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ACCESS TO JUSTICE IN EASTERN EUROPE

Reflections on the Legal Features of Collaborationist Activity: Theory and Practice in Terms of the Russian Occupation of Ukrainian Territory
Mykola Rubashchenko and Nadiia Shulzhenko

Evidentiary Standards of the UN Compensation Commission: Takeaways for Ukraine
Bohdan Karnaukh and Tetiana Khutor

North Atlantic Treaty Organization (NATO) and its Role for Security in the Western Balkans
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ACCESS TO JUSTICE IN EASTERN EUROPE

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Editor-in-Chief's Note

ABOUT ISSUE 3 OF 2024

This summer 2024 issue of AJEE offers an extensive collection of articles that delve into various critical aspects of law and justice, providing readers with in-depth analyses and fresh perspectives on contemporary legal issues. The featured articles cover a wide range of topics, from the legal features of collaborationist activities in the context of the Russian occupation of Ukrainian territory to the role of the prosecutor's office in addressing human rights violations in Kazakhstan.

Key topics include the use of prejudice as evidence in criminal proceedings, the evidentiary standards of the UN compensation commission, and the impact of NATO on security in the Western Balkans. Articles also explore social innovations and entrepreneurship in post-war Ukraine, the integral role of the Albanian parliament in EU integration, and the principles of legal regulation of decentralization in European countries.

Additionally, this issue addresses dissenting judicial opinions, disciplinary proceedings against judges in Ukraine, the matrimonial property regime in Albania, and criminal liability for unauthorized genomic data analysis. Readers will also find insightful discussions on inheritance rights for Kosovar women, combating sexual violence in Kosovo, religious slaughter and animal welfare, and legal liability of physicians in Kazakhstan and the United States.

In the 'Case Note' section, the legal concerns of international civil aviation dispute settlements and the legal ramifications of the Covid-19 pandemic on administrative

contracts in the UAE are examined. The Review Article section offers a comparative analysis of personal data protection legislation in Vietnam and Europe.

Finally, the 'Note and Comments' section provides preliminary remarks on the use of artificial intelligence in academic publishing, and the 'Review section' features an analysis of the monograph "The Best Interests of the Child and Parenthood: Parent-Child Assignment in Alternative and Cross-Border Families" by Elmar Buchstaetter.

As Editor-in-Chief, I am particularly pleased to highlight several notable publications in this issue.

In the article "Reflections on the Legal Features of Collaborationist Activity: Theory and Practice in Terms of the Russian Occupation of Ukrainian Territory," authors **Mykola Rubashchenko** and **Nadiia Shulzhenko** delve into Ukraine's evolving criminal policy regarding collaboration with occupying forces, a subject of pressing relevance due to the ongoing Russian occupation of sovereign Ukrainian territory. The authors critically analyze the legal features of collaborationist activity as distinct from high treason, following the introduction of Article 111-1 to the Ukrainian Criminal Code in March 2022. Employing a blend of general scientific and specialized research methods, the study identifies and evaluates the key traits of collaborationism, comparing existing legal provisions with an ideal normative model. The article seeks to refine the conceptualization of collaboration in Ukrainian criminal law, advocating for a clear and distinct legal framework that addresses the unique nature of this crime.

This study offers significant insights for legal scholars and practitioners aiming to understand and address collaborationism within the broader context of Ukraine's legal and historical landscape, with a particular focus on the ongoing war that has lasted for more than a decade since 2014. It continues the discourse initiated by Natalia Antonyuk's article "A Criminal and Legal Assessment of Collaborationism: A Change of Views in Connection with Russia's Military Aggression against Ukraine" published in the summer issue of 2022.

In their article, "Evidentiary Standards of the UN Compensation Commission: Takeaways for Ukraine," **Bohdan Karnaukh** and **Tetiana Khutor** provide a thorough exploration of how the UN Compensation Commission's approach to evidentiary standards can inform the future compensation mechanism for Ukraine. The authors begin by outlining the

general framework of the Commission's work, its purpose, and organizational structure, highlighting the necessity of diversified evidentiary standards due to the prioritization of claims and the expedited procedures for reviewing first-priority claims.

The article delves into the three evidentiary standards applied by the UN Compensation Commission: proving the incident alone without the need to establish the extent of the damage, proving damage based on a "reasonable minimum" of evidence appropriate to the circumstances, and proving damage through documentary and other evidence sufficient to establish the extent of the damage. The authors analyze how these standards were applied in practice, particularly to personal injury claims, and draw conclusions on the implications for Ukraine.

The authors emphasize the challenges victims face in gathering evidence of harm during armed conflict and occupation, necessitating adaptable international compensation mechanisms that do not adhere to rigid formalities. They argue that the pioneering approaches of the UN Compensation Commission, which include diversified standards of proof and eased burdens on claimants, should be refined and applied within an international compensation mechanism for Ukraine. This includes prioritizing individual claims, introducing both regular and expedited tracks for processing claims, and ensuring flexibility regarding the burden of proof and evidentiary standards to accommodate the challenges of wartime evidence collection.

This article offers significant insights for legal scholars and practitioners involved in the development of Ukraine's compensation mechanism, advocating for a system that balances the need for justice with the practical realities of evidence collection during war.

Next article I would like to intriduce, is "Addressing Human Rights Violations in the Criminal Justice System of Kazakhstan: The Role of the Prosecutor's Office and a Call for Legislative Reforms," authors provide a comprehensive examination of the pervasive issue of human rights violations within Kazakhstan's criminal justice system. The authors scrutinize the role of the prosecutor's office in safeguarding human rights, despite the country's formal commitment to international human rights standards.

The study employs documentary analysis and secondary data analysis methodologies, examining a range of legal acts, international agreements, and policy documents, including the Universal Declaration of Human Rights (UDHR), the Constitutional Law "On the Prosecutor's Office," the Concept of Legal Policy of the Republic of Kazakhstan

up to 2030, and reports from international bodies such as Amnesty International, Human Rights Watch, and Freedom House. Additionally, reports from the Ministry of Justice and the Commissioner for Human Rights of the Republic of Kazakhstan are analyzed to provide a detailed understanding of the legal framework and its implementation.

The authors reveal significant discrepancies between the legal mandates and actual practices within Kazakhstan's criminal justice system, highlighting systemic issues and instances of human rights abuses. They emphasize the critical role of the prosecutor's office in protecting human rights while acknowledging the challenges in effectively fulfilling these responsibilities. The study underscores the urgent need for legislative reforms to enhance human rights protections in the criminal justice system.

This article offers valuable insights for policymakers, human rights advocates, and scholars interested in the intersection of law enforcement and human rights protections. It provides a detailed analysis that could guide future improvements in criminal justice practices in Kazakhstan, aiming to bridge the gap between legal principles and practice.

As always, I would like to extend my heartfelt appreciation to all the authors who have contributed their valuable research and insights, as well as to the peer reviewers whose diligent efforts have ensured the high quality of our content. Special thanks also go to our section editors and editorial board members for their ongoing support and expertise.

I would also like to express my gratitude to our dedicated team, including our newly joined managing editors, and assistant editor. Your collective efforts are crucial and deserve recognition and reward.

I am proud of your unwavering dedication and hard work, and I am pleased to see the progress we have made this year.

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

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Research Article

REFLECTIONS ON THE LEGAL FEATURES OF COLLABORATIONIST ACTIVITY: THEORY AND PRACTICE IN TERMS OF THE RUSSIAN OCCUPATION OF UKRAINIAN TERRITORY

Mykola Rubashchenko* and Nadiia Shulzhenko

ABSTRACT

Background: *In this article, the co-authors contribute to the development of Ukraine's criminal policy on the legal evaluation of collaboration with occupying forces, necessitated by the ongoing Russian Federation occupation of Ukrainian territory. The study, to some extent, continues the scientific discourse that was actualised after the addition of Article 111-1 to the Criminal Code of Ukraine. Its objective is to delineate the generic legal features of collaborationist activity, the responsibility for which was introduced in the Criminal Code of Ukraine in March 2022. By critically analysing the common features of collaboration with the occupier currently reflected in theory and practice, the authors develop a comprehensive vision of collaboration as a phenomenon distinct from high treason and related concepts.*

Methods: *The research methodology employs a blend of general scientific methods of cognition (induction, deduction, analysis, synthesis, abstraction) and historical, linguistic and system-structural research methods. The strategy focuses on identifying the features of collaboration with occupying forces, selecting the most typical and essential traits that differentiate it from related phenomena.*

Structurally, the article consists of two parts. The first part explores existing definitions of collaboration in literature and identifies the five most frequently mentioned features. The second part involves a detailed analysis of each feature to determine its suitability for characterising collaboration and distinguishing it from related concepts. At the same time, the features set forth in the current criminal law of Ukraine (lex lata) are compared against the perspective of the ideal model (lex ferenda).

Results and conclusions: *The phenomenon of collaboration with occupying forces has long been the subject of research by historians, while legal scholars traditionally examine it through the lens of high treason. However, establishing collaborationism as an independent crime in criminal law, along with high treason, requires its conceptualisation. This study demonstrates the impossibility of automatically transposing an array of effective historical research into the legal field. Criminal law requires clarity, unambiguity, and logic. At the same time, de lege lata, Ukrainian criminal law provides for a casuistic and eclectic set of features of collaborationist activity. Therefore, this article analyses each of the features that are commonly used to characterise collaborationism, aiming to improve the normative framework and formulate a clear concept that deserves to exist independently alongside the concept of high treason.*

1 INTRODUCTION

With the criminalisation of collaborationist[1] activities in the Criminal Code of Ukraine,[2] a quantum leap can be seen in the research of the collaborationism phenomenon, which is important not only for Ukrainian legal science but also serves as a starting point for extensive international studies. Previously, most publications on this topic focused on its retrospective historical analysis. Now, leveraging the substantial contribution of historians, modern researchers can observe the dynamics of this multidimensional and vague phenomenon. Moreover, collaboration with an occupier has been legally institutionalised, securing its official place in legal taxonomy. The Russian-Ukrainian war is not the only modern armed conflict in the world, but its uniqueness lies in the annexation of a large territory with a large population and, for the first time, the codified criminal law of a sovereign state in an ongoing conflict enshrined the concept of collaborationism (legalised its use). This legal recognition prompts the search for differences between collaborationist activities and other forms of high treason and related concepts. Therefore, this study attempts to contribute to the determination of the general legal features of collaborationism that distinguish it from related forms of behaviour.

A serious drawback of the legislative solution to the issue of criminal liability for collaborationist activity in Ukraine is the casuistic approach: Article 111-1 of the Criminal Code of Ukraine describes certain forms (types) of cooperation, while there is no general concept that would define the essential and necessary features of this phenomenon in

1 In this article, the author's translation of the name of the crime is used. The fact is that the Ukrainian legislator literally called the crime "collaborative activity", but in scientific sources this key word does not have a negative connotation and denotes positive activity. Therefore, instead of the adjective "collaborative" we use the adjective "collaborationist". The latter has a pronounced "traitorous" semantics, which actually corresponds to the true meaning of this term.

2 Criminal Code of Ukraine no 2341-III of 5 April 2001 (amended 28 March 2024) <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 30 April 2024.

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general.[3] In this regard, the legislator had to define the features of each form of collaboration separately. As a result, some of the features are duplicated, and some are mentioned in the description of certain forms but ignored in the definition of others. This approach has led to several collisions, ambiguities and heated debates among theorists and practitioners.

Therefore, determining the generic features of collaborationist activity may seem difficult and even unsolvable. However, it is necessary to move in this direction. Only clarifying all mandatory and essential features of criminalised collaborationism can allow us to correct the current drawbacks and provide greater clarity to criminal law policy in this area.

In general, the semantics of the word "collaboration" is neither positive nor negative, good or bad, until someone decides that this is so.[4] In the French dictionary, the word "collaboration" has three meanings from the broadest to the narrowest: 1) cooperation, participation in work with another, 2) a policy of active cooperation with an enemy occupier, 3) the policy of cooperation with Germany by the Vichy government.[5] In English, the primary meaning of this word is usually positive (although it can also be negative) – "the situation of two or more people working together to create or achieve the same thing", and the second one is special and exclusively negative – "the situation of people working with an enemy who has taken control of their country".[6] Instead, "collaborationism" has an exclusively negative "traitorous" meaning.[7] In the modern dictionary of the Ukrainian language, the words "collaboration" and "collaborationism" (adopted from other languages) are considered to be synonyms and identified exclusively negatively – as cooperation with the enemies of your state in the interests of the enemy invader to the detriment of your state.[8]

In the literature, even before the Criminal Code of Ukraine was amended with an article on collaborationist activities, Y. Pysmenskyi defined collaborationism as a type of criminal offence that encroaches on the security of the state. He described it as a special type of treason – characterised by the deliberate actions of a citizen of a state in an occupied territory who aligns with the invading state to assist the latter and its representatives in conducting disruptive activities during the occupation.[9]

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3 Oleksandr Marin, 'Criminal-Law Variations of High Treason in the Criminal Code of Ukraine' (2022) 11 Law of Ukraine 66-7, doi:10.33498/louu-2022-11-060.

4 Bertram M Gordon, 'The Morphology of the Collaborator: The French Case' (1993) 23(1) Journal of European Studies 1, doi:10.1177/004724419302300102.

5 'Collaboration', *Dictionnaire de Français* (Larousse 2024) <https://www.larousse.fr/dictionnaires/francais/collaboration/17137> accessed 30 April 2024.

6 'Collaboration', *Cambridge Dictionary* (CUP & Assessment 2024) <https://dictionary.cambridge.org/dictionary/english/collaboration> accessed 30 April 2024.

7 'Collaborationism', *Merriam-Webster.com Dictionary* (Merriam-Webster 2024) <https://www.merriam-webster.com/dictionary/collaborationism> accessed 30 April 2024.

8 *Dictionary of the Ukrainian Language*, vol 7 (Naukova Dumka 2016) 231.

9 Yevgen Pysmenskyi, *Collaborationism as a Socio-Political Phenomenon in Modern Ukraine (Criminal and Legal Aspects)* (Publ Rumyantseva HV 2020) 114-5.

A. Voronzov defines collaboration as cooperation with the occupying authorities to the detriment of one's own state ("Motherland").[10] A. Benitskiy views it as a phenomenon that is associated with the cooperation between the person and the aggressor state, its armed forces and occupation administrations.[11] V. Kubalskyi describes it as an intentional and voluntary cooperation in any form with the occupying power or its representatives to the detriment of the national interests of Ukraine[12] while K. Honcharenko considers collaborationism as the cooperation of a state citizen with the aggressor state, directly with the enemy, to secure the interests of the enemy and harm their own state.[13] According to V. Orlov, it is a special form of high treason that includes military, political, economic, administrative, cultural, informational, and media cooperation of a Ukrainian citizen with the aggressor state or its representatives.[14]

A. Muzyka proposes a more detailed definition. From the author's perspective, collaborationist activity is intentional acts aimed at assisting the aggressor state, armed or militarised groups formed in the temporarily occupied territory, and/or illegal authorities established in such territory. These acts are committed by a citizen of Ukraine, a foreigner (except for citizens of the aggressor state) or a stateless person in the absence of features of high treason.[15]

M. Khavroniuk identifies four mandatory features of collaboration as an act committed: (1) under occupation; (2) in the form of cooperation with the aggressor state; (3) by representatives of the state's citizens; (4) to harm the state of Ukraine, its patriots, or allies.[16]

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10 AV Voronzov, 'Criminal Liability for Collaborative Activities (Art. 111-1 of the Criminal Code of Ukraine): Analysis of the Objective Side' (Current Issues of Criminal-Legal Qualification, Documentation and Investigation of Collaborationism: All-Ukrainian scientific and practical conference, Odesa, 21 July 2022) 29.

11 Andriy Benitskiy, 'Features of Criminal-Legal Qualification Crimes Provided for in Part 4 Article 1111 of the Criminal Code of Ukraine and Their Relationship with Related Elements of Crimes' (2022) 11 Law of Ukraine 90, doi: 10.33498/louu-2022-11-088.

12 Vladyslav Kubalskyi, 'Problems of Establishing Criminal Responsibility for Collaborationist Activities in Ukraine' (Deoccupation: Legal Front: International expert round table, Kyiv, 18 March 2022) 116.

13 K Honcharenko, 'Treason or Collaborative Activity of the Problem of Qualification of crimes Against the Foundations of National Security' (2022) 36 Collection of Scientific Papers of HS Skovoroda Kharkiv National Pedagogical University: Law 139, doi:10.34142/23121661.2022.36.16.

14 V Orlov, 'Combatants or Collaborators: Problems of Criminal Responsibility in the Conditions of Armed Conflict' (Current Issues of Criminal-Legal Qualification, Documentation and Investigation of Collaborationism: All-Ukrainian scientific and practical conference, Odesa, 21 July 2022) 78.

15 A Musyka, 'Norms on Criminal Responsibility for Collaborationist Activity Need Urgent Amendments' (Criminal-Legal Responses to the Challenges of Martial Law in Ukraine: International scientific conference, Kharkiv, Pravo, 5 May 2022) 113.

16 Mykola Khavroniuk, 'Criminal Liability for Collaborationism' (*Center for Political and Legal Reforms*, 28 April 2022) <https://pravo.org.ua/blogs/kolaboratsijna-diyalnist-nova-stattya-kryminalnogo-kodeksu> accessed 30 April 2024.

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O. Radutnyi draws special attention to the fact that a collaborator is a person who deliberately cooperates with the occupying civilian or military authorities to the detriment of the country with which he or she has a permanent or temporary legal relationship (for example, a citizen, a stateless person permanently residing in a certain territory, a monarchy national or a foreign citizen with the right of permanent or temporary residence, etc.).[17]

Even this brief review of sources proves that despite the different approaches to the definition of collaborationism, the legal literature generally uses several features in different numbers and various ways, combining them:

1) the feature of cooperation is a generic feature that limits collaboration to special forms of action - interaction, joint work, communication with a particular enemy actor (occupier, aggressor);
2) subjective feature limits the circle of collaborators to only a certain category of persons, primarily citizens and nationals of the sovereign state of the relevant territories;
3) connection of the act with the occupation of a particular territory (occupied territory, conditions of occupation, period of occupation);
4) voluntary nature of the collaboration;
5) the purpose or intent to harm the national security of the state (or other similar values).

Further, each of these features and collaboration, in general, will be examined from two perspectives: the ideal model (*de lege ferenda*) and the perspective of the current model of criminalisation of collaborationist activities in the Criminal Code of Ukraine (*de lege lata*). While the proposed model of lex ferenda is not yet part of positive law, it refers to something that, in a certain sense, should be law,[18] i.e., the proposals made from this perspective aim to improve the current edition of Article 111-1 of the Criminal Code of Ukraine.

2 IS COLLABORATION AN INTERACTION? WITH WHOM?

First, the behaviour termed collaboration is traditionally defined through the cooperation or interaction of actors. Collaborationism can involve the joint work of actors in different areas. Analysing collaboration with the occupier on Ukraine territory during World War II, V. Shaikan identified collaborationism in the political, administrative, military, economic, domestic, and cultural spheres.[19] Similarly, in her work, N. Antonyuk

17 O Radutnyi, 'Public Calls and Denials as Forms of Informational Collaborationist Activity under the Criminal Code of Ukraine' (2022) 2(41) Information and Law 104, doi:10.37750/2616-6798.2022.2(41).270372.

18 Hugh Thirlway, 'Reflections on Lex Ferenda' (2001) 32 Netherlands Yearbook of International Law 3, doi:10.1017/S0167676800001148.

19 Valentyna O Shaikan, *Collaborationism in the Territory of the Reichskommissariat "Ukraine" and the Military Zone During the Second World War* (Mineral 2005) 51-2.

distinguishes military, economic, cultural (spiritual), domestic and political (administrative) collaborationism.[20] Y. Pysmenskyi classifies collaborationist activities under Article 111-1 of the Criminal Code into the following areas: ideological (cultural and educational), administrative and military-political, and economic.[21] K. Dolhoruchenko also emphasises information and media collaboration.[22]

Undoubtedly, there are even more areas of collaboration, as well as criteria for their classification. Regardless of their number, however, the question arises: *is collaboration exclusively interaction, i.e., the mutual performance of actions by two parties, a certain joint activity in which they understand that they are acting together?* In other words, why, when defining collaboration, do we always say it is interaction or cooperation? Would it be true to say that collaboration is also a unilateral (without cooperation with anyone) act of behaviour of a person that harms the sovereign state and thus helps the enemy?

Joint activity is the core of the concept of collaboration. It is well known that the actions of two criminals who, unbeknownst to each other, simultaneously seize certain items from a shopkeeper, causing property damage, cannot be considered complicity in theft (they do not act together). Similarly, a criminal who, in the occupied territory, on his initiative and without any assistance from the occupier, called on other residents to cooperate with the enemy or neutralised an underground partisan camp organised by the sovereign state to fight the occupier cannot be considered a collaborator. He can be anyone - a traitor, diversionist, separatist, but not a collaborator. In this regard, collaboration with an appropriate degree of conditionality can be considered a kind of complicity in the occupation.

This logic may seem obvious, but it was not fully implemented in the legislation. Part 1 of Art. 111-1 of the Criminal Code of Ukraine defines two types of information acts as collaborationist activity: public calls for cooperation with or support of the aggressor and public denials of armed aggression against Ukraine or occupation of its territory. At the same time, the law is not only indifferent to cooperation with the enemy, but it does not distinguish between calls or denials made in the occupied versus "free" territory.

According to the official court statistics in Ukraine, from the moment Article 111-1 of the Criminal Code came into force (16 March 2022) until 31 December 2023, a total of 682 people were convicted of collaborationist activities. Of these, 374 people (almost 55%) were convicted

20 Natalia Antonyuk, 'A Criminal and Legal Assessment of Collaborationism: A Change of Views in Connection with Russia's Military Aggression against Ukraine' (2022) 5(3) Access to Justice in Eastern Europe 142-3, doi:10.33327/AJEE-18-5.3-n000312c.

21 Yevgen O Pysmenskyi, 'Collaborationist Activity (Article 111-1 of the Criminal Code)', in AA Vozniuk, RO Movchan and VV Chernej (eds), *Novels of the Criminal Legislation of Ukraine, Adopted in the Conditions of Martial Law: A Scientific and Practical Commentary* (Norma Prava 2022) 63.

22 K Dolgoruchenko, 'Collaborationism as a Phenomenon of War and a Scientific Concept within the Framework of Historical and Legal Research' (2022) 56 Scientific Bulletin of the International Humanitarian University, Series: Jurisprudence 18, doi:10.32841/2307-1745.2022.56.4.

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under Part 1 of this article.[23] The majority of those convicted under Part 1 committed unilateral information acts with no proven connection to the occupier/aggressor, and most of these acts were committed mainly on the "free" territory of Ukraine.

This allows us to formulate two conclusions. First, *de lege lata*, the majority of collaborators convicted in Ukraine did not commit acts of collaboration in its traditional historical sense. They are considered collaborators only because the legislator has equated cooperation with an independent (unilateral) act. This harms the reflection of the overall picture of collaborationism in the Russian-Ukrainian war and leads to a distorted perception of collaboration. Secondly, *de lege ferenda*, collaboration should only cover acts that reflect interaction with the relevant hostile actor (for example, a person calls for support for the occupier at the request of the latter). Undoubtedly, the Russian Federation is actively waging an information war, a technology of systematic influence on mass and public consciousness to achieve information superiority and political or military goals[24]. However, citizens are not always directly involved in this war, at least not consciously.

The absence of an act of cooperation does not mean that these acts should not be punished if they harm the state's national interests or are aimed at doing so. However, such acts (including informational ones) should be criminalised in a separate article or considered high treason or another crime against the state. It is noteworthy that in the draft of the new Criminal Code of Ukraine developed by the working group on criminal law reform (hereinafter - the Draft of the new Criminal Code),[25] the analysed informational acts are provided for in Articles 9.1.10 and 9.1.11, separately from the article describing collaborationist activities.

At the same time, it should be recognised that *de lege lata* informational collaborationism (Part 1, Article 111-1 of the Criminal Code) is often committed by persons who, in this way, express a peculiar readiness to cooperate with the occupier, as if making a public proposal to this effect. In this context, public calls and denials can be seen as a peculiar criminal preparation. However, it is clear that it must be proven that the person has an intention (or a goal) of further cooperation. This intention (goal) is often absent, or the investigative authorities cannot prove it.

It can be assumed that, in extreme circumstances, the legislator relied on previous legislative experience when amending the Criminal Code with Article 111-1. In particular, Articles 109 and 110 of the Criminal Code (encroachments on the constitutional order and on the territorial integrity of Ukraine) cover not only public calls for encroachments but also the

23 'Judicial Statistics: Annual Reporting' (*Judicial Power of Ukraine*, 2024) <https://court.gov.ua/inshe/sudova_statystyka/> accessed 30 April 2024.

24 Oleg Danilyan and others, 'Features of Information War in the Media Space in the Conditions of Russian Aggression Against Ukraine' (2023) 15(3) Cogito 61.

25 'Draft of the New Criminal Code of Ukraine' (*EUAM Ukraine: New Criminal Code,* 14 October 2023) <https://newcriminalcode.org.ua/criminal-code> accessed 30 April 2024.

encroachments themselves. Nevertheless, such experience is not relevant, as the specified encroachments do not require cooperation with a foreign state or another foreign element.

The next question is inextricably linked to the first one and could count on an independent status: *if it is cooperation, then with whom*? The literature provides different answers to this question. The addressee of cooperation is referred to as the occupier, the occupation authorities/administration,[26] the aggressor state and its representatives,[27] the aggressor state and its armed forces and the occupation administration,[28] and the enemy (occupier, aggressor state, etc.).[29] It can be assumed that the authors did not try to focus on this understanding of the addressee of the collaboration, leading to a lack of clarity and vagueness. The legislator also contributed to the uncertainty, as Article 111-1 of the Criminal Code of Ukraine mentions different addressees of cooperation in various combinations: the aggressor state and its occupation administration (Parts 4, 6), the occupation administration (Parts 2, 5, 7), and illegal armed or paramilitary formations of the aggressor state or created in the occupied territory (Part 4). In some cases, such as under Part 1 in relation to the previously mentioned information acts, the entity with which cooperation is supposed to take place is not mentioned at all.

In fact, the answer to the question of the addressee of the collaboration requires more clarity, as it directly affects the qualification of the crime. Cooperation with hostile elements in the criminal law of most states is traditionally considered high treason. The criminal law of Ukraine is no exception. For example, Article 111 of the Criminal Code of Ukraine defines high treason as, inter alia, siding with the enemy during an armed conflict and assisting a foreign state or foreign organisation in subversive activities against Ukraine. In other words, joint activities with the enemy are highly treasonous even in peacetime, and in such circumstances, no one would think of calling such activities collaborationist. However, under what conditions does high treason turn into collaboration? Is such a condition the emergence of a special kind of enemy - an aggressor state or an occupying state?

The collaboration is "as old as war and the occupation of foreign territory".[30] This widely quoted phrase by G. Hirschfeld has justifiably become axiomatic in historical studies of

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26 See: Kubalskyi (n 12) 116; Radutnyi (n 17) 104; Valery L Zhydkov and Oleksandr B Zhyla, 'Proving Crimes of Collaborationist Activity: Problematic Issues of Law' (*Ukrainian Helsinki Human Rights*, 5 May 2023) <https://www.helsinki.org.ua/articles/dokazuvannia-zlochyniv-pro-kolaboratsiynu-diialnist-problemni-pytannia-zakonu> accessed 30 April 2024.

27 See: Honcharenko (n 13) 139; O Matushenko and A Ligun, 'Collaborative Activity: Problematic Issues and Prospects for their Solution' (2023) 2 South Ukrainian Law Journal 37, doi:10.32850/sulj.2023.2.6; Orlov (n 14) 78.

28 See: Benitskiy (n 11) 90; Musyka (n 15) 113.

29 See: Oleksandr Golovkin and Igor Skazko, 'Collaborationism in Ukraine: Debatable Aspects' (2017) 78 State and Law, Series: Legal Sciences 244; Oleksandr Illarionov, 'Public Request to Ban Collaborationism' *Legal Bulletin of Ukraine* (Kyiv, 31 March - 6 April 2017) 4.

30 Gerhard Hirschfeld, 'Collaboration in Nazi-Occupied France: Some Introductory Remarks', in G Hirschfeld and P Marsh (eds), Collaboration in France: Politics and Culture During the Nazi Occupation, 1940–1944 (Berg 1989) 11.

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collaborationism.[31] As the history of the Second World War shows, after liberation, almost every previously occupied country had to come to terms with acts of treason and collaboration among its population.[32] Occupations can be of different types,[33] of which, in most cases, regardless of whether they are legal from the point of view of *jus ad occupation*,[34] are inherently linked to armed conflict. In the cases of the German conquests of the Second World War and the Russian-Ukrainian armed conflict that began in 2014, there is an illegal annexation occupation, so it is not surprising that in the literature on these topics, the occupier and the aggressor state are often confused. This is probably why the parallel reference to the aggressor state and the occupation administration are two addressees of interaction in Article 111-1 of the Criminal Code of Ukraine. However, from the view of legal accuracy required by criminal law, this approach is incorrect.

The existence of armed aggression or armed conflict does not in itself indicate the existence of collaboration. In non-international armed conflicts, as well as in international armed conflicts that do not involve the occupation of territory (e.g., when aggression occurs only by shelling the territory of a foreign state without physical control over that territory),[35] the question of collaboration cannot be raised. Cooperation with the aggressor state during such armed conflicts can be assessed as high treason or in any other way, but not as collaborationism. Collaborationism is a phenomenon caused by occupying a territory, not an armed conflict. Another thing is that the latter usually (though not always) goes hand in hand with the occupation. This understanding of collaborationism is enshrined in Article 120 of the Criminal Code of the Republic of Lithuania, the only case among European countries where collaboration is provided for in a separate article, similar to Ukrainian criminal law. According to this article, collaboration (in Lithuanian "kolaboravimas") is defined as assistance to illegal state structures in establishing occupation or annexation committed by a citizen of the Republic of Lithuania under conditions of occupation or annexation.[36]

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31 See, for example: Stathis N Kalyvas, 'Collaboration in Comparative Perspective' (2008) 15(2) European Review of History 109, doi:10.1080/13507480801931036.; Fabian Lemmes, 'Collaboration in wartime France, 1940-1944' (2008) 15(2) European Review of History 157, doi:10.1080/13507480801931093.

32 Jeffrey W Jones, '"Every Family Has Its Freak": Perceptions of Collaboration in Occupied Soviet Russia, 1943–1948' (2005) 64(4) Slavic Review 747, doi: 10.2307/3649911.

33 Regarding the typology of occupation, see in detail in: Simon Collard-Wexler, 'Understanding Resistance to Foreign Occupation' (DPhil thesis, Columbia University 2013) 21-5, doi:10.7916/D8BZ6D8M.

34 In the law of occupation, the traditional concepts of *jus ad bellum* and *jus in bello* are transformed into *jus ad occupation* and *jus in occupation*. For more information, see, for example: Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (CUP 2017) 1-10, doi:10.1017/9781316536308.

35 In UN General Assembly Resolution 3314, which contains a list of acts of aggression, one can find a number of other acts by a state that are considered aggression but do not yet constitute occupation, such as blockades of the coast and airspace.

36 Criminal Code of the Republic of Lithuania no VIII-1968 of 26 September 2000 'Baudžiamasis kodeksas' (amended 27 March 2024) <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.111555/asr> accessed 30 April 2024.

Expanding the definition of the addressee of collaboration to include other hostile actors blurs the phenomenon of collaborationism and makes it difficult to distinguish it from related phenomena such as high treason, espionage, sabotage, and separatism.

In terms of qualifying collaboration, this means that if, after the full de-occupation of Ukraine's territory within internationally recognised borders, the armed conflict between Ukraine and the Russian Federation continues (e.g., by shelling Ukraine's territory), the joint activities of Ukrainian citizens with Russia will be considered, for example, high treason (a more serious crime), but not collaboration.

The assessment of cooperation with the Republic of Belarus is also problematic. According to the well-known definition in UN General Assembly Resolution 3314, an act of aggression may include "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State".[37] In this regard, it is obvious that the Republic of Belarus acted as a co-aggressor, especially during the first phase of the large-scale Russian invasion in 2022. However, it can hardly be recognised as a co-occupier, as there are currently no established facts that the Republic of Belarus exercises control over a certain territory of Ukraine.

Under such circumstances, providing assistance to agents of Belarus to the detriment of Ukraine's national interests, transferring material resources to paramilitary formations of Belarus, conducting economic activities in cooperation with its bodies and institutions, or voluntary participation in the armed formations of Belarus, cannot be considered collaborationism. These actions should be classified as high treason or other crimes against the national security of Ukraine.

Finally, and more obviously, cooperation with organised crime groups or other criminal organisations not controlled by the occupier or with agents of states other than the occupying power cannot be considered collaborationism. Therefore, the initial characteristic of collaboration is that it involves some kind of interaction with the occupier, entering into a relationship with them. This feature combines two interrelated (inseparable) characteristics simultaneously: 1) the external aspect of collaborationism - a specific type of act of the person, which consists of joint activities as opposed to unilateral and independent acts of behaviour; 2) the addressee - the occupying state, on behalf of which the occupation administration, puppet bodies or armed groups may act.

Whatever terminology is used to refer to interaction with the occupier, one constant feature remains: the occupier is always one of the parties to this interaction. Without it, there is no point in considering this phenomenon separately. The occupation regime generates interaction between both representatives of the authorities of the displaced sovereign and ordinary people with an alien element.

