article 175 of the Criminal Code even in cases where smuggling, by these employees, is carried out in collaboration with other*

4 ibid 222-4.

5 Case no 7/6, decision no 4 (United Colleges of the Supreme Court of the Republic of Albania, 15 April 2011) <http://www.gjykataelarte.gov.al/web/vu_4_penal_date_15_04_2011_749.doc> accessed 22 October 2023.

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

persons, who lack the element of special qualities to be a special subject of this type of crime, that is, they are not customs employees or employees related to customs activity."[6]

Another issue for discussion surrounds how to act in cases where the criminal offence is committed by the special subject with the help or encouragement of persons who are not subject to this activity, whose actions are not prescribed by any other provision as a criminal offence.

Such cases are typically encountered in crimes against state activity committed by state employees or public service. For example, an ordinary citizen influences the clerk to commit the crime of abuse of duty, committing arbitrary actions or violating the equality of citizens. Opinions are divided on this issue as well. Some reason that the responsible entity in these cases does not bear criminal responsibility, since the law has limited the responsibility to the special entity, for example, in the form of the criminal offence of abuse of office.[7] Others consider them co-authors with the special subject on the grounds that no individual can be exempted from criminal responsibility if, in one form or another, he is involved in criminal activity.

However, judicial practices, in the cases of "Delin Hajdaraj & Leo Osmani"[8] or "Mirdash Osmani, Bujar Leza, Leonard Xhixha & Vilson Cami"[9] considered them collaborators with the quality of instigator or helper because their actions, of any nature, were done to encourage the special subject or to create facilitating conditions for him in achieving the criminal result. In this case, the criminal offence is carried out with their will, desire, and joint contribution. Thus, it is a product of their joint criminal behaviour, so they will be held accountable as accomplices.

3 EXCESSES OF THE EXECUTOR

Cooperation in the commission of a criminal offence requires the existence of an agreement between the participating persons for its commission. This legal requirement leads to the conclusion that co-conspirators bear criminal liability for conduct that falls within the bounds of their agreement. Thus, they are responsible only for their own actions that have contributed, in any form, to the achievement of the criminal objective, as well as for those actions or omissions committed by other collaborators arising from the agreement, to which they have given consent, and which are within the measure necessary for the implementation of the decision or the goals included in their joint criminal plan.

6 Case no 1, decision no 1 (United Colleges of the Supreme Court of the Republic of Albania, 12 March 2002) <http://www.gjykataelarte.gov.al/web/nr_1_dt_12_03_2002_p_67.doc> accessed 22 October 2023.

7 Criminal Code (n 2) art 248.

8 *Delin Hajdaraj dhe T*, decision no 00-2022-1812 (273) (United Colleges of the Supreme Court of the Republic of Albania, 27 October 2022) <http://www.gjykataelarte.gov.al/vendim_download.php?id=2016-06669> accessed 22 October 2023.

9 *Mirdash Osmani dhe T*, decision no 00-2023-1149 (138) (United Colleges of the Supreme Court of the Republic of Albania, 25 April 2023) <http://www.gjykataelarte.gov.al/vendim_download.php?id=2017-06069> accessed 22 October 2023.

Collaborators are not responsible for other actions of the executor during the commission of the criminal offence, for actions that go beyond the agreement or outside the general plan of cooperation, which violate other legal-criminal relations, causing unwanted criminal consequences from them.[10]

In criminal law, these excesses are called the executor's excess, and only the executor or co-executors who committed them are responsible for the criminal offences formed by them. For example, there will be excess in the case where the agreement was for beating or slightly injuring the opponent while the executor kills him, that is, commits a crime of a different, more serious quality. Another example is when one accomplice, without the consent of the other accomplice, performs another act not provided for in the agreement, that is, adds to the number of acts. As a rule, excess occurs between either the executor and collaborators who do not take direct action on the object, or between the executor and others such as organisers, instigators, and helpers, but it can also occur in the relationship between co-executors.

4 COOPERATION AND COMPLICITY OF THE CASE

Cooperation and complicity of the case exclude cooperation and, automatically, the responsibility of the authors of the work as collaborators. The random numerical union in the commission of a criminal offence and the action of these persons until its completion without agreement between them does not legitimise cooperation and does not justify the status of each collaborator as a collaborator since the will to cooperate is absent.

Albanian criminal law does not accept objective responsibility in the commission of a criminal offence, rather, it connects it with numerous other elements, also requiring the subjective element. This position applies both to the case when the act is committed by a single person as well as to the case when the act is committed in collaboration. The existence of cooperation is not only related to the objective side with the participation of two or more persons in the performance of actions that coincide by chance in the commission of a criminal offence, but also requires the mens rea, the intention expressed in the agreement to achieve the criminal consequence with concerted actions. For example, persons unknown to each other see a truck with cargo parked on the side of the road. Then each, on his own account and without agreement with the others, steals goods from the truck. In this case, even though the guilt of each one is created and exists in the realisation of the theft, the presence of cooperation is not found. Each of them will be responsible only for the actions performed by him, unrelated to the actions of others, since there is no subjective connection between the participants in the formation of their complicity. This example demonstrates a random numerical union of persons participating in the commission of the criminal offence and, consequently, shows a random, formal, inorganic union of their guilt.

10 ibid, para 24.

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

5 THE USE OF IRRESPONSIBLE PERSONS IN THE COMMISSION OF THE CRIMINAL OFFENCE

In recent years in Albanian criminal law, one of the most controversial issues is the use of mentally irresponsible persons or minors who have not reached the age of criminal responsibility. The minimum age of committing a crime is 14, and the age of committing a criminal offence is 16,[11] i.e., these individuals are not subject to the criminal offence, in the commission of the criminal offence. The theory and practice of criminal law have not accepted the cooperation between responsible persons and mentally irresponsible persons or between responsible persons and minors who had not reached the age of criminal responsibility, in cases where the latter were used to commit the criminal offence.

The unifying decision Nr. 4, dated 15.04.2011,[12] of the United Colleges of the High Court of the Republic of Albania changed many years of judicial practice, accepting cooperation even in cases where the author of the criminal offence carries it out through mentally irresponsible persons or minors under the legal age for criminal responsibility. There are reservations regarding the unifying decision, including the legal basis and the theoretical reasoning of the problems addressed in it, since its reasoning contradicts the conclusions drawn. In such a situation, the question arises:

How can cooperation between a responsible person and an irresponsible person due to mental incapacity or due to the age of a minor be justified, in other words, between a subject of criminal law and another who is not subject to it?

The point of view that accepts this type of cooperation is found in the criminal law of some countries, such as Germany, where it is known as "joint perpetration" (Täterschaft) and "accerssoryship" (Teilnahme),[13] in the Netherlands, known as the principle of "common purpose" (dolus eventualis).[14] This law generally associates cooperation with the objective side, and even accepts its execution with carelessness, which does not foresee the agreement between collaborators as a necessary element of its existence. According to its proponents, the pushing or pulling of irresponsible persons and children (under the legal age) in criminal offences can be treated as complicity if "*the irresponsible person or minor acts willingly, with premeditation in the natural sense.*"[15]

Albanian judicial practice has been unique and in accordance with modern contemporary criminal legislations that do not accept cooperation in these cases. In the criminal codes before 1995, pushing or pulling minors into crime was assessed as an aggravating

11 Code of Criminal Justice for Minors 'Kodi i Drejtësisë Penale Përtë Mitur' Law no 37/2017 of 30 March 2017, art 3 <https://qbz.gov.al/share/p7xMm3JTTG6NT5kWgTF2Og> accessed 22 October 2023.

12 Case no 7/6, decision no 4 (n 5).

13 'Täterschaft und Teilnahme – Übersicht : Strafrecht Allgemeiner Teil 1: Online-Kurs' (*Juracademy*, 2023) <https://www.juracademy.de/strafrecht-at2/taeterschaft-teilnahme-uebersicht.html> accessed 22 October 2023.

14 Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2007) 5(1) Journal of International Criminal Justice 193, doi:10.1093/jicj/mql042.

15 Shefqet Muci, *E Drejta Penale: Pjesa e Pergjithshme* (Dudaj 2012) 243.

circumstance for the perpetrator or perpetrators of the criminal offence, while in the current code, it is provided as a separate criminal offence: "*Pushing or pulling minors under the age of fourteen years for committing a crime, is punished with imprisonment of up to five years."*[16]

Many years of judicial practice is based on the legal definition of cooperation, according to which its existence is related and conditioned not only with the objective element and with the participation of two or more persons in the commission of the criminal offence, but also inseparably with the subjective element, which is expressed in the term "by agreement between them."[17] When talking about an agreement, the legislator has in mind its connection between the subjects of criminal law, between criminally responsible persons, not between the subjects and irresponsible persons, who are not subjects and are not subject to criminal liability.

All institutes of criminal law, including cooperation, are foreseen to be implemented by its subjects, by persons who are subject to criminal liability. The agreement, in all disciplines of law, means the existence of awareness of what one does, the anticipation of what will be achieved, the desire, the will, the control of oneself, and the direct will of its authors towards their behaviour and the consequences that come or desired. The word agreement itself implies the will of all its participants. On the other hand, volition is an attribute of responsible persons.

According to the decision,

> 'when it is objectively proven that the criminal offence was committed by two or more persons, the offence will be considered committed in collaboration. This applies both to cases where accomplices are not identified for criminal liability. Special qualities that increase, reduce or exclude punishment are taken into account only for the accomplice in whom they exist.'[18]

It seems clear that the subjective side is overlooked here, if not abandoned. So, this new position of the United Colleges of the Supreme Court contradicts the notion of cooperation provided for in Article 25 of the Criminal Code as it only evaluates the objective element and excludes the subjective element in the realisation of cooperation, while the criminal law requires both these elements. The unifying decision in question distorts the meaning of the agreement and strips it of its subjective side.

Thus, on the one hand, the Supreme Court admits that "*the subjective side is one of the structural components of the institution of cooperation, which requires as a necessary element the existence of an agreement*." The Supreme Court also states that "*the characteristic of the criminal offence committed in cooperation is the unity of the side subjective*" and that "*the*

16 Criminal Code (n 2) art 129.

17 ibid, art 25.

18 Case no 7/6, decision no 4 (n 5).

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

subjective side in the commission of a criminal offence in cooperation consists of two elements: - the conscience and will of the person to commit the criminal offence and - the will to cooperate with other persons for its commission, with the condition that each of authors to be aware of the actions of others."[19] On the other hand, contrary to these submissions and fair reasoning, the United Colleges draw wrong conclusions, effectively eliminating the subjective side.

Can we discuss the "conscience and will" of irresponsible persons or children to commit a criminal offence, the "will to cooperate with other persons"? Can these individuals "be aware of the actions of others"? Of course not. A person who is irresponsible by reason of his mental state has a completely disturbed mental balance, lacks intellect to such an extent that he is unable to realise that he is committing a criminal offence, and has no conscience to exercise his will or to control his conduct. Article 17 of the Criminal Code, which provides for irresponsibility due to mental state, leaves no room for discussion in this regard. It is written there in black and white that such a person does not have criminal responsibility because "*...he was not able to control his actions or inactions, nor to understand that he committed a criminal offence.*"[20] Whereas in a minor, consciousness has not yet developed to the appropriate degree to understand the severity of his actions and to act with controlled and free will. They, not being subjects of criminal law, neither can nor are able to make agreements to commit criminal acts.

6 COOPERATION WITH UNIDENTIFIED PERSONS

When several people participate in the commission of a criminal offence in cooperation, of which at least two of them are identified, the problem of the existence of cooperation is not disputed. Its existence is discussed only in the case when one of them is identified while the other participants remain unidentified. Even for this case, the Albanian judicial practice, until the above unifying decision of the United Colleges of the Supreme Court, did not accept cooperation on the grounds that the status of the unidentified persons was not known. Now, with this unifying decision, the judicial practice is changed by accepting the institute of cooperation even when the offence is committed by two or more persons, of whom only one is identified, while the others remain unknown. Therefore, for the identified person who is subject to trial, the offence will be reported as having been committed in cooperation with unidentified persons, and he, the defendant, will answer as an accomplice. "*Not knowing the personal characteristics of the unknown accomplice - say the United Colleges in the unifying decision in question - does not avoid the existence of cooperation and does not make the provision of the general part of the Criminal Code inapplicable.*"[21]

It would not be enough to prove only that other persons participated in the commission of the crime, be they all adults, but it must be proven simultaneously that the unidentified

19 ibid.
20 Criminal Code (n 2) art 17.
21 Case no 7/6, decision no 4 (n 5).

persons are criminally responsible. Hence, if the above statement is not proven, Article 4 of the Code of the Criminal Procedure will be applicable, which states that any doubt about the charge is evaluated in favour of the defendant.