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37 UNGA Resolution no 3314(XXIX) of 14 December 1974 'Definition of Aggression' <https://legal.un.org/avl/ha/da/da.html> accessed 30 April 2024.

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3 WHO CAN BE A COLLABORATOR? (QUESTION ABOUT THE SUBJECT OF THE COLLABORATIONIST ACTIVITY)

The statement that collaborationism, in its essence, involves at least some minimal interaction/communication with the occupier opens up debate on the following question without a clear answer: *who is on the opposite side of this cooperation, or can everyone who interacts with the occupier be called a collaborator?* Can these be only citizens (nationals) of the affected state, or perhaps every resident of the occupied territory, regardless of their citizenship, or even those who began living there after the occupation began, including citizens of the occupying country?

Historical research on collaboration during the Second World War usually does not focus on the citizenship of collaborators. Instead, historians operate with the concept of "the population of the occupied territory"[38] and analyse the peculiarities of collaboration depending on the national and ethnic composition of the collaborators[39] or their social role, position, or type of activity.[40]

Although criminal law, like history, evaluates events and actions of the past, historians' tasks are obviously significantly different from those that lawyers seek to solve. The former focuses on the laws of society development, the determination of events and actions of individual historical figures and their impact on the overall course of history. Lawyers, on the other hand, constantly seek justification for the responsibility of a particular person for their actions: why, for what and to what extent? Historians are not constrained by various official requirements and formalities, while lawyers are limited by strictly regulated procedures and the requirements of legal certainty.

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38 See, for example: Jochen Böhler and Jacek Andrzej Młynarczyk, 'Collaboration and Resistance in Wartime Poland (1939–1945): A Case for Differentiated Occupation Studies' (2018) 16(2) Journal of Modern European History 235-6, doi:10.17104/1611-8944-2018-2-225; Mykola Borovyk, 'Collaboration and Collaborators in the Everyday Perception of the Inhabitants of Ukraine (based on the materials of the oral history project "Ukraine during the Second World War: everyday experience of survival")' (2013) 16 Pages of the Military History of Ukraine 156; Gerhard Hirschfeld, 'Collaboration and Attentism in the Netherlands 1940-41' (1981) 16(3) Journal of Contemporary History 467-9, doi:10.1177/002200948101600304.

39 See, for example: Laura De Guissmé and others, 'Attitudes Towards World War II Collaboration in Belgium: Effects on Political Positioning Towards the Amnesty Issue in the Two Main Linguistic Communities' (2017) 57(3) Psychologica Belgica 32, doi:10.5334/pb.346; John Connelly, 'Why the Poles Collaborated so Little: And Why That Is No Reason for Nationalist Hubris' (2005) 64(4) Slavic Review 771, doi:10.2307/3649912; Bisser Petrov, 'Collaboration in the Balkans During the World War II: Forms, Motives and Results' (2002) 4 Études Balkaniques 13.

40 See, for example: Vitalii Gorobets, 'Economic and Cultural Collaborationism: A Formula for Cooperation' (2020) 1(27) Military-Historical Meridian 84 <https://vim.gov.ua/pages/ua/archive/number.php?archive_number=26.04.2020> accessed 30 April 2024; Daria T Rudakova, 'Civilian Collaboration in Occupied Ukraine and Crimea' (DPhil thesis, University of Western Australia 2018) doi:10.4225/23/5b28915c82bd3; Shaikan (n 19) 193-349.

In view of this, a wide range of historians' work on the phenomenon of collaborationism is not entirely suitable for defining the subject of collaborationist activity. It is legally impossible to define what is meant by the population of the occupied territory. It is unclear what composition should be considered: the population present at the time of occupation, during the occupation, at the time of de-occupation, or in any of the above periods. In any case, it is not possible to establish the exact number and compile an exhaustive list of persons who actually lived in a particular territory. It is impossible to do this in relation to the initial moment of occupation and even more so in relation to the subsequent development of events.

Another important circumstance is that after establishing control over the territory due to annexation, the occupier widely facilitates the migration of its citizens to the newly occupied territories. Thus, although Article 49 of the Geneva Convention (IV) prohibits the occupying power from transferring its population to the territory it occupies,[41] the policy of colonisation is widely practised by the Russian occupier. It is reported that up to 800,000 Russian citizens have illegally arrived in Crimea since 2014, and the Russian authorities plan to move 300,000 of their subjects to occupied Mariupol by 2035.[42] As a result, the occupied population largely consists of citizens of the occupying state. However, categorising them as collaborators undermines the concept of collaborationism from within, as it loses its pejorative meaning associated with treason against the sovereign state of the territory in question.

The ethnic and national dimension of collaborationism is of particular interest in historical analyses. However, in modern jurisprudence, national and ethnic affiliation cannot be a constitutional or any other feature of the subject of a criminal offence, as this automatically causes a violation of the constitutional principle of equality before the law regardless of national and ethnic origin.

The current Article 111-1 of the CC of Ukraine can serve as a model to demonstrate the prevailing uncertainty in the question of who can/should be considered a collaborator. The legislator differentially defined the subject of collaborationist activity depending on the forms (types) of collaboration. In most cases, it is explicitly stated that a citizen of Ukraine can only commit an act. We are talking about informational acts provided for in Part 1, about holding positions in the occupied territories (Parts 2, 5 and 7), and about educational and military types of collaboration (Parts 3 and 7). Therefore, regarding these types of

41 Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949 Geneva) <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949> accessed 30 April 2024.

42 Vladyslav Miroshnychenko, 'Hundreds of Thousands of Russians Moved to the Occupied Territories Of Ukraine: Illustrative Examples of Colonization' (*Ukrainian Helsinki Human Rights*, 6 December 2023) <https://www.helsinki.org.ua/articles/sotni-tysiach-rosiian-pereikhaly-na-okupovani-terytorii-ukrainy-pokazovi-pryklady-kolonizatsii/> accessed 30 April 2024.

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collaboration, scholars have no doubt that the circle of subjects of the crime should be limited exclusively to citizens of Ukraine.[43]

In the case of economic collaborationism (Part 4), there is no indication of the subject at all. As a result, scientific sources note that in this case, the subject can be either a citizen of Ukraine, a foreigner or a stateless person.[44]

Part 6 of Article 111-1 of the Criminal Code of Ukraine is unique (in a negative aspect), which provides for liability for organising and conducting political events and information activities in cooperation with the aggressor state and/or its occupation administration in the absence of signs of high treason. Since a mandatory feature of high treason (Article 111 of the Criminal Code) is that it can only be committed by a citizen of Ukraine, it appears that only a foreigner or stateless person can be the subject of these types of collaborationist activities since such actions by Ukrainian citizens would obviously contain signs of high treason.

Thus, *de lege lata*, the subject of collaborationist activity, depending on its forms, can be: a) only a citizen of Ukraine, b) only a foreigner or stateless person, c) a person regardless of citizenship.

This legislative approach does not seem to be justified. *De lege ferenda*, only a citizen of Ukraine, should be recognised as a subject of collaborationist activity. The justification for this can be summarised in the following arguments:

Firstly, collaboration under Article 111-1 of the Criminal Code of Ukraine, with some exceptions, is a special type of high treason, and the addition of a new article to the Criminal Code should be seen mainly as a way to differentiate responsibility for high treason, taking into account the conditions of occupation.

Secondly, historical research confirms that collaborators were mostly prosecuted in different countries under articles on high treason in one form or another,[45] and the subject of the

43 Benitskiy (n 11) 91; Khavroniuk (n 16); RO Movchan, "*Military" Novels of the Criminal Code of Ukraine: Law-Making and Law-Enforcement Problems* (Pravova Norma 2022) 41; Pysmenskyi (n 21) 85.

44 O Kravchuk and M Bondarenko, 'Collaborative Activities: Scientific and Practical Commentary on the New Article 111-1 of the Criminal Code' (2022) 3 Juridical Scientific and Electronic Journal 200, doi:10.32782/2524-0374/2022-3/45; Movchan (n 43) 41.

45 See, for example: Veronika Bílková, 'Post-Second World War Trials in Central and Eastern Europe', in M Bergsmo, Cheah Wui Ling and Yi Ping (eds), *Historical Origins of International Criminal Law*, vol 2 (FICHL Publ Series no 21, TOAEP 2014) 697-733; Jon Elster, 'Redemption for Wrongdoing: The Fate of Collaborators after 1945' (2006) 50(3) Journal of Conflict Resolution 324, doi:10.1177/0022002706286953; Jones (n 32) 747; Tetiana Pastushenko, '"Justice" in the Soviet Way: Qualification of Cooperation with the Nazis in the USSR, 1941-1956' (2013) 16 Pages of the Military History of Ukraine 124; Tanja Penter, 'Collaboration on Trial: New Source Material on Soviet Postwar Trials against Collaborators' (2005) 64(4) Slavic Review 782, doi:10.2307/3649913; T Vronska, 'The Phenomenon of "Accomplicity": To the Problem of the Qualification of Cooperation of the Civilian Population with the Occupiers in the First Period of the Great Patriotic War' (2008) 11 Pages of the Military History of Ukraine 88.

latter is known to be a citizen of the sovereign state of the relevant territory. It can be assumed that it is not least due to these investigations and based on the unfortunate cases of unjustifiably severe punishment for collaboration that the legislator resorted to privileging responsibility for collaborationism.

Thirdly, comparative studies[46] show that in the criminal legislation of foreign countries, interaction with the occupier is mainly covered by crimes whose subjects are citizens of the relevant state.

In the end, criminal liability for collaboration with the occupier, as well as for high treason, is based on a special legal relationship between the sovereign state of the territory in question and its citizens, which provides for mutual rights and obligations of the parties. Citizenship gives rise to not only privileges from the state (in particular, in comparison with the status of foreigners and stateless persons) but also obligations, among which is the duty of loyalty to the state, as reflected in a number of general constitutional provisions, including the duty to defend the Motherland. In some cases, the duty of loyalty to the state becomes more specific and is reflected in the formal procedure of taking an oath. At the same time, considering the conditions of the occupation and the fact that the sovereign state failed to protect its citizens from the aggressor state and its subsequent occupation of territories, the state resorts to softening its stance towards the expressions of disloyalty by its citizens under occupation.

On the other hand, recognising only citizens of Ukraine as subjects of collaboration should not make it impossible to bring foreigners and stateless persons to criminal liability for assisting the aggressor state in the establishment and consolidation of its occupation regime. According to the norms of international humanitarian law and the law of occupation, citizens of the occupying state may also be held liable for certain manifestations of assistance in the illegal (annexing) occupation, in particular, if they act in the occupied territory.

While the state has the right to rely on the unconditional loyalty of its citizens, foreigners and stateless persons should likely face lesser penalties for their assistance, qualified as another crime against the state rather than collaborationism.

If the affected state prosecutes only its own citizens for aiding the occupier and is indifferent to others, it may inadvertently benefit the occupier. Such conditions might even incentivize citizens of the sovereign state to renounce their citizenship because, among other things, it carries the threat of being accused of collaboration.

46 See more in: Movchan (n 43) 88-92.

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4 OCCUPIED TERRITORY AS THE PLACE OF COLLABORATION

At first glance, it may seem that the indication of the occupier as the addressee of collaboration is sufficient to determine the connection between collaborationism and occupation. However, the literature also mentions where this crime occurs - the occupied territory - among other special and mandatory features.[47] We believe that it makes sense to add an additional feature.

Collaboration with the occupier can occur not only within occupied territories but also on "free" (unoccupied) territory or abroad. This includes interactions within Ukraine's partner countries and in other nations, including the Russian Federation. However, such joint activities cannot be called collaborationism but rather high treason or another crime against the state. This distinction arises because it involves assisting the enemy during a period of occupation rather than during peacetime. This approach can now be seen in law enforcement practices.

For example, a citizen of Ukraine was sentenced to life imprisonment for committing high treason (Part 2 of Article 111 of the Criminal Code of Ukraine). The individual, in collaboration with an agent of the FSB of the Russian Federation in unoccupied Kharkiv, took and sent photos of the locations of units of the Armed Forces of Ukraine, Ukrainian checkpoints and the movement of Ukrainian military equipment.[48] The qualification of joint activities with the occupier on the "free" territory of Ukraine to the detriment of Ukraine as high treason is correct.

Thus, an act of cooperation between a citizen of a sovereign state and an occupier does not in itself indicate collaborationism. This act must be committed in the occupied territory.

Collaborationism is a phenomenon that arises and exists within the occupied territory. Although Ukrainian legislation uses the term "temporarily occupied territory," in fact, according to the provisions of the law of occupation, the occupation is actually temporary,[49] so the additional indication of "temporary" rather emphasises Ukraine's intentions to de-occupy it, but does not carry any additional semantic load.

The legal definition of the temporarily occupied Russian Federation territory of Ukraine, contained in Paragraph 7 of Part 1 of Article 1-1 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine", is generally based on the provisions of the law of occupation. It is understood as parts of the territory of Ukraine within which the armed forces of the Russian

47 Kravchuk and Bondarenko (n 44) 199; Zhydkov and Zhyla (n 26).

48 'For the First Time, an Ex-Policeman was Sentenced to Life Imprisonment for Treason in the Kharkiv Region' (*Zmina*, 31 January 2024) <https://zmina.info/news/na-harkivshhyni-za-derzhzradu-do-dovichnogo-uvyaznennya-vpershe-zasudyly-ekspoliczejskogo/> accessed 30 April 2024.

49 Emily Crawford and Alison Pert, *International Humanitarian Law* (CUP 2015) 74; Gross (n 34) 17-8, 29-35.

Federation and the occupation administration of the Russian Federation have established and exercised *actual control* or within which the armed forces of the Russian Federation have established and exercised *general control* to establish the occupation administration of the Russian Federation.[50]

Article 1 of the Law defines the dates marking the beginning of the occupation for certain territories, as well as the general procedure for determining the beginning and end of the occupation. The primary (general in relation to the armed conflict) date of the beginning of the occupation of certain territories of Ukraine by the Russian Federation is 19 February 2014. The occupation of Crimea and the city of Sevastopol by the Russian Federation began on 20 February 2014, while the occupation of certain territories of Donbas by the Russian Federation began on 7 April 2014. For other districts and settlements, the list of territories is dynamically maintained by the Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine.[51] In case of de-occupation of the territory, this list includes not only the initial but also the final date of occupation.

These provisions defining the temporarily occupied territory allow us to conclude that the concept is complex in the sense that it combines several components: *territorial* - it is a territory within certain boundaries; *temporal* - there are starting and ending points of occupation; *essential (contextual)* - the conditions of occupation, because both the territorial and temporal boundaries of occupation are not determined at random, but depending on whether effective control over the relevant territory is established and maintained.

The certainty of the beginning and end of the occupation of the territory helps to distinguish collaborationism from related criminal offences. The main feature affecting the recognition of territory as occupied is the existence of effective control over this territory by the occupier, i.e. the conditions of occupation. Effective control is *a conditio sine qua none* of belligerent occupation.[52] Therefore, the fact that a territory is under the occupier's control determines both the temporal and territorial boundaries of collaborationism - it can exist where and as long as this control is maintained.

De lege lata, several forms of collaborationist activities provided for in Article 111-1 of the Criminal Code of Ukraine are formulated by the legislator in such a way that they also cover acts of cooperation outside the temporarily occupied territory. This mainly concerns information collaborationism (Part 1). Existing case law has already been mentioned above, according to which the vast majority of acts of collaborationism were de facto committed

50 Law of Ukraine no 1207-VII of 15 April 2014 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine' (amended 19 May 2024) <https://zakon.rada.gov.ua/laws/show/1207-18#Text> accessed 30 April 2024.

51 Order of the Ministry of Reintegration of the Temporarily Occupied Territiries of Ukraine no 309 of 22 December 2022 'On the Approval of the List of Territories where Hostilities are (Were) Conducted or Temporarily Occupied by the Russian Federation' <https://zakon.rada.gov.ua/laws/show/z1668-22#n15> accessed 30 April 2024.

52 Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 43.

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outside the occupied territory. Additionally, many other forms are unclear regarding the place of collaboration, such as propaganda in educational institutions (Part 3) or the transfer of material resources to illegal armed or paramilitary groups established in the occupied territory (Part 4). Literally, the law does not contain any territorial restrictions.

More apparent in this context is the public office-related collaborationism defined in Parts 2, 5 and 7 of Article 111-1 of the CC, which means holding a certain type of position by a citizen of Ukraine in illegal authorities established in the temporarily occupied territory. Holding a position automatically means staying in the occupied territory where the relevant illegal authority is located and operates. However, we cannot exclude the remote holding of a position by a person not in the occupied territory. In the latter case, the qualification rule remains unclear.

Regarding the public office-related collaboration (Part 5 of Article 111-1 of the Criminal Code), the Supreme Court emphasised that the place of commission of the crime - the temporarily occupied territory of Ukraine - is an important feature.[53] It is worth noting how cautious and uncertain the position of the highest court is. The judges did not dare to point out the mandatory nature of this feature but only noted its importance, thereby levelling the significance of this position in general since many different features are important, and only some are mandatory.

Therefore, *de lege ferenda* collaborationism should be possible only within the occupied territory. This approach will allow us to distinguish by law between joint activities with the occupier under the conditions of occupation of the territory (collaborationist activities) and joint activities outside such conditions (high treason or other crimes). The latter will include acts committed primarily before or after the occupation or in the unoccupied territory. In addition, interaction with the occupier can be remote or take place "in exile", including after the de-occupation of the territory.

In this regard, it is worth noting that the working group on the development of the Draft New Criminal Code proposes to define collaborationist activities as those committed under the occupation of the territory of Ukraine or a part of it.[54] The draft law of Ukraine, submitted to the Parliament, also proposes to define collaborationist activity on the basis of its commission under the occupation of the territory of Ukraine.[55] Interaction with the occupier "under the conditions of occupation of the territory" is identical to interaction with it "in the occupied territory" since the latter is inherently characterised by the relevant conditions. At the same time, it should be borne in mind that a sign of collaborationism is

53 Case no 638/5446/22 (Supreme Court of Ukraine, 31 January 2024) <https://reyestr.court.gov.ua/Review/116705070> accessed 30 April 2024.

54 Draft of the New Criminal Code of Ukraine (n 25).

55 Draft Law of Ukraine no 7570 of 20 July 2022 'On Amendments to the Criminal and Criminal Procedural Codes of Ukraine on Improving Liability for Collaborative Activities and Related Criminal Offenses' <https://itd.rada.gov.ua/billInfo/Bills/Card/40023> accessed 30 April 2024.

the subject's presence in the occupied territory at the time of the act, i.e., in the territory controlled by the occupier. If the subject is under the control of the occupier and is not in the occupied territory (for example, a citizen of Ukraine who is in the territory of the Russian Federation), this fact can certainly be taken into account by the court, but it should not identify the act as collaborationism.

5 VOLUNTARY OR FORCED CHARACTER?

Another debatable feature of collaborationist activity is its *voluntary* nature. *De lege lata*, in Article 111-1 of the Criminal Code of Ukraine, the legislator has repeatedly pointed to the voluntary nature of collaboration, in particular with regard to public office-related and military collaboration: "voluntary holding of a position by a citizen of Ukraine..." (Part 2, 5, 7), "voluntary election to the authorities" (Part 5), "voluntary participation of a citizen of Ukraine in illegal armed or paramilitary groups..." (Part 7). The indication of "voluntariness" only in relation to certain types of collaboration naturally raises the question of whether such a characteristic also applies to those acts for which there is no special indication. Does this mean, for example, that educational (Part 3) or economic collaborationism (Part 4) are punishable even if they are involuntary? In general, what should be understood by the voluntariness of collaboration, and can collaboration under occupation be voluntary?

It is worth noting that scholarly works often emphasise the voluntary nature of interaction with the occupier as a sign of collaboration.[56] After all, the Draft of the New Criminal Code of Ukraine[57] and the draft amendments to the Criminal Code registered in Parliament[58] recognise the voluntary nature of collaboration as a mandatory feature in the definition of collaborationist activity. At the same time, Y. Pysmenskyi and R. Movchan note that the indication of the feature of voluntariness is the result of a banal mistake due to hasty military law-making in extreme circumstances.[59]

We believe that the reference to the "voluntariness" of certain forms of collaborationist activity in Article 111-1 of the CC is unnecessary. The voluntariness of a human act in criminal law is traditionally associated with the absence of circumstances that exclude the criminal unlawfulness of an act, such as extreme necessity and coercion. Thus, in the context of the public office-related collaboration (Part 5 of Article 111-1 of the CCU), the Supreme Court noted that an act committed when it is possible to choose several options for behaviour, taking into account the totality of circumstances that may exclude criminal

56 See, for example: Illarionov (n 29); Khavroniuk (n 16); Zhydkov and Zhyla (n 26).
57 Draft of the New Criminal Code of Ukraine (n 25).
58 Draft Law of Ukraine no 7570 (n 55).
59 Ye Pysmenskyi and R Movchan, 'New Provisions of Criminal Law of Ukraine on Collaborative Activities: Discussion Issues and Attempt to Solve them' (2022) 6 Juridical Scientific and Electronic Journal 358, doi:10.32782/2524-0374/2022-6/79.

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unlawfulness under Articles 39 and 40 of the CC of Ukraine, should be considered voluntary.[60] These articles contain universal prescriptions for determining the voluntariness/coercion of any act of a person, regardless of whether it concerns collaboration, theft, murder, or other crime. Their content is summarised as follows:

1) the behaviour of a person under the direct influence of physical coercion, as a result of which the person could not control his or her actions (insurmountable physical coercion), is not a crime;
2) criminal liability of a person for causing damage to law-protected interests under the influence of overwhelming physical coercion (when the ability to control one's actions is preserved) or under the influence of mental coercion (various threats) is made dependent on whether there was an extreme necessity: a) if there is, liability is excluded; b) if the limits of extreme necessity are exceeded (the damage caused is more significant than the damage prevented), liability is incurred on general grounds, and the commitment of a crime under duress is only taken into account as a mitigating circumstance when imposing a punishment.

Therefore, if "voluntariness" is understood to mean that it is excluded in the presence of insurmountable physical coercion/extreme necessity without exceeding its limits, then the reference to the voluntariness of collaboration is superfluous since the provisions of Articles 39 and 40 of the CC of Ukraine are applied regardless of whether the disposition of the article of the Special Part of the CC of Ukraine contains a reference to "voluntariness" or not. Otherwise, the definition of murder should have referred to the voluntary deprivation of life of another person, and the definition of theft should have referred to the voluntary seizure of another's property by secret means.

Reflecting on this feature, N. Savinova mentions a different understanding of "voluntariness" that has emerged in criminal law in connection with the strengthening of counteraction to domestic violence, including sexual crimes.[61] In 2017, Article 152 of the Criminal Code of Ukraine ("Rape") was supplemented with a note that partially explains the meaning of the legislative wording "committing acts of a sexual nature... without the voluntary consent of the victim".[62] According to the note, consent is considered voluntary if it results from a person's free will, taking into account the surrounding circumstances. In practical terms, this wording is defined as involuntary cases of consent obtained under the

60 Case no 638/5446/22 (n 53).

61 NA Savinova, 'Criminal law Without Revenge: Humanism and the Law of the Ukrainian State During the War and in the Post-War Period' (Criminal Law of Ukraine before the Challenges of Modernity and the Future: What it is and What it Should be: International scientific conference, Kharkiv, 21-22 October 2022) 23-4.

62 Law of Ukraine no 2227-VIII of 06 December 2017 'On Amendments to the Criminal Code and the Criminal Procedure Code of Ukraine in Order to Implement the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence' [2018] Official Gazette of Ukraine 6/244.

influence of virtually any threat (e.g., threat of dismissal from the position or threat to disclose private information).

The interpretation of "voluntariness" in the sense in which this concept is used to denote the lack of consent of the victim (in rape) may lead to the impossibility of criminal prosecution for collaborationism. According to this approach, for example, a citizen of Ukraine who worked as a Ukrainian prosecutor and, after the occupation and annexation of the territory, begins to serve in the prosecutor's office of the Russian Federation can easily argue that he or she collaborated because otherwise he or she would have lost his or her job and the necessary income for the survival of the family, would have been forced to move, leave his or her property, etc.

We believe that the definition of voluntary consent in the note to Article 152 of the CC of Ukraine cannot serve as a model for interpreting voluntariness as a feature of collaborationism, as it does not refer to the assessment of the person's actions but to the determination of the victim's consent, and is intended to be used only in the context of sexual crimes. The victim's lack of voluntary consent may be evidenced by the fact that she has expressed disagreement, even in the absence of any threats or use of force. The same cannot be said for the voluntariness of the perpetrator's actions.

At the same time, the issue raised actualises the consideration of the actions of collaborators from the other side. Since collaborationist activities are carried out in the occupied territory (under occupation), it is not so much about the voluntariness of cooperation, but rather about its inherently forced nature by occupation circumstances. It should be emphasized that the adjective "forced" in this context means that it is carried out under the pressure of circumstances and is different in meaning from the word "violent".

The conditions of occupation are an environment of potential violence. The occupied territory's population is under the full control of a large number of armed military forces. The occupying army is accompanied by heavy weapons, sophisticated military equipment and even air support. Explosions and shots are heard from time to time. Any protests are demonstratively suppressed, and those who not only cause the slightest obstacles or refuse to cooperate but also those who have nothing to do with obstacles or refusals are being punished. The legitimate authorities are deprived of any access and opportunity to help. The scale of the occupier's activities and goals makes the people realise that the new order and the occupier's power in this territory are clearly not for hours or days but for weeks, months, and possibly years.[63] In view of this, even non-compulsory (i.e. voluntary) actions of the population under such conditions - transfer of resources, organisation of referendums, performance of official functions, etc. - are essentially forced by abstract threats (probable harm) in case of disloyalty to the occupier.

63 MA Rubashchenko, 'Criminal Liability for Collaborationist Activity: Separate Problems' (Criminal Liability for Crimes against the Foundations of National Security of Ukraine, 1992-2022: Round table in memory of prof P Matyshevskyi and S Yatsenko, Kyiv, 18 November 2022) 47.

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At the same time, the provisions of criminal law on extreme necessity and physical and mental coercion (Articles 39 and 40 of the Criminal Code) are not designed to address such potential risks and such a comprehensive scope. These norms require that the violence used or the danger to the protected interest be real (concrete, not abstract).

Of course, if a citizen in the occupied territory is directly subjected to violence or threats to his or her legitimate interests, the provisions of Articles 39 and 40 of the Criminal Code of Ukraine are automatically applied. However, the potential of these articles is limited to a specific act of violence or threat. It does not consider abstract threats caused by the extreme conditions of occupation. In this regard, R. Movchan, exploring the problems of assessing the collaboration of educators, emphasises that their liability should be excluded if it is proved, taking into account the specific circumstances of the case, an immediate and real threat to life and health that excludes the ability to control their actions, or in the presence of extreme necessity.[64]

Assessing the overall appearance in the Criminal Code of Ukraine in March 2022 of an article on collaborationist activities, which provides for less severe liability compared to the article on high treason, it can be assumed that such a change in the criminal law is precisely an attempt by the legislator to take into account the extreme conditions in which citizens decide to cooperate with the occupier.

Therefore, the reference to voluntariness in Article 111-1 of the CC is only an unnecessary duplication of the provisions of Articles 39 and 40 of the CC of Ukraine. We assume that in this way, the legislator sought to further focus the attention of the investigating authorities and the court on a thorough examination of the facts of collaboration in terms of the potential use of coercion against a person. At the same time, there is no need to separately indicate in the law the somewhat forced nature of cooperation, as this follows from another feature - the occupied territory as a place of collaboration. The extreme conditions of the occupation make sense for separating collaborationist activities into a separate article of the Special Part of the Criminal Code. Ignoring or failing to recognise these conditions will inevitably lead to the equation of collaboration and high treason and, thus, to the disappearance of the reasons for lawyers to consider collaboration an independent phenomenon.

Another thing is that collaborationist activities are often carried out by Ukrainian citizens who, even before the occupation, were waiting for the occupier to arrive, preparing the ground for the occupation, and after the occupation of the territory by the Russian Federation, showed their activity and initiative.

In the works of some researchers on the relationship between the occupier and the occupied population during the Second World War, the identification of such subjects served as the basis for dividing the concept under study into two types: *collaborationism*

64 Movchan (n 43) 63-4.

and *collaboration* (including *collaboration d'etat*). The first reflected an open desire to cooperate and imitate the National Socialist regime,[65] or more organised and systematic forms of cooperation,[66] and active work for the victory of Germany.[67] The second was largely a necessary, unintended by-product.[68] In the end, however, this dichotomy was not widely recognised, and most studies equate the two concepts.

The existence of these ideological and proactive citizens naturally casts a shadow on the possibility of extending to them the signs of involuntariness that immanently follow from the conditions of occupation. In fact, after the establishment of the occupation regime, they probably not only did not feel any potential threats to their rights and legitimate interests but also got the opportunity to realise their desires and needs to a greater extent than they could afford before the occupation. Since the conditions of occupation of the territory are generally characterised by a certain degree of compulsion (i.e., extreme conditions are presumed), a separate legislative decision is needed in relation to these subjects. When implementing filtration measures after the de-occupation of the territory, they should be prevented from applying incentives and other similar norms that will be formed to meet the needs of reintegrating the territories, and additional lustration measures should be applied. Such "initiative" may also be considered as an aggravating circumstance.

Summarising the above, the introduction of the mitigating rule of liability for collaborationism can be explained by the following generalised scheme. A citizen has a duty of loyalty to the state. By collaborating with the occupier, he or she violates this duty and conditionally becomes a kind of accomplice to the occupation. If the citizen did not act under conditions of extreme necessity or under the influence of insurmountable physical coercion, the sovereign state may hold him or her liable for breach of the duty of loyalty. However, it does not punish him under the rule of high treason but under the rule of collaborationism, taking into account two mitigating factors: first, the state failed to fulfil its duty to protect this citizen on its territory from the occupier, and second, the citizen is in the territory controlled by the occupier, in special extreme conditions that cannot be ignored. At the same time, it is necessary to significantly limit the extension of the mitigating rule of collaboration to those who cooperate with the occupier for ideological reasons, identifying themselves with the occupier and proactively supporting it.

65 Stanley Hoffmann, 'Collaborationism in France during World War II' (1968) 40(3) The Journal of Modern History 376, doi:10.1086/240209.

66 John A Armstrong, 'Collaborationism in World War II: The Integral Nationalist Variant in Eastern Europe' (1968) 40(3) The Journal of Modern History 396, doi:10.1086/240210.

67 David Littlejohn, *The Patriotic Traitors: A History of Collaboration in German-Occupied Europe, 1940-45* (Heinemann 1972) 210.

68 Hoffmann (n 65) 376.

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6 THE AIM OF HARMING THE NATIONAL SECURITY OF THE STATE

In academic literature, one can often find an indication that a mandatory feature of collaboration is the intention to harm the state or undermine social values foundational to national security.[69] At the same time, there are opposing positions. For example, A. Muzyka, in his definition of collaborationist activity, emphasises that the actions of a collaborator can be committed for any reason and any purpose.[70]

De lege lata, the purpose, as a subjective feature, is directly mentioned in Article 111-1 of the CC of Ukraine only in relation to one of the forms of collaborationist activity. Part 3 of this article states that the aim of propaganda in educational institutions by a citizen of Ukraine is to facilitate the armed aggression against Ukraine, establish and consolidate occupation, and evade responsibility for such aggression. In other words, in most cases, the legislator does not consider this characteristic mandatory.

In the criminal law of Ukraine, the aim of a crime is usually understood as independent and distinct from intent, representing a specific desired outcome for which a person commits a crime.[71] We believe that the aim of committing a criminal offence, as the final (desired) result of a person's act, should not be a mandatory feature of collaboration. The first counterargument is purely pragmatic: proving such an aim in practice is challenging due to its subjective and internal (hidden from the human eye) nature.

Second, outwardly identical acts of behaviour may be committed for different purposes. As a rule, in such cases, only the degree, but not the nature of the harmfulness of the act differs. A collaborator might not consider harming Ukraine's interests as a desirable result but might collaborate for personal reasons such as career advancement or material gain. This in itself should not exclude the possibility of criminal prosecution, while a thorough analysis of the collaborator's desired goals and motives should still be conducted to individualise the punishment.

Thirdly, it is equally important that the aim is not recognised as an imperative feature of high treason, in relation to which collaborationist activity can be considered a special type of treason. Recognising the aim of causing damage to the national security of Ukraine as a sign of collaborationist activity may lead to illogical conclusions: the presence of such an aim, which should generally aggravate liability, will indicate the application of a privileged norm under Article 111-1 of the CC of Ukraine, while its absence will indicate the application of the general norm on high treason (Article 111 of the CC) with a more severe sanction.

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69 See, for example: Honcharenko (n 13) 139; Khavroniuk (n 16).

70 Musyka (n 15) 113.

71 V Lomaco, 'The Subjective Side of a Criminal Offence' in V Tatsii, V Tiutiuhin and V Borysov (eds), *Criminal Law of Ukraine: General Part* (Pravo 2020) 177, 201.

Finally, the content of the purpose as a proposed feature of collaborationist activity is sufficiently covered by other features of corpus delicti. Specifically, the object of the criminal offence (the good encroached upon by the offender) and guilt - direct intent – address this sufficiently. Together, these features make the introduction of an additional feature of aim unnecessary.

The article on collaborationism is located within the section of the Special Part entitled "Crimes against the foundations of national security of Ukraine". Consequently, the act of collaboration must objectively cause damage to national security or at least create a real threat of such damage. At the same time, given the intentional form of guilt, the offender must be aware of this and understand this fact.

7 CONCLUSIONS

Collaborationism is one of the most controversial historical phenomena, the seeds of which are beginning to take root in the legal sphere. Unlike historians, lawyers deal with strictly regulated procedures and are limited by the requirements of legal certainty, which leads to the search for clear criteria that would define a particular legal concept. The Russian occupation of certain territories of Ukraine and the immediate appearance in the Criminal Code of Ukraine of a separate article on collaborationist activities, along with the article on high treason, have created fruitful ground for new legal research that was previously hidden behind the general screen of the concept of high treason.

The research conducted in this article demonstrates that the *de lege lata* provisions of the Criminal Code of Ukraine on collaborationist activities are a crude attempt by the legislator to shade the phenomenon of collaboration from high treason. Although the idea of a separate article deserves a positive assessment, its implementation is evidently far from perfect and is subject to serious criticism.

De lege lata collaborationist activity under Article 111-1 of the Criminal Code of Ukraine is a casuistic mixture of individual forms of collaboration with the occupier, which differ significantly in terms of features. All forms are united by the fact that they involve intentional behaviour that causes harm or creates a real threat of harm to the national security of Ukraine. Most of the acts described in the law involve some kind of cooperation (joint activity) with an enemy actor to a greater or lesser extent, but some acts can be considered collaboration outside of cooperation (unilateral acts). The parties to cooperation also differ depending on the forms of behaviour. The addressee of cooperation is usually the occupying power and its representatives, but the law also refers to the aggressor state regardless of occupation. As a rule, the subject of collaboration is a citizen of Ukraine, while in the case of certain acts, it is any person (regardless of citizenship) or even only a foreigner or stateless person (in particular, Part 6 of Article 111-1 of the Criminal Code). The essential feature of collaborationism, i.e., cooperation under conditions of occupation of the territory (in the occupied territory), is characteristic of most collaborationist activities, but it is

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ignored when describing certain types. For some acts, the voluntary nature of the commission is stipulated, while for others, it is not mentioned.

De lege ferenda collaborationist activity should consist of intentional cooperation (joint activity, interaction) of Ukrainian citizens with the occupier, as provided for by criminal law, committed under conditions of occupation of the territory (in the occupied territory), which harms the national security of the state whose territory is occupied.

Collaborationism acquires an independent and different meaning in criminal law from other crimes against the state if it is considered cooperation in the extreme conditions inherent in the occupied territories. Under this approach, the occupation conditions in which collaboration takes place determine the partially privileged position of a collaborator compared to an ordinary traitor.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЗДУМИ ПРО ЮРИДИЧНІ ОЗНАКИ КОЛАБОРАЦІОНІСТСЬКОЇ ДІЯЛЬНОСТІ: ТЕОРІЯ І ПРАКТИКА У КОНТЕКСТІ РОСІЙСЬКОЇ ОКУПАЦІЇ УКРАЇНСЬКОЇ ТЕРИТОРІЇ

Микола Рубащенко* та Надія Шульженко

АНОТАЦІЯ

Вступ. *У цій статті співавтори роблять внесок у розвиток кримінальної політики України щодо юридичної оцінки колаборації з окупантом. Її реалізація пов'язана з окупацією частин території України Російською Федерацією, що триває і досі.*

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Дослідження певною мірою продовжує науковий дискурс, який розпочався після доповнення Кримінального кодексу України статтею 111-1. Ця робота спрямована на встановлення родових юридичних ознак колабораціоністської діяльності, відповідальність за яку була передбачена в КК України у березні 2022 року. Шляхом критичного аналізу типових ознак колаборації з окупантом, відображених на цей час у теорії та практиці, формулюється узагальнене бачення колабораціоністської діяльності як феномену, відмінного від державної зради та інших суміжних концептів.

Методи. *В основі методології знаходиться поєднання загальнонаукових методів пізнання (індукція, дедукція, аналіз, синтез, абстрагування), історичних, лінгвістичних та системно-структурних методів дослідження. Дослідницька стратегія сфокусована на визначенні ознак колаборації з окупантом шляхом добору найбільш типових й істотних характеристик, які відображають сутність колабораціонізму та відмежовують його від суміжних явищ.*

Структурно стаття складається з двох частин. У першій автори демонструють, як у науковій літературі прийнято визначати колаборацію, і виділяють п'ять найбільш згадуваних ознак. Друга частина є аналізом кожної із зазначених ознак з метою встановлення їх придатності для характеристики колаборації та для відмежування від суміжних понять. При цьому ознаки, встановлені в чинному кримінальному законі України (lex lata), розглядаються також із позиції ідеальної моделі (lex ferenda).

Результати та висновки. *Феномен колаборації з окупантом уже давно є предметом досліджень істориків. Юридична наука натомість традиційно розглядає це явище в межах концепту державної зради. Проте виокремлення колабораціонізму як самостійного злочину в кримінальному законі поряд із державною зрадою вимагає його концептуалізації. Це дослідження демонструє неможливість автоматичного перенесення масиву результативних історичних розвідок в юридичну площину. Кримінальне право вимагає чіткості, однозначності та логічності. Водночас de lege lata кримінальне законодавство України передбачає казуїстичний та еклектичний набір ознак колабораціоністської діяльності. Тож у цій статті проаналізовано кожну з ознак, якими прийнято характеризувати колабораціонізм, та здійснено їх добір з метою вдосконалення нормативного матеріалу та формулювання зрозумілого концепту, що заслуговує на самостійне існування поряд із концептом державної зради.*

Ключові слова: *колабораціонізм, колабораціоністська діяльність, державна зрада, окупація, кримінальне право.*

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Research Article

PREJUDICE AS A MEANS OF PROOF IN CRIMINAL PROCEEDINGS IN UKRAINE: A COMPARATIVE ANALYSIS WITH CONTINENTAL AND COMMON LAW SYSTEMS

Nazar Bobechko* and Volodymyr Fihurskyy

ABSTRACT

Background: *During the preparation of the CPC of Ukraine in 2012, the issue of legal regulation regarding the use of prejudice in the process of criminal procedure proof received little scholarly attention. Although much time has passed since then, this subject of discussion remains largely unexplored in textbooks and manuals on criminal procedure published after the adoption of the codified act. Even within the few scholarly investigations dedicated to prejudice in criminal proceedings, a communis opinion doctorum on some issues related to the means of proof has yet to be achieved.*

This article aims to clarify the concept, formulate its characteristics, uncover the significance of prejudice in Ukraine's criminal procedure, and distinguish peculiarities of legal regulation and the use of this means of proof in criminal procedure law of countries with continental and general systems of law.

Methods: *The methodological basis of the article is a dialectical approach to the scientific understanding of social phenomena. In writing this article, general scientific and specialised legal methods of cognition were also used, including analysis, generalisation, structural and functional methods, hermeneutic methods, doctrinal or specialised legal methods, and comparative legal methods.*

Results and conclusions: *It has been found that prejudicial significance is attributed to legal acts that summarise the outcome of criminal procedural activities in specific criminal proceedings. These legal acts include final judgments and rulings of the court and unrevoked decisions of the interrogator, investigator, detective, and prosecutor. Prejudice encompasses not only relevant facts and circumstances but also legal conclusions regarding them. The principle*

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of free evaluation of proof allows the parties to come to different legal conclusions than those made in the previous criminal proceedings, with proper argumentation of their legal position. The use of prejudice in criminal proceedings of civil law jurisdictions is based on the doctrine of res judicata, while in common law systems, it is based on the doctrine of collateral estoppel. Examples from the criminal procedure of Poland, Greece, Italy, and the USA illustrate the specific features of using this means of proof.

1 INTRODUCTION

One means of establishing circumstances significant for criminal proceedings and subject to proof without conducting investigative activities is prejudice (from Latin *praejudicium* – to make decisions in advance; a decision made in advance; circumstances that allow discussing consequences).

In legal theory, prejudice is interpreted as the exclusion of challenging the legal credibility of a fact that a court or other jurisdictional body has once proved.[1] The fact referred to in this definition is called prejudicial. This is an event established using the appropriate standard of proof within the form of legal proceedings, which has been enshrined in a procedural decision that has entered into force and, therefore, does not require proof in another case involving the same persons, provided that the truth of its establishment is not reasonably doubted.

Prejudice is connected with the principle of the binding nature of court decisions, which states that a judgment or ruling of the court that has acquired legal force in the manner determined by criminal procedural law is mandatory and subject to unconditional enforcement throughout Ukraine (Part 2 of Article 21 of the Criminal Procedure Code of Ukraine). Article 533 of the Criminal Procedure Code of Ukraine specifies that a judgment or ruling of the court that has acquired legal force is binding for individuals participating in criminal proceedings, as well as for all natural and legal persons, state authorities, local self-government bodies, their officials, and must be enforced throughout Ukraine.[2] This principle is based on the presumption of the truthfulness of a court decision that has acquired legal force, forming the foundation of the concept of prejudice.

Moreover, according to Part 2 of Article 13 of the Law of Ukraine "On Judicial System and Status of Judges" dated 2 June 2016, the mandatory consideration (prejudicial nature) of court decisions by other courts is determined by law.[3] In Ukrainian legal doctrine, the

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1 OF Skakun, *Theory of Law and State* (Alerta 2012) 417; SD Ghusarjeva and OD Tykhomyrova (eds), *Theory of Law and State* (Education of Ukraine 2017) 215.

2 Code of Ukraine no 4651-VI of 13 April 2012 'Criminal Procedure Code of Ukraine' (amended 19 May 2024) <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 20 May 2024.

3 Law of Ukraine no 1402-VIII of 2 June 2016 'On the Judiciary and the Status of Judges' (amended 26 March 2024) <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 20 May 2024.

prejudicial nature of court decisions means that all courts hearing a case must accept as facts, without reviewing evidence, the findings previously established by a court decision in another case involving the same parties, provided that the decision has acquired legal force.[4]

Therefore, the limits of the prejudicial nature of a court decision are determined by its objective (the facts and circumstances established in the court decision) and subjective (the persons, rights, freedoms, or interests affected by the court decision) boundaries of its legal force.

In Ukrainian criminal procedural science, prejudiciality is commonly regarded as one of the attributes of a court decision.[5] The prejudicial nature of court decisions does not prevent their review in a cassation procedure based on newly discovered or exceptional circumstances, as a result of which such decisions may be annulled or modified. These mechanisms provide the opportunity to challenge prejudicial facts and circumstances. Moreover, according to Part 3, Clause 3 of Article 459 of the Criminal Procedure Code of Ukraine, the cancellation of a court decision that served as the basis for a judgment or ruling to be reviewed is considered a newly discovered circumstance.[6] This ensures an optimal balance between the binding nature of a court decision that has acquired legal force and the establishment of objective truth as the purpose of evidence. This means that prejudice in criminal proceedings is not absolute.

From the perspective of the European Court of Human Rights (ECtHR), the Criminal Procedure Code of Ukraine (CPCU) does not prohibit the use of presumptions of facts and legal presumptions in criminal cases. Still, it requires states "to confine them within reasonable limits which consider the importance of what is at stake and maintain the rights of the defence. The Court accepts that in complex criminal proceedings involving several persons who cannot be tried together, references by the trial court to the participation of third parties, who may later be tried separately, may be indispensable for the assessment of the guilt of those on trial. Criminal courts are obliged to establish the facts of the case relevant for the assessment of the legal responsibility of the accused as accurately and precisely as possible, and they cannot present established facts as mere allegations or suspicions. This also applies to facts related to the involvement of third parties, though if such facts have to be introduced, the court should avoid giving more information than necessary for the assessment of the legal responsibility of those accused in the trial before it. Even if the law expressly states that no inferences about the guilt of a person can be drawn from criminal proceedings in which he or she has not participated, judicial decisions must

4 VT Nor and others (eds), *The Great Ukrainian Legal Encyclopedia*, vol 19: *Criminal Procedure, Judiciary, Public Prosecution and Advocacy* (Pravo 2020) 683.

5 OI Berezhnyi, *Prejudicial Effect of Court Decisions in Criminal Cases* (Publ Vapnyarchuk 2004) 12; DV Shilin, 'Prejudices in Criminal Proceedings' (PhD (Law) thesis abstract, National University "Odesa Law Academy" 2010) 11, 14; II Kohutych, *Court Decisions in Criminal Proceedings of Ukraine* (Textbooks and Manuals 2013) 45; KhR Taylieva, 'Judicial Decisions in Criminal Proceedings' (PhD (Law) thesis, National Academy of Internal Affairs 2016) 164-5.

6 Code of Ukraine no 4651-VI (n 2).

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be worded so as to avoid any potential pre-judgment about the third party's guilt in order not to jeopardise the fair examination of the charges in the separate proceedings."[7]

While using prejudice in criminal proceedings, there is a partial manifestation of the principle of prohibition of double jeopardy (*ne bis in idem*). According to Part 2 of Article 19 of the Criminal Procedure Code of Ukraine, criminal proceedings shall be immediately terminated if it becomes known that there is a final court judgment on the same charge.[8]

Ne bis in idem is inseparable from the principle of *res judicata.* It ensures that a convicted person, after serving their punishment and "repaying their debt" to society, can reintegrate without fearing further prosecution.[9]

Prejudice facilitates and expedites criminal procedural activities, providing the opportunity to avoid significant costs, efforts, and time associated with re-proving facts and circumstances, preventing collisions in the results of the activities of state authorities and officials conducting criminal proceedings, and ensuring legal certainty.

On the other hand, prejudice also imposes certain restrictions. It limits the application of the principle of free evaluation of evidence by leading investigators, prosecutors, investigating judges, and courts to accept the facts and circumstances from previous criminal proceedings as established reality. Nonetheless, this does not exempt the aforementioned subjects of evidence from the necessity of assessing prejudicial facts and circumstances in conjunction with the evidence available in the materials of the criminal proceedings. Such an assessment is conducted from the perspective of their relevance, admissibility, reliability, and sufficiency.

Assessing relevance means determining the existence of a prejudicial connection between the facts and circumstances established in one criminal proceeding and those needed in another. Admissibility involves determining whether the rules for obtaining evidence are followed. Assessing reliability entails identifying and analysing the evidence corroborating prejudicial facts and circumstances mentioned in the final procedural decision and ascertaining their correspondence to the facts and circumstances established in the criminal proceedings where prejudice is being used. Lastly, assessing the sufficiency of prejudicial facts and circumstances involves determining whether these elements of the subject of evidence are established with exhaustive completeness.

As a result of such an assessment, one may be convinced of the inadequacy, inadmissibility, or unreliability of prejudicial facts and circumstances. In such cases, prejudice will not be applied, and the relevant facts and circumstances must be established afresh in the new

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7 *Navalnyy and Ofitserov v Russia* App nos 46632/13, 28671/14 (ECtHR, 23 February 2016) paras 98, 99 <https://hudoc.echr.coe.int/fre?i=001-161060> accessed 20 May 2024.

8 Code of Ukraine no 4651-VI (n 2).

9 Libor Klimek, 'Ne Bis in Idem as a Modern Guarantee in Criminal Proceedings in Europe' (2022) 5(4) Access to Justice in Eastern Europe 103, doi:10.33327/AJEE-18-5.4-a000439.

criminal proceeding. Therefore, the use of prejudicial facts and circumstances must be justified in procedural decisions.

One can unlikely agree that "legal prejudice is not directly related to the cognitive process".[10] Prejudice encompasses not only relevant facts and circumstances but also legal conclusions drawn from them. The principle of free assessment of evidence allows parties to reach different legal conclusions than those made in prior criminal proceedings, with proper argumentation of their legal position.

2 THE CONCEPT, SIGNS OF PREJUDICE AND PECULIARITIES O F ITS LEGAL REGULATION AND USE IN CRIMINAL PROCEEDINGS OF UKRAINE

In the Criminal Procedure Code of Ukraine, no article is dedicated to the comprehensive regulation of prejudice in criminal proceedings. Such a legal regulation of this means of criminal procedural evidence has resulted in an interpretation that is too narrow by some researchers in the field of its use in criminal proceedings. In particular, according to N.M. Senchenko, "in national legislation, prejudicial facts are determined by circumstances established by a court decision that has acquired legal force, which, as a result, do not require proof in the consideration of another case involving the same persons or a person concerning whom these circumstances have been established, or by a decision of another authority empowered by law to establish legal facts".[11] Other authors, when characterising prejudicial facts, also assert that prejudicial facts are exclusively enshrined in court decisions.[12]

However, the use of prejudice in criminal proceedings is not limited solely to court decisions. According to the provisions of the Criminal Procedure Code of Ukraine, prejudice is manifested in various ways in criminal procedural evidence. First, there is interbranch and international prejudice, where decisions by national courts or international judicial institutions that establish violations of human rights and fundamental freedoms guaranteed by the Constitution of Ukraine and international treaties ratified by the Verkhovna Rada of Ukraine influence the admissibility of evidence as per Article 90 of the Criminal Procedure Code of Ukraine.

10 OV Pavlichenko, 'Legal Presumption, Legal Prejudice and Legal Fiction: Correlation of Concepts' (2010) 50 The State and Law, Legal and Political Sciences 96; II Kohutych, *Theory and Practice of Using Fictions in the Investigation of Crimes* (Textbooks and manuals 2014) 64.

11 NM Senchenko, 'On the Essence of Prejudicial Facts in the Process of Proving in Criminal Proceedings' (Modern Jurisprudence of the European Union: The Interaction of Law, Rulemaking and Practice: International Scientific Conference, Lublin, 17 April 2018) 153.

12 G Ustinova-Boychenko, T Chernysh and Y Chabanenko, 'The Place of Prejudicial Facts in the Process of Criminal Procedural Evidence' (2019) 4 Law Herald 181-2, DOI:10.32837/yuv.v0i4.988.

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Second, branch prejudice is evident in the binding nature of final judgment rulings or rulings on the same charge, including court rulings on the closure of criminal proceedings as detailed in paragraph 6 of Part 1 of Article 284 of the Criminal Procedure Code of Ukraine. Additionally, branch prejudice applies to the uncancelled decision of an investigator, interrogator, or prosecutor to close criminal proceedings on the grounds provided for in paragraphs 1, 2, 4, 9 of Part 1 of Article 284 of the Criminal Procedure Code of Ukraine, provided the requirements for jurisdiction are observed, as detailed in paragraph 91 of Part 1 of Article 284 of the Criminal Procedure Code of Ukraine.

Furthermore, international prejudice is also evident in the recognition and enforcement of judgements from foreign state courts under Articles 602-604 of the Criminal Procedure Code of Ukraine, as well as the execution of decisions from the International Criminal Court according to Article 636 of the Criminal Procedure Code of Ukraine.[13]

In essence, the discussion revolves around the grounds for exemption from proof in criminal proceedings. The following conclusions can be drawn from the provisions of the criminal procedural law.

First, judicial decisions that have acquired legal force in civil, commercial, and administrative proceedings hold prejudicial significance in criminal proceedings. This includes decisions from international judicial institutions referred to in Article 90 of the Criminal Procedure Code of Ukraine, including the European Court of Human Rights, the United Nations Human Rights Committee, and the International Criminal Court.

Second, prejudicial significance is given to legal acts summarising the results of criminal procedural activities in a specific criminal proceeding. Accordingly, the scope of prejudice does not extend to intermediate procedural decisions. For instance, Article 198 of the Criminal Procedure Code of Ukraine provides a normative assessment of the significance of conclusions contained in a ruling on the application of preventive measures – conclusions expressed in a ruling by an investigating judge or court following consideration of a motion for the application of a preventive measure. Conclusions regarding any circumstances relating to the substance of suspicion or accusation do not have prejudicial significance for the court during trial or for the investigator or prosecutor during this or other criminal proceedings.[14]

Third, the aforementioned legal acts include not only final judgments and rulings of the court that have acquired legal force but also uncancelled decisions of an investigator, interrogator, detective, or prosecutor. The Code of Criminal Procedure (Part 1 of Article 36, Part 5 of Article 40, Part 4 of Article 40[1]) stipulates the mandatory nature of procedural decisions of pre-trial investigation bodies and prosecutors.[15]

13 Code of Ukraine no 4651-VI (n 2).
14 ibid.
15 ibid.

Thus, it is inadequate to limit oneself solely to the prejudicial nature of court decisions in criminal proceedings; it is more accurate to speak about the prejudicial nature of procedural decisions that conclude criminal proceedings. It is also worth noting that the Ukrainian legislature attributes the quality of prejudiciality even to judgments rendered as a result of expedited court proceedings, for the consequences of simplified proceedings regarding criminal offences, as well as based on agreements on the admission of guilt or reconciliation. This reflects the principle of *res judicata*.

Regarding such a legislative approach, legal literature notes that "when proof in one case is presented under the rules of Chapter 35 of the Criminal Procedure Code of Ukraine, priority is given to proof presented in the ordinary course of judicial proceedings. Thus, prejudiciality has a reverse significance in cases where evidence in the first case is presented in a special manner of court proceedings, meaning that a later court decision becomes prejudicial to an earlier one".[16] It seems that the example is not about choosing between the general or special procedure of criminal procedural proof using prejudice but rather about its non-use altogether. Therefore, the identification of reverse (reversive) prejudice raises objections.

In this regard, V.V. Vapnyarchuk is correct in stating that "in such cases, there should be no problems, as the current Criminal Procedure Code contains sufficient guarantees to ensure that a court decision made in such a criminal procedural manner does not raise doubts about its legality and validity."[17]

Fourth, the scope of prejudice extends to a) the fact of violations of human rights and fundamental freedoms guaranteed by the Constitution of Ukraine and international treaties ratified by the Verkhovna Rada of Ukraine, which is relevant to determining the admissibility of evidence; b) the same accusation for which a judgment was rendered, a ruling was issued, or a decision to close the criminal proceedings was made; c) the same act for which the criminal proceedings were closed by an investigator, interrogator, or prosecutor during the pre-trial investigation stage.

For instance, in overturning the ruling of the appellate court and appointing a new judicial review in the appellate court, the panel of judges of the First Judicial Chamber of the Cassation Court of Ukraine noted the following:

"In justifying the decision on the necessity to close the criminal proceedings regarding PERSON_6 due to the absence of elements of a criminal offence under Article 172, the appellate court stated that PERSON_8 and PERSON_9 were not employed by the individual entrepreneur PERSON_6 under labour relations but worked according to civil law contracts. In support of this conclusion, the appellate court referred to the decision of the Lviv District Administrative Court of 12 November 2014, which recognised the

16 Marija Pavlova, 'Classification of Types of Prejudice as a Tool for Determining its Essence' (2016) 7 Entrepreneurship, Economy and Law 135.

17 VV Vapnyarchuk, *Theory and Practice of Criminal Procedural Evidence* (Yurait 2017) 324.

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unlawful actions of the chief state inspector of the Territorial State Labor Inspectorate in the Lviv region during an unscheduled inspection regarding compliance with labour legislation by the individual entrepreneur PERSON_6, following which an inspection report No. 13170140749 was drawn up on 9 July 2014. By the same decision, the order to eliminate the identified violations of labour legislation (regarding the obligation under Article 24 of the Labor Code of Ukraine to employ workers by concluding written employment contracts with subsequent registration with the state employment service, ensuring the recording of working time, and deducting unified social contributions when using hired labour) was revoked. Moreover, the appellate court, referring to Articles 86 and 90 of the Criminal Procedure Code, stated that the decision of the Lviv District Administrative Court of 12 November 2014 has prejudicial significance in deciding on the admissibility of evidence to confirm the absence of violations of labour legislation by the individual entrepreneur PERSON_6. Therefore, the first-instance court unjustifiably did not recognise the inspection report No. 13170140749 of 9 July 2014 as inadmissible evidence, which indicates the incompleteness of the judicial review."[18]

Fifth, the use of court decisions in administrative, commercial, and civil cases as evidence in criminal procedural proceedings is limited.

This is also emphasised in judicial practice. Analysing the provision of Article 90 of the Criminal Procedure Code of Ukraine, the panel of judges of the Third Judicial Chamber of the Cassation Court of Ukraine noted that "a court decision has prejudicial significance for the court considering criminal proceedings only in the cases defined by this article. The current Criminal Procedure Code does not contain other provisions under which decisions of courts of other jurisdictions could be recognised as prejudicial in criminal proceedings, that is, those that exempt the court from the necessity of establishing facts subject to proof by examining and evaluating all the evidence in the criminal proceedings. ...The task of criminal justice is different from the tasks solved by national courts in civil, commercial, or administrative jurisdictions. In conducting criminal justice, courts do not resolve disputes but consider the accusation against the person and, with the help of evidence, establish whether the particular person is guilty of it. ...All evidence of guilt or innocence of a person is subject to examination in an adversarial criminal process. ...The appellate court, by granting prejudicial significance to the aforementioned decisions of other jurisdictions, did not consider that different participants, different subjects of consideration, means of evidence, and the scope of evidence were involved in the aforementioned cases and in this criminal proceeding. ...The appellate court should not have limited itself to referring to the mentioned decisions of courts of other jurisdictions but should have evaluated them taking into account all the circumstances of the criminal proceedings and the entire body of evidence provided by the parties."[19]

18 Case no 446/1797/14-к (Supreme Court of Ukraine, 19 June 2018) <https://reyestr.court.gov.ua/Review/74927276> accessed 20 May 2024.

19 Case no 390/934/13-к (Supreme Court of Ukraine, 4 August 2021) <https://reyestr.court.gov.ua/Review/98882010> accessed 20 May 2024.

The presented approach has been critically evaluated in procedural literature:

"The mentioned legal position is quite controversial because it effectively nullifies the prejudicial nature of decisions of national courts made in civil, commercial, or administrative proceedings ... Otherwise, within the framework of criminal proceedings, there will be a reassessment of established circumstances by the courts, thereby nullifying the legal significance of the court decision and creating opportunities for the courts to adopt diametrically opposite judicial acts on the same issues, which not only negatively affects the quality of justice but also contradicts the essence of the rule of law."[20]

It is envisaged that in the analysed legal position, the Supreme Court correctly interpreted the content of Article 90 of the Criminal Procedure Code of Ukraine. In each form of legal proceedings, due to its tasks, subject matter, methods and the mechanism of legal regulation, special rules of evidence apply that are characteristic only for it. A vivid example is criminal proceedings, in which significantly higher standards of cognitive activity and its results are established compared to administrative and civil proceedings. In criminal proceedings, qualitatively different procedural guarantees operate, and the implementation of the principles of proceedings is distinguished by its specificity. In addition, the subjects of evidence, as well as the opportunities for participants in procedural relations to obtain and verify evidence, differ. The rules regarding the burden of proof also differ. Therefore, facts and circumstances predominantly established during criminal procedural activity can be accepted without prior verification.

In criminal procedural doctrine, the opinion has been expressed that "procedural decisions containing prejudicial facts can be used in evidence as 'other documents".[21] However, M. Khavronyuk is right in stating that "a judicial decision having prejudicial significance is not evidence in itself."[22] Indeed, the approach mentioned above does not correspond to the provisions of the Criminal Procedure Code of Ukraine, as it equates to a legal decision in which legally significant facts are established based on evidence, with the evidence itself.

Hence, prejudice in criminal proceedings is characterised by the following provisions:

1) facts and circumstances established in the framework of another criminal proceeding, provided they are relevant to both processes, regarding the same accusation or act, are not subject to proof in the criminal proceedings;

20 D Melnikov, 'Prejudice in Criminal Proceedings: The Position of the Supreme Court' <https://uz.ligazakon.ua/ua/magazine_article/EA015333> accessed 20 May 2024.

21 Shilin (n) 10-1.

22 MI Khavroniuk, 'Expert Opinion on the Prejudicial Effect of Decisions' (*Council of Public NABU*, 2023) <https://rgk-nabu.org/uk/diyalnist-rhk/korysni-dokumenty/ekspertniy-visnovok-na-temu-znachennya-rishen-sudiv-nekriminalnoi-yurisdiktsii-dlya-kriminalnikh-provadzhen> accessed 20 May 2024.

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2) facts and circumstances established in civil, criminal, and economic cases, as well as by the European Court of Human Rights, the UN Human Rights Committee, and the International Criminal Court, are not subject to proof in criminal proceedings, provided they are relevant to both processes regarding the admissibility of evidence;
3) therefore, re-examination, verification, and reassessment of these facts and circumstances are unnecessary;
4) legal conclusions regarding such facts and circumstances are outlined in the final procedural decisions of the investigator, detective, prosecutor, or court;
5) the prejudicial nature of the procedural decision remains until its cancellation or modification regarding the clarification of the relevant facts and circumstances;
6) the legal act establishing prejudicial facts and circumstances is binding for all subjects of criminal procedural proof.

Therefore, ***prejudice*** is a means of procedural proof that exempts from the necessity to prove facts and circumstances in criminal proceedings, which have been established in final procedural decisions in another criminal proceeding regarding the same accusation or act, in court decisions in civil, commercial, and administrative cases, as well as in decisions of the European Court of Human Rights, the UN Human Rights Committee, and the International Criminal Court regarding the admissibility of evidence, provided these facts and circumstances are relevant to both processes.

For further scientific reflections on the use of prejudice in criminal proceedings, it is important to consider the impact of standards of proof in various branches of justice on the prejudicial effect of court decisions.

Enshrined in procedural law and formulated in the legal positions of the Supreme Court, the rules that ensure the necessary level of conviction of the law enforcement officer when making procedural decisions and the standards of proof affect compliance with all established requirements (conditions) for cognitive activities including the use of presumptions. This impact depends on the type of prejudice, the nature of the issues to which the relevant standards of proof are applied, and the form of legal proceedings.

Under sectoral prejudice, a court decision must be based on a fact established by a standard of proof not lower than that required to decide another case using those facts. Thus, if a fact in a civil case was established in accordance with the “balance of probabilities” standard, and a higher standard of proof is required to decide another civil case (for example, "clear and convincing evidence"), the court is not entitled to apply prejudgment. In this case, the parties must provide additional evidence that meets the required (higher) standard of proof.

Instead, under inter-branch prejudice, the facts established under the rules of a higher standard of proof may be used as the basis for a court decision but based on a lower standard of proof. In particular, for a court considering a case on the civil legal consequences of the actions of a convicted or acquitted person, the prejudicial effect of the verdict extends to the question of whether such actions actually took place and

whether that person committed them. At the same time, different standards of proof generally apply in criminal and civil proceedings.

In criminal proceedings, the standard of proof is "beyond reasonable doubt", while in civil proceedings, the standard is the "balance of probabilities". This disparity allows for the possibility that, after an acquittal in criminal proceedings due to the absence of a criminal offence, a civil court might still satisfy the claim in civil proceedings. This occurs because the court operates under the lower "balance of probabilities" standard, which is sufficient to decide a civil case despite being less stringent than the criminal standard of "beyond reasonable doubt".

Criminal proceedings provide the most thorough knowledge of the circumstances to be proved. The standards of proof in this area are higher than in civil, commercial and administrative proceedings. In general, establishing facts through criminal procedural standards in civil, commercial, and administrative cases is excessive, as the ECtHR has pointed out in its judgments.[23] At the same time, the use of prejudicial facts established through a higher standard of proof to make a decision significantly increases the level of conviction of the law enforcement officer in their integrity. It is no coincidence that the Ukrainian civil procedure, commercial procedure, and administrative procedure laws state that a court in civil, commercial, and administrative cases is prejudiced by a decision in criminal proceedings - a court verdict in criminal proceedings, a decision to close criminal proceedings and release a person from criminal liability.

The CPC of Ukraine does not contain a similar provision. Prejudicial facts established under the rules of some common standards of proof for the forms of legal proceedings may be the factual basis for making procedural decisions of different functional significance. While the aforementioned "balance of probabilities" standard of proof in civil proceedings is used to make final decisions, in criminal proceedings, its application is limited to intermediate procedural decisions (e.g., temporary restriction of a special right, removal from office).

The subject matter of this study also includes consideration of the difference between the precedential nature of court decisions and the binding nature of the Supreme Court's legal opinions.

While the Supreme Court's legal opinions relate to an inexhaustible number of proceedings, as they are designed for a typical situation and repeated use, precedence is limited to a few cases with common objective and subjective factors. Thus, if the legal opinions of the Supreme Court are to be taken into account in proceedings with similar circumstances, then precedence establishes the obligation to take into account specific facts and circumstances previously established in a procedural decision in the investigation or consideration of another case. In

23 *JK and Others v Sweden* App no 59166/12 (ECtHR, 23 August 2016) para 53 <https://hudoc.echr.coe.int/fre?i=001-165442> accessed 20 May 2024; *Balsamo v San Marino* App nos 20319/17, 21414/17 (ECtHR, 8 October 2019) paras 58-66 <https://hudoc.echr.coe.int/?i=001-196421> accessed 20 May 2024.

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addition, while the Supreme Court's opinions apply to an unlimited number of subjects, precedence applies only to law enforcement officers conducting proceedings related to the first case and to those participants who are the same for both cases.

The binding nature of the Supreme Court's legal opinions ensures the unity of judicial practice, while prejudiciality ensures the unity of fact-finding. The Supreme Court's opinions are based on law interpretation, law enforcement and regulatory precedents (if they contain judicial rules and examples of their application to the circumstances of a particular criminal proceeding). Precedence, on the other hand, is based on the reliability of facts.

Lower-level courts may not use the Supreme Court's opinion without properly motivating such a decision. In case of doubt about the reliability of the prejudicial facts, they may verify them or establish them themselves. When conclusions come from the Supreme Court, the prejudicial effect refers to decisions of the body that first established a particular fact or circumstance that can be used in another proceeding.

The conclusions are set out in a resolution of the Supreme Court. While verdicts and court rulings that have entered into force, unrepealed decisions of the investigator, detective, and prosecutor to close criminal proceedings, as well as decisions of the ECHR, the UN Human Rights Committee, and the International Criminal Court, acquire precedential value.