7 CONCLUSIONS

In cases where the criminal offence is committed by the special subject with the help or encouragement of persons who are not subject to this activity and their actions are not provided by any other provision as a criminal offence, opinions are divided. In these cases, some reason that the responsible entity does not bear criminal responsibility since the law has limited the responsibility to the special entity. Others consider them co-authors with the special subject, on the grounds that no one can be exempted from criminal responsibility if, in one form or another, he is involved in criminal activity. The criminal offence is carried out with their will, desire, and joint contribution, thus, it is a product of their joint criminal behaviour, so they will be held accountable as accomplices.

Collaborators are not responsible for other actions of the executor during the commission of the criminal offence, for actions that go beyond the agreement, outside the general plan of cooperation, which violate other legal-criminal relations, causing unwanted criminal consequences from them. In criminal law, these excesses are called the executor's excess, and only the executor or co-executors who committed them are responsible for the criminal offences formed by them.

Albanian criminal law does not accept the objective responsibility in the commission of a criminal offence; it also requires the subjective element. This position applies both to the case when the act is committed by a single person as well as to the case when the act is committed in collaboration.

Acceptance of cooperation, in the case when the status of unidentified persons is not known and their status is important, if we adhere to the variant that there is no cooperation with irresponsible persons, it would not be enough to prove only the fact that in the commission of the crime other persons also participated, be they all adults, but it must be proven at the same time that the unidentified persons are criminally responsible.

REFERENCES

1. Kambovski V, *E Drejta Penale: Pjesa e Përgjithshme* (Furkan ISM 2007).
2. Muci Sh, *E Drejta Penale: Pjesa e Pergjithshme* (Dudaj 2012).
3. Muci Sh, *E Drejta Penale: Pjesa e Pergjithshme* (Dudaj 2017).
4. van Sliedregt E, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2007) 5(1) Journal of International Criminal Justice 184, doi:10.1093/jicj/mql042.

AUTHORS INFORMATION

Naim Mecalla
Ph.D. (Law), Assistant Professor at Department of law, Barleti University, Tirana, Albania
n.mecalla@umb.edu.al
https://orcid.org/0009-0009-8040-7831
Co-author, responsible for writing, conceptualisation and research.

Erjola Xhuvani*
Ph.D. (Law), Lecturer at the Private Law Department, Wisdom College University, Tirana, Albania
erjolaxhuvani@wisdomuniversity.eu
https://orcid.org/0009-0003-0555-7596
Corresponding author, responsible for writing, data curation, methodology and research.

Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organisations.

ABOUT THIS ARTICLE

Cite this article
Mecalla N and Xhuvani E, 'Criminal Responsibility of Accomplices in Committing a Criminal Offence' (2024) 7(1) Access to Justice in Eastern Europe 404-15 <https://doi.org/10.33327/AJEE-18-7.1-n000115>

Submitted on 01 Nov 2023 / Revised 24 Nov 2023 / Approved 18 Dec 2023
Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-n000115

Managing editor – Mag. Yuliia Hartman. **English Editor** – Nicole Robinson.

Keywords: *Liability of accomplices, special subject, excess of executor, cooperation, complicity.*

RIGHTS AND PERMISSIONS

CASE STUDY

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

Case Study

NEW STEPS OF DIGITALISATION OF CIVIL JUSTICE IN UKRAINE

Olena Sereda, Valeriy Mamnitskyi, Polina Kornieva and Iryna Cherevatenko*

ABSTRACT

Background: *The emergence of virtual space and digital technologies is a natural consequence of the scientific and technical progress of humankind. Currently, digital technologies are actively used in the field of law, particularly within the judiciary. Therefore, the development of e-courts is a response to modern challenges. This paper is devoted to the issue of the evolution of digitalisation in civil justice; specifically, it examines the development and regulatory regulation of the use of electronic courts (e-courts) in civil proceedings. It elucidates the peculiarities and difficulties of using the electronic court to combat bureaucracy in civil proceedings.*

Furthermore, the paper explores the key elements of e-justice and assesses the possibility of implementing electronic lawsuits in Ukraine's courts. It also delineates the peculiarities of employing electronic means of proof in civil proceedings. Moreover, the paper clarifies the possibility of conducting court hearings online using platforms such as Meet and Zoom, drawing insights from the practices of other countries. Additionally, it compares the American Pacer system with the Ukrainian analogue, the "Electronic Court", as one of the ways to access case materials via the Internet. Lastly, the paper outlines the practice of the Supreme Court regarding the use of electronic subpoenas and the advantages of the electronic form.

Methods: *An analysis of judicial practice and positions of the Supreme Court regarding individual elements of e-justice and the legality of their application was carried out. Also, special attention was paid to the practice of other countries regarding their use of electronic courts and the possibility of similar proceedings in Ukraine.*

Results and Conclusions: *Based on the analysis, the authors concluded regarding the further improvement of the electronic court system in civil proceedings. Conclusions highlighted the advantages of digitalisation in the civil justice system.*

1 INTRODUCTION

On February 24 2022, the troops of the russian federation[1] launched an invasion of the territory of Ukraine and violated its territorial integrity, causing huge losses to defence facilities, civilians and buildings of state authorities and local governments, including court buildings. From that moment on, justice in Ukraine was paralysed. In such cities as Kharkiv, Kherson, Mariupol, Enerhodar, Berdyansk, and Vovchansk, in general, the Russian occupiers committed actions which violated the norms of international humanitarian law, such as self-appointing managers and severing territories from Ukraine's state borders. On the same day, the President of Ukraine signed a decree on the imposition of martial law throughout Ukraine for 30 days.[2]

Nevertheless, for the administration of justice, some courts continued to work under martial law with certain restrictions in implementing the principles of openness and publicity. One of the main issues of the administration of justice under martial law is the availability of participants in the case to court and compliance with the proper consideration of the case, including through the digitalisation of legal proceedings.

On April 26 2022, the Verkhovna Rada of Ukraine registered the Draft Law 'On Amendments to the Code of Administrative Procedure of Ukraine, the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine (regarding the implementation of legal proceedings under martial law or a state of emergency)', the primary purpose of which was the introduction of effective procedural mechanisms under martial law.[3] The possibility of conducting court hearings remotely and notifying case participants about proceedings through various digital messenger resources, e-mails, and announcements on the official Internet resource of the judiciary of Ukraine was explored. Although such innovations were proposed to improve the implementation of legal proceedings, on July 01 2022, this draft Law was rejected.

Analysing this, a number of questions arise regarding the prospects of consolidating these mechanisms in legislation in the future and further improving them through the application of the experience of countries where e-litigation is developed and progressive.[4]

1 Today, more and more often, the public and the international community are in support of Ukraine. The name "russian federation" is written with a small letter.

2 Decree of the President of Ukraine no 64/2022 of 24 February 2022 'On the Imposition of Martial Law in Ukraine' [2022] Official Gazette of Ukraine 46/2497.

3 Draft Law of Ukraine no 7316 of 26 April 2022 'On Amendments to the Code of Administrative Procedure of Ukraine, the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine (regarding the implementation of legal proceedings under martial law or a state of emergency)' <https://itd.rada.gov.ua/billInfo/Bills/Card/39489> accessed 22 December 2023.

4 See more in: Xandra E Kramer, 'Digitising Access to Justice: The Next Steps in the Digitalisation of Judicial Cooperation in Europe' (2022) 56 Revista General de Derecho Europeo 1, doi:10.2139/ssrn.4034962; Elena Alina Ontanu, 'Adapting Justice to Technology and Technology to Justice: A Coevolution Process to e-Justice in Cross-border Litigation' (2019) 8(2) European Quarterly of Political Attitudes and Mentalities 54; Corien Prins, 'Digital Justice' (2018) 34(4) Computer Law & Security Review 920, doi:10.1016/j.clsr.2018.05.024; Didier Reynders, 'Digitalising Justice Systems to Bring Out the Best in Justice' (2021) 4 Eucrim 236, doi:10.30709/eucrim-2021-030; Judith Townend and Lucy Welsh, 'Justice System Modernisation, Digitalisation and Data' in J Townend and L Welsh, *Observing Justice: Observing Justice* (Bristol UP 2023) 40, doi:10.51952/9781529228694.ch003.

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

2 DIGITALISATION OF CIVIL JUSTICE: GENERAL REMARKS

It should be emphasised that the process of digitalisation of civil justice was forced to accelerate in 2020 amid the pandemic when the question arose about the possibility of the judicial branch of power performing its main function, that is, justice under quarantine restrictions. The inability to hold court hearings under martial law has led to the activation of the further introduction of the e-court system; as life continues, civil disputes continue to be generated and exist, and they need to be resolved by the courts. In view of the foregoing, it seems relevant to study digitalisation, civil proceedings, comments on possible shortcomings and the formation of its own proposals for improving this institution.

The digitalisation of legal proceedings in Ukraine's legal system requires increasingly systematic analysis and consideration of the prospects for its modernisation.[5] The above concept is borrowed; therefore, the domestic law at the present stage does not provide an interpretation of the concept of 'digitalisation'. In general, this concept should be considered as a process of changing information into a digital form that computer can be read and analysed by a computer.[6] We prefer to use this term due to the wider context and the recognition by the main stakeholders like the UN and the EU.[7]

This concept is understood as the digitalisation of information for further perception by a computer program. However, in terms of the rapid evolution of legal relations, digitalisation covers not only the digitalisation of data but also the complex process of transition of entire legal institutions to the electronic format. In this aspect, it would be expedient to identify the directions of digitalisation that will be relevant specifically for developing civil procedures. Such an institution should single out such a concept, known as e-litigation, the legal nature of which is reflected in literature.[8]

5 Concerning the Ukrainian development please see in: Henriette-Christine Boscheinen-Duursma and Roksolana Khanyk-Pospolitak, 'Austria and Ukraine Comparative Study of E-Justice: Towards Confidence of Judicial Rights Protection' (2019) 2(4) Access to Justice in Eastern Europe 42; Iryna Izarova, 'Digitalisation of Justice in Ukraine: Some Remarks on the Main Goal' in K Gajda-Roszczynialska (ed), *Impact of the COVID-19 Pandemic on Justice Systems: Reconstruction or Erosion of Justice Systems – Case Study and Suggested Solution* (V&R unipress 2023) 235.

6 'Digitalization' (*Oxford Learner's Dictionaries*, 2023) <https://www.oxfordlearnersdictionaries.com/definition/english/digitalisation?q=digitalisation> accessed 22 December 2023. Some authors use the term "digitization", see more here: Federico Iannacci, 'Digitising Criminal Justice in England and Wales: Revisiting Information-Growth Dynamics' (2009) 3(1) Transforming Government: People, Process and Policy 50, doi:10.1108/17506160910940731; Jane Loo and Mark Findlay, 'Digitised Justice: The New Two Tiers?' (2022) 33 Criminal Law Forum 1, doi:10.1007/s10609-022-09431-x.

7 European Commission, 'Digitalisation of Justice' (European Commission, 2023) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/digitalisation-justice_en> accessed 22 December 2023; United Nations Development Programme, 'Digitalization and e-Justice' (UNDP, 2023) <https://www.undp.org/rolhr/justice/digitalization-and-e-justice> accessed 22 December 2023.

8 Boscheinen-Duursma and Khanyk-Pospolitak (n 5); Z Hadecka and A Shtabrat, 'Implementation of Electronic Judicial Systems' (2021) 1 Efektyvna ekonomika doi:10.32702/2307-2105-2021.1.80.

3 KEY ELEMENTS OF E-JUSTICE IN UKRAINE

We propose considering the following elements as integral components of e-justice in Ukraine: 1) filing a claim and other procedural document via the Internet; 2) use of means of proof in electronic form; 3) holding a court hearing online via video conferencing such as Meet and Zoom platforms, as well as e-mail; 4) formation of an electronic dossier, and hence the transfer of document circulation and office work into electronic form; 5) providing access to case files for participants in the process and other persons via the Internet; 6) use of electronic subpoenas; 7) implementation of all legal proceedings exclusively through Internet-based platforms, including electronic courts or cyber courts (e-courts).[9]

Based on the foregoing, we consider it appropriate to analyse such signs and prospects for their application and improvement in the conditions of martial law in Ukraine.