The Supreme Court's opinions are not permanent and may be subject to correction. At the same time, precedence is characterised by stability, as it is a manifestation of the entry into force of a court decision and, accordingly, res judicata. It depends only on legal regulation, and therefore, law enforcement officers must strictly adhere to the rules of precedence.

The Supreme Court's opinions relate to various issues of law enforcement, both substantive and procedural law, while prejudice is only a matter of evidence.

3 REGULATION OF THE USE OF PREJUDICE IN CRIMINAL PROCEDURE OF OTHER EUROPEAN STATES

Modern criminal procedure research will be considered incomplete without the use of the comparative legal method. In the context of this research, the purpose of the comparison is to identify the common, similar, distinctive and unique features of the criminal procedure law of Ukraine and foreign countries with regard to the institute of prejudgment and the practice of its use.

The study of the use of prejudice in criminal procedure in the continental legal system from the perspective of legal regulation, the practice of use and doctrinal approaches to understanding this category made it possible to distinguish two polar national approaches - a broad one, as exemplified by the criminal procedure law of the Republic of Poland, and a narrow one, embodied in particular in the criminal procedure of the Republic of Italy. It

is also worthwhile to dwell on the regulation of prejudice in the Code of Criminal Procedure of the Republic of Greece, which enshrines the safeguards for its use.

According to Part 1 of Article 8 of the Criminal Procedure Code of the Republic of Poland, the criminal court independently decides factual and legal issues and is not bound by the decision of another court or authority.[24]

In Polish procedural doctrine, the provisions cited are a manifestation of the principle of judicial independence *(zasada samodzielności jurysdykcyjnej sądu)*.[25] It interacts closely with other criminal procedure principles of the Republic of Poland, particularly with the establishment of objective truth, ensuring the right to defence, the direct examination of evidence, and their free evaluation.

Furthermore, there is a connection with the principle of judicial independence.[26] Judicial independence entails the court's freedom to decide matters within its jurisdiction. This principle exclusively pertains to the issuance of judicial decisions.[27]

The court's independence in making decisions pertains to factual and legal issues. The court's independence in deciding legal issues lies in its autonomy in the criminal-legal qualification of the actions charged by the accusation. The jurisdictional independence of the court in deciding legal issues also manifests in its independent interpretation of both substantive and procedural law. When it comes to the jurisdictional independence of the court in establishing factual circumstances, this independence, although it authorises the court to draw its own conclusions, does not imply that the decision of another court in the case regarding the same act is invalid. An alternative assessment by the criminal court will require a corresponding justification, i.e., presenting arguments for adopting a contradictory judicial decision. Otherwise, there may be a situation where two completely different versions of the same event are present in legal proceedings based on extremely different assessments of the same evidence. Such a situation is undesirable, as there should be only one version of the same event in legal circulation, regardless of whether the case was considered in one proceeding or whether issues concerning certain defendants were separated for separate judicial consideration. However, this does not mean that the previously made decision is preliminary, but this circumstance requires the court issuing the decision later in time to thoroughly consider the arguments that are the basis for the already final decision.[28]

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24 Criminal Procedure Code of the Republic of Poland of 6 June 1996 'Kodeks Postępowania Karnego' <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970890555> accessed 20 May 2024.

25 Ewa Pieniążek, 'Prejudycjalność Orzeczeń w Procesie Karnym' (2005) 12 Prokuratura i Prawo 102; Barbara Augustyniak i in (red), *Kodeks postępowania karnego: Komentarz*, t 1 (6 wyd, Wolters Kluwer 2022) 74.

26 Renata Badowiec, *Zasada samodzielności jurysdykcyjnej sądu karnego i odstępstwa od niej* (Dom Organizatora 2021) 28.

27 ibid 30, 32.

28 ibid 34-6.

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The independent examination and resolution of all issues arising during judicial proceedings are intended to ensure a comprehensive clarification of the circumstances of a criminal case and its resolution based on evidence examined exclusively during these proceedings. Therefore, the basis for all judicial decisions in criminal proceedings is only those conclusions drawn in this process. In criminal proceedings, the court has the right to independently resolve issues in areas of law other than those related to the relevant legal relationships. The principle of judicial independence allows the court to apply any legal norm to the facts substantiating the prejudicial decision, regardless of the field of law to which it belongs. This regulation is a manifestation of the legal certainty and predictability of the law. Thus, judicial independence constitutes a legal value and is one of the guarantees of a fair trial.[29]

Nevertheless, the unconditional implementation of this principle can lead to negative consequences. The most significant are the divergent interpretations of legal regulations, discrepancies between judicial decisions in establishing factual circumstances, the threat to the finality of legally binding court decisions, and the inability to guarantee legal certainty. Establishing reasonable limits on applying the principle in question by the court in resolving factual and legal issues is necessary to ensure the right to a fair trial.

Given this, there are normatively established limitations on the principle of judicial independence. For instance, in Part 2 of Article 8 of the Criminal Procedure Code of the Republic of Poland, an exception to the above-mentioned general rule is stipulated – final court decisions that regulate rights or legal relationships are binding.[30]

From the provided paragraph, three conditions determine the binding nature of court decisions in criminal proceedings. First, a decision must be final, meaning it cannot be appealed using regular legal means (*zażalenie, apelacja*). Second, the decision must orginate from a court, defined as an entity belonging to the judicial system of the Republic of Poland, regardless of its level. Third, the decision must regulate rights or legal relationships. This involves establishing, modifying, or terminating the rights of a specific subject or the legal relationships involving such a subject. Such decisions are termed constitutive (*konstytutywny*) as they mark a legal event associated with specific consequences, meaning that only upon its adoption do certain outcomes occur, such as changing existing legal relationships or forming a new legal status.[31] Typically, such court decisions include accusatory (guilty) and acquittal verdicts.[32]

In particular, in criminal proceedings, the court is bound by the decisions of another court regarding 1) imposing punishment of the same kind for the commission of two or more crimes or other punishments that can be combined (*kara łączną*); 2) reopening proceedings

29 ibid 43.
30 Criminal Procedure Code of the Republic of Poland (n 24).
31 Augustyniak and others (n 25) 75-6.
32 Pieniążek (n 25) 103-4.

that have been concluded by a final court decision (Part 1, Article 540 of the Criminal Procedure Code of the Republic of Poland); 3) establishing the fact of recidivism in accordance with the provisions of Part 1 or Part 2 of Article 64 of the Criminal Code of the Republic of Poland; 4) decisions regarding compensation for damages or compensation for unlawful conviction, pre-trial detention, or arrest; 4) legal assessment by the appellate court, in the event of its returning the criminal proceedings for a new judicial review.[33]

Moreover, in the Republic of Poland, courts are not only bound by decisions made in other criminal proceedings but also by those made in administrative and civil cases. Specifically, decisions from administrative cases are mandatory when they have a constitutive effect on the sphere of personal rights of a specific individual, establish factual circumstances, or are aimed at ensuring the proper conduct of criminal proceedings.[34]

Similarly, when a court in civil proceedings, based on the provisions of the current legislation of the Republic of Poland, establishes a new legal status in the sphere of legal relations of specific legal subjects, this status cannot subsequently be changed according to these provisions by any means other than by another court decision in a civil case that has acquired legal force, the court in criminal proceedings must recognise this particular status. In such a situation, the previously established legal status appears before the criminal court as a concrete reality. As an example, decisions of the civil court regarding the dissolution of marriage are cited.[35]

The use of cross-sector prejudice in criminal proceedings is permitted by the legislation of other European states. Specifically, according to Article 59(1) of the Code of Criminal Procedure of the Hellenic Republic, when a decision in a judicial proceeding depends on another case in which criminal prosecution is carried out, the consideration of the first case is postponed until the final decision is made in the second judicial proceeding. Additionally, Article 60(2) of the same codified act states that criminal prosecution is suspended if a civil court decision of the civil court precedes. Furthermore, according to Article 61, when the civil court is conducting a judicial proceeding regarding an issue within the competence of civil courts, which, however, is related to criminal judicial proceedings, the criminal court may, at its discretion, postpone the judicial proceeding until the conclusion of the civil proceeding. However, according to Article 62, while the decision of the civil court on an issue related to criminal prosecution is not binding on the criminal court, it is considered a factor that the criminal judge may evaluate alongside other evidence.[36]

33 Badowiec (n 26) 45, 47-66.
34 ibid 68.
35 ibid 97-8.
36 Criminal Procedure Code of the Hellenic Republic no 4620 of 1 July 2019 'Κώδικας Ποινικής Δικονομίας' <https://www.kodiko.gr/nomothesia/document/530491/nomos-4620-2019> accessed 20 May 2024.

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Therefore, the Greek legislator has enshrined the right or obligation of courts to suspend or postpone the trial until the resolution of a related case whose court decision is relevant to the criminal proceedings.

In contrast, the criminal procedural laws of some European states do not permit the unconditional use of sectoral prejudice. For example, Article 238-bis of the Criminal Procedure Code of the Italian Republic allows for the use of final court decisions to prove a fact established by them, provided that they are evaluated in accordance with the provisions of this codified act.[37] Therefore, it follows that the decision can be used to establish the fact established in the judgment as proven. However, this requires the application of a special rule for assessing evidence: unrevoked judgments are suitable for proving the fact established in them in another proceeding only in conjunction with other evidence that confirms their reliability.[38] Thus, the evidence of a fact cannot be derived solely from an unrevoked judgment: the Italian legislator requires additional confirmations for this purpose. In this way, the Italian criminal procedural law preserves the independence of the court and ensures its free assessment of evidence for formulating legal conclusions.

It is worth noting that EU law and the national legislation of some EU states include a mechanism referred to in legal literature as a "preliminary request" or, to be more precise, a "preliminary reference". This is an appeal of a national court of an EU state to the Court of Justice of the EU or an appeal of a lower court to the highest judicial body of the national judicial system with a request to interpret and clarify the correct application of a specific rule of substantive and procedural law. The preliminary request is aimed at ensuring a uniform understanding of the provisions of EU law, harmonisation of the European legal system, and the right to effective legal protection, and is one of the ways to ensure the unity of judicial practice before the national court makes a decision on the merits of the case. After considering the preliminary request, the EU court or the highest authority in the national judicial system formulates a preliminary ruling. In this case, both the preliminary request and the preliminary ruling are based on the same factual circumstances established in a particular case.

Whereas prejudice allows the facts established in one case to be used in making a decision in another case, provided that these facts are common to both processes. In preliminary proceedings, higher and lower courts are involved, while prejudgment is used by a single court that decides the case on the merits. Therefore, while prejudice is a means of establishing circumstances relevant to criminal proceedings and subject to proof without conducting cognitive activities, a preliminary (preliminary) request is an element of the mechanism of uniform interpretation and application of legal norms.

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37 Criminal Procedure Code of the Italian Republic no 477 of 22 September 1988 'Codice Di Procedura Penale' <https://www.brocardi.it/codice-di-procedura-penale/> accessed 20 May 2024.

38 Codice Di Procedura Penale Esplicato: Spiegato articolo per articolo; Leggi complementari; Formulario (18 ed, Edizioni Giuridiche Simone 2013) 334.

4 THE USE OF PREJUDICE IN THE CRIMINAL PROCESS OF THE STATES WITH A COMMON SYSTEM OF LAW

In countries with a continental legal system, the concept of prejudice arises from the principle of *res judicata*. In contrast, in countries following the Anglo-American legal system, this evidentiary tool is based on the doctrine of *collateral estoppel*.

Both *res judicata* and *collateral estoppel* are aimed at ensuring procedural economy, freeing participants in the judicial process from re-examining the same issues of fact and law. They both come into effect after a court has rendered a final decision on the merits of the dispute. Then, this decision is used to resolve subsequent legal disputes, and the initial decision can serve as a bar to relitigating the entire case (*res judicata*) or a specific issue (*collateral estoppel*).

In general law, *res judicata* is associated with *claim preclusion*, whereas *collateral estoppel* is associated with issue preclusion. The principle of *claim preclusion* prohibits the successive judicial consideration of the same claim, regardless of whether the subsequent claim raises the same issues as the previous one. The principle of *issue preclusion* prohibits further judicial consideration of a factual or legal issue that was actually litigated and decided in a prior court judgment and is essential to that prior judgment, regardless of whether the issue arises in the same or a different case. Only issues that were actually litigated and necessary to resolve the initial claim have a preclusive effect. According to the doctrine of *nonmutual collateral estoppel,* issue preclusion can be used both offensively and defensively by parties who were not involved in the initial proceeding.[39]

The doctrine of *collateral estoppel* involves using a judicial decision in a new action to prevent the relitigation of issues already decided in that decision. According to principles of general law, the use of the doctrine required that the party invoking *collateral estoppel* and the party against whom it was invoked be the same as those in the previous judicial proceeding. However, later on, the courts' desire for efficiency led to the application of this doctrine in cases where the parties were not the same.[40] The use of *collateral estoppel* is possible when the following requirements are met: a *valid final judgment*, *the court's personal* and *subject matter jurisdiction*, and the presence of the sa*me legal or factual issue*. For example, in Ashe v. Swenson (1970), Ashe was one of four individuals arrested for robbing six poker players. A jury acquitted him of one of the robberies due to insufficient evidence. Six weeks later, Ashe was again brought to trial for the robbery of another poker player. Following this trial, Ashe was found guilty and sentenced to thirty-five years in prison. The U.S. Supreme Court ruled that since the first jury had rejected the claim that Ashe was one of the robbers, the state could not constitutionally bring him before a new

39 Andrew S Tulumello and Mark Whitburn, 'Res Judicata and Collateral Estoppel Issues in Class Litigation' in Marcy Hogan Greer (ed), *A Practitioner's Guide to Class Actions* (American Bar Association 2010) 605, 607-9.

40 Rose M Alexander and others, 'Collateral Estoppel' (1982) 16(2) University of Richmond Law Review 342.

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jury to reconsider this issue. Therefore, if an ultimate issue of fact has been determined in a prior, valid, and final court decision, it cannot be relitigated between the same parties in any subsequent prosecution.[41]

5 CONCLUSIONS

Prejudice in the criminal procedure of Ukraine is a means of procedural proof that exempts from the necessity to prove facts and circumstances already established in final procedural decisions from other criminal proceedings regarding the same accusation or act in court decisions in civil, commercial, and administrative cases. This also includes decisions from the European Court of Human Rights, the UN Human Rights Committee, and the International Criminal Court regarding the admissibility of evidence, provided these facts and circumstances are relevant to both processes.

In countries with a continental legal system, prejudice follows from the principle of res judicata. A common feature of legal regulation and the use of prejudice in criminal proceedings across these countries is the recognition of only court decisions that have entered into force as prejudicial. Instead, the Ukrainian regulation allows for the establishment of prejudicial facts in the decision of the pre-trial investigation body and the prosecutor to close criminal proceedings.

Continental legal systems generally feature sectoral and inter-sectoral prejudice. In contrast, the CPC of Ukraine gives grounds to distinguish international prejudice. In the criminal proceedings of European countries, the scope of prejudice is covered by issues of fact. Ukraine legislation, however, limits these issues to the same charge or the same act while also extending it to issues of evidence admissibility.

Some continental legal systems, like that of Poland, impose no restrictions on the content of preliminary facts, allowing such facts to be established through court decisions in civil and administrative cases. Conversely, Italy adopts a narrow approach, not only by enshrining exclusively sectoral prejudice but also by introducing a condition for its use - the circumstances established by a court decision in a criminal case are subject to verification in the context of a trial in another criminal case.

The Criminal Procedure Code of the Hellenic Republic provides additional procedural institutions related to the use of prejudice, such as suspending court proceedings or postponing a criminal case until the resolution of another criminal or civil case if the outcome of the court case is directly dependent on those resolutions.

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41 *Ashe v Swenson* 397 US 436 (US Supreme Court, 6 April 1970) <https://supreme.justia.com/cases/federal/us/397/436/> accessed 20 May 2024.

In contrast, in the Anglo-American legal system, the application of prejudice in evidence is based on the doctrine of collateral estoppel. At the same time, the scope of using presumption includes questions of fact and law.

Each state determines its own approach to the regulation and use of prejudice in criminal proceedings, which is influenced by many factors, including the type of legal system to which the state belongs, the model of its criminal procedure, historical traditions of state building, the effectiveness of legislation regulating the activities of pre-trial investigation and court bodies and the effectiveness of these bodies themselves, the level of legal culture and legal awareness of the population. While Ukrainian procedural law offers a more comprehensive and specific framework compared to some foreign ones, there remains room for improvement. These include clarifying the grounds for exemption from proof in criminal proceedings and prohibiting the use of prejudicial facts established through summary trials, simplified proceedings for criminal misdemeanours as well as plea agreements or reconciliation.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРЕЮДИЦІЯ ЯК ЗАСІБ ДОКАЗУВАННЯ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ В УКРАЇНІ: ПОРІВНЯЛЬНИЙ АНАЛІЗ ДЕРЖАВ КОНТИНЕНТАЛЬНОЇ ТА ЗАГАЛЬНОЇ СИСТЕМ ПРАВА

Назар Бобечко* та Володимир Фігурський

АНОТАЦІЯ

Вступ. *Під час підготовки КПК України 2012 р. питання правової регламентації щодо використання преюдиції у кримінальному процесуальному доказуванні не привертали особливої уваги дослідників. Відтоді пройшло чимало часу, проте ця проблематика не стала предметом висвітлення в підручниках та посібниках із кримінального процесу, що побачили світ після прийняття цього кодифікованого акту. Та й у нечисленних наукових розвідках, присвячених преюдиції у кримінальному провадженні, поки не вдалося сформулювати communis opinion doctorum із деяких питань, що стосуються цього засобу доказування.*

Метою статті є з'ясування поняття, формулювання ознак, розкриття значення преюдиції у кримінальному процесі України, виокремлення особливостей правового регулювання та використання цього засобу доказування у кримінальному процесуальному праві держав континентальної та загальної систем права.

Методи. *Методологічною основою статті є діалектичний підхід до наукового пізнання соціальних явищ. Під час написання статті також були використані загальнонаукові та спеціально-правові методи пізнання: аналіз, узагальнення, структурно-функціональний метод, герменевтичний метод, догматичний або спеціально-правовий метод, порівняльно-правовий метод.*

Результати та висновки. *З'ясовано, що преюдиційне значення надається правозастосовним актам, за допомогою яких підводиться підсумок кримінальної процесуальної діяльності у конкретному кримінальному провадженні. До цих правозастосовних актів належать не лише вироки та ухвали суду, що набрали законної сили, але й нескасовані постанови дізнавача, слідчого, детектива, прокурора. Преюдиція охоплює не лише відповідні факти й обставини, але й правові висновки щодо них. Засада вільної оцінки доказів дає можливість суб'єктам доказування дійти інших правових висновків, ніж ті, що були зроблені у попередньому кримінальному провадженні, із належною аргументацією своєї правової позиції. Використання преюдиції у кримінальному провадженні держав континентальної системи права базується на доктрині res judicata, натомість загальної системи права – на доктрині collateral estoppel. Особливості використання цього засобу доказування були розглянуті на прикладі кримінального процесу Польщі, Греції, Італії та США.*

Ключові слова: *кримінальне процесуальне право, процес доказування, засоби кримінального процесуального доказування, преюдиція, факти і обставини, суб'єкти доказування.*

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Research Article

ADDRESSING HUMAN RIGHTS VIOLATIONS IN THE CRIMINAL JUSTICE SYSTEM OF KAZAKHSTAN: THE ROLE OF THE PROSECUTOR'S OFFICE AND A CALL FOR LEGISLATIVE REFORMS

Kanatay Dalmatov, Daniyar Nurmukhanbet, Kairat Yernishev, Akynkozha Zhanibekov, Bakhyt Altynbassov*

ABSTRACT

Background: *Human rights violations within the criminal justice system represent a pervasive problem. International human rights agreements and national laws clearly assert the absolute protection of human rights. However, despite these strong legal principles, human rights violations frequently occur within the criminal justice system. This article examines the problem of human rights violations in the criminal justice system of Kazakhstan and the role of the prosecutor's office in protecting human rights.*

Methods: *This study utilised documentary analysis and secondary data analysis methodologies to conduct a detailed examination of legal acts, international agreements, and policy documents It specifically reviewed documents including the Universal Declaration of Human Rights (UDHR), the Constitutional Law "On the Prosecutor's Office", the Concept of Legal Policy of the Republic of Kazakhstan up to 2030, and human rights reports from international bodies such as Amnesty International, Human Rights Watch, and Freedom House. The study also analysed reports from the Ministry of Justice and the Commissioner for Human Rights of the Republic of Kazakhstan.*

Results and conclusions: *By analysing international human rights treaties, national legislation, and reports from leading human rights organisations, the study exposes significant discrepancies between legal mandates and actual practices. Despite Kazakhstan's formal commitment to international human rights standards, it reveals systemic issues, including instances of human rights abuses in criminal justice. The study highlights the critical role of the prosecutor's office in human rights protection while also pointing out the*

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challenges in effectively fulfilling these responsibilities. The findings stress the importance of legislative reforms for enhancing the protection of human rights in criminal justice. The study is particularly relevant for policymakers, human rights advocates, and scholars interested in the intersection of law enforcement and human rights protections, offering insights that could guide future improvements in criminal justice practices.

1 INTRODUCTION

The protection of human rights within the criminal justice system is one of the pillars of a just and equitable society. It reflects the concepts of justice and the rule of law and guarantees that everyone, regardless of status, is treated justly and without discrimination. International human rights treaties, along with domestic legal frameworks, unequivocally proclaim the inviolability of human rights. Despite these ideals encapsulated within legal frameworks, there is often a troubling prevalence of human rights violations in the criminal justice system.[1] These violations range from minor procedural inconsistencies to more serious abuses of human rights, undermining the fundamental values of justice and equality. The disparity between the theoretical commitment to human rights and their practical application highlights systemic flaws that require rigorous scrutiny and comprehensive reforms.

Kazakhstan has ratified various international human rights treaties and conventions, thereby affirming its commitment to the protection and promotion of fundamental human rights and freedoms.[2] In Kazakhstan, law enforcement agencies, including the prosecutor's office, play an important role in ensuring the protection of human rights in criminal justice. The role of the prosecutor is the most significant as their responsibilities

1 Albin Dearing and Holly Huxtable, 'Doing Justice for Victims of Violent Crime in the European Union - Reflections on Findings from a Research Project Conducted by the European Union Agency for Fundamental Rights' (2021) 45(1) International Journal of Comparative and Applied Criminal Justice 39, doi:10.1080/01924036.2020.1762233; Lars Holmberg and others, 'Victims' Rights: Serving Victims or the Criminal Justice System? An Empirical Study on Victims of Violent Crime and Their Experiences with the Danish Police' (2021) 45(1) International Journal of Comparative and Applied Criminal Justice 89, doi:10.1080/01924036.2020.1719525; Brandon Perkins, 'Cruel, Inhuman or Degrading Treatment or Punishment in Australia's Criminal Justice System: Does Human Rights Legislation Provide Accountability?' (2023) 29(2) Australian Journal of Human Rights 277, doi:10.1080/1323238X.2023.2296023; Mykhailo Ryazanov, Hanna Chuvakova and Suliko Piliuk, 'Legal Anomalies within Human Rights Implementation in Court: Ukrainian Heritage and Perspectives' (2021) 4(4) Access to Justice in Eastern Europe 90, doi:10.33327/AJEE-18-4.4-n000086.

2 Paul Chaney, 'Exploring Civil Society Perspectives on the Situation of Human Rights Defenders in the Commonwealth of Independent States' (2023) 42(2) Central Asian Survey 293, doi:10.1080/02634937.2022.2113034.

extend beyond monitoring criminal cases; they are also actively involved in protecting human rights in criminal justice.[3]

However, the Human Rights report by the US Embassy highlights that human rights violations are prevalent in criminal justice in Kazakhstan.[4] Incidents of abuse occur in police cells, pretrial detention centres, and prisons. Mistreatment is particularly frequent in pretrial facilities, including interrogation spaces, and authorities sometimes use pretrial detention as a tool to physically assault and mistreat detainees to coerce confessions. Moreover, local prosecutor's offices, responsible for investigating complaints of abuse and torture during criminal justice, occasionally use bureaucratic loopholes to avoid conducting thorough investigations.

This underscores the importance of examining the role of the prosecutor in ensuring human rights in the criminal justice of Kazakhstan. Delving into the prosecutor's responsibilities provides a better understanding of how they play a crucial role in building a rights-respecting criminal justice system. However, there is a notable research gap in the existing literature regarding the specific actions and effectiveness of the prosecutor's office in this context. This study aims to bridge this research gap and examine the prosecutor's role in ensuring human rights in the criminal justice of Kazakhstan.

The significance of this study lies in its potential to contribute to the broader discourse on human rights protections in Kazakhstan, offering insights that may inform future reforms. The study is guided by the following research questions: What is the state of human rights in Kazakhstan's criminal justice system? What is the role of the prosecutor's office in protecting human rights within Kazakhstan's criminal justice system?

2 UNDERSTANDING HUMAN RIGHTS VIOLATIONS WITHIN THE CRIMINAL JUSTICE SYSTEM

Human rights violations can happen at different stages of the criminal justice process, from the moment of arrest to the moment of sentencing. Some key aspects and principles related to protecting human rights within the criminal justice system include the presumption of innocence, legal representation, right to privacy, right to a fair trial, protection against torture and inhuman treatment, and protection against arbitrary arrest and detention, as outlined by principal international human rights conventions.

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3 Takehiko Yamamura, Hiroshi Kinoshita and Shigeru Hishida, 'The Role of the Public Prosecutor with Treatment of Suspects Involving Suspended Prosecution Disposition in Accordance with the Crime Investigation Policy of Police in Japan' (2011) 13(4) International Journal of Police Science and Management 348, doi:10.1350/ijps.2011.13.4.230.

4 Bureau of Democracy, Human Rights, and Labor, '2022 Country Reports on Human Rights Practices: Kazakhstan' (*US Department of State*, 20 March 2023) <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/kazakhstan/> accessed 20 April 2024.

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The discourse on integrating international human rights standards into the criminal justice system underscores the necessity of enhancing protections for both victims and the accused amidst widespread observations of human rights violations and the imperative for procedural justice and fair treatment by authorities.[5] De la Vega posits that international human rights frameworks and treaties afford a greater level of protection for human rights within the criminal justice system as compared to domestic legal provisions.[6] Meanwhile, van Hall et al. highlight the critical importance of ensuring procedural justice and fair treatment by various authoritative entities in the criminal justice system.[7]

Nevertheless, empirical observations frequently indicate that human rights violations within the criminal justice system, encompassing the rights of both the accused and the victims, are prevalent.[8] For instance, Dearing and Huxtable emphasise a discrepancy between the rights of victims, as specified in the European Convention on Human Rights and the EU Charter of Fundamental Rights, and how they are recognised and implemented in several European countries.[9] They revealed that many victims experienced a lack of recognition as holders of these rights, demonstrating the importance of practical acknowledgement from authorities. Moreover, they found that it is common for victims to feel marginalised and instrumentalised, particularly when their participation rights conflict with the fundamental rationale of criminal proceedings that focus on the offender's state punishment.

Similarly, Mergaerts' findings highlight the complexity of addressing suspect vulnerability in criminal proceedings in Belgium and stress the importance of knowledge, training, and clear legal provisions to safeguard and defend the human rights of vulnerable suspects.[10] Meanwhile, Holm argues that Sweden only refers to international law in a few bills when conceptualising rights for crime victims in legislation.[11] Holder et al. state that it is

5 Marcin Dziurda, Agnieszka Gołąb and Tadeusz Zembrzuski, 'European Convention of Human Rights and Fundamental Freedoms: Impact on Polish Law Development' (2021) 4(1) Access to Justice in Eastern Europe 23, doi:10.33327/AJEE-18-4.1-a000045.

6 Connie de la Vega, 'Using International Human Rights Standards to Effect Criminal Justice Reform in the United States' (2015) 41(2) Human Rights 13.

7 Matthias van Hall and others, 'Procedural Justice and Legitimacy of the Law in the Criminal Justice System: A Longitudinal Study among Dutch Detainees' (2024) 30(2) Psychology, Crime and Law 101, doi:10.1080/1068316X.2022.2065274.

8 Hildur Fjóla Antonsdóttir, '"A Witness in My Own Case": Victim–Survivors' Views on the Criminal Justice Process in Iceland' (2018) 26 Feminist Legal Studies 307, doi:10.1007/s10691-018-9386-z; Dearing and Huxtable (n 1); Holmberg and others (n 1); Lore Mergaerts, '"Defence Lawyers" Views on and Identification of Suspect Vulnerability in Criminal Proceedings' (2022) 29(3) International Journal of the Legal Profession 281, doi:10.1080/09695958.2021.1982719; Mattia Pinto, 'Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34(2) Utrecht Journal of International and European Law 161, doi:10.5334/ujiel.462.

9 Dearing and Huxtable (n 1).

10 Mergaerts (n 8).

11 Fanny Holm, 'Successful Human Rights Implementation? Victims of Crime and the Swedish Example' (2022) 40(4) Nordic Journal of Human Rights 529, doi:10.1080/18918131.2022.2147319.

important to acknowledge that both victims and offenders have human rights and the distinct status of victims in criminal justice processes.[12] By highlighting the parallel interests between these two groups, this understanding challenges the notion that state entities only have duties towards offenders. In this regard, Dearing and Huxtable stress the need for a new conceptualisation of criminal justice, basing it on principles of dignity and human rights.[13] This entails acknowledging the direct breach of victims' rights and dignity, holding offenders accountable, and restoring the normative order that safeguards the dignity and rights of all individuals.

Identifying factors contributing to human rights violations in criminal justice is essential. According to Uddin, three primary factors that are largely responsible for human rights violations in police practices in Bangladesh include corruption, a culture of impunity, and the militarisation of policing.[14] The author argues that developing a human rights movement is an effective approach to increasing awareness, combating corruption and impunity, and exerting public pressure on the state to protect human rights. The study emphasises the significance of partnerships between civil society, legal professionals, academics, media, human rights defenders, victims, and politicians in promoting this movement. Meanwhile, Efrat and Tomasina established a connection between human rights violations in international extraditions and the political and economic interests of the countries.[15] Their study shows that, despite rhetorical commitments to human rights, political and economic interests can sometimes outweigh human rights concerns in extradition decisions, particularly when dealing with powerful states like China. These studies collectively highlight the urgent need for collaboration to promote awareness, fight injustice, and enhance human rights protection in criminal justice.

A significant body of research focuses on the challenges within the criminal justice system that hinder the effective protection of human rights. Perkins highlights a considerable challenge in proving violations of the right not to be subjected to cruel, inhuman, or degrading treatment or punishment (CIDTP) in Australian jurisdiction.[16] This is partly due to the court's narrow interpretation and the high threshold for proving such a breach, often requiring evidence of intent or severe impact. Moreover, the author argues that despite the strong protections against CIDTP in international law, these standards are not fully realised or reflected in the Australian criminal justice system's practices. The author

12 Robyn Holder, Tyrone Kirchengast and Paul Cassell, '"Transforming Crime Victims" Rights: From Myth to Reality' (2021) 45(1) International Journal of Comparative and Applied Criminal Justice 1, doi:10.1080/01924036.2020.1857278.

13 Dearing and Huxtable (n 1).

14 Md Kamal Uddin, 'Human Rights Abuses and Criminal Justice in Policing Practices in Bangladesh' [2022] Criminology and Criminal Justice doi:10.1177/17488958221120915.

15 Asif Efrat and Marcello Tomasina, 'Value-Free Extradition? Human Rights and the Dilemma of Surrendering Wanted Persons to China' (2018) 17(5) Journal of Human Rights 605, doi:10.1080/14754835.2018.1533454.

16 Perkins (n 1).

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argues that the High Court of Australia views international and comparative human rights jurisprudence as "imperfect analogues" with limited applicability, emphasising the need to prioritise the literal meaning and legislative intent of domestic statutes when interpreting human rights in Australia.

Similarly, Daly et al. stress several challenges within the criminal justice systems of Ireland, the Netherlands, and Italy that hinder the effective protection of human rights.[17] Despite legal protections for the right to silence, all three jurisdictions allow adverse inferences from a suspect's silence under certain conditions. This practice can cause a breach of the right to silence and the presumption of innocence, causing suspects to speak without comprehending their rights or the consequences of their statements.

Grenfell et al. discuss the problem of ensuring the human right to daily access to fresh air in Australian prisons and identify a diverse set of challenges, from legislative inadequacies and lack of enforcement to discrepancies in applying international human rights standards.[18] Overall, these challenges emphasise the need for a more unified and enforceable approach to human rights protection within the criminal justice system, particularly regarding the treatment of individuals deprived of their liberty.

In the criminal justice system, the prosecutor is a key figure with state authority to oversee procedural activities. Their active participation is essential for maintaining legal standards in law enforcement activities and ensuring the rights of all parties involved in criminal proceedings are respected.[19] The role and status of a prosecutorial organ differ significantly depending on its location within the executive branch (USA, Mexico, Uruguay), within the judiciary (Italy, Colombia, Costa Rica), or it can be an autonomous institution (Chile, Guatemala, Switzerland).[20]

In Singapore, the Public Prosecutor must act independently and impartially as a minister of justice, advising the government on legal matters, controlling criminal prosecutions, and assisting in sentencing to ensure justice while avoiding political influence and maintaining public confidence in the criminal justice system. However, the Public Prosecutor's

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17 Yvonne Daly and others, 'Human Rights Protections in Drawing Inferences from Criminal Suspects' Silence' (2021) 21(3) Human Rights Law Review 696, doi:10.1093/hrlr/ngab006.

18 Laura Grenfell, Anita Mackay and Meribah Rose, 'A Human Right to Daily Access to Fresh Air beyond Prisons in Australia?' (2023) 29(2) Australian Journal of Human Rights 259, doi:10.1080/1323238X.2023.2254538.

19 Kumaralingam Amirthalingam, 'The Public Prosecutor and Sentencing: Drug Trafficking and the Death Penalty in Singapore' (2018) 18(1) Oxford University Commonwealth Law Journal 46, doi: 10.1080/14729342.2018.1471835; Yamamura, Kinoshita and Hishida (n 3).

20 Verónica Michel, 'The Role of Prosecutorial Independence and Prosecutorial Accountability in Domestic Human Rights Trials' (2017) 16(2) Journal of Human Rights 193, doi:10.1080/14754835.2015.1113864; Gwladys Gilliéron, *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France, and Germany* (Springer International 2014) doi:10.1007/978-3-319-04504-7.

discretionary power to issue certificates of substantive assistance in drug trafficking cases, which significantly influences whether a convict faces the death penalty or life imprisonment, raises constitutional concerns regarding the separation of powers.[21]

In Chile, the role of the prosecutor, deeply embedded within the judiciary, was pivotal in managing human rights cases. Their independence and the introduction of private prosecution rights were crucial in overcoming political and legal obstacles in bringing state agents to trial. This judicial framework, particularly after the democratic transition and judicial reforms, significantly increased the successful prosecution of human rights violations.[22] Thus, a comparative analysis of various jurisdictions indicates that the prosecutor plays a critical role in shaping the criminal justice process and ensuring fair and impartial application of justice, regardless of the country's legal system.

3 METHODOLOGIES

This study employed documentary and secondary data analysis methodologies to critically examine legal acts, international conventions, and policy documents. Specifically, it analysed documents such as the Universal Declaration of Human Rights (UDHR), the Constitutional Law "On the Prosecutor's Office", the Concept of Legal Policy of the Republic of Kazakhstan until 2030, and human rights reports from international organisations such as Amnesty International, Human Rights Watch, and Freedom House. Additionally, reports from the Ministry of Justice and the Commissioner for Human Rights of the Republic of Kazakhstan were analysed.

Documentary analysis was utilised to examine current legislation, procedural guidelines, and any relevant documents that outline human rights in the criminal justice system.[23] This approach provided insights into the formal structures and regulatory frameworks that govern the prosecutor's role in protecting human rights. Secondary data analysis drew upon existing statistical data and reports related to Kazakhstan's criminal justice, human rights, and legal practices, facilitating a deeper understanding of current practices and trends.[24]

The findings from documentary analysis and secondary data analysis were synthesised to create a comprehensive understanding of the prosecutor's role in protecting human rights in Kazakhstan's criminal justice system. Triangulation of the data from diverse sources enhanced the reliability and robustness of the study.

21 Amirthalingam (n 19).

22 Michel (n 20).

23 Philip Matthew Stinson, 'Document Analysis' in JC Barnes and David R Forde (eds), *The Encyclopedia of Research Methods in Criminology and Criminal Justice* (John Wiley & Sons 2021) ch 79, 392.

24 Megan Bookstaver, 'Secondary Data Analysis' in JC Barnes and David R Forde (eds), *The Encyclopedia of Research Methods in Criminology and Criminal Justice* (John Wiley & Sons 2021) ch 107, 531.

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4 THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS IN CRIMINAL JUSTICE

International legal instruments outline the foundational principles of human rights in criminal justice. These standards guide countries to ensure justice and respect for human rights. The principal international human rights documents relevant to protection in criminal justice include the UDHR, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Convention Against Torture (UNCAT), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), Rome Statute of the International Criminal Court (ICC), United Nations Rules for the Protection of Juveniles Deprived of their Liberty and United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

The UDHR, adopted by the United Nations General Assembly in 1948, outlines the fundamental rights and freedoms to which every individual is entitled.[25] Among its various provisions, Articles 7, 9, 10, and 11 specifically address the rights related to criminal justice, ensuring equality, fairness, and justice for all under the law. Article 11 of the UDHR embodies two essential principles of criminal law – the presumption of innocence and the principle of legality:

> Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

The ICCPR, adopted by the United Nations General Assembly in 1966, expands on the civil and political rights and freedoms listed in the UDHR.[26] The ICCPR prohibits any discrimination and slavery, torture, cruel, inhuman, degrading treatment or punishment. Article 9 of the ICCPR establishes several key principles aimed at safeguarding individuals against arbitrary arrest and detention and that due process is followed in the administration of justice:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be

25 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 20 April 2024.

26 International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) <https://undocs.org/en/A/RES/2200(XXI)> accessed accessed 20 April 2024.

> entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

The UNCAT aims to strengthen the fight against torture and other cruel, inhuman or degrading treatment or punishment. The UNCAT delineates a clear definition of torture in Article 1, emphasising the intentional infliction of severe pain or suffering for specific purposes, such as obtaining information or confessions, punishment, intimidation, or for reasons based on discrimination, when such acts are conducted or sanctioned by public officials.[27]

United Nations Standard Minimum Rules for the Treatment of Prisoners set minimum standards for the treatment of prisoners, which include provisions on housing, healthcare, disciplinary measures, and access to the outside world.[28] Rule 1 of the Nelson Mandela Rules defines a high standard for prison treatment, highlighting the importance of human dignity and the prohibition of torture and ill-treatment:

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.

These international instruments provide a foundation for countries to design and reform their criminal justice systems in a way that upholds, defends, and respects human rights. A number of UN committees and entities oversee the observance of these standards and offer advice and recommendations to governments regarding the implementation of their responsibilities.

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27 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en> accessed 20 April 2024.

28 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (adopted 17 December 2015 UNGA Res 70/175) <https://www.refworld.org/legal/resolution/unga/2016/en/119111> accessed 20 April 2024.

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5 COMMITMENT TO ENHANCING HUMAN RIGHTS IN NATIONAL LEGAL FRAMEWORKS OF KAZAKHSTAN

A strong commitment to enhancing human rights in the criminal justice system of Kazakhstan is reflected in national legislation, policy documents and the country's adherence to international human rights conventions and declarations. Kazakhstan has ratified important human rights conventions and declarations such as the UDHR, the ICCPR, and the CEDAW. The "UN Sustainable Development Cooperation Framework for 2021-2025", signed on 12 August 2020 between the UN and Kazakhstan, stresses that "by 2025, all people in Kazakhstan are protected and enjoy full realisation of human rights and gender equality and a life free from discrimination, violence, and threats, and equally participate in decision-making".[29] Additionally, the EU-funded projects adopt a proactive approach to advancing human rights in Kazakhstan.[30]

National legislation and policy documents also stress the importance of human rights in the country's criminal justice system. The Constitution and current legislation of Kazakhstan recognise and guarantee human rights and freedoms. The Constitution of Kazakhstan has a section that outlines the respect for human and civil rights and freedoms.[31] The Concept of Legal Policy (hereafter: the Concept) of the Republic of Kazakhstan until 2030[32] focuses on ensuring human rights in criminal procedural activities as the main development direction of national law and highlights Kazakhstan's aspiration to approach the level of ensuring the observance of human rights and its legitimate interests in OECD countries. It involves the phased implementation of a three-tier model of criminal proceedings with a delineation of powers between pre-trial investigation bodies, the prosecutor's office, and the court. This model introduces a structured approach aimed at simplifying and reducing the forms of criminal proceedings. The Concept stresses the importance of strengthening government policies on human rights protection, a commitment further evidenced by the adoption of the Human Rights Priority Action Plan (hereafter: the Plan) by the government on 11 June 2021, aimed at enhancing human rights in Kazakhstan.[33]

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29 United Nations, *Sustainable Development Cooperation Framework Country Kazakhstan, Year 2021-2025* (UN 12 August 2020) 24 <https://kazakhstan.un.org/en/89567-un-sustainable-development-cooperation-framework-2021-2025> accessed 20 April 2024.

30 Chiara Pierobon, 'EU's Support to Civil Society in Kazakhstan: A Pilot Evaluation of the Social Capital Generated' (2019) 25(2) Evaluation 207, doi:10.1177/1356389018796023.

31 Constitution of the Republic of Kazakhstan of 30 August 1995 (amended 17 September 2022) art 1, para 1 <https://adilet.zan.kz/eng/docs/K950001000_> accessed 20 April 2024.

32 Decree of the President of the Republic of Kazakhstan no 674 of 15 October 2021 'On approval of the Concept of legal policy of the Republic of Kazakhstan until 2030' <https://adilet.zan.kz/kaz/docs/U2100000674> accessed 20 April 2024.

33 Resolution of the Government of the Republic of Kazakhstan no 405 of 11 June 2021 'On approval of the Plan of Priority Measures in the Field of Human Rights' <https://adilet.zan.kz/kaz/docs/P2100000405> accessed 20 April 2024.

According to the Plan, priority measures in ensuring human rights include improving mechanisms of interaction with UN treaty bodies and special procedures of the UN Human Rights Council, ensuring the rights of victims of human trafficking, eliminating discrimination against women, human rights in criminal justice, and the prevention of torture and cruel treatment. To improve the effectiveness of implementing human rights, it is essential to create and gradually implement national indicators to assess compliance with human rights.[34] This systematic approach will offer a structured and measurable framework to evaluate how well the government upholds and protects human rights. Establishing clear and quantifiable indicators allows policymakers to monitor progress, identify areas for improvement, and ensure accountability in pursuit of a society that respects human rights.

A significant transformation in criminal procedure legislation was marked by the enactment of the new Criminal,[35] Criminal Procedure,[36] and Criminal Executive Codes[37] on 1 January 2015. The main goals of this legal reform include protecting the rights of suspects, accused individuals, victims, and witnesses in criminal proceedings. The legislation is designed to fully implement the principle of equality between all parties involved, leading to a more efficient and effective legal process. Specifically, Articles 67 and 135 of the Code of Criminal Procedure guarantee detainees the right to inform their families and have access to a defender. Article 274 outlines the rights of the suspect, accused, victim, witness, defence lawyer and representative of the victim when ordering and conducting an examination. Meanwhile, Article 10 of the Criminal Executive Code of Kazakhstan identifies a wide range of entitlements for convicted persons to ensure their dignity, safety, and well-being while serving their sentences.

In a referendum on 5 June 2022, important constitutional amendments were approved, marking the most substantial change since the adoption of the Constitution in 1995. Key changes include citizens' newfound ability to appeal cases directly to the Constitutional Court alongside the Prosecutor General and the Commissioner for Human Rights.[38] This move signifies a crucial step towards enhancing the legal empowerment of citizens and strengthening the mechanisms for protecting human rights in Kazakhstan.

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34 Gauthier de Beco, 'Human Rights Indicators for Assessing State Compliance with International Human Rights' (2008) 77(1-2) Nordic Journal of International Law 23, doi:10.1163/090273508X290681; Nicole Stremlau, 'Developing Bottom-up Indicators for Human Rights' (2019) 23(8) International Journal of Human Rights 1378, doi:10.1080/13642987.2019.1642198.

35 Code of the Republic of Kazakhstan no 226-V of 3 July 2014 'Penal Code of the Republic of Kazakhstan' <https://adilet.zan.kz/eng/docs/K1400000226> accessed 20 April 2024.

36 Code of the Republic of Kazakhstan no 231 of 4 July 2014 'Criminal Procedure Code of the Republic of Kazakhstan' <https://adilet.zan.kz/eng/docs/K1400000231> accessed 20 April 2024.

37 Code of the Republic of Kazakhstan no 234-V of 5 July 2014 'Penal Execution Code of the Republic of Kazakhstan' <https://adilet.zan.kz/eng/docs/K1400000234> accessed 20 April 2024.

38 Ministry of Justice of the Republic of Kazakhstan, *Annual Review of the Human Rights Situation in the Republic of Kazakhstan* (Ministry of Justice 2022) 6 <https://www.gov.kz/memleket/entities/adilet/documents/details/344082?lang=en> accessed 20 April 2024.

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On 5 November 2022, the Constitutional law "On the Prosecutor's Office" was enacted, introducing several changes directly focused on enhancing the protection of human rights.[39] The Constitutional Law establishes three forms of higher supervision: conducting inspections, analysing the state of legality, and assessing acts that have entered into force. These provisions fortify the protection of human rights by the prosecutor's office, empowering it to challenge illegal legal acts and seek their overturn in the courts of general jurisdiction. A notable change in the Constitutional law is the provision for collaboration with the Commissioner for Human Rights, who also holds constitutional status. This is a major advance towards a more comprehensive and rights-centered legal system. Bringing together key institutions and addressing human rights challenges collectively reinforces the commitment to fairness, justice, and the protection of human rights within the legal framework.

As part of the implementation of the Concept, there has been a gradual shift to a new three-tier model of the criminal process that clearly outlines areas of responsibility between the investigative body, the prosecutor's office, and the court. This new system will guarantee the fairness of the criminal process and the protection of human rights, eliminating any potential bias from specific departments. Additionally, it will enable an effective system of checks and balances.[40]

A key priority is enhancing digitalisation and fostering transparency in the law enforcement sector. According to the General Prosecutor's Office, in 2022, 90.8% of criminal cases, which totalled 205,270 out of 226.030 cases, were investigated in electronic format. Furthermore, 8.1 million electronic protocols and orders were compiled, accounting for 88% of the total volume of administrative materials.[41] These figures demonstrate the nation's dedication to utilising digital tools to achieve a more efficient, accountable, and transparent legal framework.

Complementing this technological advancement, the introduction of judicial authorisation has marked a significant step towards strengthening the protection of human rights and eliminating ongoing violations by law enforcement agencies. Following amendments to the legislation, the arrest and detention of suspects now require prior authorisation from a court. This process complies with the provisions of the ICCPR, which Kazakhstan has ratified.

Judicial authorisation in Kazakhstan was established based on examining global practices and legal instruments concerning human rights and freedoms, as outlined in UN resolutions. The judge initiates the proceedings by detailing the petition under

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39 Constitutional Law of the Republic of Kazakhstan no 155-VII LRK of 5 November 2022 'On the Prosecutor's Office' accessed 20 April 2024.

40 Ministry of Justice of the Republic of Kazakhstan (n 38) 17.

41 Anti-Corruption Agency of the Republic of Kazakhstan, *National Anti-Corruption Report 2022* (Anti-Corruption Service 14 July 2023) 31 <https://www.gov.kz/memleket/entities/anticorruption/documents/details/494573?lang=en> accessed 20 April 2024.

consideration and explaining the rights and obligations of those present during the court hearing. Subsequently, the prosecutor presents the case for choosing arrest as a preventive measure for the accused or suspect, allowing all parties present at the hearing to be heard. The court hearing involves both the suspect and their lawyer, as well as the victim and their representative. The court's decision-making process is highly transparent, with decisions made openly, ensuring a clear and transparent resolution of issues.

To summarise, Kazakhstan's extensive legal reforms, constitutional amendments, and commitment to international human rights standards demonstrate a steadfast determination to construct a rule-of-law-based legal system, promote transparency and accountability, and protect human rights within the criminal justice framework.

6 HUMAN RIGHTS VIOLATIONS IN THE CRIMINAL JUSTICE OF KAZAKHSTAN

The findings show that instances of human rights abuses are common in the criminal justice of Kazakhstan. The Concept points to the ongoing challenges in protecting human rights, ensuring quality criminal prosecution, and administering justice by the courts. It highlights that law enforcement agencies currently prioritise departmental indicators, such as detectability and referral to court, above adherence to human rights principles. Moreover, the US Embassy revealed that investigative and prosecutorial practices prioritised confessions of guilt over evidence when building criminal cases against defendants.[42] It is common for courts to disregard allegations from defendants that officials obtained confessions by using torture or duress.

Independent observers consistently assess the condition of human rights within Kazakhstan's criminal justice system as falling short of international standards.[43] Analysis of the reports on human rights in Kazakhstan shows that the number of detentions and arrests has significantly increased. Conversely, preventive measures that do not involve deprivation of liberty, such as personal guarantees, bail, and house arrest, have become virtually unused and are seldom applied, except for a written undertaking not to leave the place and maintain proper behaviour. Common issues have included arbitrary arrest and

42 Bureau of Democracy, Human Rights, and Labor (n 4).

43 Amnesty International, *The State of the World's Human Rights, April 2024* (Amnesty International Ltd 2024) 223-5 <https://www.amnesty.org/en/documents/pol10/7200/2024/en/> accessed 20 April 2024; Michiel S de Vries and Iwona Sobis, 'Reluctant Reforms: The Case of Kazakhstan' (2014) 14(2) Public Organization Review 139, doi:10.1007/s11115-012-0210-y; Joshua Foust, 'Security and Human Rights in Central Asia' (2012) 19(1) The Brown Journal of World Affairs 45; Freedom House, 'Kazakhstan: Freedom in the World 2023 Country Report' (*Freedom House*, 2024) <https://freedomhouse.org/country/kazakhstan/freedom-world/2023> accessed 20 April 2024; Katharina Hoffmann, 'The EU in Central Asia: Successful Good Governance Promotion?' (2010) 31(1) Third World Quarterly 87, doi:10.1080/01436590903557397; Human Rights Watch, 'World Report 2024: Kazakhstan: Events of 2023' (*Human Rights Watch*, 2024) <https://www.hrw.org/world-report/2024/country-chapters/kazakhstan> accessed 20 April 2024.

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detention, torture and ill-treatment, unfair trials, and poor prison conditions.[44] Consequently, there is an increase in human rights violations year by year. According to the Report on the activities of the Commissioner for Human Rights in the Republic of Kazakhstan, in 2021, the Commissioner for Human Rights received 1,855 appeals. Compared to 2020, the total number of complaints increased by 55% (Figure 1).[45]

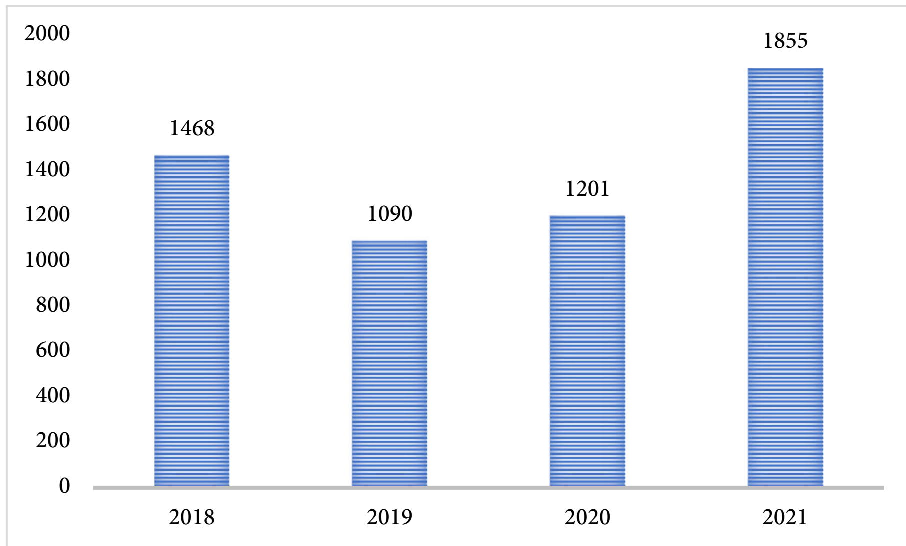

Figure 1. Total number of complaints received by the Commissioner for Human Rights from 2018 to 2021

Complaints of human rights violations received by the Commissioner for Human Rights in 2019-2021 indicate that most complaints are related to the criminal justice system (Figure 2).[46] The data show that complaints against law enforcement agencies, disagreement with court decisions, and prisoners' rights comprised most complaints compared to other human rights violations and consistently increased over the three years. Moreover, the report highlights that compared to 2020, there has been a sharp increase in complaints against the actions of law enforcement agencies (by 217%), appeals of disagreement with court decisions (by 263%), and appeals on issues of the penal system (by 288%) in 2021.

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44 Amnesty International (n 43) ; Bureau of Democracy, Human Rights, and Labor (n 4); Freedom House (n 43); Human Rights Watch (n 43).

45 Commissioner for Human Rights in the Republic of Kazakhstan, 'Report of the Commissioner for Human Rights in the Republic of Kazakhstan for 2021' (*Human Rights in the Republic of Kazakhstan*, 01 March 2022) <https://www.gov.kz/memleket/entities/ombudsman/documents/details/298052?lang=en> accessed 20 April 2024.

46 ibid.

The consistent increase in complaints over the three years, coupled with sharp spikes in 2021, suggests that challenges within the criminal justice system are not only prevalent but may be escalating. This observation is supported by the US Embassy, which revealed several concerning issues related to the treatment of individuals within the criminal justice system in Kazakhstan.[47] Despite the separation of men and women, pretrial detainees and convicted prisoners, there have been cases where youth have been held with adults while moving between temporary detention centres, pretrial detention, and prisons. Human rights observers pointed out that transportation to penal colonies was considered inhumane, and the segregation of men and women was not consistently maintained during the process. Despite routine checks led by the prosecutor on unlawful detention of individuals in office premises under suspicion of committing crimes, instances of unlawful detention persist.

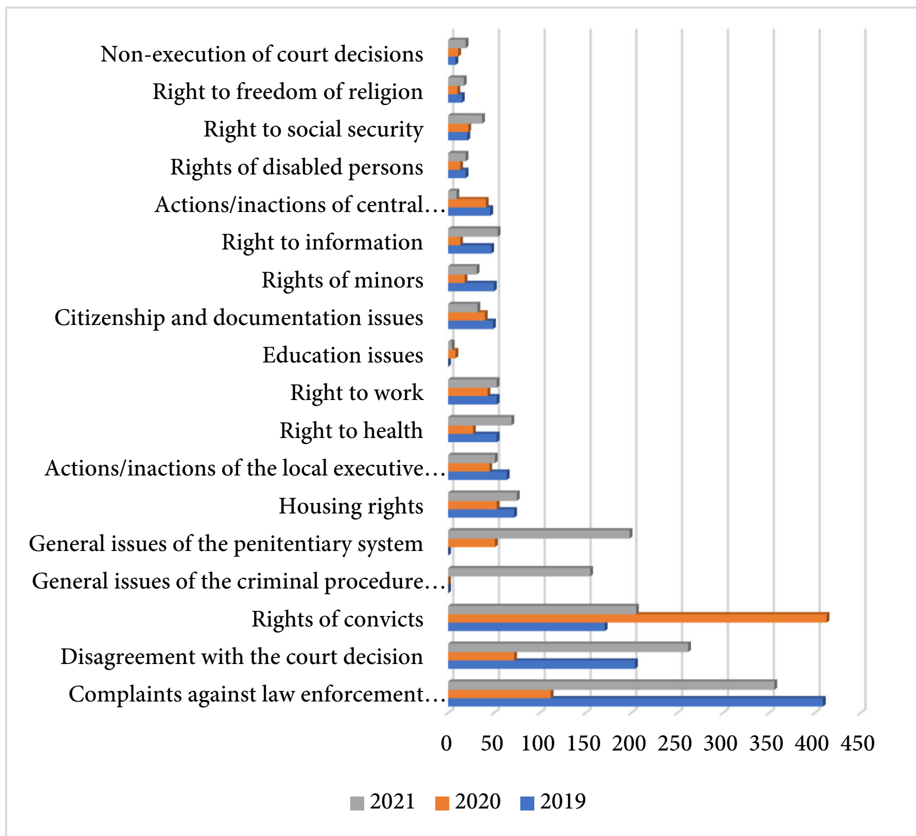

Figure 2. Contents of complaints received by the Commissioner for Human Rights in 2019-2021

47 Bureau of Democracy, Human Rights, and Labor (n 4).

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The analysis of complaints against the actions of law enforcement agencies received by the Commissioner for Human Rights reveals several recurring actions by law enforcement agencies. As Figure 3 indicates, the complaints related to inappropriate pre-trial investigations (37.6%) followed by pressure, torture and forced confession (18.9%).[48]

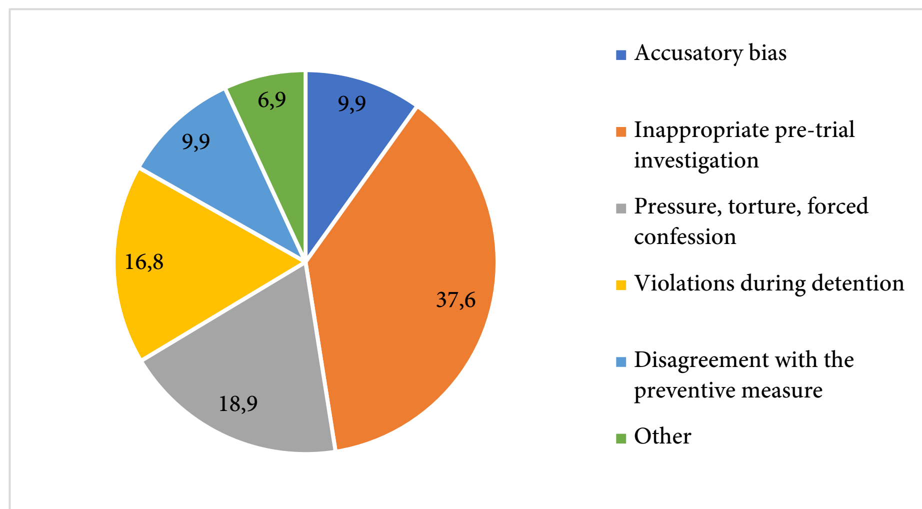

Figure 3. Contents of complaints against the actions of law enforcement agencies

The Report stresses concerns about delays in the investigation process, unjustified case closures, the inaction of police officers to complaints, and other issues. In most cases, authorities either conducted investigations against officials or terminated such investigations because there was no evidence of a criminal offence. However, in some cases, citizens' violated rights to access justice due to the inappropriate conduct of pre-trial investigations were partially restored. This raises serious concerns about the treatment of suspects during pre-trial investigations, potentially pointing to human rights violations and unethical practices by law enforcement agencies. The data suggest that there may be systemic issues or shortcomings in the pre-trial investigative procedures, which could lead to human rights violations and undermine the integrity of the criminal justice system. Addressing these concerns is important for ensuring a fair criminal process, upholding human rights standards, and fostering public trust in law enforcement and the broader justice system.

As Figure 2 illustrates, complaints about the rights of prisoners stand out as a major issue. This category represents a substantial and persistent problem in the criminal justice system, highlighting the difficulties faced by prisoners. According to the Report, in 2021,

48 Commissioner for Human Rights in the Republic of Kazakhstan (n 45).

the Commissioner for Human Rights received 205 complaints concerning the violations of the rights and freedoms of prisoners within the penal system. The majority of complaints were concerning the use of torture, cruel treatment and pressure, unjustified placement in disciplinary isolation, unlawful reprimands, unsatisfactory living conditions, and incidents that led to suicide (Figure 4).[49]

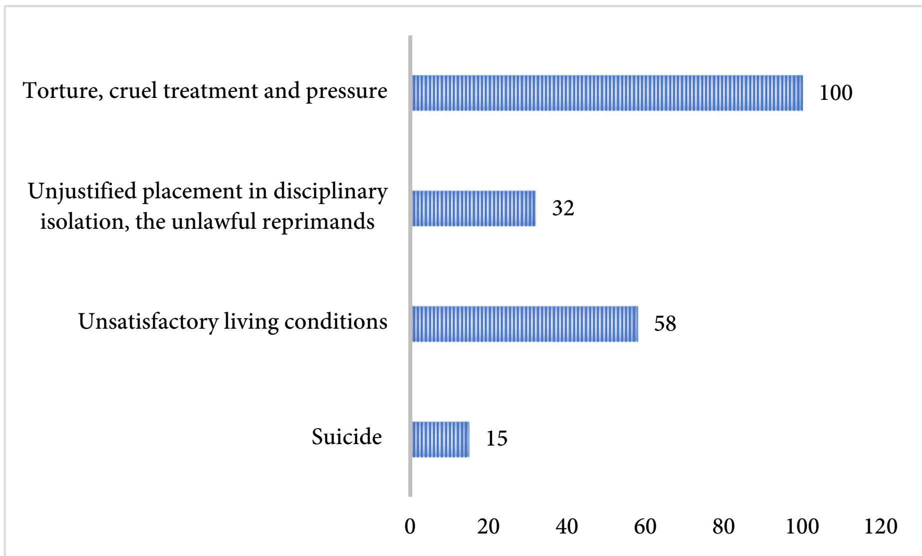

Figure 4. Contents of complaints on the rights of prisoners

These practices not only violate international human rights standards but also undermine the fundamental principles of rehabilitation and justice that should underpin the penal system. Addressing these issues requires comprehensive reforms at both policy and practice levels. These could include creating independent monitoring bodies with the authority to inspect prisons, adopting a broader approach to prison oversight, training prison staff on human rights and the ethical treatment of prisoners, emphasising rehabilitation over punishment, and collaborating with international human rights organisations.[50]

It is worth recognising that the presented statistics may not provide a complete picture of human rights violations, as a significant number of people choose to remain silent and

49 ibid.

50 Alice Jill Edwards, 'Justice Starts at Home: A Call for Stepped-up Nationally-Led Investigations into Torture' (2023) 41(3) Netherlands Quarterly of Human Rights 123, doi:10.1177/09240519231195389; Róisín Mulgrew, 'Prisoner Lives Cut Short: The Need to Address Structural, Societal and Environmental Factors to Reduce Preventable Prisoner Deaths' (2023) 23(2) Human Rights Law Review ngad006, doi:10.1093/hrlr/ngad006.

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avoid reporting their complaints to the proper authorities. This brings attention to an important aspect of the human rights landscape – the widespread problem of underreporting. While the data presented is a sign of substantial concerns and violations, it likely represents only a small portion of the actual human rights abuses that occur.

The Freedom House report highlights that the use of excessive force by police during arrests is a common practice, and torture is widely used to obtain confessions.[51] Similarly, the human rights report of the US Embassy stresses that the increase in arrests can be explained by the fact that the suspects are coerced into confessing during prolonged detention in police department premises and pre-trial detention centres.[52] In fact, suspected individuals are particularly at risk of violating their rights and freedoms during criminal investigations.[53] The Freedom House report reveals serious concerns regarding the rule of law, human rights, and judicial fairness within Kazakhstan's law enforcement system.[54] It revealed challenges such as arbitrary arrests, limited access to legal representation, an imbalance in the authorisation of legal actions, prolonged pretrial detentions, and politically motivated legal proceedings. Moreover, Chaney found that the Commonwealth of Independent States, including Kazakhstan, is witnessing a significant trend of shrinking civil space, where human rights defenders are facing significant obstacles in their work.[55]

The repression affecting civil society actors involves a variety of rights pathologies, such as threats, violence, and even murder. While the government of Kazakhstan is committed to democratic reforms and the protection of human rights in the criminal justice system, there are significant concerns and criticisms about the actual implementation of these reforms in the country.[56] These findings stress the need to strengthen mechanisms for protecting human rights in the criminal justice system of Kazakhstan and the importance of reinforcing the prosecutor's role in monitoring and ensuring the effective implementation of human rights in criminal justice.

51 Freedom House (n 43).
52 Bureau of Democracy, Human Rights, and Labor (n 4).
53 Mergaerts (n 8).
54 Freedom House (n 43).
55 Chaney (n 2).
56 de Vries and Sobis (n 43); Daniel C O'Neill and Christopher B Primiano, 'Kazakhstan's Quest for Status: A Secondary State's Strategy to Shape Its International Image' (2023) 15(1) Journal of Eurasian Studies 81, doi:10.1177/18793665231173000.

7 THE ROLE OF THE PROSECUTOR'S OFFICE IN PROTECTING HUMAN RIGHTS IN THE CRIMINAL JUSTICE SYSTEM OF KAZAKHSTAN

The prosecutor, as a key participant in the criminal justice system, possesses state powers for supervising procedural activities. Their active involvement is crucial for ensuring the legality of law enforcement activities and respecting the rights of parties involved in criminal proceedings.[57] According to the current criminal legislation of Kazakhstan, prosecutors are responsible for monitoring the enforcement of the law in criminal investigations, law enforcement actions, and civil cases.

Adopting the Constitutional law "On the Prosecutor's Office" on 5 November 2022 marked a significant shift in the emphasis of prosecutorial supervision in criminal proceedings. According to Article 29 of the Law, the prosecutor's office collaborates extensively with state, local representative and executive bodies, local government entities, institutions, their officials, quasi-public sector entities, and other organisations, regardless of their ownership structure, to protect and restore violated human and civil rights and freedoms. Furthermore, the prosecutor's office is actively involved with the Commissioner for Human Rights in the Republic of Kazakhstan, offering support. Additionally, the prosecutor's office extends its collaborations beyond national borders. Through criminal legal cooperation frameworks, it cooperates with the competent authorities of foreign states and international organisations. By adopting a multifaceted approach, the prosecutor's office demonstrates its commitment to upholding justice, protecting rights, and fostering collaboration at both domestic and international levels. The law has brought about a notable shift in the priorities of the prosecutor's office, with a clear emphasis on its role in human rights, highlighting its crucial and positive impact.

From 31 December 2020, the prosecutor began approving key procedural decisions by investigative bodies at the initial stage. This approach underscores the prosecutor's central role in the Kazakhstan criminal justice system. According to the National Report on anti-corruption for 2022 by the Anti-Corruption Agency of the Republic of Kazakhstan, over two years, the prosecutor's office reviewed more than 840,000 decisions (2021 – 419,808, 2022 – 422,217). Furthermore, more than 81,000 illegal procedural decisions that affected the rights of suspects and victims were halted (2021 - 53,270, 2022 - 28,180).[58] These figures highlight the significant role of the prosecutor's office in scrutinising and reviewing decisions within the criminal justice system.