In accordance with the order of the State Judicial Administration of Ukraine dated December 22 2018, No. 628 'On testing the subsystem "Electronic Court" in local and appellate courts', the operation of the subsystem "Electronic Court" in test mode began in all local and appellate courts.[10] The property of this project was the possibility of filing claims in electronic format, which is a convenient step in the fight against established bureaucracy. Although this mechanism has become a promising step towards the digitalisation of civil procedure, there are some difficulties in its application. Art. 43 of the Civil Procedure Code of Ukraine (hereinafter – CPC)[11] stipulates that documents (including procedural documents, written and electronic evidence, etc.) may be submitted to the court, and procedural actions may be performed by the parties to the case in electronic form using the Unified Judicial Information and Telecommunication System (hereinafter - ESITS),[12] except as provided for in this Code. And further, para. 2 of Pt. 1 of Art. 177 of the CPC procedure expressly provides for the possibility of filing electronic claims.

Initially, at the beginning of the introduction of this system, there were frequent cases where the courts refused to accept claims that were filed electronically, referring to a) the inconsistency of the claim with the legal form and b) the absence of the fact of the full

9 Iryna Izarova and Henriette Christine Boscheinen-Duursma, 'Towards sustainable civil justice: Lessons from Ukraine and Austria' (2022) 1(Espec) Revista Jurídica Portucalense 55; Maksym Maika, 'The Implementation of E-justice within the Framework of the Right to a Fair Trial in Ukraine: Problems and Prospects' (2022) 5(3) Access to Justice in Eastern Europe 249, doi:10.33327/AJEE-18-5.2-n000320

10 Order of the State Judicial Administration of Ukraine no 628 of 22 December 2018 'On Testing the Subsystem "Electronic Court" in Local and Appellate Courts' <https://ips.ligazakon.net/document/SA18177> accessed 22 December 2023.

11 Civil Procedure Code of Ukraine no 1618-IV of 18 March 2004 (as amended of 16 December 2023) <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 22 December 2023.

12 'Functioning of the Unified Judicial Information and Communication System' (*Ukrainian Judiciary, State Judicial Administration of Ukraine*, 2023) <https://dsa.court.gov.ua/dsa/inshe/func_ecits/> accessed 22 December 2023.

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

functioning of the ESITS. The decisive argument for the position of the possibility of filing claims with the court in electronic form was the conclusion of the Supreme Court in the panel of judges of the Cassation Administrative Court when considering case No. 160/1841/19,[13] which resolved conflicts regarding the possibility of applying the institution of electronic claim. The panel of judges of the Supreme Court concluded that from December 22 2018, applications and other procedural documents received by all local and appellate administrative courts through the subsystem "Electronic Court" should be registered and considered in the prescribed manner.

Therefore, further application of the institution of electronic claims will significantly contribute to the development of the process of digitalisation of civil proceedings, especially in conditions of martial law, when the issue of filing a quick and "safe" claim is appropriate.

Secondly, the issue of using electronic means of proof is an important element on the way to the formation of electronic legal proceedings. Considering the development of scientific and technological progress, improving means of communication and storage of information, using computer equipment and information, and introducing electronic evidence into the system of means of proof is undoubtedly a progressive innovation. Electronic evidence is information in electronic (digital) form containing data on the circumstances relevant to the case, in particular electronic documents (for example, text documents, graphic images, plans, photographs, video and sound recordings, etc.), websites (pages), text, multimedia and voice messages, metadata, databases and other data in electronic form (Pt. 1 of Art. 100 of the CPC).

The law enforcement practice of national courts is ambiguous in determining electronic evidence, as there are some difficulties in establishing the authenticity of the evidence and the author himself. For example, in case No. 908/1264/18, the Supreme Court established whether the official e-mail address of one of the parties to the dispute from which the evidence was submitted was electronic.[14] In addition, the Court was quite critical of the authentication of the person submitting evidence in the case due to the fact that the sender did not use QES (qualified electronic signature) that could identify him as a person. The court found the evidence inadequate. Therefore, when using electronic evidence, several problematic issues arise that must be resolved at the legislative level.

Thirdly, the innovation of recent years has been the possibility of holding court hearings online via video conferencing on the Meet and Zoom platforms, which was regulated by Order No. 169 of April 8 2020, of the State Court Administration of Ukraine, according to which the Procedure for working with technical means of videoconferencing during a court hearing with the participation of the parties outside the court premises was approved. This proposal was a novelty at that time, but because of this, several questions

13 Case no 160/1841/19 (Administrative Cassation Court of the Supreme Court of Ukraine, 6 August 2020) < https://reyestr.court.gov.ua/Review/90846939 > accessed 22 December 2023.

14 Case no 908/1264/18 (Commercial Cassation Court of the Supreme Court of Ukraine, 7 November 2019) <https://reyestr.court.gov.ua/Review/85470804> accessed 22 December 2023.

arose, namely the expediency of introducing such a procedure into Ukrainian law and further implementation.

Despite all the possible gaps, electronic means of communication met its expectations, simplifying the possibility of persons accessing the court. In addition to the analysed aspects to further expand the use of such technology, it is worth noting that the practice of using such technologies has long been employed by the countries of the European Union have long utilised such technologies in their legal systems, benefitting from more robust opportunities for the introduction of information and communication technologies and e-justice in legal proceedings.

It should be noted that implementing information and communication technologies and e-justice in other countries has been conducted consistently for more than ten years through multi-year pilot projects, which made it possible to determine through practical application the most effective procedures that should be introduced into the current legislation.

We believe that using video conferences for civil proceedings can effectively consider cases that resolve the impossibility of judicial proceedings due to the issue of "cross-borderness". The application of this mechanism is quite relevant due to the migration processes that took place during martial law in Ukraine, and the further praised practice of applying e-communication will serve as a lever on the way to electronic legal proceedings.

Fourthly, the next step to improve digitalisation in Ukraine is introducing a single working electronic document management system, which can solve well-established issues of proper consideration of civil cases.[15]

Domestic law is already on the way to establishing an electronic document management system, provided for in paragraph 6.1 of paragraph 6 of the Regulations on the procedure for the functioning of individual subsystems (modules) of the Unified Judicial Information and Telecommunication System, namely 'electronic record keeping, including the movement of electronic documents within the relevant bodies and institutions and between them, registration of incoming and outgoing documents and stages of their movement'.[16]

Thus, in the future, the prospect of a complete transition of document circulation to the electronic space in Ukraine is a fundamental and necessary prerequisite for improving the e-judicial system and adjusting it to the practice of European Union countries.

The fifth crucial element of digitalising legal proceedings is access to online case files for participants and other individuals involved in the process.

15 Maika (n 9).

16 Decision of the Supreme Judicial Council no 1845/0/15-21 of 17 August 2021 'On approval of the Regulation on the procedure for the functioning of individual subsystems of the Unified Judicial Information and Telecommunication System' <https://zakon.rada.gov.ua/rada/show/v1845910-21#n22> accessed 22 December 2023.

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

A prerequisite for the possibility of the existence of such a system around the world was the practice of the United States. The electronic publication of judicial acts was started in the order of experiment in 1988 based on the Pacer system.[17] Currently, it is possible for all interested parties to open access to court case files and related information in the Pacer system over the Internet.[18]

The Pacer system includes the following information: a registry of incoming applications; information in the case, such as subject and price of the claim, case number, participants of the meeting, and at what stage of consideration the case is located; court decisions and rulings; and a calendar of cases scheduled for consideration and considered. The system allows you to search by type of case, date of application, name of the party to the case, name of the judge, representative of the party and other parameters. Federal courts independently maintain a database of their cases by sending data daily to the centre of the Pacer system. An analogue of this system in the domestic space is the "Electronic Court" system,[19] which provides an opportunity for quick access to the court case, to track its movement, and to view information about the progress of the court case. To use the "Electronic Court" service, the system user must go to the official web portal 'Judiciary of Ukraine', 20 search for a court and register their personal account through which the system user can receive all necessary information about the course of the trial. To connect to the "Electronic Court" system, it is necessary to have an electronic qualification signature for registration. Thus, the functioning of the e-court system regarding the possibility of free access to case materials is an important asset on the way to the digitalisation of civil procedure because the possibility of such digitalisation is the foundation for moving away from 'the power of paper media'.

Sixth, a step towards digitalisation is the use of electronic subpoenas. However, the question arises: what is the legal nature of such a procedural document?

In general, according to the Code of Civil Procedure, the court summons the participants of the case to a court hearing or to participate in the commission of a procedural action if it recognises their turnout as mandatory. The court notifies the parties of the case of the date, time, and place of the trial or the commission of the relevant procedural action if their turnout is not mandatory. Subpoenas serve as a formal notification from the court.

In accordance with the resolution, the Civil Court of Cassation of July 13 2022,[20], it was noted that the defendant (referred to as Citizen B) contested the decision of the Court of Appeal, arguing that it was adopted in his absence and therefore should be overturned. He claimed that he was not properly notified of the date, time and place of the case. However, the Court of Appeal had sent a subpoena to Citizen B's email address, which they had consistently used throughout the entire case period; in particular, they sent procedural applications from this e-mail address to the Court of Appeal. Therefore, the CCS of the

17 Pragya Jha and J Nayak, 'COVID-19: The Catalyst to an e-Judiciary' (2020) 18 Supremo Amicus 644.
18 *PACER Public Access to Court Electronic Records* <https://pacer.uscourts.gov> accessed 22 December 2023.
19 *Electronic Court* <https://id.court.gov.ua> accessed 22 December 2023.
20 Case no 761/14537/15-c (Civil Cassation Court of the Supreme Court of Ukraine, 13 July 2022) <https://reyestr.court.gov.ua/Review/105325048> accessed 22 December 2023.

Supreme Court ruled that sending a subpoena to the e-mail address of the party in the case is proper notice, provided that the participant in the trial had provided that e-mail address and used it to send certain procedural documents to the court. Thus, as noted by the panel of judges of the CCS of the Supreme Court, the appellate court fulfilled the obligation to notify Citizen B. of the date, time and place of the case.

Summarising the above circumstances, it can be concluded that, indeed, the system of electronic subpoenas can and should take place in the modern legal space (especially in conditions of martial law, when persons are forced to leave their place of permanent residence), but taking into account an important feature, namely: a) notification of the existence of a person's e-mail; b) permanent use and access to this mail. In order to avoid the problem with inactive e-mail, we propose improving the mechanism of electronic court summonses through the Diia[21] application. The advantage of this form of subpoena, in our opinion, may be: a)the impossibility of losing this application, unlike e-mail, and (b) the speed and unhindered receipt of the subpoena in the application.

Seventh, one of the key issues is the complete transfer of legal proceedings to the e-court system. In this case, we are referring to a certain abstraction, although analysing the practice of the United States (the PACER system, as noted above), the complete transfer of the trial into electronic form may occur in the future. Again, turning to U.S. practice, we can talk about improving e-litigation by introducing artificial intelligence. A total of fifteen states use automated systems to assess the risks of releasing those arrested on bail. The main task is not to replace the judge but to exclude subjective factors that may affect the decision from the process. The work is based on data from 1.5 million court cases in the U.S. The assessment uses nine criteria, including age, former convictions, cases of ignoring court decisions and other facts from the criminal history of the suspect. The solutions of the algorithm are recommendatory in nature. However, in our opinion, artificial intelligence cannot be a perfect regulator of public relations because it is only a computer program written by people that operates according to a specially created algorithm (as we know, algorithms can very often fail and create dissonances). Therefore, we agree with the opinion on the possibility of creating a system, but one that will be exclusively auxiliary in nature.[22]

4 CONCLUSIONS

The digitalisation of legal proceedings is becoming an increasingly integral part of the legal development of the state, especially during martial law. It is worth noting that Ukraine is on the right path to improve the e-court. However, aligning national legislation with world standards for a fully functional e-justice system is a significant step towards reforming civil

21 *Diia: Government services online* <https://diia.gov.ua> accessed 22 December 2023.

22 Goda Strikaitė-Latušinskaja, 'Can We Make All Legal Norms into Legal Syllogisms and Why is That Important in Times of Artificial Intelligence?' (2022) 5(1) Access to Justice in Eastern Europe 8, doi:10.33327/AJEE-18-5.1-a000095.

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

litigation. Digitalisation is not merely a trend but also a great saving of human resources and funds. In particular, utilising videoconference for civil proceedings can be an effective way to consider cases with cross-border implications; this mechanism is especially relevant amid migration processes that take place during martial law in Ukraine. Embracing e-communication practices will further advance electronic legal proceedings.

A second proposal involves the mechanism of electronic court summonses through the Diia application. This approach offers several advances, including the impossibility of missing this application compared to e-mail, and ensures the swift and unhindered receipt of the subpoena of the summons.