Moreover, a study conducted by the Bureau of National Statistics of Kazakhstan in October-November 2022 assessed public trust in law enforcement agencies, highlighting a significant level of confidence in the prosecutor's office. According to Figure 5,[59] which breaks down

57 Yamamura, Kinoshita and Hishida (n 3).

58 Anti-Corruption Agency of the Republic of Kazakhstan (n 41) 6.

59 Bureau of National Statistics Agency for Strategic Planning and Reforms of the Republic of Kazakhstan <https://stat.gov.kz/en/> accessed 20 April 2024.

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public perceptions of various law enforcement agencies in Kazakhstan, 44% of respondents expressed full confidence in the prosecutor's office, and 31.6% indicated partial trust. Conversely, only 3.4% partially disagreed, and 1.7% completely disagreed with the statement about trusting the prosecutor's office. Furthermore, 19.4% of respondents mentioned having no previous encounters with the prosecutor's office. These findings demonstrate a predominant trust in the prosecutor's office over other law enforcement agencies, underscoring its perceived importance and credibility within Kazakhstan's legal system and criminal justice framework.

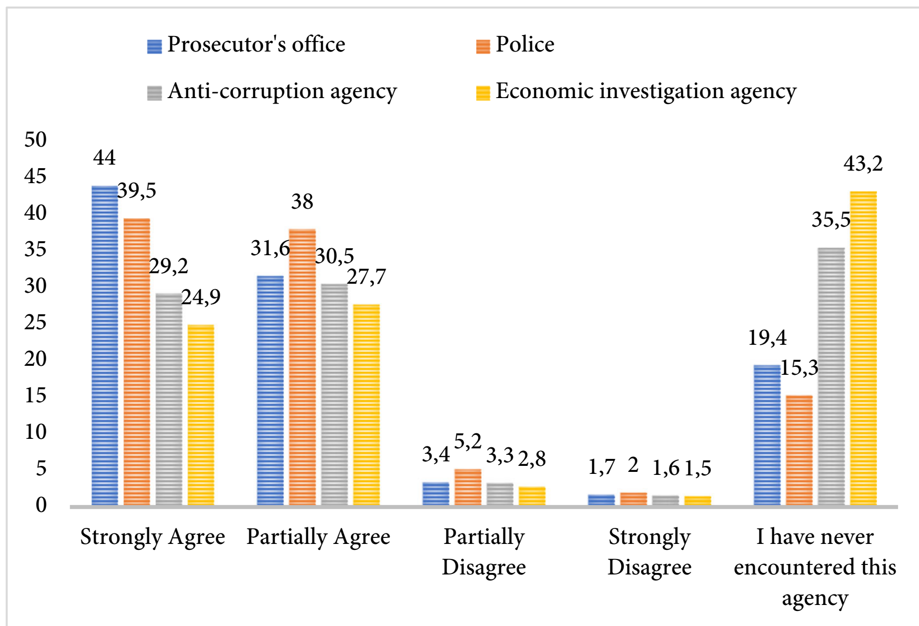

Figure 5. Level of trust in law enforcement agencies (in percentages)

Kazakhstan's current phase of societal evolution is marked by a notable trend towards adopting global community practices to protect human rights through the establishment of state legal institutions. In this evolving landscape, the prosecutor's office plays a pivotal role in safeguarding human rights and freedoms, serving both as a guarantor and a vigilant overseer to ensure that prosecutorial supervision over human rights remains robust and unyielding.

According to the Ministry of Justice of the Republic of Kazakhstan, the introduction of the Public Sector information portal for process participants and the digitalisation of criminal proceedings have significantly reduced the risk of falsifying electronic criminal case

materials.[60] This innovation allows supervising prosecutors to monitor investigations remotely and address violations promptly.

However, it is critical to clearly delineate the role and functions of the prosecutor's office within public authorities, define the boundaries of prosecutorial competence, and clarify the methods and forms used in executing its duties. Ensuring vigilant oversight of human rights and freedoms within the criminal justice system remains paramount.[61] Therefore, it is imperative that mechanisms are established and strengthened to ensure that prosecutors adhere to ethical standards and legal obligations. This includes not only the rigorous enforcement of existing laws but also the ongoing evaluation and enhancement of legal frameworks to better safeguard against such violations.

Prosecutors, despite their duty to uphold the rule of law and protect human rights during criminal proceedings, sometimes contravene these principles. Several studies found that prosecutors often committed offences such as concealing evidence that proves a suspect's innocence and falsifying investigation results to support a guilty verdict during judicial proceedings[62]. This behaviour is particularly concerning in many countries, including Kazakhstan, where the prosecutor's office holds a dual function: supervising the legality of investigations and acting as the state prosecutor. The combination of these roles can result in conflicts of interest, exacerbating the risk of abuse and highlighting the need for structural reforms to ensure greater accountability and transparency in the judiciary process.[63] Additionally, the effectiveness of these prosecutorial organs is significantly influenced by the political environment. Prosecutorial organs that are independent of political pressures and have robust accountability mechanisms, such as private prosecution rights and judicial review, are more likely to initiate prosecutions against state agents for human rights violations, even in politically resistant environments.[64]

The reported human rights violations serve as a stark reminder of the necessity for continual improvement in the legislation concerning the prosecutor's office's role in the criminal justice system, ensuring it acts as a pillar of justice and protector of human rights. The future development of the prosecutor's office in Kazakhstan should involve significant modifications to current legislation aimed at strengthening the role and expanding the legal status of the prosecutor. Key initiatives should include the prevention

60 Ministry of Justice of the Republic of Kazakhstan (n 38).

61 Raimo Lahti and John Martyn Chamberlain, 'Towards a More Efficient, Fair and Humane Criminal Justice System: Developments of Criminal Policy and Criminal Sanctions during the Last 50 Years in Finland' (2017) 3(1) Cogent Social Sciences doi:10.1080/23311886.2017.1303910; Uddin (n 14).

62 Katherine Polzer, Johnny Nhan and John Polzer, 'Prosecuting the Prosecutor: The Makings of the Michael Morton Act' (2014) 51(4) Social Science Journal 652, doi:10.1016/j.soscij.2014.05.007; Sergiy O Ivanytskyy and others, 'Criminal Judicial Actions of the Defence Lawyer and Prosecutor: Problems of the US Legal System' (2024) 36(3) Public Integrity 337, doi:10.1080/10999922.2023.2225337.

63 Gilliéron (n 20).

64 Michel (n 20).

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of torture and inhumane treatment of suspects in custody, the establishment of effective mechanisms to hold law enforcement accountable for misconduct, and the provision of ongoing training in human rights principles for law enforcement agencies and legal professionals. Implementing these structural adjustments necessitates a collaborative effort among policymakers, law enforcement agencies, human rights advocates, and the broader community.

8 CONCLUSIONS

This study aimed to examine the role of the prosecutor's office in protecting human rights in Kazakhstan's criminal justice. Although Kazakhstan is dedicated to enhancing human rights within its legal frameworks, the findings underscore challenges and concerns, demanding further endeavours to fortify mechanisms for protecting human rights and reinforcing the prosecutor's role in protecting them. Despite the robust framework provided by the Constitution and current legislation for recognising and guaranteeing human rights and freedoms, the implementation and enforcement of these rights remain inconsistent.

In particular, the US Embassy and Freedom House reports underscore the pressing need for Kazakhstan to address human rights concerns within its criminal justice. The study uncovers instances of human rights violations in the criminal justice system, including the prioritisation of departmental indicators over human rights principles, resulting in an increase in detentions and arrests. Concerns raised in external reports include the treatment of detainees, transportation conditions, and the persistence of unlawful detentions despite routine checks.

The study also reveals that the prosecutor's office in Kazakhstan is important in maintaining law and order and protecting human rights. Recent reforms, such as constitutional amendments and the Constitutional Law "On the Prosecutor's Office", reflect efforts to adapt to evolving legal needs and enhance the office's effectiveness. The prosecutor's office is now a key body in the protection of human rights, as evidenced by its monitoring role and initiatives to prevent abuses by other law enforcement agencies. Recent developments, including the institution of judicial authorisation and collaboration with the Commissioner for Human Rights, underscore a commitment to transparency, accountability, and respect for constitutional principles.

However, the prosecutor's office must continue to evolve in response to changing legal frameworks and societal demands, employing further legislative adjustments and institutional enhancements. The study's findings may have wider implications for reforming criminal justice in Kazakhstan, potentially guiding policymakers, legal practitioners, and stakeholders in implementing reforms and improving criminal justice's overall effectiveness and fairness. By pinpointing strengths and areas for improvement in

the prosecutor's role, the study offers valuable insights for policy discussions and reforms aimed at enhancing human rights protections in the criminal justice framework.

First, acknowledging the pivotal role of prosecutors, the study suggests the need for ongoing training and professional development programs. These initiatives can improve prosecutors' capacity to fulfil their constitutional obligations by enhancing their understanding of human rights principles, ethical conduct, and best practices. Second, the study highlights the implications of increased collaboration with international human rights organisations and bodies. Exchanges of knowledge, experiences, and best practices can help Kazakhstan align its criminal justice system with international human rights norms.

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Keywords: *human rights, criminal justice, prosecutor, legislative reforms, Kazakhstan.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

БОРОТЬБА З ПОРУШЕННЯМИ ПРАВ ЛЮДИНИ В СИСТЕМІ КРИМІНАЛЬНОГО СУДОЧИНСТВА КАЗАХСТАНУ: РОЛЬ ПРОКУРАТУРИ ТА ЗАКЛИК ДО ЗАКОНОДАВЧИХ РЕФОРМ

Канатай Далматов, Даніяр Нурмуханбет, Кайрат Єрнішев, Акинкожа Жанібеков та Бахит Алтинбасов*

АНОТАЦІЯ

Вступ. *Порушення прав людини в системі кримінального судочинства є поширеною проблемою. Міжнародні договори у галузі прав людини та національне законодавство гарантують абсолютний захист прав людини. Однак, незважаючи на ці стійкі правові принципи, порушення прав людини часто відбуваються в системі кримінального судочинства. У статті розглядається проблема порушення прав людини в системі кримінального судочинства Казахстану та роль прокуратури у захисті прав людини.*

Методи. *У цьому дослідженні використовувалися методології аналізу документів й аналізу вторинних даних для детального вивчення нормативно-правових актів, міжнародних угод і програмних документів. Зокрема, були розглянуті такі документи, як Загальна декларація прав людини (ЗДПЛ), Конституційний закон «Про прокуратуру», Концепції правової політики Республіки Казахстан до 2030 року, а також доповіді про права людини міжнародних організацій, таких Amnesty International, Human Rights Watch iFreedom House. У дослідженні також проаналізовано звіти Міністерства юстиції та Уповноваженого з прав людини Республіки Казахстан.*

Результати та висновки. *Здійснивши аналіз міжнародних договорів з прав людини, національного законодавства та звітів провідних правозахисних організацій, у своєму дослідженні автори виявили значні розбіжності між юридично визначеними нормами та реальною практикою. Незважаючи на офіційне визнання Казахстаном міжнародних стандартів прав людини, у статті було розкрито системні проблеми, зокрема випадки порушення прав людини в кримінальному судочинстві. У дослідженні наголошено на важливій ролі прокуратури у захисті прав людини, а також зазначено проблеми, пов'язані з ефективним виконанням цих обов'язків. У висновках було підкреслено важливість законодавчих реформ для посилення захисту прав людини в кримінальному судочинстві. Дослідження є особливо актуальним для політиків, правозахисників і науковців, які цікавляться питанням перетину правоохоронної діяльності та захисту прав людини. Запропоновані ідеї можуть стати орієнтиром для подальшого вдосконалення практики кримінального судочинства.*

Ключові слова: *права людини, кримінальне судочинство, прокурор, законодавчі реформи, Казахстан.*

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Research Article

EVIDENTIARY STANDARDS OF THE UN COMPENSATION COMMISSION: TAKEAWAYS FOR UKRAINE

Bohdan Karnaukh* and Tetiana Khutor

ABSTRACT

Background: *According to international law, a state responsible for internationally wrongful acts is obliged to fully compensate for the damage caused by such acts (Responsibility of States for Internationally Wrongful Acts, Art. 31). Accordingly, victims who suffered losses as a result of such actions are entitled to compensation. To implement these fundamental principles, the Committee of Ministers of the Council of Europe established the Register of Damages Caused by the Aggression of the Russian Federation against Ukraine. It is just the first of three elements of the future compensation mechanism for Ukraine (the other two, yet to be created, are the compensation commission and the compensation fund). However, to get compensation, every victim of the war will have to prove his or her case before the future commission. In this regard, the evidentiary standards will become critical. To understand how future compensation mechanism for Ukraine could operate, it is useful to study the practice of similar institutions. The UN Compensation Commission deserves special attention, as it could provide valuable insights into how war-related damage must be proven to warrant compensation.*

Methods: *The article's primary purpose is to explore the approach adopted by the UN Compensation Commission with respect to evidentiary standards. To this end, the article will first outline the general framework of the Commission's work, its purpose and organisational structure. It is then necessary to describe the categories of claims reviewed by the Commission, since - as will be shown later - the Commission applied a diversified approach: different categories of claims were subject to different evidentiary standards with varying degrees of exactingness. This differentiation was necessitated by the prioritisation of claims and the use of an expedited procedure for reviewing first-priority claims. This main part of the study will focus on the Commission's documents that illustrate its approach to evidentiary standards. First, the three evidentiary standards applied by the Commission will be outlined and*

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explained: proving the incident alone with no need to establish the extent of the damage; proving damage on the basis of a "reasonable minimum" of evidence appropriate in the circumstances; and proving damage on the basis of documentary and other evidence sufficient to establish the extent of the damage. The article will then analyse how these three standards were applied in practice to the selected categories of personal injury claims. Finally, the conclusions will consider what takeaways can be drawn from the Commission's case law for the Ukrainian case.

Results and Conclusions: *In times of armed conflict and occupation, gathering evidence of harm is notably challenging for victims due to various reasons. This fact calls for special consideration from international compensation mechanisms, which cannot adhere to the rigid formalities used in regular court proceedings. That is why the international law of evidence is adaptable and seeks to adjust to claimants' unique situations. This adaptability is exemplified by the relaxed and diversified standards of proof utilised by the UN Compensation Commission. Diversifying the standards of proof in the practice of the UN Compensation Commission consisted of applying three different approaches to different categories of claims. In addition, the burden placed on claimants was eased by presumptions developed in the Commission's case law. The pioneering approaches of the UN Compensation Commission should be applied and refined within an international compensation mechanism for Ukraine. This entails prioritising individual claims, introducing both regular and expedited tracks for processing claims, and ensuring flexibility with regard to the burden of proof and evidentiary standards to accommodate the challenges of wartime evidence collection without overwhelming victims.*

1 INTRODUCTION

The aggressive war waged by the Russian Federation against Ukraine has inflicted immense destruction. According to the World Bank, the estimated cost of reconstruction amounts to USD 486 billion as of December 2023.[1] Other estimations suggest that the overall damage could approach nearly one trillion.[2]

These calculations do not include the most significant loss of all: human casualties. According to the UN High Commissioner for Human Rights, as of February 2024, civilian casualties alone amounted to 30,755 people, including 10,675 killed and 20,080 injured.[3]

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1 World Bank, Ukraine, EU and UN, *Ukraine: Third Rapid Damage and Needs Assessment (RDNA 3) February 2022 – December 2023* (World Bank Publ 2024) 9.

2 Steven Arons, 'Ukraine Reconstruction May Cost $1.1 Trillion, EIB Head Says' (*Bloomberg*, 21 June 2022) <https://www.bloomberg.com/news/articles/2022-06-21/ukraine-reconstruction-may-cost-1-1-trillion-eib-head-says?leadSource=uverify%252525252525252520wall> accessed 21 March 2024.

3 HRMMU, 'Ukraine: Protection of Civilians in Armed Conflict, February 2024 update' (*United Nations: Ukraine*, 07 March 2024) <https://ukraine.un.org/en/262581-protection-civilians-armed-conflict-%E2%80%94-february-2024> accessed 21 March 2024.

These figures are accompanied by the acknowledgement that actual losses could be significantly higher because statistics only capture confirmed cases, whereas during wartime, verification is often unattainable.

A huge number of Ukrainians had to leave their homes. According to the Ministry of Social Policy, the number of officially registered internally displaced persons in the country currently reaches 4.9 million.[4] Additionally, about 6 million Ukrainians have been forced to flee the country.[5] All of this is a consequence of the aggressive war waged by the Russian Federation against Ukraine.

According to international law, a state responsible for internationally wrongful acts is obliged to compensate in full for the damage caused by such acts (Responsibility of States for Internationally Wrongful Acts, Art. 31).[6]

Thus, all damage caused by the Russian aggression must be compensated by the aggressor state. To this end, the Committee of Ministers of the Council of Europe adopted a Resolution (Resolution CM/Res(2023)3),[7] which introduced the first of three elements of the international compensation mechanism for Ukraine, namely the International Register of Damages Caused by the Aggression of the Russian Federation against Ukraine.

Forecasts of how the future compensation mechanism will work should be based on the study of previous precedents. The UN Compensation Commission is considered one of the most recent and successful compensation mechanisms, having delivered practical justice to millions affected by the Iraqi invasion and occupation of Kuwait.[8]

According to Francis E. McGovern, UNCC "should be a model for the design of future claims resolution facilities because of its tailoring of decision-making techniques to different types of claims. By adopting the processes to the claims, rather than vice versa, the UNCC has become a model of rough justice that will have long-lasting precedential impact."[9]

The study of the Commission's practice could prove helpful in outlining the principles of the future mechanism for Ukraine, which is currently being shaped. In its Expert

4 'Internally Displaced Persons' (*Ministry of Social Policy of Ukraine*, 2023) <https://www.msp.gov.ua/timeline/Vnutrishno-peremishcheni-osobi.html> accessed 21 March 2024.

5 'Ukrainian Refugee Situation' (*Operational Data Portal*, 14 March 2024) <https://data.unhcr.org/en/situations/ukraine> accessed 21 March 2024.

6 Responsibility of States for Internationally Wrongful Acts (adopted 12 December 2001 UNGA A/RES/56/83) <https://undocs.org/A/RES/56/83> accessed 21 March 2024.

7 Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (adopted 12 May 2023) <https://rm.coe.int/native/1680ab2595> accessed 21 March 2024.

8 David D Caron and Brian Morris, 'The UN Compensation Commission: Practical Justice, Not Retribution' (2002) 13(1) European Journal of International Law 183, doi:10.1093/ejil/13.1.183.

9 Francis McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 Harvard Negotiation Law Review 189, doi:10.2139/ssrn.1495855.

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Report of November 2023,[10] the Council of Europe emphasised the need to consult the Commission's practice.

The primary purpose of the article is to explore the approach adopted by the UN Compensation Commission with respect to evidentiary standards. To this end, the article will first outline the general framework of the Commission's work, its purpose and organisational structure. It will then be necessary to describe the categories of claims reviewed by the Commission, since - as will be shown later - the Commission applied a diversified approach: different categories of claims were subject to different evidentiary standards with varying degrees of exactingness. This was necessitated by the prioritisation of claims and the use of an expedited procedure for reviewing first-priority claims.

This main part of the study will focus on the Commission's documents that illustrate its approach to evidentiary standards. First, the three evidentiary standards applied by the Commission will be outlined and explained: proving the incident alone with no need to establish the extent of the damage; proving damage on the basis of a "reasonable minimum" of evidence appropriate in the circumstances; and proving damage on the basis of documentary and other evidence sufficient to establish the extent of the damage. Following this, an analysis will be conducted to ascertain how these three standards were applied in practice to selected categories of personal injury claims. Finally, the conclusions will reflect what takeaways can be drawn from the Commission's case law for the Ukrainian situation.

2 ABOUT THE COMMISSION IN GENERAL

The United Nations Compensation Commission (hereinafter referred to as the Commission) was established in 1991 pursuant to UN Security Council Resolution 692[11] to consider claims and pay compensation for damage and losses caused by Iraq's illegal invasion of Kuwait and subsequent occupation of Kuwait in 1990-1991.[12]

The legal basis of the compensation mechanism was the provision of paragraph 16 of UN Security Council Resolution 687, according to which:

> *'Iraq... is liable under international law for any direct loss, damage - including environmental damage and the depletion of natural resources - or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait'.*[13]

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10 Council of Europe, 'Expert Report on Remedies and Redress Mechanisms for War-Affected Individuals in Ukraine' (*Council of Europe*, November 2023) <https://rm.coe.int/council-of-europe-expert-report-on-national-remedies-in-ukraine-2775-2/1680adebf5> accessed 21 March 2024.

11 Resolution 692 (1991) UN Security Council of 20 May 1991 <https://undocs.org/S/RES/692(1991)> accessed 21 March 2024.

12 For the general overview of the Commission's establishment see: Carlos Alzamora, 'The UN Compensation Commission: An Overview' in R Lillich (ed), *The United Nations Compensation* Commission (Brill Nijhoff 1995) 3.

13 Resolution 687 (1991) UN Security Council of 3 April 1991 <https://undocs.org/S/RES/687(1991)> accessed 21 March 2024.

The Commission differed from a court or tribunal in that it did not need to establish Iraq's responsibility; the internationally wrongful character of the invasion was already established by the UN Security Council and openly acknowledged by the Iraqi government. As a result, the Commission's rules do not provide for detailed adversarial procedures.[14] Its operations were more of an administrative rather than a judicial nature, focused on establishing the facts and determining the amount of compensation.[15]

Organisationally, the Commission consisted of the following bodies:

- Secretariat: responsible for receiving claims and examining them for compliance with formal requirements;
- Panels of Commissioners: tasked with reviewing claims on the merits and recommending the sum to be paid;
- The Governing Council is responsible for making the final decision on the payments.

Injured individuals and legal entities did not directly submit claims to the Commission but through their governments, which collected and consolidated the claims before submission.

In total, the Commission received about 2.7 million claims totalling USD 325.5 billion. Of those, around 1.5 million were granted, totalling USD 52.2 billion.[16] The Commission worked for 31 years and completed its work, having made payments in full by the end of 2022. The President of the Commission's Governing Council presented the Final Report to the UN Security Council on 22 February 2022, two days before Russia's full-scale invasion of Ukraine.

3 CATEGORIES OF CLAIMS

The Governing Council has defined six categories of claims:

Category A: Claims for a fixed amount of money on account of the forced abandonment of Kuwait or Iraq. These claims were filed by people who were forced to leave Kuwait or Iraq between 2 August 1990 (the day of the Iraqi invasion of Kuwait) and March 2, 1991 (the day of the ceasefire). The compensation for this category was fixed at USD 2,500 per person and USD 5,000 per family. However, if the applicant did not claim compensation under any other category, the amount was USD 4,000 and USD 8,000, respectively.

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14 The inquisitorial nature of the procedure utilized by the Commission provoked much debate in academic literature. See: John R Crook, 'The UNCC and Its Critics: Is Iraq Entitled to Judicial Due Process?' in R Lillich (ed), *The United Nations Compensation* Commission (Brill Nijhoff 1995) 77; Jeremy P Carver, 'Dispute Resolution or Administrative Tribunal: A Question of Due Process' in R Lillich (ed), *The United Nations Compensation* Commission (Brill Nijhoff 1995) 69.

15 See: 'Claims Processing' (*UNCC United Nations Compensation Commission*, 2005) <https://web.archive.org/web/20231004074610/https:/uncc.ch/claims-processing> accessed 21 March 2024.

16 'UNCC at a Glance' (*UNCC United Nations Compensation Commission*, 2023) <https://web.archive.org/web/20230610151433/https:/uncc.ch/uncc-glance> accessed 21 March 2024.

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Category B: Claims for compensation for serious personal injury and/or death of a family member (parents, children, or spouse). Serious personal injury" has been defined in Decision 3 to mean (a) dismemberment; (b) permanent or temporary significant disfigurement, such as a substantial change to one's outward appearance; (c) permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system; (d) any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery.[17]

The compensation for such claims was USD 2,500 per person and USD 10,000 per family. However, if a person believed that this amount was not sufficient to remedy the damage, he or she could also file a Category C claim.

Category C: Individual claims for compensation of up to USD 100,000 for various types of damage. Claims in this category included twenty-one types of damages, including damage related to leaving Kuwait or Iraq, serious personal injury, mental pain and anguish, loss of property, loss of bank accounts, shares and other securities, loss of income, loss of real estate, and individual business losses.

This category included eight subcategories:

C1: Damages arising from departure from Iraq or Kuwait, inability to leave Iraq or Kuwait, a decision not to return to Iraq or Kuwait, hostage taking or other illegal detention;
C2: Damages arising from personal injury;
C3: Damages arising from the death of [the claimant's] spouse, child or parent;
C4: Personal property losses;
C5: Loss of bank accounts, stocks and other securities;
C6: Loss of income, unpaid salaries or support;
C7: Real property losses;
C8: Individual business losses.

In addition, for the sub-categories C1, C2, C3 and C6, applicants could also claim compensation for mental pain and anguish (MPA) in accordance with the standards and limits set out in Decisions 3 and 8 of the Governing Council.[18]

Category D: Individual claims for compensation of more than USD 100,000 for various types of damage. The types of damage were the same as in Category C.

17 Decision 3 (1991) (S/AC.26/1991/3) of the Governing Council UNCC of 18 October 1991 'Personal Injury and Mental Pain and Anguish' <https://digitallibrary.un.org/record/241706?ln=en> accessed 21 March 2024.

18 ibid; Decision 8 (1992) (S/AC.26/1992/8) of the Governing Council UNCC of 24 January 1992 'Determination of Ceilings for Compensation for Mental Pain and Anguish' <https://digitallibrary.un.org/record/241656> accessed 21 March 2024.

Category E: Claims of corporations, other private legal entities and public sector enterprises. Such claims related to losses under construction or other contracts, losses from non-payment for goods or services, losses related to the destruction or seizure of business assets, lost profits, losses in the oil sector, etc.

Category F: Claims filed by governments and international organisations, including for damage to the environment. Such claims covered the costs incurred by states in evacuating their citizens, providing them with aid, damages in connection with the destruction of diplomatic buildings, loss or damage to other state property, as well as environmental damage and depletion of natural resources in the Gulf region, including as a result of oil well fires and oil dumps into the sea.

4 PRIORITISATION AND EXPEDITED PROCEDURE

An important innovation of the Commission was prioritising individual claims of affected natural persons over claims of governments and corporations, which had previously been the case. This humanistic and victim-centred approach represented a significant step in the evolution of international compensation mechanisms.

The Governing Council decided to consider under the expedited procedure and treat as urgent individual claims of victims in categories A (forced abandonment of Kuwait or Iraq), B (serious personal injury and/or death of a family member) and C (various types of damage up to $100,000).[19]

Art. 37 of the Provisional Rules For Claims Procedure provides specific features of the expedited procedure.[20] These, in particular, include the use of special methods of analysing claims, including computerised comparison of claim details with verification data, sampling, statistical modelling, and the absence of oral hearings.

Under Art. 37(d) of the Provisional Rules, each panel of commissioners was required to complete its review of the claims submitted to it and publish a report promptly, ensuring completion within 120 days from the submission date of the claims to the panel.

In decision S/AC.26/1991/1, the Governing Council stated:

> *"For a great many persons these procedures would provide prompt compensation in full; for others they will provide substantial interim relief while their larger or more complex claims are being processed, including those suffering business losses."*[21]

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19 Decision 1 (1991) (S/AC.26/1991/1) of the Governing Council UNCC of 2 August 1991 'Criteria for Expedited Processing of Urgent Claims' <https://digitallibrary.un.org/record/125786?ln=en> accessed 21 March 2024.

20 Decision 10 (1992) (S/AC.26/1992/10) of the Governing Council UNCC of 26 June 1992 'Provisional Rules for Claims Procedure' <https://digitallibrary.un.org/record/241657?ln=en> accessed 21 March 2024.

21 Decision 1 (1991) (S/AC.26/1991/1) (n 19) para 1.

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Thus, a person who suffered significant economic losses of more than USD 100,000 could file a Category C claim and receive at least partial compensation through the expedited procedure, and at the same time, based on the same facts, file a Category D claim (claims over USD 100,000) under the regular procedure, prove that his or her losses were actually greater and eventually receive full compensation.

The expedited processing of the three categories of claims was also made possible due to the lowered standards of proof established for these categories by the decision of the Governing Council S/AC.26/1991/1 (discussed below).

5 BURDEN OF PROOF

According to the general principles of tort law, the injured person has to prove:

(a) the fault of the person against whom the claim for compensation is made (i.e., that the defendant has acted in a wrongful manner);
(b) the presence of legally relevant damage (i.e., the presence of negative consequences that are recognised as compensable by law); and
(c) a causal link[22] between the first and the second (i.e., that the victim's damage was caused by the wrongful behaviour of the person against whom the compensation claim is made).

However, as noted above, there was no need for the Commission to establish Iraq's fault - the fault had already been established by the UN Security Council and acknowledged by the Iraqi government itself. Thus, the Commission's task was to verify (a) the fact that the applicant had indeed suffered an injury falling within one of the six categories defined and (b) that this damage was indeed a consequence of Iraq's invasion of Kuwait and subsequent occupation of Kuwait.

To this should also be added the task of determining the amount of compensation, which, from a theoretical point of view, can either be considered part of the first question (presence of damage) or can be separated into a distinct inquiry.

22 For the analysis of causation inquiry in the practice of the UNCC see: Norbert Wühler, 'Causation and Directness of Loss as Elements of Compensability Before the United Nations Compensation Commission' in R Lillich (ed), *The United Nations Compensation* Commission (Brill Nijhoff 1995) 207; Merritt B Fox, 'Imposing Liability for Losses from Aggressive War: An Economic Analysis of the UN Compensation Commission' (2002) 13(1) European Journal of International Law 201, doi:10.1093/ejil/13.1.201; Arthur W Rovine and Grant Hanessian, 'Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission' in R Lillich (ed), *The United Nations Compensation* Commission (Brill Nijhoff 1995) 235; and Bohdan Karnaukh, 'What Damage is a "Direct" Consequence of War: the Practice of The UN Compensation Commission' (2024) 1 Foreign Trade: Economics, Finance, Law 23, doi:10.31617/3.2024(132)02.

6 EVIDENTIARY STANDARDS

As a general rule, the burden of proof of a certain fact rests with the person who relies on that fact to support his or her legal standing (claim, action, complaint or objection). According to this rule, a claimant applying to the Commission must prove with relevant evidence that he or she has suffered legally cognisable damage, justify its amount, and demonstrate that it was the result of Iraq's internationally wrongful acts.

Standards of proof are of key importance in the context of probative activities. The standard of proof indicates the level of exaction with respect to the evidence submitted to prove a particular fact. It is a sort of "bar" that the party has to meet for its legal stance to be recognised as well-founded. Depending on the procedural rules, this bar may be higher or lower, and, accordingly, the exaction will be greater or lesser.

For example, the standards of proof for criminal and civil cases are different.[23] In a criminal case, a person's guilt must be proven beyond reasonable doubt, while in a civil case, the facts are established based on the "preponderance of the evidence" standard. The former standard is much more demanding, meaning the judge must be 90 or more per cent convinced of the person's guilt. The civil standard is less demanding - it is enough to convince the judge that the fact is more likely to have occurred than not (effectively, it means that the judge only needs to be (50+1) per cent convinced that the alleged fact is true).[24]

However, the consideration of claims by the Commission and similar institutions in the past has a number of distinct features that require a specially tailored, flexible and diversified approach to setting the "evidentiary bar" that claimants have to overcome. In particular, the claimants' ability to collect evidence was affected by the exceptional circumstances of the harm. In times of military aggression and occupation, gathering evidence is far from being a top priority for individuals. People are forced to flee the war in a hurry, leaving their belongings behind, and in this mess, needed documents could be lost, stolen or ruined. War disrupted the operation of various government agencies and institutions, making it difficult to keep track of various civil status acts and other events that normally would have been officially documented.

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23 See: Bohdan Karnaukh, 'Standards of Proof: A Comparative Overview from the Ukrainian Perspective' (2021) 5(2) Access to Justice in Eastern Europe 25, doi:10.33327/AJEE-18-4.2-a000058; Valentina I Borysova and Bohdan P Karnaukh, 'Standard of Proof in Common Law: Mathematical Explication and Probative Value of Statistical Data' (2021) 28(2) Journal of the National Academy of Legal Sciences of Ukraine 171, doi:10.37635/jnalsu.28(2).2021.171-180.

24 These figures have mathematical explanation behind them. According to Bayesian decision theory, the standard of proof depends on the ratio of the false positive error disutility to false negative error disutility. Since both types of error have the same disutility in a civil litigation, the threshold value of conviction is 50+ percent. Yet in a criminal case the disutility of false positive error considerably exceeds the disutility of the false negative one, and therefore the threshold value of conviction shall be much higher, amounting to 90 percent. For elaborate mathematical explication see: Borysova and Karnaukh (n 23) 179.

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In recommendations S/AC.26/1994/1, the Commission stated:

> *"The scarcity of evidentiary support characterizing many claims may be attributable mainly to the circumstances prevailing in Kuwait and Iraq during the invasion and occupation period. Under the general emergency conditions prevailing in the two countries, thousands of individuals were forced to flee or hide, or were held captive, without retaining documents that later could be used to substantiate their losses. In addition, many claimants chose not to or could not return to Iraq or Kuwait, and therefore had difficulty producing primary evidence of their losses, damages or injuries."*[25]

These circumstances, coupled with the large number of claims that the Commission had to process, made it inefficient and infeasible to apply the regular standards of proof used in civil or criminal proceedings. Therefore, it was a natural step to establish special, lowered requirements for evidence to prove the damage caused. In doing so, the Commission noted that this practice is common for similar international compensation mechanisms:

> *"The scarcity of evidentiary support where massive numbers of claims are involved is not a phenomenon without precedent in international claims programs, in particular if the events generating responsibility have taken place in abnormal circumstances such as those prevailing in Kuwait and Iraq during the conflict. An analysis of the practice of international tribunals regarding issues of evidence shows that tribunals often had to decide claims on the basis of meagre or incomplete evidence. It has been observed that the lowering of the levels of the evidence required occurs especially "in the case of claims commissions, which have to deal with complex questions of fact relating to the claims of hundreds or even thousands of individuals."*[26]

Secondly, in addition to the context of the armed conflict, the Commission also considered the realities of national practice in the respective country of the victims' origin when determining the level of exactingness in respect of evidence. For example, the Commission took into account that Kuwait's economy is mainly cash-based, which impacts the specifics of proving the transactions and settlements made under them.[27]

Thirdly, the Commission applied a diversified approach - different standards of proof were applied to different categories of claims. The exactingness depended directly on the amount of compensation claimed by the applicant: the lower the amount, the lower the requirements for proving damage, and vice versa. Moreover, in some cases (when the amount of

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25 Recommendations (S/AC.26/1994/1) of the Panel of Commissioners UNCC of 26 May 1994 'Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims)' <https://digitallibrary.un.org/record/202480?ln=en> accessed 21 March 2024.

26 Report and Recommendations (S/AC.26/1994/3) of the Panel of Commissioners UNCC of 21 December 1994 'Concerning the First Installment of Individual Claims for Damages up to Us$100,000 (Category "C" Claims)' 29 <https://digitallibrary.un.org/record/202830?ln=en> accessed 21 March 2024.

27 ibid 28.

compensation was fixed), even the burden of proof changed. Thus, in Category A (forced displacement) claims, for example, there was no need to prove the amount of damage at all: the applicant had only to demonstrate that he or she had left the country during a specified period of time (from the date of the invasion until the date of the ceasefire). The claimant did not have to provide any explanation or evidence regarding the costs or damages that such forced displacement entailed.[28]

The same applied to claims for serious personal injuries and death of family members, where applicants claimed a fixed amount:

> *"in the case of serious personal injury not resulting in death, $2,500 will be provided where there is simple documentation of the fact and date of the injury; and in the case of death, $2,500 will be provided where there is simple documentation of the death and family relationship. Documentation of the actual amount of loss resulting from the death or injury will not be required. If the actual loss in question was greater than $2,500, these payments will be treated as interim relief, and claims for additional amounts may also be submitted under paragraph`14 and in other appropriate categories."*[29]

The last, third category of claims reviewed under the expedited procedure did require proof of the amount of damages suffered. For this category, the Governing Council established a special evidentiary standard of "a reasonable minimum [of evidence] appropriate under the circumstance". At the same time, it is stipulated that claims for smaller amounts (up to $20,000) require less documentary evidence. In accordance with paragraph 15(a) of decision S/AC.26/1991/1:

> *"Such claims must be documented by appropriate evidence of the circumstances and the amount of the claimed loss. The evidence required will be the reasonable minimum that is appropriate under the circumstances involved, and a lesser degree of documentary evidence would ordinarily be required for smaller claims, such as those below $20,000."*[30]

Finally, the most demanding standard applied by the Commission was set to categories D, E and F of claims. Such claims had to be supported by "documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss" (Art. 35(3) of the Provisional Rules for Claims Procedure). However, the Commission, in its Report S/AC.26/1998/1 emphasised that even this most demanding standard is not commensurate with the high criminal law standard "beyond a reasonable doubt." Instead, it

28 Decision 1 (1991) (S/AC.26/1991/1) (n 19) para 11.
29 ibid, para 12.
30 ibid, para 15(a).

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aligned more closely with the civil law standard of "preponderance of the evidence," albeit adjusted for the exceptional circumstances of war.[31]

All evidentiary standards applied by the Commission, along with the general rule on the burden of proof, were summarised in Art. 35 of the Provisional Rules for Claims Procedure.

Thus, the diversified approach to evidentiary standards in the Commission's practice involved the application of three different standards of proof:

- for fixed-amount claims processed under the expedited procedure, claimants had to prove only the fact of injury without having to prove the exact amount of damage caused by the harmful incident
- for claims processed under the expedited procedure seeking compensation of up to $100,000 (category), the claimant had to prove the fact of injury and its amount based on a reasonable minimum [of evidence] appropriate under the particular circumstances of the case
- for individual applications processed under the regular procedure and involving compensation in excess of $100,000, the claimant had to prove the fact of injury and its amount, relying on documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the loss claimed.

Finally, another aspect that eased the burden placed on claimants was the use of presumptions, i.e. assertions accepted by the Commission as a given without the need for proof by the claimant. Presumptions may relate to specific facts and may be drawn as an inference from other established facts.

For example, the Commission considered it reasonable to presume that the majority of deaths and injuries that occurred in Iraq or Kuwait between 2 August 1990 and 2 March 1991 were causally related to the invasion and occupation.[32]

The Commission also presumed the existence of non-pecuniary damage (mental pain and anguish) in cases where it was established that a person (1) was taken hostage or unlawfully detained for more than three days; or (2) was taken hostage or unlawfully detained for three days or less under circumstances that indicated an imminent threat to his or her life; or (3) was forced to hide for more than three days due to a manifestly reasonable fear for his or her life or because he or she was taken hostage or unlawfully detained.[33] If a vehicle was left in Iraq or Kuwait before or during the invasion and occupation and then lost without trace, the Commission also presumed that the loss was attributable to hostilities.[34]

31 Report and Recommendations (S/AC.26/1998/1) of the Panel of Commissioners UNCC of 3 February 1998 'Concerning Part One of the First Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)', para 72 <https://digitallibrary.un.org/record/251206?ln=en> accessed 21 March 2024.

32 Report and Recommendations (S/AC.26/1994/3) (n 26) 110, 124.

33 ibid 87.

34 Report and Recommendations (S/AC.26/1998/1) (n 31) para 266.

7 HOW IT WORKED: SELECTED EXAMPLES OF THE EVIDENTIARY STANDARDS APPLIED

7.1. Category B

In Recommendation S/AC.26/1994/1,[35] the Panel noted that the circumstances prevailing in Kuwait and some neighbouring countries between 2 August 1990 and 2 March 1991 made it extremely difficult for claimants to obtain contemporaneous medical records (i.e., medical records that were made immediately or shortly after the injury). Given this, the Panel decided to accept medical documentation drawn up later on as sufficient evidence to confirm the fact of injury or trauma.

Moreover, the Panel noted that some claimants were deprived of the opportunity to obtain the necessary medical documents, particularly given that the number of medical facilities and medical personnel in the country had been critically reduced during the occupation.[36]

Some were unable to obtain any documents because they were injured in the desert while fleeing Iraq or Kuwait; others found it difficult to see a doctor for personal or cultural reasons, as in the case of sexual violence or torture.

In such cases, the Board accepted other written evidence, witness testimony and, in some cases, the applicant's personal statements as sufficient evidence of the injury instead of medical documentation.[37]

In particular, the Panel considered a number of cases in which claimants alleged that they had been detained by the Iraqi military and tortured in detention. The majority of such applicants submitted as evidence personal explanations stating that they had been detained and tortured, as well as an official document from the Kuwaiti authorities or the International Committee of the Red Cross confirming that the person had been detained. The vast majority had no medical documents certifying the consequences of torture.

The Commission's medical expert confirmed that victims of torture are often reluctant to seek medical help because they want to erase the memory of torture or may be ashamed to admit that their mental health has suffered as a result of their ordeal. In addition, some forms of torture do not leave visible physical scars. Taking into account the above, and the

35 Recommendations (S/AC.26/1994/1) (n 25) 35.

36 Three main factors affected the availability of medical and related services during the invasion and occupation. First, there was a massive outflow of medical personnel from the country. Secondly, the closure, destruction and looting of medical facilities: by the end of the occupation, all 87 medical facilities were either closed or operating at far less than normal capacity. Thirdly, it is the restriction of access to medical facilities, in particular, because the occupation authorities have conditioned the ability to receive medical care on the exchange of a Kuwaiti passport for an Iraqi one, established curfews and priority treatment for the Iraqi military.

37 Recommendations (S/AC.26/1994/1) (n 25) 36.

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fact that the torture of Kuwaiti nationals in Iraqi captivity has been recognised as widespread in reports by international organisations,[38] the Panel concluded that:

> *"compensation should be awarded to those claimants who showed that they were tortured by Iraqi forces while in detention, even if they were not able to submit medical documentation, provided that the fact of detention has been attested to by an official authority."*[39]

A similar approach was followed with regard to claims of sexual violence. In addition to the fact that victims of sexual violence often avoid seeing physicians, a physician can potentially document traces of such violence only if the victim seeks treatment immediately after the attack. In the context of war and occupation, it is virtually impossible. As well as the practice of torture of detainees, sexual violence by the Iraqi military has been documented in reports by international organisations. Given this, the Panel recommended that claims of sexual violence be upheld, even when such claims were based solely on circumstantial evidence.

In Category B claims regarding the death of a family member, three circumstances were subject to verification, namely the fact of death, the family relationship between the claimant and the deceased, and the causal link between the death and the invasion.

A death or burial certificate or similar document issued by an official institution (including a national authority, foreign embassy, or international organisation), such as a letter informing the family of the deceased about the death, were recognised as conclusive evidence of the fact of death.

However, in a number of cases, death certificates could not be issued immediately upon death, in particular because the cause of death had to be determined by an expert, of which there were few due to the situation in the country, or because families received death certificates from the Iraqi authorities and then had to exchange them for Kuwaiti certificates. As a result, the death certificate could be issued several months after the death. The Commission accepted such certificates as proper and sufficient evidence.[40]

With regard to the causal link between the death and the invasion, a death certificate or any other official document (e.g., a police report) was considered sufficient evidence of causation if it stated the cause of death. If the death certificate did not indicate the cause of death, other documents explaining the connection between the invasion and the death were accepted as evidence.

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38 Walter Kälin, 'Report of the Situation of Human Rights in Kuwait under Iraqi Occupation: prepared by Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/67 (E/CN.4/1992/26)' <https://digitallibrary.un.org/record/225886?ln=en> accessed 21 March 2024.

39 Recommendations (S/AC.26/1994/1) (n 25) 37.

40 ibid 39-40.

In some cases, the Panel recognised the applicant's statements of the connection between his or her injuries and the invasion as sufficient evidence, provided that the Commission's medical expert confirmed that the nature of the injury was consistent with the cause alleged by the claimant.[41]

7.2. Category C

As noted above, for this category of applications, the standard of proof was defined as a "reasonable minimum" of evidence appropriate under the particular circumstances of the case. In determining what constitutes such a "reasonable minimum", the Panel compared the specific evidence submitted by the complainants with the background data at the disposal of the Panel regarding the availability, relevance and reliability of any such evidence in the context of the conditions prevailing as a result of the invasion and occupation.

The Panel also noted that the completed claim form itself can be of significant probative value, provided it is properly completed and consistent with the background data and patterns identified in similar claims. It is also important that the claim form contains an assurance signed by the claimant that the information in the claim is true.[42] This is especially relevant for persons who were held in Iraqi captivity:

> *"A special standard, furthermore, should apply to those "C2" claimants who have established that they have been taken hostage or otherwise detained or have been in hiding. Covered by the "C1" loss page, such events are likely to have had a deleterious effect on the health of these individuals, at the same time hampering their ability to provide evidence of their injuries. Consequently, their completion of the "C2" loss page may be viewed as sufficient proof of the fact of their injury."*[43]

While assessing the probative value of the completed claim forms, the Panel also considered the socio-economic characteristics of the claimants, such as education and income, as they helped to better understand the individuals' ability to present certain evidence and substantiate their position.

In addition, since the claims were not submitted directly to the Commission, but through governments, the evidentiary weight of the information provided in the claims had to be assessed by analysing the national programs for processing these claims, and in particular whether the officials of the relevant state assisted the applicants in filling out the documents and whether they conducted any verification or checking of the information.

41 ibid 41.
42 Report and Recommendations (S/AC.26/1994/3) (n 26) 24.
43 ibid 110.

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In particular, the following factors had to be taken into account:

> *"(i) Whether claimants were required to complete their claim form at an officially designated location (e.g., national claims programme central or local office) or under the supervision of, or with assistance from, a national claims programme official;*
> *(ii) Whether the evidentiary items provided by claimants were reviewed by programme officials;*
> *(iii) The policies, procedures and standards employed by programme officials in screening, modifying or validating claims (e.g., whether programme officials requested additional information or evidence from claimants in support of claims, and what types of claims were held back due to deficiencies, and what types of deficiencies resulted in claims being held back);*
> *(iv) The policies and procedures implemented by the national claims programme in connection with verifying the claims (e.g., the use of investigators or loss adjusters)."*[44]

The vast majority of claims in this category were supported by the applicant's personal statements as the main evidence. These statements recounted the applicant's experiences during the invasion and described the circumstances and extent of the damage he or she had suffered. The Panel decided that the evidentiary weight of such statements should vary depending on the specific damage claimed.[45]

In certain situations, such as when someone claims compensation for mental suffering caused by being forced to hide, their own written statement might be the best evidence available to explain where, why, and how they were hiding. The details provided in these statements can assist judges in comprehending the significance and authenticity of the claims, especially when corroborated by other relevant information.

However, if someone is claiming compensation for damage to their property, their personal statement alone might not suffice to prove ownership of the property or quantify the extent of their losses.

Many claimants submitted witness testimonies as evidence. Such testimony could either be an independent document or take the form of confirmation by one or more witnesses of the facts set forth in the claim. Notably, the witnesses were most often relatives and friends of the claimant. In its Report S/AC.26/1994/3, the Panel noted that the evidentiary weight of such testimony should be determined in the light of:

(i) the relationship of the witness to the person incurring the loss, bearing in mind that under hostile conditions and circumstances involving urgency, the only available witness may be a person related to the victim; and (ii) general evidentiary principles relating to the quality and relevance of a witness statement, such as whether the statement indicates the bases for the witness' testimony (e.g., time, place, first-hand knowledge of the events).[46]

44 ibid 28.
45 ibid 25-6.
46 ibid 26.

Of course, written evidence such as receipts, invoices, contracts, official government documents, civil status documents, bank and real estate documents, letters from relevant professionals (including physicians, insurance experts and former employers), photographs, and newspaper articles were recognised as having a high probative value.

As with the previous category of claims, the Panel also relied on general background information, including reports and statistical data prepared by national authorities, international organisations and other independent institutions, on the nature and causes of the losses occasioned by Iraq's invasion and occupation of Kuwait.

7.3. Category D

For this category of claims, a higher standard of proof (compared to categories A, B and C) was required, as well as consideration of each claim individually. Describing the standard, the Panel noted:

> *"The Panel is aware that international tribunals, however composed, and entrusted with the task of adjudicating a dispute between two States belonging to whatever legal system or systems, have recognised the principle that the law of evidence in international procedure is a flexible system shorn of any technical rules. The Panel is also conscious of the fact that the lack of standard international law rules of evidence and the fact that international tribunals are liberal in their approach to the admission and assessment of evidence does not waive the burden resting on claimants to demonstrate the circumstances and amount of the claimed loss. On the other hand, considering the difficult circumstances of the invasion and occupation of Kuwait by Iraq, as outlined in the Background Reports referred to above, many claimants cannot, and cannot be expected to, document all aspects of a claim. In many cases, relevant documents do not exist, have been destroyed, or were left behind by claimants who fled Kuwait or Iraq. Accordingly, the level of proof the Panel has considered appropriate is close to what has been called the "balance of probability" as distinguished from the concept of "beyond reasonable doubt" required in some jurisdictions to prove guilt in a criminal trial. Moreover, the test of "balance of probability" has to be applied having regard to the circumstances existing at the time of the invasion and loss."*[47]

At the same time, when assessing the evidence in this category of claims, the Commission took into account a number of factors that affected the availability of certain evidence, in particular: (a) the circumstances of the armed conflict; (b) the socio-economic characteristics of the claimants; (c) the predominantly cash-based nature of the Kuwaiti economy; and (d) the specifics of the national compensation programs through which the initial gathering of information from the claimants was carried out.

47 Report and Recommendations (S/AC.26/1998/1) (n 31) para 72.

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As in the previous categories, background information, i.e. general data on the events of the military conflict consolidated in reports and statements of international organisations, played an important role in assessing the credibility of claimants' statements. Thus, even the most demanding of the evidentiary standards used by the Commission remained flexible enough to consider circumstantial evidence in the form of background data sets.

8 UKRAINIAN CASE: FIRST STEPS

On 2 April 2024, the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine opened for the submission of claims. The complete list of categories of claims eligible for recording in the Register was approved on 26 March 2024 and includes three broad categories: claims by natural persons (A), claims by the State of Ukraine (B), and claims by legal entities (C).[48] Each of them is further divided into sub-categories. For example, claims by natural persons include claims related to involuntary displacement (A1), claims related to violation of personal integrity (A2), claims related to loss of property, income or livelihood (A3) and loss of access to public services (A4).

However, the Register will begin with one category initially, namely damage or destruction of residential immovable property (A3.1). One reason for this decision is, of course, the immense impact the loss of housing has on people's lives. Another reason relates to the existing evidentiary support of this category of claims. In its statement, the Board of the Register underscored that *"substantial evidence is readily available"*.[49]

The substantial evidence the Board mentions is collected through a domestic mechanism for recording damage to residential property,[50] which operates in the digital format. Homeowners can file a claim through a mobile application called "Diia". The same app will

48 Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine: Categories of Claims Eligible for Recording (approved 26 March 2024) <https://rd4u.coe.int/documents/358068/386726/RD4U-Board%282024%2907-final-EN+-+Categories+of+Claims.pdf/3f375b28-5466-0c2e-90b6-55d23c4f7a49?t=1711546048763> accessed 6 April 2024.

49 'The Board prepares for the opening of submission of claims to the Register of Damage for Ukraine' (*RD4U Register of Damage for Ukraine*, 1 March 2024) <https://rd4u.coe.int/en/-/the-board-prepares-for-the-opening-of-submission-of-claims-to-the-register-of-damage-for-ukraine> accessed 6 April 2024

50 The domestic mechanism is regulated by the Resolutions of the Cabinet of Ministers of Ukraine, see: Resolutions of the Cabinet of Ministers of Ukraine no 380 of 26 March 2022 'On collection, processing and accounting of information on the damaged and destroyed real estate as a result of the fighting, acts of terrorism, diversions caused by the armed aggression of the Russian Federation against Ukraine' (amended 23 June 2023) <https://zakon.rada.gov.ua/laws/show/380-2022-%D0%BF#Text> accessed 21 March 2024; Resolutions of the Cabinet of Ministers of Ukraine no 473 of 19 April 2022 'On approval of the Procedure for accomplishment of the urgent works on mitigation of consequences of the armed aggression of the Russian Federation connected with damage of buildings and constructions' (amended 11 January 2024) <https://zakon.rada.gov.ua/laws/show/473-2022-%D0%BF#Text> accessed 21 March 2024.

be used for the submission of claims to the Register.[51] A claim will be deemed complete and submitted when a claimant fills out all the required information and documentation in the Claim Form in the Diia app, verifies all such information and documentation, and electronically signs the Claim Form within the app.[52] All evidence must be submitted in digital format through Diia; evidence in any other format will not be considered.[53]

Regarding the evidence required, it broadly states that "claimants shall be responsible for submitting information and Evidence supporting the eligibility of their Claims."[54]

Similar to the UN Compensation Commission, the Register will use "mass claims processing techniques and tools such as computer-assisted data processing, data analysis and sampling, including with the use of artificial intelligence."[55]

The digitalisation of the process is commendable as it expedites the procedure, increases accessibility, and enhances reliability due to interoperability between governmental databases. However, civil society has highlighted numerous hurdles that affected individuals face while proving their losses.[56] In particular, in many instances, documents proving the ownership may be lost because of the hostilities or hasty evacuation. If the data is unavailable in the State Register of Property Rights to Real Estate (rrp.minjust.gov.ua, launched on 1 January 2013), the proof of the title becomes close to impossible. The mentioned Register of Rights lacks some data that was previously stored in paperwork in the bureaus of technical inventory. It also lacks data concerning property bought from communal farms within the privatisation campaign. In rural areas, people may abstain from registering their titles to avoid paying registration fees (which may be comparable to the price of the house in the area). Unauthorised construction is yet another "blind spot" for the National Register of Rights. Additionally, in the areas where hostilities continue, documenting damage is hindered.

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51 See: Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine: Rules Governing the Submission, Processing and Recording of Claims ("Claims Rules") (approved 26 March 2024) art 13 <https://rd4u.coe.int/documents/358068/386726/RD4U-Board%282024%2904-final-EN+-+Claims+Rules.pdf/46892730-ba99-c1ec-fa98-44082a2e0f25?t=1711545756013> accessed 6 April 2024.

52 ibid, art 13(2).

53 ibid, art 14(2).

54 ibid, art 14(1).

55 ibid, art 20.

56 Ukrainian Helsinki Human Rights Union and Think Tank "Institute of Legislative Ideas", 'What should the International Register of Damage take into account when designing procedures for submitting and reviewing applications concerning destroyed or damaged housing?' (*Confiscation Tracker*, 15 March 2024) <https://confiscation.com.ua/en/analytics/what_should_the_international_register_of_damage_take_into_account_when_designing_procedures_for_submitting_and_reviewing_applications_concerning_destroyed_or_damaged_housing/> accessed 6 April 2024.

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The obstacles mentioned above should be carefully considered by the Register of Damage for Ukraine, akin to how the UN Compensation Commission took into account the contextual challenges "in the field". Disregarding the peculiarities of the ongoing hostilities situation may lead to many victims being deprived of compensation.

9 CONCLUSIONS

In the extraordinary conditions of armed conflict and occupation, collecting evidence of injury is considerably more difficult for victims. There are many various reasons for that. First, when victims are facing imminent danger, documenting the events unfolding around them is not their primary concern. Secondly, the nature of the undergone experience is often such that victims may consciously or unconsciously avoid any actions that remind them of the horrific past. Thirdly, official certification of certain facts usually made by state bodies or other institutions (including medical institutions) may prove impossible or close to impossible due to malfunctions of such bodies and institutions, loss of control over a part of the territory by the state, physical destruction or loss of archives, registers, etc.

All of these circumstances call for special attention from international compensation mechanisms, which cannot afford the rigid approach and strict formalism characteristic of ordinary proceedings in national courts. For this reason, the law of evidence in this area is flexible and sensitive to the special circumstances in which claimants find themselves.

This flexibility is reflected in the special, lowered standards of proof employed in international compensation mechanisms, as exemplified by the UN Compensation Commission. The diversification of standards of proof consisted of applying three different approaches to different categories of claims. One approach only required claimants to prove the damage and its connection to the invasion without providing any evidence of the amount of damage. Secondly, the amount of damage had to be proved by a "reasonable minimum" of evidence appropriate to the circumstances of the case. Finally, the third standard, reminiscent of the civil law standard of "preponderance of the evidence", required applicants to submit "documentary and other appropriate evidence sufficient to demonstrate the circumstances and extent of the damage suffered". However, even this standard was subject to adjustment for the special context of war.

In addition, the burden placed on claimants was eased by presumptions developed in the Commission's case law.

The approaches pioneered by the UN Compensation Commission should be utilised and further developed within the framework of an international compensation mechanism for Ukraine. Embracing a revolving human-centred approach and prioritising individual claims of injured natural persons, as demonstrated by the Register of Damage for Ukraine,

is essential.[57] Secondly, introducing two different tracks for processing claims – regular and expedited (fast-track) – where claimants can receive interim, fast-track compensation while awaiting consideration of their claims in the regular track, is a productive idea.

Ultimately, the approach to the standards of proof in compensation mechanisms dealing with war and mass harm incidents cannot be anything other than flexible and sensitive to the special circumstances of the harmful events. The burden of proof imposed on victims of war should not become an excessive, unbearable weight; instead, it should be tailored flexibly to the conditions in which victims find themselves and to the realities of wartime that limit the ability to collect and present evidence.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДОКАЗОВІ СТАНДАРТИ У ПРАКТИЦІ КОМПЕНСАЦІЙНОЇ КОМІСІЇ ООН: ДОСВІД УКРАЇНИ

Богдан Карнаух* та Тетяна Хутор

АНОТАЦІЯ

Вступ. *Згідно з міжнародним правом, держава, відповідальна за міжнародно-протиправні діяння, зобов'язана повністю відшкодувати шкоду, заподіяну такими діяннями (Відповідальність держав за міжнародно-протиправні діяння, ст. 31). Відповідно, потерпілі, яким внаслідок таких дій завдано збитків, мають право на компенсацію. Для реалізації цих фундаментальних принципів Комітет міністрів Ради Європи створив Реєстр збитків, завданих агресією Російської Федерації проти України. Це лише перший із трьох елементів майбутнього механізму компенсації для України (два інших, які ще мають бути створені, — компенсаційна комісія та компенсаційний фонд). Однак, щоб отримати компенсацію, кожен, хто постраждав від війни, повинен буде довести свій кейс перед майбутньою комісією. У цьому контексті доказові стандарти стануть критичними. Щоб зрозуміти, як міг би працювати майбутній механізм компенсацій для України, корисно вивчити практику подібних установ. Компенсаційна комісія ООН*

заслуговує на особливу увагу, оскільки вона може надати цінну інформацію про те, як необхідно довести збитки, пов'язані з війною, щоб отримати відшкодування.

Методи. *Основна мета статті — вивчити підхід Компенсаційної комісії ООН щодо доказових стандартів. У зв'язку з цим у статті спочатку зазначено загальні межі роботи Комісії, її мету та організаційну структуру. Потім описано категорії заяв, розглянутих Комісією, оскільки, як показано далі, Комісія застосувала диверсифікований підхід: різні категорії заяв підлягали різним доказовим стандартам з різним ступенем вимог. Така диференціація була зумовлена встановленням пріоритетів щодо заяв та застосуванням прискореної процедури розгляду заяв першої черги. Основна частина дослідження зосереджена на документах Комісії, які ілюструють її підхід до доказових стандартів. Спочатку окреслені та пояснені три доказові стандарти, які застосовує Комісія: доведення лише інциденту без необхідності встановлення розміру завданої шкоди; доведення шкоди, що ґрунтується на «розумному мінімумі» доказів у відповідних обставинах; доведення шкоди на підставі документальних та інших доказів, достатніх для встановлення розміру шкоди. Потім у статті проаналізовано, як ці три стандарти застосовувалися на практиці до вибраних категорій заяв про відшкодування шкоди, завданої тілесними ушкодженнями. Також були сформульовані висновки, які можна зробити з огляду на практику Комісії щодо досвіду України.*

Результати та висновки. *Під час збройного конфлікту та окупації збір доказів шкоди є надзвичайно складним для постраждалих з різних причин. Цей факт потребує особливої уваги з боку міжнародних механізмів компенсації, які не можуть дотримуватися жорстких формальностей, що використовуються у звичайних судових провадженнях. Ось чому міжнародне доказове право є адаптивним і прагне пристосуватися до унікальних ситуацій заявників. Прикладом цієї адаптивності є м'які та диверсифіковані доказові стандарти, які використовує Компенсаційна комісія ООН. Урізноманітнення стандартів доказування в практиці Компенсаційної комісії ООН полягало у застосуванні трьох різних підходів до різних категорій заяв. Крім того, тягар, покладений на позивачів, було полегшено через презумпції, розроблені в практиці Комісії. Піонерські підходи Компенсаційної комісії ООН мають бути застосовані та вдосконалені в межах міжнародного механізму компенсацій для України. Це передбачає визначення пріоритетності індивідуальних заяв, запровадження як регулярних, так і прискорених шляхів розгляду заяв, а також забезпечення гнучкості щодо тягаря доказування та стандартів доказів, щоб врахувати проблеми збору доказів у воєнний час.*

Ключові слова: *доказові стандарти; тягар доказування; деліктне право; шкода, пов'язана з війною; міжнародне доказове право; механізм міжнародної компенсації.*

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Research Article

NORTH ATLANTIC TREATY ORGANIZATION (NATO) AND ITS ROLE FOR SECURITY IN THE WESTERN BALKANS

Sheqir Kutllovci and Orhan Çeku*

ABSTRACT

Background: *The North Atlantic Treaty Organization (NATO) is the world's largest and most powerful collective security organisation in modern times. Membership in this organisation is the objective and effort of many countries, including most of the countries of the Western Balkans. Membership ensures collective protection, security and political stability. Since its inception, NATO has emerged as a global force for security and the spread of peace almost across the globe. Not everyone deems it as such, considering the Russian Federation sees it as its main enemy. Its military operations have been centred around protecting human rights and maintaining peace. The best example of this commitment is NATO's humanitarian intervention in Kosovo, one of the countries of the Western Balkans. Even after June 1999, NATO was present in this country and took care of the peace and security of the entire Western Balkans. The presence of this organisation in this part of the globe remained essential, as did knowing the geopolitical history of this region.*

The Balkans still suffers from nationalist policies and interethnic divisions, which in either case remain a very important factor for security in this region. One fundamental issue of Western Balkan countries is the acceleration of economic reforms, the rule of law and the fight against corruption to achieve membership in the European Union. Instead of these important issues in the Western Balkans, clashes have continued over border changes and nationalist rhetoric, which could undermine peace and security in this region. The current problems of the Western Balkans are inherited from the dissolution of the Socialist Federation of Yugoslavia. The wars in the former Yugoslavia, despite being the cause for the establishment of new independent states, did not fulfil the ethnic expectations of these countries. Given that the Republic of Serbia,

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in the preamble of the 2006 Constitution, foresees the Republic of Kosovo as its own territory,[1] *legal action that expresses territorial claims against a sovereign state poses a risk for new conflicts in the Balkans. A situation with conflicting tendencies is also present in the Republic of Bosnia and Herzegovina, where the official policy of the Serbian Republic of Bosnia has openly shown the tendencies for secession from the Federation and union with Serbia.*[2]

This paper deals with the role that NATO has played and continues to play with its presence in the Balkans in maintaining peace and regional security, the challenges of security and building a stable peace in this region of Europe, where nationalist tendencies dominate as well as interethnic problems, lack of political culture and deficits of democracy.

Methods: *Combined scientific methods were used in this paper, starting with the qualitative method and literature review. The qualitative method was used to interpret the scientific theories related to security. Reviewing the literature, we managed to combine the results of other studies related to our study topic. This paper also used the analysis method, which helped us separate the elements from the totality of the study problem. The historical method has served to show the axis of the security problem in the Balkans and to explain the development of NATO.*

Results and conclusions: *As a security organisation, during the Cold War, it served as a mechanism for collective defence against the nuclear threats of the Warsaw Pact and the spread of democratic values of the Western world. After the fall of the Iron Curtain, it has served as an organisation that promotes global peace and security, democracy, human rights and the rule of law. The existence of open political issues in the Western Balkans, in particular the territorial claims of Serbia against Kosovo, the nationalist tendencies of the Serbs from Bosnia and Herzegovina for separation from the Federation, the attempts of Russia to influence this region, using history, culture and intelligence services and some other issues such as the lack of political culture in Albania and Montenegro and the issues of North Macedonia with Bulgaria have posed risks to the regional security. In this geopolitical environment called the Western Balkans, the integration of all countries in NATO and its presence in this region is essential for the future and security. In this context, the membership of Kosovo and Bosnia and Herzegovina in NATO will have to be a priority for Western countries. The membership of these two states would serve regional peace and security.*

1 INTRODUCTION

North Atlantic Treaty Organization, known by the abbreviation NATO (hereinafter referred to in this paper as NATO), is the most powerful security organisation in the world. It was founded in 1949 as a collective security mechanism of the Western countries in efforts to cope with the expansion of the communist system and the expansion of the Soviet Union.

1 For more refer to: Constitution of the Republic of Serbia (2006) <https://www.srbija.gov.rs/tekst/en/130144/constitution-of-serbia.php> accessed 5 December 2023.

2 Gordana Knezevic, 'The Politics of Fear: Referendum in Republika Srpska' (*Radio Free Europe/Radio Liberty*, 23 September 2016) <https://www.rferl.org/a/politics-of-fear-referendum-in-republika-srpska-statehood-day-dodik/28009309.html> accessed 5 December 2023.

"The Alliance's creation was part of a broader effort to serve three purposes: deterring Soviet expansionism, forbidding the revival of nationalist militarism in Europe through a strong North American presence on the continent, and encouraging European political integration."[3] Former US President, Dwight D. Eisenhower, has rightly emphasised:

> *"We do not keep security establishments merely to defend property or territory or rights abroad or at sea. We keep the security forces to defend a way of life."*[4]

This way of life includes ensuring peace, freedom, respect for human rights, the rule of law, economic development and social prosperity. For 45 years, until the fall of the Berlin Wall, the developed world was engaged in upholding these principles and human freedom. Today, these principles remain a guide for peace and prosperity. On this basis, efforts to spread global peace and security continue.

Since its establishment, NATO has served in several military and peace operations in the world, the most successful of which was the humanitarian intervention in Kosovo in 1999. By intervening militarily against the military targets of the former Yugoslav Federation, it stopped ethnic cleansing and serious violations of humanitarian law. The intervention, in addition to the effects of stopping the armed conflict in the areas of former Yugoslavia, brought regional stability to the entire Western Balkans. This region is known as a source of conflicts and a history of fighting between different peoples and ethnicities.