REFERENCES

1. Boscheinen-Duursma HCh and Khanyk-Pospolitak R, 'Austria and Ukraine Comparative Study of E-Justice: Towards Confidence of Judicial Rights Protection' (2019) 2(4) Access to Justice in Eastern Europe 42.
2. Hadecka Z and Shtabrat A, 'Implementation of Electronic Judicial Systems' (2021) 1 Efektyvna ekonomika doi:10.32702/2307-2105-2021.1.80.
3. Iannacci F, 'Digitising Criminal Justice in England and Wales: Revisiting Information-Growth Dynamics' (2009) 3(1) Transforming Government: People, Process and Policy 50, doi:10.1108/17506160910940731.
4. Izarova I and Boscheinen-Duursma HCh, 'Towards sustainable civil justice: Lessons from Ukraine and Austria' (2022) 1(Espec) Revista Jurídica Portucalense 55.
5. Izarova I, 'Digitalisation of Justice in Ukraine: Some Remarks on the Main Goal' in Gajda-Roszczynialska K (ed), *Impact of the COVID-19 Pandemic on Justice Systems: Reconstruction or Erosion of Justice Systems – Case Study and Suggested Solution* (V&R unipress 2023) 235.
6. Jha P and Nayak J, 'COVID-19: The Catalyst to an e-Judiciary' (2020) 18 Supremo Amicus 644.
7. Kramer XE, 'Digitising Access to Justice: The Next Steps in the Digitalisation of Judicial Cooperation in Europe' (2022) 56 Revista General de Derecho Europeo 1, doi:10.2139/ssrn.4034962.
8. Loo J and Findlay M, 'Digitised Justice: The New Two Tiers?' (2022) 33 Criminal Law Forum 1, doi:10.1007/s10609-022-09431-x.
9. Maika M, 'The Implementation of E-justice within the Framework of the Right to a Fair Trial in Ukraine: Problems and Prospects' (2022) 5(3) Access to Justice in Eastern Europe 249, doi:10.33327/AJEE-18-5.2-n000320.
10. Ontanu EA, 'Adapting Justice to Technology and Technology to Justice: A Coevolution Process to e-Justice in Cross-border Litigation' (2019) 8(2) European Quarterly of Political Attitudes and Mentalities 54.

11. Prins C, 'Digital Justice' (2018) 34(4) Computer Law & Security Review 920, doi:10.1016/j.clsr.2018.05.024.

12. Reynders D, 'Digitalising Justice Systems to Bring Out the Best in Justice' (2021) 4 Eucrim 236, doi:10.30709/eucrim-2021-030.

13. Strikaitė-Latušinskaja G, 'Can We Make All Legal Norms into Legal Syllogisms and Why is That Important in Times of Artificial Intelligence?' (2022) 5(1) Access to Justice in Eastern Europe 8, doi:10.33327/AJEE-18-5.1-a000095.

14. Townend J and Welsh L, 'Justice System Modernisation, Digitalisation and Data' in Townend J and Welsh L, *Observing Justice: Observing Justice* (Bristol UP 2023) 40, doi:10.51952/9781529228694.ch003.

AUTHORS INFORMATION

Olena Sereda
Doctor of Science (Law), Prof., Head of the Department of Labor Law, Yaroslav Mudryi National Law University, Kharkiv, Ukraine
http://orcid.org/0000-0002-8252-1963

Valeriy Mamnitskyi
Cand. of Science (Equiv. of PhD in Law), Assoc. Prof., Civil Proceeding Department, Yaroslav Mudryi National Law University, Kharkiv, Ukraine
v.yu.mamnytskyy@nlu.edu.ua
https://orcid.org/0000-0002-1455-3883

Polina Kornieva
PhD in Law, Assistant Prof., Department of Private International Law and Comparative Law, Yaroslav Mydryi National Law University, Kharkiv, Ukraine
p.m.kornyeva@nlu.edu.ua korneva91@ukr.net
http://orcid.org/0000-0002-7901-9008
Co-author, responsible for writing and data collection.

Iryna Cherevatenko*
Cand. of Science (Equiv. of PhD in Law), Assoc. Prof., Civil Justice and Advocacy Department, Yaroslav Mudryi National Law University, Kharkiv, Ukraine
i.m.cherevatenko@nlu.edu.ua
https://orcid.org/0000-0003-2937-1529
Co-author, responsible for writing and data collection.
Corresponding author, responsible for the manuscript preparing.

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

CO-AUTHORSHIP

Conceptualization – Olena Sereda and Valeriy Mamnitskyi
Data curation – Polina Kornieva, Iryna Cherevatenko
Methodology – Olena Sereda and Valeriy Mamnitskyi
Supervision – Olena Sereda and Valeriy Mamnitskyi
Writing – original draft – Olena Sereda, Valeriy Mamnitskyi, Polina Kornieva, Iryna Cherevatenko
Writing – review & editing – Olena Sereda and Valeriy Mamnitskyi

Competing interests: No competing interests were disclosed by authors.

Disclaimer: The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organizations.

ABOUT THIS ARTICLE

Cite this article
Sereda O, Mamnitskyi V, Kornieva P and Cherevatenko I, 'New Steps of Digitalisation of Civil Justice in Ukraine' (2024) 7(1) Access to Justice in Eastern Europe 416-26 <https://doi.org/10.33327/AJEE-18-7.1-n000118>

Submitted on 1 Jun 2023 / Revised 1st 2 Oct 2023 / Revised 2nd 3 Dec 2023 /
Approved 7 Dec 2024 / Published: 1 Feb 2024
DOI https://doi.org/10.33327/AJEE-18-7.1-n000118

Managing editor – Mag. Polina Siedova. **English Editor** – Julie Bold.

Keywords: *electronic court, digitalisation, civil proceedings, digital justice, Ukraine.*

RIGHTS AND PERMISSIONS

Abstracts in Ukrainian language / Анотації українською мовою

ПРАВОВИЙ СТАТУС МІГРАНТІВ, ПОВ'ЯЗАНИХ З ВІЙНОЮ: ЯК ВИЗНАЧИТИ ПРАВО, ЩО ЗАСТОСОВУЄТЬСЯ?

Ірина Діковська*

АНОТАЦІЯ

Вступ. Визначення права, що підлягає застосуванню для з'ясування правового статусу особи, має важливе значення для регулювання сімейних і спадкових відносин з іноземним елементом та питань правового статусу особи. Це може залежати від обставин життя людини. Ця стаття має на меті проаналізувати, якою мірою фактичні обставини життя пов'язаних з війною мігрантів (наприклад, їхній статус мігранта, тривалість перебування в конкретній країні) впливають на визначення права, застосовного до їх правового статусу.

Методи. Для досягнення цілей дослідження використовувалися порівняльний, історичний та аналітичний методи. Стаття спирається на підготовчі матеріали до Конвенції про статус біженців від 28 липня 1951 р., а також на відповідні роботи щодо тлумачення її положень, правового статусу, розуміння поняття «постійне місце проживання» і співвідношення між міжнародним приватним правом і міграційним правом. Порівнюються підходи національних законів до визначення права, застосовного до правового статусу особи. Для уточнення поняття «доміцилій біженця» використовується англійська доктрина. Крім того, аналізуються деякі положення Європейської конвенції з прав людини та прецедентне право Європейського суду з прав людини, щоб з'ясувати питання про те, право якої держави застосовується до прав, пов'язаних зі шлюбом.

Результати та висновки. З'ясовано, що міграційний статус не впливає на визначення права, застосовного до правового статусу особи. Якщо колізійна норма сформульована таким чином, що вимагає аналізу обставин життя мігранта, то факторами можуть бути можливості працевлаштування, знання мови, сімейні чи ділові зв'язки та його або її бажання залишитися в цій країні. Право, застосовне до особистого статусу деяких пов'язаних з війною мігрантів, може бути визначено на основі згаданого документа про статус біженців від 28 липня 1951 р. Для цього їм не потрібен статус біженця. Однак вони повинні відповідати критеріям статусу біженця, зазначеним у Конвенції. Отже, право, застосовне до особистого статусу осіб з додатковим або тимчасовим захистом, також може визначатися на основі Конвенції. Під час визначення права, застосовного до особистого статусу на основі Конвенції, доцільно використовувати широке розуміння поняття «особистий статус».

Якщо намір мігранта залишитися в країні, куди він утік, є реалістичним, це можна вважати фактором, який вказує на те, що він або вона має місце проживання в цій країні. За відсутності вибору права сторонами конкретних відносин, питання, що охоплюються особистим статутом пов'язаного з війною мігранта, який не відповідає критеріям

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

біженця, зазначеним у Конвенції, можуть регулюватися правом держави. з якою такий мігрант має найтісніший зв'язок на момент розгляду відповідного питання в суді.

***Ключові слова**: особистий статус, право, застосовне до особистого статусу, мігранти, пов'язані з війною, Конвенція про статус біженців, місце проживання, біженець.*

ЗАСТОСУВАННЯ ПРИНЦИПУ КОНСЕНСУАЛЬНОСТІ У СУЧАСНОМУ ЦИВІЛЬНОМУ ПРОЦЕСІ: ПОРІВНЯЛЬНИЙ АНАЛІЗ ПРОЦЕДУР, ЩО ЗАСТОСОВУЮТЬСЯ В АВСТРІЇ, ЛИТВІ ТА УКРАЇНІ

Тетяна Цувіна*, Саша Ферц, Агнє Тваронавічене та Паула Ріенер

АНОТАЦІЯ

Вступ. У пропонованій статті автори продовжують досліджувати зміни в орієнтації цивільного процесу, що свідчать про перехід від конкурентних й адверсарних моделей до моделей співпраці та консенсусу.

Мета роботи – розкрити особливості практичного застосування принципів взаємної співпраці та консенсуальності в цивільному процесі. У дослідженні розглянуто процедури досудового врегулювання спорів у трьох країнах Європи: Австрії, Литві й Україні. Шляхом порівняльного аналізу правових нормативів і практики в обраних країнах оцінено вплив застосування процедур, спрямованих на урегулювання спорів та сприяння більш мирному залагодженню цивільних суперечок.

Методи. Дослідження розпочалося з огляду наявної наукової літератури, короткого історичного аналізу й аналізу документів щодо правової бази процедур, спрямованих на урегулювання спорів, які застосовуються у цивільному процесі в обраних країнах. Ця робота є продовженням попередніх досліджень співавторів і спрямована на вивчення того, як виявлений глобальний тренд у напрямку консенсуального принципу в цивільному процесі відобразився у правовому законодавстві та практиці окремих країн. Правові рамки процедур, спрямованих на урегулювання спорів, які застосовують в Австрії, Литві й Україні, порівнювалися для визнання наявної різноманітності та специфіки національних підходів до консенсуальності в цивільному процесі в різних юрисдикціях.

Результати та висновки. Ідеї більш соціально орієнтованого та консенсуального цивільного процесу реалізуються в цивільному процесі Австрії, Литви й України за допомогою впровадження методів досудового врегулювання спорів, спрямованих на досягнення згоди, таких як судове медіаторство та судове посередництво. Незважаючи на широке загальне розуміння цих мирних процедур, було виявлено суттєві відмінності в теоретичному розумінні концепції та її впровадженні в аналізованих юрисдикціях. Пропоноване дослідження допомагає практикам у розв'язанні спорів і дослідникам, які зацікавлені у кращому розумінні процесу упровадження процедур, спрямованих на досудове урегулювання спорів у різних юрисдикціях.

***Ключові слова**: мирова угода, цивільний процес, медіація, примирення, судове примирення, судова медіація, альтернативне вирішення спорів.*

КРИМІНАЛЬНО-ПРАВОВИЙ ЗАХИСТ ГОЛОСУВАННЯ УКРАЇНСЬКИХ ГРОМАДЯН ЗА КОРДОНОМ ДЛЯ ОБРАННЯ ДЕРЖАВНИХ ОРГАНІВ В УМОВАХ ПІСЛЯВОЄННОГО ПЕРІОДУ (на прикладі Польщі)

Оксана Калужна* та Лідія Палюх

АНОТАЦІЯ

Вступ. У статті досліджено потенціал проведення виборів до державних органів України в закордонному виборчому окрузі (зовнішнє голосування) в умовах, спричинених повномасштабним вторгненням Російської Федерації в Україну 24 лютого 2022 р. Згідно з Верховним комісаром ООН з питань біженців, зауваживши, що реальні цифри можуть бути вищими через те, що не всі мігранти з України можуть зареєструватися як біженці, зараз за кордоном проживає 6,2 млн українців, з яких 5,8 млн перебувають у Європі. Республіка Польща є країною, яка прийняла найбільшу кількість українських біженців зі статусом тимчасового захисту, їхня кількість перевищує 1,5 млн. З огляду на це дослідження зосереджено на досвіді Республіки Польща з очікуванням, що його результати можуть бути узагальнені для інших країн, де проживає значна кількість громадян України.

Оскільки близько 20 % громадян України проживають за кордоном, серед них як біженці, так і ті, хто постійно проживав за кордоном до 24 лютого 2023 р., Україні необхідно розробити ефективні механізми організації зовнішнього голосування; в іншому випадку, якщо не будуть ужиті заходи, за кордоном зможуть проголосувати менше ніж 0,5 % виборців. Зокрема, необхідно вибудувати моделі, що забезпечують кримінально-правовий захист голосування за кордоном, оскільки порушення виборчих правил можуть суттєво впливати на результати голосування, спотворювати процес і навіть призводити до захоплення влади.

Методи. У дослідженні автори використовувалися різні методи, серед яких логічні (аналіз, синтез, узагальнення, екстраполяція, аналогія, моделювання, гіпотеза), історичний, системно-структурний, порівняльно-правовий та догматичний. Логічні методи відіграли важливу роль в аналізі дії Кримінального кодексу України, Кодексу України про адміністративні правопорушення, стосовно можливих виборчих злочинів, скоєних за кордоном під час українських виборів, що проводилися за кордоном. Історичний метод застосовано для аналізу досвіду українських парламентських виборів 2019 р. З допомогою системно-структурного методу здійснено формулювання пропозицій щодо забезпечення правового захисту виборів до державних органів. Метод порівняльного права застосовувався для порівняння положень кримінального законодавства України та Республіки Польща, зокрема тих, у яких ідеться про відповідальність за виборчі правопорушення. Догматичний метод використано під час тлумачення норм Кримінального кодексу Республіки Польща щодо встановлення відповідальності за виборчі правопорушення, у розумінні норм Кримінального кодексу України, Кодексу України про адміністративні правопорушення щодо їхнього

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

застосування до виборчих правопорушень, скоєних за межами України. У статті розглянуто два основні аспекти. По-перше, у ній досліджено юрисдикцію, у межах якої накладається кримінальна відповідальність за виборчі правопорушення під час голосування українських громадян за кордоном, явно визначаючи відповідне законодавство зацікавленої держави. По-друге, вона розглядає проблеми застосування принципів дії Кримінального кодексу України у просторі щодо притягнення до відповідальності за виборчі кримінальні злочини, зокрема й іноземців.

Результати та висновки. Автори обґрунтовують необхідність створення додаткових виборчих дільниць на території Республіки Польща, призначених для проведення українських виборів поза приміщеннями дипломатичних установ України та зрівняння їх у позиції правового статусу з приміщеннями дипломатичних установ України. Це можливо шляхом укладання двосторонньої угоди між Україною та Республікою Польща щодо надання допомоги в проведенні зовнішнього голосування українських громадян на території Республіки Польща.

***Ключові слова**: зовнішнє голосування; зовнішнє голосування у післявоєнних умовах; кримінальні виборчі правопорушення; принципи дії кримінального права в космосі; проміжне (непряме) виконання кримінального правопорушення; принцип невтручання (невтручання у внутрішні справи держави).*

ВІЛЬНЕ ПЕРЕМІЩЕННЯ ПОСЕРЕДНИКІВ У СКЛАДІ ЄВРОПЕЙСЬКОГО СОЮЗУ: НОВА МЕЖА, ЩО ЩЕ НЕ ДОСЯГНУТА?

Юлія Раданова* та Агнє Тваронавічєнє

АНОТАЦІЯ

Вступ. У пропонованій статті досліджено виклики, пов'язані із чинним національним законодавством у галузі регулювання професійної діяльності посередників (медіаторів) на рівні Європейського Союзу. Це визначає деякі професійні та навчальні вимоги в зазначеній сфері й аналізує їхній вплив на свободу та якість послуг посередництва, що надаються з однієї держави-члена до іншої. Крім того, розглянуто різноманітні моделі регулювання та практики акредитації, які застосовують до посередників, що були сертифіковані в ЄС або сторонніх країнах, та ставить це в контекст поширення обов'язкових моделей медіації. Автори досліджують різні процедури навчання та акредитації, щоб виявити спільні риси та відмінності в професійних стандартах, які застосовуються, та їхній вплив на досягнені угоди про врегулювання посередництва.

Методи. Дослідження розпочато з огляду наявної наукової літератури, короткого огляду національного законодавства щодо професії посередників й аналізу документів, що стосуються питань визнання та акредитації посередників у ЄС. Виконано також порівняльний аналіз вимог до навчання та процедур медіації, пов'язаних із судами, що

існують у декількох юрисдикціях, таких як Болгарія, Литва та Італія, щоб висвітлити деякі основні відмінності.

Результати та висновки. Аналіз чинного національного законодавства в галузі регулювання професії медіаторів на рівні ЄС показав, що важко або майже неможливо посередникам, які отримали освіту в одній країні – члені ЄС, надавати послуги медіації в інших країнах-членах. Чинні правила, у поєднанні з різноманітними національними вимогами до підготовки, вимагають уведення єдиних стандартів навчання із синхронізованими та застосовними вимогами у всіх країнах. Автори вважають це одним із шляхів збільшення довіри до якості послуг медіації, що повинні мати певний фіксований стандарт, та підтримки численних обов'язкових схем посередництва, відсутність яких у транскордонних спорах породжує питання про професійну придатність посередника, який допомагає сторонам у процесі їхнього врегулювання.

***Ключові слова**: медіація, професійні вимоги, вільне пересування, визнання, міжнародні стандарти.*

ПРОБЛЕМИ ЗАБЕЗПЕЧЕННЯ ВИКОНАННЯ АРБІТРАЖНИХ РІШЕНЬ У МІЖНАРОДНИХ КОМЕРЦІЙНИХ СПРАВАХ

Олексій Макаренков* і Лурдес Варрегосо Мескіта

АНОТАЦІЯ

Вступ. Історичні детермінанти появи міжнародного арбітражу відповідають загальній тенденції ускладнення правових відносин високорозвинених цивілізацій, де бізнес-процеси є її каталізаторами. Очікується, що складний транснаціональний бізнес, представлений на різних рівнях цивілізації, характеризується збільшенням імовірності непорозумінь щодо належного виконання зобов'язань, урегулювання яких здійснюється через міжнародний арбітраж, який за своєю природою ефективніший, ніж національні суди. У зв'язку із цим у правовій доктрині та серед юристів триває дискурс щодо стратегій зменшення ризиків, пов'язаних із виконанням рішень міжнародного арбітражу та дотичних питань.

Методи. У дослідженні використано методологічний інструментарій, що охоплював формальну і діалектичну логіку, синергетичний методологічний підхід. Основним методом був синергетичний аналіз трансформації формально-правових джерел і відповідних практик їхнього застосування. До додаткових методів належать: історико-правовий, порівняльно-правовий, формально-догматичний та метод контекстуального аналізу.

Результати та висновки. Формально-правові гарантії виконання рішень міжнародного арбітражу являють собою систему вимог, що регулюють процедурні та фактичні дії державних осіб (органів), які в підсумку приводять до такого виконання. Основою таких гарантій є адекватність суб'єкта, до якого застосовують метод. По-перше, арбітри

мають ухвалити рішення. По-друге, це стосується спору стосовно майна. По-третє і по-четверте, виконання арбітражних рішень, ухвалених на території держави, відмінної від держави, де здійснюється визнання та виконання таких рішень, що виникли у зв'язку з відмінностями між фізичними чи юридичними особами. Ці ознаки випливають із відповідних конкретних актів приватного міжнародного права. Можливість виконання арбітражного рішення залежить від своєчасних і відповідних дій сторін угоди. Навіть під час переговорів з іноземним бізнес-партнером варто отримати результат аудиту його надійності з позиції здатності належним чином виконувати свої фінансові та/або інші зобов'язання.

Формально-правові гарантії виконання рішень міжнародного арбітражу являють собою систему вимог, що регулюють процесуальні та фактичні дії уповноважених державою осіб (органів), які в кінцевому підсумку призводять до такого виконання. Основою таких гарантій є адекватність суб'єкта, до якого застосовується метод. По-перше, рішення повинні прийняти арбітри. По-друге, це стосується майнового (господарського) спору. По-третє, і по-четверте, примусове виконання арбітражних рішень, винесених на території держави, відмінної від держави, вимагає визнання та виконання таких рішень, що виникають у зв'язку з розбіжностями між особами, фізичними чи юридичними. Ці ознаки випливають з відповідних специфічних актів міжнародного приватного права. Можливість виконання арбітражного рішення залежить від своєчасних і належних дій сторін договору. Ще під час переговорів щодо зовнішньоекономічної угоди має бути отриманий результат аудиту надійності ділового партнера з точки зору його здатності належним чином виконувати свої фінансові та/або інші зобов'язання.

***Ключові слова**: господарські спори, договір, корупція, правозастосування, міжнародний арбітраж, верховенство права.*

РОЗВИТОК СТАЛОГО ПРАВОСУДДЯ ЗА ДОПОМОГОЮ АНАЛІЗУ СУДОВОЇ ПРАКТИКИ НА ОСНОВІ ШТУЧНОГО ІНТЕЛЕКТУ: УКРАЇНСЬКИЙ ДОСВІД

Ірина Ізарова*, Оксана Угриновська, Оксана Хотинська-Нор, Юрій Притика, Олександр Бедюх та Юлія Алендар

АНОТАЦІЯ

Вступ. Україна має унікальний Загальний державний реєстр судових рішень, де публікують усі судові рішення у справах, розглянутих і вирішених судами в режимі відкритого доступу. Натепер у реєстрі міститься понад сто мільйонів таких документів. Це створює виняткові можливості для збирання, аналізу й узагальнення емпіричної бази юстиції, що має потенціал стати основою для подальшої трансформації національної моделі правосуддя. Стимул до проведення цього дослідження може випливати з розуміння, що робота виключно з людськими ресурсами у таких зусиллях може містити виклики.

Методи. Дослідження базується на гіпотезі, що завдяки використанню апаратного та програмного забезпечення для аналізу великих масивів даних державних реєстрів судових рішень і статистичних даних про судову діяльність можна визначити постійні закономірності та причини неефективної роботи судової системи.

Результати та висновки. Унаслідок проведеного дослідження здійснено розроблення програмного забезпечення із функціоналом, що анотує текст судових рішень, призначений для подальшого використання в розширених алгоритмах оброблення природної мови. Крім того, у роботі підкреслено необхідність розроблення алгоритму для передбачення ризиків і результатів судових процесів та методики оброблення великих обсягів даних із Загального державного реєстру судових рішень. Це обґрунтовано на основі конкретних показників ефективності розв'язання спорів. У статті також подано аргументи щодо використання алгоритмів машинного навчання як інноваційного інструменту для узагальнення великих обсягів даних з реєстрів судових рішень, зокрема і для отримання об'єктивних даних великого масштабу. Крім цього, розглянуто передумови для створення Інституту національної судової практики та досліджено його функціонування на сучасному етапі судової реформи.

***Ключові слова**: штучний інтелект, судова система, судочинство, цивільний процес, судові рішення, електронне правосуддя, судова реформа, аналіз великих масивів даних, судова статистика.*

ПРАВОВА АДАПТАЦІЯ ДЛЯ СИРІЙСЬКОГО КОНСТИТУЦІЙНОГО КОМІТЕТУ, СФОРМОВАНОГО НА ПІДСТАВІ РЕЗОЛЮЦІЇ РАДИ БЕЗПЕКИ ООН № 2245

Хамуд Таннар*, Айман Мохамед Афіфі та Сам Далла

АНОТАЦІЯ

Вступ. Створення конституції, безперечно, є національним процесом, що відображає державний суверенітет та народну волю. Гострота конфлікту в Сирії та його небезпека спричинили втручання в нього міжнародної спільноти, й у 2015 р. Рада Безпеки задля врегулювання конфлікту ухвалила резолюцію 2254. У пункті 4 цього документа містилася вимога початку процесу розроблення нової Конституції для Сирії; отже, у 2019 р. у Женеві за згодою сторін конфлікту, уряду й опозиції та схвалення міжнародної спільноти, представленої Організацією Об'єднаних Націй, був утворений Сирійський конституційний комітет. У пропонованому дослідженні обговорюється вплив втручання ООН у формування та роботу Сирійського конституційного комітету на принципі національності конституції та державного суверенітету. Досліджується також законність повноважень, наданих цьому комітету, чи-то у складанні нової конституції для держави Сирія, чи внесенні змін до поточної Конституції 2012 р., та чи не суперечать вони принципу національного суверенітету під час розгляду принципів конституційного права.

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

Методи. Автори спиралися на аналітичний метод для вивчення правової адаптації Сирійського конституційного комітету, сформованого на підставі Резолюції Ради Безпеки ООН № 2254. Вплив втручання ООН у роботу конституційного комітету та його взаємозв'язок із принципом національного суверенітету залежить від уточнення ролі, яку відігравала організація у формуванні комітету та його здатності накладати обов'язкові рішення. Для досягнення цієї мети необхідно виконати аналіз повноважень Конституційного комітету у світлі принципів і правил конституційного права. Це передбачає визначення щодо того, чи комітет володіє повними повноваженнями початкового установчого органу для створення нової конституції для держави без посилання на народ або ж його юрисдикція обмежена підготовкою проєкту. За допомогою цього аналітичного методу ми з'ясуємо, чи формування Конституційного комітету та надані йому повноваження суперечать принципу національного суверенітету, який передбачає, що Конституція є національною промисловістю конституційне право є провідною галуззю національного права.

Результати та висновки. Створення Сирійського конституційного комітету, уповноваженого ООН Резолюцією Ради Безпеки № 2254, не підриває національний суверенітет Сирії і не суперечить принципу конституційного націоналізму. По-перше, формування установчого органу, відповідального за прийняття конституції, не є юридичним питанням, а, радше, випливає із дійсності, і це стосується Конституційного комітету Сирії, який виник із реальності сирійського конфлікту та за погодженням його сторін, уряду й опозиції. З огляду на це не можна стверджувати, що формування комітету є незаконним або суперечить принципам конституційного права, ураховуючи відсутність правового каркасу, який би регулював механізм формування влади, відповідальної за створення конституції, чи-то в сирійському конституційному праві, чи в порівняльному конституційному праві. Конституція є результатом обставин і ситуацій, що супроводжували її виникнення та визначали метод її створення. По-друге, Конституційний комітет не є повноправним установчим органом, оскільки він не має повноважень затверджувати нову конституцію чи вносити правки до чинної Конституції на власний розсуд. Він може функціонувати як технічний консенсусний комітет, чия роль обмежується формулюванням пропозицій, що вимагають загальної згоди. По-третє, можна вважати, що Резолюція Ради Безпеки № 2254 та рішення про формування Сирійського конституційного комітету утворюють правовий каркас, на якому засновується його легітимність та організовується робота.

Отже, ми можемо стверджувати, що проблеми формування Сирійського конституційного комітету та його роботи стали юридичним питанням, яке регулюється міжнародною правовою базою, знаменуючи відхід від його попереднього позасудового статусу відповідно до національного конституційного права.

***Ключові слова**: конституційна творчість, первісна конституційна влада, конституційна влада, суверенна влада.*

РОЗУМІННЯ ВЗАЄМОЗВ'ЯЗКУ МІЖ ПРАВОВОЮ ДЕРЖАВОЮ ТА СТАЛИМ РОЗВИТКОМ

Аднан Махмутович* та Абдулазіз Альхамуді

АНОТАЦІЯ

Вступ. Метою пропонованої статті є вивчення взаємозв'язку між правовою державою та сталим розвитком. Правова держава, яку часто називають "імперією законів, а не людей", підкреслює важливість обмеження непередбачуваної влади та забезпечення того, щоб державні службовці дотримувалися правових рамок у своїй діяльності. Верховенство права, як провідний правовий принцип, є надзвичайно важливим для сталого розвитку та благополуччя суспільства. Зважаючи на це, не варто недооцінювати його значення та применшувати його цінність.

На відміну від цього, сталий розвиток прагне узгодити інтереси теперішнього і майбутніх поколінь шляхом інтеграції економічних, соціальних й екологічних аспектів.

Методи. Це дослідження переважно зосереджене на теоретичних спостереженнях та використовує якісну методологію. Його метою є вивчення взаємозв’язку між правовою державою та сталим розвитком за допомогою аналізу їхніх характеристик, думок та інтерпретацій. Шляхом інтеграції ідеї правової держави зі сталим розвитком автори мають на меті консолідувати інформацію, яка часто розпорошена або напівструктурована. Дані зібрані за допомогою методів, включно з дослідженнями за письмовим столом, описовим аналізом і теоретичними спостереженнями.

Результати та висновки. У статті підкреслено значення дотримання принципу верховенства права в гонитві за сталим розвитком. Крім того, досліджується зв'язок між просуванням сталого розвитку та поняттям правової держави. Це охоплює всебічний аналіз різних аспектів, включно із формальними, процедурними, субстантивними, конституційними й елементами доброго врядування. Міжнародне співтовариство розвитку визнає верховенство права основним елементом, що сприяє досягненню додаткових цілей розвитку. У науковій стаття розширено наявне розуміння взаємовпливу між сталим розвитком і правовою державою шляхом поглибленого аналізу цієї складної взаємодії.

***Ключові слова**: верховенство права, цілі сталого розвитку, міжнародне верховенство права, взаємодія.*

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

НАПРЯМИ ЕФЕКТИВНОГО ПРАВОВОГО ЗАХИСТУ ОСІБ СТАРШОГО ВІКУ У XXI СТОЛІТТІ: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ МІЖНАРОДНОГО ПРАВА ІЗ ПРАВОМ АРАБСЬКИХ ДЕРЖАВ

Джамал Барафі*, Зейад Джафал, Фаісал Альшавабке та Ріад Аль Аджлані

АНОТАЦІЯ

Вступ. У пропонованому дослідженні проаналізовано правовий захист людей старшого віку у XXI ст., зокрема в контексті міжнародного права прав людини й арабських конституцій. Хоча міжнародні системи прав людини передбачають неявний захист для літніх громадян, міжнародна правова система недостатньо адаптована для здійснення їхніх конкретних прав й усунення викликів у цій сфері. Незважаючи на те, що арабські конституції часто містять загальні положення, які захищають права громадян, усе ж вони не експліцитно стосуються прав і правового захисту людей старшого віку.

Метою роботи є усунення цієї прогалини шляхом визначення правового регулювання захисту прав літніх громадян як у міжнародному праві прав людини, так і в арабських державах.

Результати та висновки. Відсутність загальноприйнятого визначення терміна "громадянин старшого віку" становить проблему під час вивчення цієї демографічної групи, оскільки вона є дуже неоднорідною. У світі, що швидко старіє, надзвичайно важливо розробляти правові рамки, які специфічно стосуються прав людей старшого віку, щоб забезпечити їхню гідність і благополуччя.

***Ключові слова**: людина похилого віку, міжнародні документи, Віденський план дій, Мадридський план, арабське право.*

НЕВІДПОВІДНІСТЬ КРИМІНАЛЬНОГО ЗАКОНОДАВСТВА КАЗАХСТАНУ МІЖНАРОДНИМ СТАНДАРТАМ АНТИКОРУПЦІЙНОЇ ДІЯЛЬНОСТІ

Елена Міцкая*

АНОТАЦІЯ

Вступ. Після ухвалення нового Кримінального кодексу Казахстану норми, що регулюють кримінальну відповідальність за корупційні злочини, були уже повторно змінені та доповнені задля відповідності вимогам міжнародних правових зобов'язань щодо протидії корупції. Однак деякі невідповідності кидають виклик успішному подоланню корупції.

Методи. У дослідженні автори використовували різні методології, включно з історичним і правовим методом, статистичним аналізом, формальною логікою, аналізом і синтезом систем.

Результати та висновки. Викорінення корупції є пріоритетним завданням Національного плану розвитку Казахстану. Аналіз антикорупційних кримінально-правових норм зарубіжних країн показав варіативність закріплення норм міжнародних конвенцій у національному кримінальному законодавстві. Однак загальний зміст цих норм залишається незмінним. На основі критичного підходу до аналізу запобігання корупції за допомогою норм кримінального законодавства Казахстану у статті обґрунтовано необхідність подальших корекцій для їхньої відповідності міжнародним стандартам протидії корупції. Також запропоновано заходи щодо посилення запобігання корупції шляхом удосконалення антикорупційних норм кримінального законодавства Казахстану відповідно до міжнародних вимог.

***Ключові слова**: корупція, кримінальне право, запобігання корупції, кримінальні корупційні правопорушення.*

ЦИФРОВІЗАЦІЯ АДМІНІСТРАЦІЇ ТА ПРАВОВА БАЗА В КОСОВО

Кастріот Дермаку* та Ардіан Еміні

АНОТАЦІЯ

Вступ. У контексті сучасних технологій державне управління трансформується, набуваючи нового вигляду та змінюючи свою правову природу, перетворюючись на електронне державне управліяння. Крім того, ми також можемо спостерігати використання інформаційних технологій у діяльності судів. В електронному урядуванні, що базується на використанні інформаційно-комунікаційних технологій та інтернету, основним робочим елементом є інформація й особисті дані громадян. Однак нові технології також несуть численні ризики для безпеки інформації та особистих даних, які використовуються у роботі адміністративних органів та судів, що може призвести до порушення прав громадян і громадських інтересів. Вимога належного захисту персональних даних щодо адміністративних державних органів виокремлюється як важлива потреба громадян у сучасному суспільстві, яку ми намагалися проілюструвати на прикладі Республіки Косово.

Методи. Методологія, використана в цьому дослідженні, охоплює методи опису, порівняння, правового аналізу й аналізу даних та інформації, зібраної щодо Косово. Правовий аналіз у пропонованій статті зосереджений на вмісті конституційного та правового каркасу для інструментів контролю в галузі державного управління. Правовий аналіз, що стосується інструментів контролю в зазначеній галузі, також широко використовується для роз'яснення реалізації законів і принципів на практиці в межах Косово. За допомогою цього методу передбачено висвітлення проблем під час застосування законодавства. Описовий метод був спрямований на відображення поточного стану інструментів контролю в галузі державного управління в Косово. У дослідженні подано огляд правових механізмів, які можуть бути впроваджені для стимулювання цифрової адміністрації у країнах, що розвиваються. Ці правові механізми

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

передбачають розроблення відповідних правових каркасів для е-врядування, захист прав інтелектуальної власності, ухвалення законів про конфіденційність і захист даних, а також про кібербезпеку.

Результати та висновки. Електронне державне управління в Косово є сучасною концепцією державного управління, що видозмінила спосіб і мету виконання державних справ. Технічно вона базується на використанні інтернету й інформаційно-комунікаційних технологій для ведення регулярних державних справ і прогнозування ситуації в різних соціальних сферах. Згадані технічні елементи також вплинули на його правову природу, надаючи допомогу адміністративним органам у пришвидшенні та поліпшенні виконання своїх обов'язків. Ця еволюція сприяє ближчій взаємодії між громадянами Косово та державою, даючи змогу громадянам отримати уявлення про державні справи, що здійснюють безпосередній вплив на їхні права й інтереси.

Ключові слова: *публічне адміністрування, електронне державне управління, персональні дані, захист даних, правоадміністрування.*

ФАКТОРИ ВПЛИВУ НА МІГРАЦІЮ В ІСПАНІЮ

Тетяна Затонатська*, Юлія Форостяна, Вінцентас Роландас Гедраітіс, Яна Фаренюк та Дмитро Затонатський

АНОТАЦІЯ

Вступ. Міграційні процеси відіграють важливу роль в економічному розвитку країн і формують людські ресурси, необхідні для їхнього розвитку. З огляду на це створення сприятливої законодавчої бази для певної категорії мігрантів впливає на залучення необхідних людських ресурсів для країни.

Загалом рівень міграції зріс за останні 50 років, і близько 3,6 % усієї світової популяції є іммігрантами. Визначення впливових факторів, які мотивують людей до міграції, є дуже важливим. Це розуміння допомагає розробити добре обґрунтовану міграційну політику й ефективні рішення у зовнішній політиці.

Мета статті – проаналізувати та змоделювати значення факторів, які впливають на вибір країни призначення, досліджуючи, що приваблює людину до країни або, навпаки, чому відмовляються від вибору певної країни. Крім того, завданням статті є прогнозування динаміки міграції в Іспанію на 2022–2024 рр. під впливом обраних для аналізу факторів.

Методи. Для створення регресійної моделі використовувалося програмне забезпечення R-Studio на основі даних за 2000–2021 рр. Наукова гіпотеза полягає в тому, що на рівень міграції в Іспанію може впливати: інфляція, рівень зайнятості й освіти, витрати уряду на соціальний захист, частка сектора ІКТ у ВВП країни, а також економічна криза в США 2007 року та правовий фактор, такий як наявність відкритих кордонів для африканського населення у 2019 р., що є характерним для Іспанії, але не для інших європейських країн.

Останні два показники, які виявилися значущими для залучення іммігрантів, були внесені до моделі як фіктивні змінні.

Результати та висновки. Дослідження довели нелінійний негативний вплив логарифму витрат на соціальний захист та інфляції третього ступеня, тоді як спостерігається позитивний вплив рівня зайнятості третього ступеня. Подана інформація буде цікавою для уряду, оскільки міграція має важливе значення не лише з позиції демографічної структури країни, але також вона має прямий вплив на національну економіку. Міграція може як зміцнити, так і послабити економічний розвиток країни, що робить її важливою для політиків.

***Ключові слова**: імміграція, економетрика, Іспанія, зайнятість, соціально-економічні показники. JEL: F22, O15, C01*

ПРАВОВІ НАСЛІДКИ ВХОДЖЕННЯ АВІАЦІЙНОЇ ПРОМИСЛОВОСТІ В МЕТАСВІТ

Міра Абдулла Альшамсі* і Аттіла Сіпош

АНОТАЦІЯ

Вступ. Технологічний розвиток дає змогу авіаційним компаніям використовувати практики та застосунки, що поліпшують підходи до їхні діяльності. Серед фірм у цій галузі швидко набуває популярності концепція метасвіту. Зазначена технологія, керована штучним інтелектом (ШІ), поліпшує обслуговування споживачів, зокрема даючи змогу пасажирам подорожувати віртуально. Різні суб'єкти вже використовують цю функцію, й організаційні та наукові звіти свідчать, що такі установи фіксують позитивні результати у своїй діяльності. Основною метою цього аналізу є опис того, чому операторам потрібно бути уважними щодо можливих правових наслідків використання зазначеного інструменту. Важливим пунктом є те, що їм слід запобігати порушенням безпеки даних, які можуть порушувати права на конфіденційність споживачів. Декілька компаній у цьому секторі стали жертвами цих негативних явищ, що призвели до втрати даних. Після цього можливі звернення до суду, й організації витрачають багато ресурсів на врегулювання таких справ. Ще одна важлива обставина, що стосується використання цієї інновації, полягає в тому, що вона може призвести до недобросовісної конкуренції. Особливі установи, особливо ті, які ще не впровадили цю ідею, можуть заявляти, що групи, які використовують метасвіт, викривають важливі особисті дані кібератакерам. Крім того, у секторі фіксуються судові процеси, у яких деякі авіакомпанії звинувачують конкурентів у веденні недобросовісної конкуренції. Хоча специфічних законів про метасвіт не існує, відповідним рішенням для операторів є дотримання законодавства та політики, які визначають використання ШІ для комерційних цілей. Важливо дотримуватися законів, що забезпечують конфіденційність даних споживачів. Ще одним варіантом урегулювання проблеми є те, що корпорації можуть дотримуватися міжнародних нормативних актів, таких як Загальний регламент з питань захисту персональних даних (GDPR), які мають глобальний вплив. Крім того, невиконання може

призвести до руйнівних правових наслідків, що шкодять бізнес-практикам. У пропонованій статті розглянуто зазначені виклики та приділено більше уваги практичним і правовим аспектам.

Методи. Дані для статті отримано із вторинних джерел, до яких належать вебсайти та журнальні статті. Зазначений підхід передбачає перегляд того, що автори обраних робіт презентують для розкриття теми, та використання відповідної інформації для цього проєкту.

Результати та висновки. Різні компанії в авіаційному секторі вже використовують метасвіт для поліпшення свого споживчого досвіду. Компанії стають привабливішими завдяки перевагам, пов'язаним із цією технологією. Однак їм слід бути обережними щодо потенційних обмежень використання цієї концепції. Крім того, користувачам слід ураховувати правові аспекти інновації.

***Ключові слова**: метавсесвіт, безпека даних, конфіденційність даних, технологія штучного інтелекту, правовий захист.*

ПАНДЕМІЯ COVID-19 В АРАБСЬКИХ КРАЇНАХ: ДОСВІД МАРОККО

Шеріф Ельхілалі*

АНОТАЦІЯ

Вступ. Дослідження спрямоване на висвітлення ефективності державної фінансової політики в Марокко, арабській країні, під час пандемії COVID-19, зосереджуючись на рівні її внеску у зменшення наслідків, включно із фінансовими, економічними та соціальними аспектами. Крім того, автор прагне визначити, якою мірою ця політика сприятиме подоланню наслідків постепідемічного періоду.

Методи. Пропонована стаття базується на аналітичному описовому підході до вивчення бюджетної політики, яку ухвалив уряд під час цієї кризи. Подано аналіз національних та міжнародних джерел, досліджень та звітів для розроблення рекомендацій та отримання результатів, що стосуються успішності цієї політики в обмеженні впливу кризи на здоров'я людей.

Результати та висновки. У дослідженні подано висновки та рекомендації, які виявляються в такому: хоча фінансова політика держави і сприяла обмеженню наслідків пандемії COVID-19, пом'якшуючи її вплив на фінанси великих компаній і підприємств, а також на більшість громадян, усе ж вона не повністю обмежила негативний вплив пандемії на всі економічні сектори, громадян з низьким рівнем доходу та працівників приватного сектору. Це підкреслює необхідність прийняти державою інші ефективніші заходи для виходу з кризи з мінімальними збитками й ефективно протистояти викликам післяпандемічного періоду на всіх рівнях.

***Ключові слова**: фінансова політика, наслідки кризи в галузі охорони здоров'я, фінансові заходи, наслідки пандемії, спеціальний фонд, епідемія коронавірусу.*

ЕКОНОМІЧНА ТА ПРАВОВА ОСНОВА УПРОВАДЖЕННЯ КОМПЛАЙЕНСУ У БІЗНЕС-ПРОЦЕСИ ПІДПРИЄМСТВ

Лілія Амелічева*, Марина Савченко, Лариса Шаульська, Валентина Єгорова та Ірина Голубенко

АНОТАЦІЯ

Вступ. У сучасному економічному світі ефективна доктрина комплаєнсу є обов'язковою складовою портфеля управління будь-якої поважної бізнес-структури.

Нині стратегія комплаєнсу впроваджується у всіх країнах глобалізованого світу, але різними способами: у деяких країнах – активно й усебічно, а в інших – пасивно та фрагментарно. Пропоноване дослідження, використовуючи аналітичні та статистичні методологічні підходи, пояснює, чому комплаєнс реалізується по-різному у бізнесах по всьому світу. Автори оцінюють ефективність провідних видів комплаєнсу (антикорупційного, кримінально-правового, екологічного, фінансового, трудового) в економіках країн ОЕСР та інших країн. Також подано обґрунтування, що для посилення політичної волі урядів, особливо країн, що розвиваються, щодо залучення комплаєнсу в національне бізнес-середовище, необхідно розробити національний стратегічний документ із поетапного впровадження системи комплаєнсу в бізнес-процеси підприємств, а також міжнародний документ загального застосування (у формі Конвенції ООН), щоб сприяти активнішому впровадженню всіх видів комплаєнсу урядами по всьому світу.

Методи. Для вивчення доктрини комплаєнсу автори використовували методологічний апарат юридичних та економічних наук. Методологічний апарат дослідження охоплював математичні методи обчислень і графічні методи для оцінювання рівня впровадження комплаєнсу у країнах світу, імовірнісні методи для надання рекомендацій щодо управлінських заходів і тестування для кластеризації країн світу. У дослідженні також використано спеціальні юридичні методи: формально-правові методи для класифікації основних ознак явища комплаєнсу, порівняльно-правові – для порівняння регулювання комплаєнсу в різних країнах та логічно-правові методи для вдосконалення правового регулювання комплаєнсу як засобу економічного благополуччя підприємств.

Результати та висновки. У статті розкрито зміст відповідності бізнес-процесів; подано оцінку ефективності цього інструменту в економіках країн – членів ОЕСР, Європейського Союзу та інших країн у пріоритетних напрямах; розроблено пропозиції щодо регулювання, включно із законодавчим регулюванням та впровадженням його дотримання на міжнародному, національному та підприємницькому рівнях у контексті цифровізації та сталого розвитку.

***Ключові слова**: комплаєнс-доктрина, комплаєнс-законодавство, бізнес-процес, кластерінг.*

AJEE
ACCESS TO JUSTICE IN EASTERN EUROPE
Peer-reviewed Journal

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

ПРАВА ВИКРИВАЧІВ У СУДОВОМУ РОЗСЛІДУВАННІ: ДОСЛІДЖЕННЯ ВИКЛИКІВ І МОЖЛИВОСТЕЙ В АЛБАНІЇ

Альбан Кочі*

АНОТАЦІЯ

Вступ. У статті досліджено питання, можливості та методи, пов'язані з інформуванням щодо корупції в Албанії. Прозорість і підзвітність набували дедалі більшого значення з переходом країни від комуністичного правління до демократії. Ухвалення Закону про захист викривачів у 2016 р. заклало основи для їхнього визнання та захисту. У роботі обговорюється правова база Закону № 60/2016, а також ініціативи інших законодавчих органів у контексті прав та захисту, які надаються викривачам, з подальшим адміністративним розслідуванням і кримінальним провадженням. Однак, незважаючи на ці правові досягнення, перед викривачами постали кілька проблем, зокрема: відсутність громадської обізнаності, пануючий досі страх перед помстою, обмежені законодавчі гарантії та брак ресурсів серед організацій, що займаються зазначеними питаннями. Оскільки Албанія продовжує боротися із цими викликами та використовувати наявні можливості, завдання суспільства полягає у зміцненні культури чесності, прозорості та підзвітності. Зобов'язання перед цією критичною частиною державного управління не лише посилює практику викривачів, але й сприяє боротьбі з корупцією та утвердженню верховенства права.

На завершення подано рекомендації щодо перетворення викликів на можливості та переваги за допомогою правильного управління й інструментів, узгоджуючись із найкращими міжнародними практиками.

Методи. Методологія, яку застосовували для дослідження практики інформування щодо корупції в Албанії, містила ретельний аналіз відповідних правових текстів, законодавчих рамок і наукової літератури. Основні джерела охоплювали уважний огляд албанського законодавства щодо захисту викривачів, з особливим акцентом на положеннях, що стосуються прав, гарантій і процедур. Це юридичне дослідження надало чітке уявлення про законодавчі системи, що існують для сприяння практики викриття корупції у країні. Крім того, проведено ретельний аналіз наукових статей, звітів міжнародних організацій і тематичних досліджень, з метою визначення практичних наслідків і перешкод, з якими стикаються викривачі в Албанії. Цей багатовимірний підхід дав змогу провести повний аналіз теоретичних засад і практичного використання механізмів інформування про корупцію в контексті Албанії.

Результати та висновки. Практика щодо викривачів корупції в країні зіткнулася з багатьма викликами, але були здійснені і поліпшення для гарантування доступу до правосуддя. Основна проблема, з якою стикається викривач, – це помста, яка викликає такий страх, що більшість обирає мовчати у відповідь на несправедливість або незаконні дії. Іншою проблемою є, безумовно, складнощі із працевлаштуванням, оскільки багато

людей не можуть дозволити собі змінити роботу або знайти роботу, що відповідає їхнім критеріям. Деякі рекомендації щодо підвищення ефективності практики інформування про корупцію та гарантування більшої захищеності вразливих осіб передбачають навчання викривачів, зміцнення їхньої мережі, часте оцінювання результатів і впровадження фінансових гарантій.

***Ключові слова**: викривач, корупція, вплив, розслідування, доступ, Албанія.*

НАДАННЯ СТОМАТОЛОГІЧНОЇ ДОПОМОГИ: ОКРЕМІ АСПЕКТИ ЗНАЧЕННЯ СУДОВОЇ ПРАКТИКИ ДЛЯ МЕДИЧНОГО ПРАВА

Оксана Сорока*, Наталія Козан, Оксана Попадинець, Наталія Федосенко, Сергій Репецький, Валентина Лампель та Тарас Котик

АНОТАЦІЯ

Вступ. В Україні останнім часом простежується дедалі помітніша тенденція, коли у регулюванні медично-правових відносин все вагомішу роль відіграє судова практика. Нещодавно увагу українського суспільства було прикуто до судової справи щодо компенсації матеріальної та моральної шкоди, спричиненої неправильною медичною допомогою, наданою пацієнту у приватній стоматологічній клініці в місті Івано-Франківську. Після розгляду цієї справи Вищий суд, найвищий суд у судовій системі України, ухвалив рішення, яке, на нашу думку, є показовим у медичному праві – складній галузі права, яка охоплює сукупність правових норм, що регулюють публічні відносини у сфері медичної діяльності.

Мета пропонованого дослідження – проаналізувати судовий процес у цивільній справі за позовом, пов'язаним зі спором, що стосується застосування Закону України "Про захист прав споживачів" у частині відшкодування матеріальної та моральної шкоди в контексті можливості її подальшого розгляду як знакової справи в медичному праві та як судового прецеденту, що визначає роль додаткового регулятора медично-правових відносин і роль джерела медичного права.

Методи. У дослідженні автори використовували комбінацію загальнонаукових і спеціальних наукових методів, а також аналітичні, синтетичні, комплексні методи.

Результати та висновки. Результати дослідження показують, що судова практика має потенціал демонструвати гнучкість, ефективність, зв'язок із повсякденним життям та швидку адаптацію до складних соціальних обставин, зокрема й тих, що стосуються доступу пацієнтів до якісної медичної допомоги. Вищий суд, ураховуючи обставини конкретної справи, характер спірних правових відносин і зміст вимог, може надати не лише модельне тлумачення нормативного положення, що є обов'язковим для нижчих

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

судів під час урегулювання схожих справ, але й також має всі підстави служити провідником для медичних працівників у процесі їхньої професійної діяльності.

***Ключові слова**: медичне право, охорона здоров'я, медико-правові відносини, судова практика, Верховний Суд.*

ТОРГІВЛЯ ЛЮДЬМИ НА ЗАХІДНИХ БАЛКАНАХ: ВИПАДОК КОСОВО

Фідайр Беріша*, Астріт Дема, Менсут Адемі та Ісламм Керімі

АНОТАЦІЯ

Вступ. Об'єктом дослідження пропонованої статті є кримінальний злочин торгівлі людьми в Косово та розкриття суті цього негативного та протиправного явища. Особливу увагу приділено питанням виявлення та переслідування злочинців, призначення покарання, винесення вироків й накладання кримінальних санкцій з єдиною метою – посилення боротьби суспільства із цими злочинами.

Також проаналізовано та розглянуто деякі основні кримінально-правові та кримінологічні ознаки злочину торгівлі людьми. З огляду на те, що це кримінальне правопорушення належить до небезпечного виду кримінальної діяльності, то у роботі автори з'ясовують, як воно проявляє себе у своїх наслідках для окремої особи та суспільства.

Проведене дослідження торгівлі людьми в Косово має вирішальне значення у вивченні цього негативного явища, оскільки завдяки йому ми можемо зробити висновки щодо того, чи були жертви невинуватими, чи також причетними до діяльності, що призвела до торгівлі людьми.

Методи. Під час підготовки наукового дослідження автори використовували такі методи: порівняльний, статистичний, графічний, історичний, аналітичний, опитування та кейс-стадії (з 1999 р. і дотепер). За допомогою цих методів виокремлено та розглянуто кілька аспектів злочину торгівлі людьми.

Усупереч загальному переконанню, що існує достатньо досліджень щодо жертв торгівлі людьми й інших злочинних дій, автори довели, що насправді це не відповідає дійсності. У багатьох випадках держави підраховували кількість жертв різних злочинів та інших кримінальних дій виключно за числовими показниками. Здобута в такий спосіб статистична інформація є основою для ідентифікації даних і висновків, а також визначення рекомендацій, що містяться в цій статті.

Результати та висновки. Торгівля людьми – один із найтяжчих злочинів нашого часу та сама по собі – порушення прав людини. У нашій роботі ми стикалися зі складнощами в пошуку найбільш адекватних і конкретних даних для запобігання та боротьби із цим ганебним явищем. Торгівля людьми здійснюється з метою примусової праці,

незаконного працевлаштування, індустрії розваг, примусових і фіктивних шлюбів, примусової проституції тощо.

У нашому випадку, у країнах Західних Балкан це, зазвичай, відбувається як наслідок соціально-економічних проблем та обмеження свободи пересування. Торгівля людьми є прибутковою формою

організованої злочинності, що дуже важливо для злочинців, оскільки ризик низький, а виграш високий; після торгівлі наркотиками і зброєю та проституції вона приносить третій за величиною дохід.

Про це свідчать дані щодо Косово з 1999 р. і дотепер. У дослідженні показано, як злочинці використовують біженців від війни, як відбувається торгівля наркотичними речовинами тощо. Найпоширенішою формою торгівлі людьми є торгівля людьми з метою сексуальної експлуатації або для примусової проституції. Найчастішими жертвами цієї форми торгівлі є діти та жінки, які належать до найвразливіших соціальних груп, згідно з даними, представленими у статті. Зазначене є викликом для Косово, оскільки у країні немає адекватного закону щодо легалізації проституції. З огляду на це в Косово існує багато злочинних угруповань, які використовують, особливо неповнолітніх, для проституції, і мета роботи полягає в тому, щоб сприяти ухваленню адекватних законів щодо декриміналізації проституції, для контролю, запобігання та боротьби з торгівлею людьми.

***Ключові слова**: торгівля людьми, організована злочинність, вербування, передача, експлуатація, укриття, сексуальна експлуатація, Косово, Західні Балкани.*

КРИМІНАЛЬНА ВІДПОВІДАЛЬНІСТЬ СПІВУЧАСНИКІВ У ВЧИНЕННІ КРИМІНАЛЬНОГО ЗЛОЧИНУ: ДОСВІД АЛБАНІЇ

Найм Мецалла та Ерьола Жувані*

АНОТАЦІЯ

Вступ. Коли кримінальний злочин вчиняє одна особа, то проблема кримінальної відповідальності є зрозумілою, але коли кримінальний злочин вчиняється спільно двома чи більше особами, виникає проблема відповідальності. У пропонованій статті будуть розглянуті питання, пов'язані з проблемами відповідальності співучасників, які беруть участь у кримінальній діяльності, такі як спеціальний суб'єкт, перевищення виконавця, взаємодія і співучасть у справі, використання недієздатних осіб у вчиненні кримінального злочину і співпраця з невстановленими особами. У дослідженні надано відповідь на питання, як кваліфікується кримінальний злочин, учинений у співпраці, у випадках взаємодії з невстановленими чи недієздатними особами.

Методи. У дослідженні було використано комплексний правовий аналіз для вивчення складних питань, що стосуються кримінальної відповідальності співучасників, залучених до спільної кримінальної діяльності. Методологія передбачає ретельний аналіз

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

албанського кримінального законодавства, судової практики та відповідних правових принципів. Дослідження сфокусоване на різних аспектах, серед яких: спеціальний суб'єкт, поняття співпраці, перевищення виконавця, співпраця та співучасть у конкретних справах, використання недієздатних осіб під час учинення кримінальних злочинів та співпраця з невстановленими особами. Цей метод дає змогу отримати глибоке розуміння правового каркасу, що регулює спільну кримінальну поведінку та відповідальність співучасників.

Результати та висновки. У дослідженні розкрито складні питання, пов'язані з кримінальною відповідальністю співучасників у випадках спільних кримінальних дій. Шляхом глибокого аналізу албанського кримінального законодавства та судової практики подано відповіді на критичні питання щодо кваліфікації кримінальних злочинів, учинених у співпраці, особливо в разі співпраці з невстановленими чи недієздатними особами. Результати підтверджують: якщо кримінальний злочин учинено за наявності спільної волі, бажання і спільного внеску осіб, то це однозначно є спільною кримінальною поведінкою, що призводить до відповідальності для всіх співучасників. Крім того, дослідження розкриває, що співучасники не можуть бути притягнуті до відповідальності за дії основного виконавця, які виходять за межі їхньої угоди. Додатково наголошується, що албанське кримінальне законодавство дотримується вимог щодо суб'єктивного елементу для кримінальної відповідальності, відкидаючи об'єктивну відповідальність за вчинення кримінальних злочинів. Щодо прийняття співпраці автори підкреслюють, що проста участь інших осіб у вчиненні злочину, навіть якщо вони є повнолітніми, не є достатньою підставою для притягнення до кримінальної відповідальності невстановлених осіб. Замість цього, потрібно одночасно продемонструвати їхню індивідуальну кримінальну відповідальність. Результати надають цінні уявлення про правові принципи, які регулюють відповідальність співучасників у спільних кримінальних діяннях у контексті албанського права.

***Ключові слова**: відповідальність співучасників, спеціальний суб'єкт, ексцес виконавця, співпраця, співучасть.*

НОВІ КРОКИ ДИГІТАЛІЗАЦІЇ ЦИВІЛЬНОГО ПРАВОСУДДЯ В УКРАЇНІ

Олена Середа, Валерій Мамницький, Поліна Корнієва та Ірина Череватенко*

АНОТАЦІЯ

Вступ. Виникнення віртуального простору та цифрових технологій є природним наслідком науково-технічного прогресу людства. Нині цифрові технології активно використовують у галузі права, зокрема і в судовій системі. З огляду на це розвиток електронних судів є відповіддю на сучасні виклики. Пропоновану статтю присвячено питанню еволюції цифровізації в цивільному правосудді; зокрема досліджено розвиток і нормативне регулювання використання електронних судів (е-судів) в цивільному судочинстві. Розкрито також особливості та складнощі використання електронного суду

для боротьби з бюрократією у цивільному процесі. Крім того, у статті досліджено ключові елементи е-правосуддя й оцінено можливість упровадження електронних позовів у судах України. Також виокремлено особливості використання електронних засобів доказування в цивільному процесі. Ба більше, уточнено можливість проведення судових слухань в онлайн-режимі за допомогою платформ, таких як "Meet" і "Zoom", спираючись на досвід інших країн. Крім того, здійснюється порівняння американської системи "Pacer" з українським аналогом "Електронний суд", як один зі способів доступу до матеріалів справ через інтернет. Нарешті, висвітлено практику Верховного Суду щодо використання електронних повісток до суду та переваги електронної форми.

Методи. Було проведено аналіз судової практики та позицій Верховного Суду щодо окремих елементів е-правосуддя та законності їхнього застосування. Також приділено особливу увагу практиці інших країн у використанні електронних судів та можливості подібних процедур в Україні.

Результати та висновки. На основі аналізу автори дійшли висновку щодо необхідності подальшого вдосконалення системи електронних судів у цивільних справах. Крім цього, у дослідженні також акцентовано на перевагах цифровізації в системі цивільного правосуддя.

***Ключові слова**: електронний суд, цифровізація, цивільне судочинство, цифрове правосуддя, Україна.*

For further information, please contact
Access to Justice in Eastern Europe, Mazepy Ivana str., 10, Kyiv, 01010, Ukraine.
Email: info@ajee-journal.com. Tel: +38 (044) 205 33 65. Fax: +38 (044) 205 33 65.

Postal information
Access to Justice in Eastern Europe, Mazepy Ivana str., 10, Kyiv, 01010, Ukraine.

Permissions
For information on how to request permissions to reproduce articles from this journal, please visit our web-site and contact Editor-in-Chief.

Advertising
Inquiries about advertising and inserts should be addressed to info@ajee-journal.com.

Disclaimer
Statements of fact and opinion in the articles and notes in *Access to Justice in Eastern Europe* are those of the respective authors and contributors and not of *Access to Justice in Eastern Europe*.
No *Access to Justice in Eastern Europe* issue makes any representation, expressed or implied, regarding the accuracy of the material in this journal and cannot accept any legal responsibility or liability for any errors or omissions that may be made. The reader should make his/her evaluation as to the appropriateness or otherwise of any experimental technique described.

Certificate of state registration of the print media KB No 23634-13474P

Cover-list by Alona Hrytsyk

Publishing House 'Academic Insights Press'
('Akademische Einblicke Verlag') Kreuzplatz 19/3, Bad Ischl, 4820, Austria
https://academicinsights.press

Publishing House LLC 'VD 'Dakor' PH Cert. No 4349 dated 05.07.2012
Beresteysky Avenue , 56, Kyiv, 03057, Ukraine,
Tel: +38 (067) 153 96 73
email: vd_dakor@ukr.net
www.dakor.kiev.ua.
https://dakor.kiev.ua

AJEE

PEER REVIEWED JOURNAL

AJEE is an English-language journal covering a variety of issues related to access to justice and the right to a fair and impartial trial. The specific area of interest of AJEE is the law in East European countries such as Ukraine, Poland and Lithuania and other countries of the region which share special features in the evolution of their legal traditions. While preserving the high academic standards of scholarly research, AJEE provides the opportunity for its contributing authors and especially young legal professionals and practitioners to present their articles on the most current issues.

Видавничий дім Дакор

EELRC
East European Law Research Center