Every time the Balkans is mentioned in the context of international relations, we think of the First World War and nationalistic tendencies for borders, territorial expansion and the domination of one nation over another being reborn. This region of Europe (Western Balkans) has remained troubled by many crises, ranging from security problems, economic and social problems, and political problems. It is worth mentioning that "Western Balkans" is a geopolitical term that refers to the following countries: Albania, Bosnia and Herzegovina, North Macedonia, Kosovo, Serbia and Montenegro."[5] Even now, at the beginning of the third decade of the 21st century, this region has continued to face security problems as well as numerous economic, political and social issues. In this sense, István Gyarmati rightly points out, "The last two decades have brought revolutionary changes in Europe - all for the better." At the same time, the Western Balkans is the only region in Europe where the balance is much more dubious. It is the only region where the changes were accompanied by bloody wars, in which more than a hundred thousand people were killed and millions displaced. It is the only country in post-communist

3 'A Short History of NATO' (*North Atlantic Treaty Organization - NATO*, 2023) <https://www.nato.int/cps/en/natohq/declassified_139339.htm> accessed 30 November 2023.

4 Dwight D Eisenhower, 'Remarks to the Committee for Economic Development (20 May 1954)' <https://www.presidency.ucsb.edu/documents/remarks-the-committee-for-economic-development> accessed 30 November 2023.

5 Marjan Gjurovski, 'Reforms of the security system of the Republic of Macedonia' in M Gjurovski (ed), *Security, Regional Cooperation and Reforms - Kosovo and Macedonia: Security Forum Kosovo-Macedonia 2018* (Vinsent Grafika Скопје 2018) 15.

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Europe where massive ethnic cleansing took place. Researcher István Gyarmati, in his study about the security challenges in the Western Balkans emphasised, "And this is the only region that is still knocking on the doors of Europe and which is not sure whether or when they will open."[6]

Western Balkans is the term used by European Union institutions to indicate the region of the Balkans, which consists of the post-communist countries (Albania, Serbia, Bosnia and Herzegovina, North Macedonia, Montenegro and Kosovo) which aspire to become part of the European Union.[7] All these states that are independent today were part of the Socialist Federation of Yugoslavia, excluding Albania. Albania was a communist country (1945-1991) led by the dictator Enver Hoxha, while former socialist Yugoslavia was led by the dictator Tito until his death in 1980. The dissolution of Yugoslavia in the 1990s was marked by armed conflicts. Initially in Slovenia (1991), then Croatia (1991-1995), Bosnia and Herzegovina (1992-1995) and finally Kosovo (1998-1999).[8] The region faced ideological problems, with a considerable lack of liberal democracy, lack of political culture, and interethnic conflicts which culminated in wars at the end of the 20th century.

The problems of the Western Balkans can be categorised into several groups: political, economic, interethnic, ideological and security problems. Being the least developed region of Europe, since the beginning of the 90s, the internal political problems also fuelled by interethnic conflicts have created significant insecurity and prompted the EU and the US to be active in this area of Europe. In this aspect, the role of the USA, as the main power of NATO, is indisputable in maintaining peace and security in the Western Balkans. The nationalist tendencies of the Bosnian Serbs for secession from the Bosnian Federation and the non-recognition of the Republic of Kosovo by Serbia are two of the main security problems in the Western Balkans. In these two countries, NATO's presence has maintained peace and stability.

Serbia, as a traditional ally of Russia in the latter's conflict with Ukraine, continues to maintain a neutral position and not impose sanctions on its great ally, Russia. In this respect, Serbia continues to play a double game: 1. On the one hand, it is determined for membership in the European Union; 2. On the other hand, it does not harm relations with Russia by continuing the traditional alliance with it. The Western world has made it clear that Serbia must align itself with the West to make progress towards the European Union. Serbia has also made it clear that it does not intend to become a member of NATO.[9]

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6 István Gyarmati and Darko Stančić (eds), *Study on the Assessment of Regional Security Threats and Challenges in the Western Balkans* (DCAF 2007) 1.

7 'Western Balkans' (*European Commission*, 2023) <https://research-and-innovation.ec.europa.eu/strategy/strategy-2020-2024/europe-world/international-cooperation/regional-dialogues-and-international-organisations/western-balkans_en> accessed 5 December 2023.

8 See more: 'The Conflicts' (*United Nations, International Criminal Tribunal for the former Yugoslavia*, 2017) <https://www.icty.org/en/about/what-former-yugoslavia/conflicts> accessed 5 December 2023.

9 Norbert Beckmann-Dierkes and Slađan Rankić, 'Serbian Foreign Policy in the Wake of the War in Ukraine' (*Konrad-Adenauer-Stiftung*, 29 Juli 2022) <https://www.kas.de/de/laenderberichte/detail/-/content/serbian-foreign-policy-in-the-wake-of-the-war-in-ukraine> accessed 5 December 2023.

The security background in the Western Balkans consists of determining factors of nationalistic internal policies of the member countries, from the unresolved political problems, lack of democracy and political culture and low economic and social development. Currently, the Western Balkans is boiling from the tense relations between Serbia and Kosovo. The European Union facilitated dialogue with the support of the USA, which should culminate in the final legally binding Agreement to normalise relations and mutual recognition. This will not be easy to achieve in practice since the parties are in antagonistic tendencies regarding the axis of the issue. The functioning of the Federation of Bosnia and Herzegovina remains a challenge to international stakeholders who are taking care of the Dayton Agreement not to fail. Progress has been made in North Macedonia in recognising the rights of Albanians through the implementation of the 2001 Ohrid Agreement and by changing the constitutional name. The current background of the problem in this country lies in overcoming issues with Bulgaria regarding the language and the recognition of the Bulgarian minority with the Constitution.

These countries, as a whole, considerably lack democracy as well as political culture. Albania should be mentioned in this case, which has had constant problems with the legitimacy of accepting election results, as well as Serbia and, in some cases, North Macedonia.[10]

The European Commission has expressed concerns that the region faces a low level of economic development, which affects the economic reforms. "The lack of convergence is a major issue for the Western Balkan region; it is currently at around 35% of the EU average level. This translates in limited revenue base to fund the accession process and related reforms, and it also contributes to large-scale outward migration."[11]

The membership of the Western Balkans countries in the EU is one of the main challenges not only for the improvement of democracy, political pluralism and economic development but also for the peace and security of this region.

The membership of Kosovo and Bosnia and Herzegovina in NATO should be the priority of the member countries of this organization. The membership of these states, which have gone through difficult historical processes – initially with wars and then with state building – constitutes the axis of regional security.

The paper examines and analyses the North Atlantic Alliance, NATO, as a military and political mechanism of collective security and its role in maintaining peace and security in the world, in particular in the Western Balkans region.

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10 See more: Ljiljana Kolarski and others, 'Fraudulent electoral process: How to foster free, fair and transparent elections in the Western Balkans' (GLOBSEC Forum, 15-17 June 2021) <https://www.globsec.org/sites/default/files/2020-09/Policy-Proposal_Fraudulent-electoral-process.pdf> accessed 5 December 2023.

11 'New Growth Plan for the Western Balkans' (*European Commission, European Neighbourhood Policy and Enlargement Negotiations (DG NEAR)*, 8 November 2023) <https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/new-growth-plan-western-balkans_en> accessed 5 December 2023.

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The paper first describes the history of its establishment, its membership and the development of its military operations. The paper deals with the concept of this organisation today in the contemporary world. The role and importance of NATO for the Western Balkans is an integral and important part of this paper.

The paper has been prepared to achieve its scientific objectives by answering two research questions: 1. Is peace and security in the Western Balkans vulnerable? 2. What is NATO's role in security in the Western Balkans?

The paper's methodological framework has faced certain limitations due to technical difficulties in collecting empirical data in the field. Another limitation was the inability to interview political stakeholders of the Western Balkan countries.

2 NATO ESTABLISHMENT AND EVOLUTION

Knowing that two world wars of devastating proportions and the expansion of the Soviet Union and communist ideology occurred within 30 years, the countries of Western Europe, together with the United States of America, initiated the establishment of a security organisation – a collective defence organisation. In this way, 12 sovereign states decided to establish the North Atlantic Treaty Organization (NATO).

The treaty was signed on 4 April 1949 in Washington and contains the preamble and 14 articles in total.[12] The preamble to the establishment of NATO emphasises the commitment of Western countries to maintaining peace and security in the world:

> *"The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments. They are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law. They seek to promote stability and well-being in the North Atlantic area. They are resolved to unite their efforts for collective defence and for the preservation of peace and security. They therefore agree to this North Atlantic Treaty."*[13]

The Treaty and, as such, the North Atlantic Treaty Organization (NATO) rely on the United Nations to maintain international peace and security, "The Treaty thus operates inside the Charter but outside the veto. It does not replace United Nations peace machinery; it functions only if and when that machinery breaks down.[14]

12 North Atlantic Treaty (Washington DC, 4 April 1949) <https://www.nato.int/cps/en/natohq/official_texts_17120.htm> accessed 5 December 2023.

13 ibid, preamble.

14 Richard H Heindel, Thorsten V Kalijarvi and Francis O Wilcox, 'The North Atlantic Treaty in the United States Senate' (1949) 43(4) American Journal of International Law 633, doi:10.2307/2193257.

Although NATO is a military organisation, its primary goal is peace and security, which must be ensured through peaceful mechanisms or means. This is emphasised in Article 1 of the Founding Treaty:

> *"The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations."*[15]

When peaceful resolution of disputes is not possible, then military mechanisms are not excluded. NATO has, on several occasions, shown that it is for lasting peace in the world. NATO, since its establishment, has participated in direct military operations and as a peacekeeping mission. The main operations in the form of military intervention are Iraq (1991), Bosnia and Herzegovina (1994), Kosovo (1999) and Afghanistan (2003). The first case of military intervention was "*Operation Anchor Guard*, (10 August 1990 – 9 March 1991), *Operation Ace Guard*, (3 January 1991 – 8 March 1991), Kuwait-Iraq, Operation Ocean Shield, Somalia (2009) and Military Intervention in Libya (2011)."[16]

After Iraqi forces invaded Kuwait, on 2 August 1990, NATO Airborne Early Warning aircraft deployed to Konya, Türkiye, to monitor the crisis and provide coverage of south-eastern Türkiye in case of an Iraqi attack during the first Gulf Crisis/War (*Operation Anchor Guard)*. In response to a Turkish request for assistance to meet the threat posed by Iraq during the first Gulf Crisis/War, NATO deployed the ACE Mobile Force (Air) and air defence packages to Türkiye (*Operation Ace Guard)*.[17]

The other military operation was carried out during the war in the territory of the former Yugoslavia, namely in Bosnia and Herzegovina. During the dissolution of Yugoslavia, the largest military conflict was in Bosnia and Herzegovina. The European Union and NATO imposed an arms embargo in response to the fighting in this country.[18]

It was during the monitoring of the no-fly-zone that NATO engaged in the first combat operations in its history by shooting down four Bosnian-Serb fighter bombers conducting a bombing mission on 28 February 1994. In August 1995, to compel an end to Serb-led violence in the country, UN peacekeepers requested NATO airstrikes.[19] Operation Deadeye began on 30 August against Bosnian-Serb air forces but failed to result in Bosnian-Serb

15 North Atlantic Treaty (n 12) art 1.

16 'Operations and Missions: Past and Present' (*North Atlantic Treaty Organization - NATO*, 10 July 2023) <https://www.nato.int/cps/en/natohq/topics_52060.htm> accessed 5 December 2023.

17 ibid.

18 'EU Sanctions against Russia Following the Invasion of Ukraine' (*European Commission*, *EU Solidarity with Ukraine*, 2023) <https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en> accessed 5 December 2023.

19 Operations and Missions (n 16).

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compliance with the UN's demands to withdraw. This led to Operation Deliberate Force, which targeted Bosnian-Serb command and control installations and ammunition facilities. This NATO air campaign was a key factor in bringing the Serbs to the negotiating table and ending the war in Bosnia.[20]

The biggest and most important operation ever undertaken by NATO is the case of Kosovo in 1999. In February and March 1999, the signing of the Rambouillet agreement between Serbia and the representatives of the Kosovo Albanians failed. The agreement sponsored by the US and the EU was signed by the Kosovar side, but the Serbian side refused to sign it. As a result of the failure of this agreement, the military forces of President Slobodan Milosevic began a comprehensive campaign of ethnic cleansing of the majority population in Kosovo - the Albanians. Diplomatic means were exhausted, and NATO, without the approval of the UN Security Council, began bombing military targets on the territory of the remaining Yugoslavia on 24 March 1999. Operation Allied Force started on 24 March 1999 and was suspended on 10 June, lasting a total of 78 days. On 10 June 1999, the Federal Republic of Yugoslavia accepted the withdrawal of its military, police and paramilitary forces and the deployment of an effective international civil and security presence.[21] The humanitarian intervention in Kosovo encouraged the debate on the use of force in cases where human rights are violated. Regarding the researcher, Thorsten Gromes, explaining the humanitarian intervention in Kosovo, he emphasised:

> *"Already during and shortly after the intervention, many comments categorized NATO's Operation Allied Force as a turning point for international reactions to grave human rights violations and for using military means."*[22]

When NATO initiated its intervention named "Operation Allied Force" on 24 March 1999, Secretary General Javier Solana declared:

> *"This military action is intended to support the political aims of the international community. It will be directed towards disrupting the violent attacks being committed by the Serb Army and Special Police Forces and weakening their ability to cause further humanitarian catastrophe. […] Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo. […] We must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo."*[23]

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20 ibid.

21 'Kosovo Air Campaign (March-June 1999): Operation Allied Force' (*North Atlantic Treaty Organization - NATO*, 17 May 2022) <https://www.nato.int/cps/en/natohq/topics_49602.htm> accessed 5 December 2023.

22 Thorsten Gromes, *A Humanitarian Milestone?: NATO'S 1999 Intervention in Kosovo and Trends in Military Responses to Mass Violence* (PRIF Report 2, Leibniz Institut; HSFK; PRIF 2019) 1 <https://reliefweb.int/report/serbia/humanitarian-milestone-nato-s-1999-intervention-kosovo-and-trends-military-responses> accessed 5 December 2023.

23 Javier Solana, 'Press Statement of 23 March 1999' [1999] NATO Press Release 40 <https://www.nato.int/docu/pr/1999/p99-040e.htm> accessed 5 December 2023.

Humanitarian intervention in Kosovo stopped ethnic cleansing and violations of humanitarian law, and history has shown that military intervention was necessary and NATO was on the right side of history. Even the case of Kosovo is taken as an example of similar cases, such as the intervention in Libya, in the case of the civil war in 2011.

Since its establishment by 12 Western countries (Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the United States), NATO has continued its expansion in several stages. In 1952, Türkiye and Greece joined the Alliance, while in 1955, Germany and in 1982, Spain. NATO continued its expansion with the first group of countries of the former communist bloc in 1999 with the membership of the Czech Republic, Hungary and Poland. The next expansion was achieved in 2004 with the membership of the second group of post-communist countries Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia, as well as in 2009 with Albania and Croatia. NATO expansion was halted until 2017, when Montenegro, a traditional ally of Serbia and Russia, joined the Alliance. With membership into NATO, Montenegro made the separation between Western orientation and traditional Orthodox ties. North Macedonia, along with Croatia and Albania, failed to become part of NATO in 2009 due to Greece's non-acceptance. Greece refused to sign the Macedonian accession treaty demanding the change of the constitutional name. In 2018, the Macedonian Assembly approved the constitutional name change, and it was decided to call it North Macedonia. In 2020, North Macedonia officially became the 30th member of NATO.[24] Meanwhile, after Russia's aggression against Ukraine, in 2023, Finland officially became the last country to join the Alliance. Sweden's membership process continues, and it is expected that in 2024, it will also officially join the Alliance.[25] The end of the war in Ukraine and the accession process of Ukraine, Kosovo and Bosnia and Herzegovina will be the main challenges in the expansion and development of NATO.

3 WHAT IS NATO TODAY?

Seventy-four years have passed since the establishment of NATO, and ever since, the world has taken different directions and political and military developments other than those at its establishment. In 1949, the world was divided into two hemispheres: the Western world and the Eastern world, represented by the Soviet Union. Under Soviet influence, the Warsaw Pact was founded in 1955 as a response to the NATO Alliance. After the end of the Cold War, the nature of NATO was primarily similar to a military alliance directed towards external threats. It transformed to a certain extent into a new entity, where the defence of territories, countries and nations and even the alliance as a

24 'NATO Relations' (*Ministry of Foreign Affairsof the Republic of North Macedonia*, 31 October 2022) <https://mfa.gov.mk/en/page/7/nato-relations> accessed 5 December 2023.

25 For more on the membership process in NATO, see: 'NATO Member Countries' (*North Atlantic Treaty Organization - NATO*, 2023) <https://www.nato.int/cps/en/natohq/topics_52044.htm> accessed 2 December 2023.

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whole became paramount. NATO has been transformed into an instrument defending common values. Therefore, the duties and the responsibilities of NATO, on the one hand, changed and, on the other hand, were enlarged.[26]

NATO today is a strategic security and defence hub that can project both military and partnership power worldwide. However, its core mission remains unchanged: to safeguard the freedom and security of its member nations through political and security means founded upon the values of democracy, liberty, rule of law and the peaceful resolution of disputes. To that end, NATO provides a strategic forum for consultations between North Americans and Europeans on security issues of common concern and the means for joint action to deal with them. Even today, an attack upon one member is an attack on all.[27]

One of the keys to NATO's success is its decision-making process based on consensus. There is no system of voting, and all decisions have to be unanimous. Extensive consultations and discussions are often required before an important decision can be taken. Although this system may appear slow and unwieldy to an outside observer, it has two major advantages; firstly, the sovereignty and independence of each member country are respected; and secondly, when a decision is reached, it has the full backing of all member countries and their commitment to implement it.[28]

In this context, it should be appreciated that even though the US plays a leading role in NATO, the decision-making mechanism includes all members with equal votes, emphasising political consensus on matters of vital interest. This creates equality of states in this security mechanism.

NATO is focused and operates in two dimensions: political and military.

> *"Security in our daily lives is key to our well-being. NATO's purpose is to guarantee the freedom and security of its members through political and military means.* ***POLITICAL*** *– NATO promotes democratic values and enables members to consult and cooperate on defence and security-related issues to solve problems, build trust and, in the long run, prevent conflict.* ***MILITARY*** *– NATO is committed to the peaceful resolution of disputes. If diplomatic efforts fail, it has the military power to undertake crisis-management operations. These are carried out under the collective defence clause of NATO's founding treaty – Article 5 of the Washington Treaty or under a United Nations mandate, alone or in cooperation with other countries and international organisations."*[29]

26 Rudolf Logothetti, 'The Security of the Balkan Region: The Role of NATO' in I Tarrósy (ed), *Security Under Global Pressure* (Europe Centre PBC 2005) 71.

27 Julian Lindley-French, *The North Atlantic Treaty Organization: The Enduring Alliance* (Routledge; Global Institutions 2007) 87-8.

28 'Understanding NATO' (*North Atlantic Treaty Organization - NATO*, 2023) 3 <https://www.nato.int/docu/presskit/010219/004gb.pdf> accessed 5 December 2023.

29 'What is NATO?' (*North Atlantic Treaty Organization - NATO*, 2023) <https://www.nato.int/nato-welcome/> accessed 5 December 2023.

In 1994, NATO introduced the Partnership for Peace.[30] This is a major programme designed to assist participating countries in restructuring their armed forces to play their proper role in a democratic society. Tailored to the individual needs of each country, it offers opportunities for practical cooperation in many different fields, allowing participants to choose as much or as little from the programme as their security needs require. Activities range from military exercises and workshops to seminars and training courses. Particular emphasis is placed on making military forces more transparent and accountable to the electorate. The experience gained through Partnership for Peace has contributed significantly to the cooperation between the countries participating in peace-keeping forces such as the Stabilisation Force (SFOR) in Bosnia and Herzegovina and the Kosovo Force (KFOR).[31]

The transformation of NATO is not complete. It is an ongoing process of adaptation and reform aimed at enabling NATO to deal effectively with new security challenges in the Euro-Atlantic area. Despite these continuing changes, however, NATO's core principles will remain the same: the principle that nations can only ensure their security by working together, and, above all, the principle that Europe and North America are a unique community of shared values and interests. Based on these fundamental principles, NATO will continue to play a key role as an effective crisis manager and as a solid framework for security cooperation across the Euro-Atlantic area.[32]

NATO's strategic objectives today include expanding the security range by welcoming new member countries. This expansion aims to increase political stability and security in Europe, especially in light of the growing threats posed by Russia, particularly following its military aggression in Ukraine, and the expanding influence of China.

NATO standards are the key and must remain at the core of the twenty-first century Alliance because they represent the convergence of American and European concepts of the use of force (with Canada effectively aligning with European perspectives).[33]

For aspiring countries, meeting NATO standards would result in state modernisation, political stability, modern armed forces, and sustainable development.

4 NATO RELATIONS WITH THE WESTERN BALKANS

The Western Balkans have been among the most troubled regions on the European continent and remains a troubled region, which is of increasing interest to the European Union, as well as NATO and the United States of America. Notably, "NATO and the European Union share common strategic interests. Both organisations advise and work

30 'Partnership for Peace Programme' (*North Atlantic Treaty Organization - NATO*, 2023) <https://www.nato.int/cps/en/natohq/topics_50349.htm> accessed 5 December 2023.

31 Understanding NATO (n 28) 3.

32 ibid.

33 Lindley-French (n 27) 99.

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together to prevent and resolve armed crises and conflicts, in a complementary spirit."[34] It should also be noted that meeting the conditions for integration into the European Union and the entry of these countries into NATO undoubtedly means creating much greater security for lasting peace and stability in the region. Certainly, economic development, socio-political and genuine democratisation are the determining factors in the path to Euro-Atlantic integration of these countries.

The Western Balkans is historically a connecting point between Europe, the Caucasus and the Middle East, a region which still continues to be important due to the trade routes that connect them. The strategic importance of this region is observed, in particular in an era of widespread energy armament, the advantage offered by the Balkans for gas and oil pipeline routes coming from the Caspian Sea and destined for the Old Continent, over possible more expensive and articulated routes across the Bosporus. The region then wedges between the eastern and southern flanks of the Atlantic Alliance, playing a key role in the overall compactness and security of the Euro-Atlantic front.[35]

Since 1990, the Balkan region has effectively been divided into "two Balkans": the successful Balkans in the Euro-Atlantic integration processes and the non-integrated or semi-integrated Balkans. The integrated Balkans are its eastern and southern parts, while the non-integrated Balkans are the Western Balkans, precisely that part of the region that includes Albania, Montenegro, Bosnia-Herzegovina, Serbia, Kosovo and North Macedonia. Thus, it is not so much the geographical position that gives a name to this region than is the need for an essential distinction of the group of countries in this part of the Balkans, to give a politically correct name to a sub-region that was no longer Yugoslavia and Albania, but not really anywhere else.[36]

In this context, several post-communist countries of the Balkans (Slovenia, Bulgaria, Romania and Croatia) became part of the EU and continued their journey towards development and prosperity. The others - those that remain under the designation "Western Balkans," are far from being part of the EU. Of the countries that are part of the Western Balkans, Albania, North Macedonia, and Montenegro are members of NATO, while Serbia, in its strategic policies, has refused to become a member of this security organisation. While Bosnia and Herzegovina and Kosovo have been interested in becoming members, the membership process is complicated. In the case of Bosnia and Herzegovina,

34 Ferdinand Gjana, 'The Western Balkans and EU-NATO Relations' (International Conference on Balkan Studies (ICBS 2008) "Integration of the Western Balkans into Euro-Atlantic Structures - Future Challenges", Tirana, EPOKA University Centre for European Studies, 7-8 November 2008) 44 <http://dspace.epoka.edu.al/handle/1/179> accessed 5 December 2023.

35 Emmanuele Panero, 'The Western Balkans into NATO: security perspectives' (*CeSPI*, 14 December 2023) Brief n 12, 2 <https://www.cespi.it/en/eventi-attualita/focus-balcani/western-balkans-nato-security-perspectives> accessed 5 December 2023.

36 Vedran Dzihic and Daniel S Hamilton (eds), *Unfinished Business: The Western Balkans and the International Community* (Center for Transatlantic Relations SAIS 2012) 3.

the internal problems related to decision-making in the Federation make it impossible to start a genuine NATO membership process. Kosovo's challenge lies in its lack of recognition by some NATO member countries.

Political elites in the Balkans have consistently demonstrated that they are not ready or cannot reach a consensus on problematic issues with common compromise and convenience. This fundamental phenomenon is evident in the long-standing Greco-Macedonian conflict over the constitutional name of Macedonia and the ongoing disputes between Serbia and Kosovo. Conflicts in the Balkans typically lead to international intervention rather than bilateral resolution within the regional framework.

For instance, the recent conflicts in the Balkans triggered international military interventions by members of the United Nations Security Council (United States, United Kingdom and France) as well as Germany as a Western European country. Conflicts in the Balkans have also been on the UN Agenda, Organization for Security and Co-operation in Europe (OSCE), European Union, NATO and the Council of Europe, contributing significantly to disagreements and antagonism between the Great Powers.[37]

In addition, the countries of the Western Balkans have a number of tasks on the road to NATO accession, so it is rightly stated that "In the case of Western Balkan candidates, plus two non-candidates who want to improve their ties and relations with the Alliance, homework poses a range of administrative, organisational and political challenges that need to be addressed. Unfortunately, the completion of homework does not mean an automatic invitation to join NATO, as such a decision is of a political and subjective nature."[38]

Interstate cooperation between the Western Balkan countries is of extraordinary relevance in reducing interethnic tensions that have existed for decades and establishing economic cooperation, which would contribute to establishing security and lasting peace in the region. Certainly, it is rightly stated that "previous conflicts, resistance to relinquish part of newly acquired sovereignty, incomplete and late nation-state building (compared to most Western European countries), status issues unresolved and, above all, the problems associated with the transition to democracy, societies and market economies make regional co-operation in the Western Balkans difficult."[39]

The United States of America and the European Union have invested a lot in peace and security in the Western Balkans, especially since the beginning of the '90s. Other conflicts

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37 Wolfgang-Uwe Friedrich, Wolfgang Ischinger and Rudolf Scharping, *The Legacy of Kosovo: German Politics and Policies in the Balkans* (German issues 22, AICGS; Johns Hopkins University 2000) 2-3.

38 Kacper Rękawek, *The Western Balkans and the Alliance: All Is Not Well on NATO's Southern Flank?* (Polisy Paper n 14, PISM 2013) 3 <https://www.files.ethz.ch/isn/165421/PISM%20Policy%20Paper%20no%2014%20(62).pdf> accessed 5 December 2023.

39 Jelica Minić, 'A Decade of Regional Cooperation in South Eastern Europe – Sharing Guidance, Leadership and Ownership' in M Weichert and other, *Dialogues: Ownership for Regional Cooperation in the Western Balkan Countries*(Friedrich-Ebert-Stiftung 2009) 19-20.

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in the world, especially in the Middle East, have left the Western Balkans region aside.[40] But American and European interest will inevitably return to the countries of the region due to the cessation of Russian and Chinese influence that has been constantly present in the region, which has fostered destabilisation rather than comfort and development. In this sense, it is a fact that "the presence of the US and Russia, as an extended arm for defence and military assistance, economic benefits and social care for the Balkan countries is in fact another attempt to secure military and economic supremacy."[41]

NATO has continued to pay increasing attention to the effects and implications arising from the involvement of the Russian Federation and the People's Republic of China in the Western Balkans, in particular by assessing the possible destabilising consequences of actions taken by Moscow and Beijing, regardless of whether these are created by malevolent intents or results.[42]

Russia has historically had close bilateral relations with Serbia and has strong ties with some nationalist groups in Belgrade. For instance, in 2014, personnel from the paramilitary formation called Garda Çetnike (Chetnik Guard) participated in actions leading to the Russian annexation of Crimea. Following Russia's aggression against Ukraine, on 24 February 2022, some members of this organisation continued to fight alongside the Russian Armed Forces in occupied territories in eastern Ukraine.[43]

In addition, in the previous year and a half, there has been an intensification of operations in the Serbian information environment by the Russian Federation, with the plausible aim of consolidating a positive perception of the Kremlin in local public opinion while promoting an aversion to NATO that could dangerously degrade regional stability.[44]

On the other hand, China, over the last five years, has developed a comprehensive network of economic investments, in particular in the energy and infrastructure sectors, as well as

40 Thomas E Graham and others, *Time for Action in the Western Balkans: Policy Prescriptions for American Diplomacy* (NCAFP; EastWest Institute 2018) 7.

41 Katerina Veljanoska, Oliver Andonov and Goran Shibakovski, 'The Democratization Process in the Western Balkans in the Last 20 Years: Interethnic Relations and Security Implications' (2014) 14(2) Romanian Journal of European Affairs 30.

42 Michal Szczerba, The Western Balkans: Russia's War on Ukraine and the Region's Enduring Challenges : Report of 19 November 2022 018 ESCTD 22 E rev. 2 fin (*NATO Parliamentary Assembly*, 19 January 2023) <https://www.nato-pa.int/document/2022-western-balkans-russias-war-ukraine-and-regions-enduring-challenges-report-michal> accessed 5 December 2023.

43 US Army Special Operations Command, *"Little Green Men": A Primer on Modern Russian Unconventional Warfare, Ukraine 2013-2014* (Fort Bragg, NC 2015) 44 <https://nsarchive.gwu.edu/media/16170/ocr> accessed 5 December 2023.

44 Wouter Zweers, Niels Drost and Baptiste Henry, *Little Substance, Considerable Impact: Russian Influence in Serbia, Bosnia and Herzegovina, and Montenegro : Clingendael Report* (Clingendael 2023) <https://www.clingendael.org/publication/russian-influence-serbia-bosnia-and-herzegovina-and-montenegro> accessed 5 December 2023.

activities and initiatives in culture, scientific research, education and mass media, also by cooperating with local political formations and government entities.[45]

China's approach to the Western Balkans is implemented both through bilateral relations, among which the one with Serbia is the most longstanding and is expanding to the Defence sphere12, and concurrently with the "16 plus 1" Framework of the Cooperation Initiative between China and the Central and Eastern European Countries, launched in 2012-13, but increasingly implemented since 2021.[46]

In 2006, through a referendum, Montenegro finally separated from the Union of Serbia and Montenegro and created an independent state. In 2017, Montenegro formally joined NATO, marking a shift towards the West.[47] This NATO membership significantly reduced the influence of Russia and Serbia in Montenegro. After overcoming the constitutional name dispute with Greece and implementing the 2001 Ohrid Agreement to some extent, North Macedonia joined NATO, and the internal interethnic problems have largely been overcome. Currently, the Macedonian state faces challenges with Bulgaria, especially regarding the acceptance of the Bulgarian ethnicity as a category in their Constitution and the acceptance of the Macedonian language as a separate language from Bulgarian.[48] These issues are expected to be resolved as North Macedonia progresses in its European Union integration process.

In the Western Balkans, two crisis situations still affect not only the Euro-Atlantic integration processes but also peace and security: Bosnia and Herzegovina and especially Kosovo. The first is the functioning of the Federation of Bosnia and Herzegovina according to the Dayton Agreement of 1995 and the tendencies of the Srpska Republic to secede from the Federation. On the one hand, the relationship between Serbia and Kosovo remains an insurmountable crisis. The negotiations that started in 2011 and resulted in the first agreement in 2013 are not ending, and the final result is not visible in the background. Despite the negotiations facilitated by the European Union and promoted by the United States of America, Serbia's non-recognition of Kosovo remains a dark point in the integration process of these countries towards the EU, but also represents a danger to peace and regional security. Until the reaching of a legally binding comprehensive agreement

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45 Stanicek Branislav and Simona Tarpova, *China's Strategic Interests in the Western Balkans* (EPRS 2022) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733558> accessed 5 December 2023.

46 Ana Krstinovska and others, *China's Influence on the Western Balkans' EU Accession Process: Synergies and Obstacles* (Konrad-Adenauer-Foundation; Wilfried Martens centre for European Studies; ESTIMA 2023).

47 'Relations with Montenegro' (*North Atlantic Treaty Organization - NATO*, 14 December 2017) <https://www.nato.int/cps/en/natolive/topics_49736.htm> accessed 5 December 2023.

48 Ulf Brunnbauer, 'Side Effects of "Phantom Pains": How Bulgarian Historical Mythology Derails North Macedonia's EU Accession' (2022) 70(4) Comparative Southeast European Studies 722, doi:10.1515/soeu-2022-0064.

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between Serbia and Kosovo, the presence of NATO in Kosovo will remain a factor of peace and stability in the future.

NATO, through the KFOR (Kosovo Force) mission, as of 10 June 1999 when it was given the mandate to serve in Kosovo under the 1244 United Nations Security Council Resolution,[49] has served with the mission of guaranteeing peace and stability, not only in Kosovo, but also in the entire region of the Western Balkans. "Today, NATO strongly supports the Belgrade-Pristina EU-brokered Normalisation Agreement (2013). The increased tensions in the region throughout 2023 have led NATO to temporarily deploy extra troops to ensure KFOR has the forces it needs to fulfil its United Nations (UN) mandate impartially."[50]

5 NATIONALISMS AND INTERETHNIC PROBLEMS

Interethnic nationalism in the Balkans probably has its roots in the historical period of the Middle- Ages. All the peoples of the Balkans claim their antiquity in the lands where they live and oppose each other concerning their origins. The Balkans has historically been the site of the biggest clashes during the Greek, Roman, Byzantine, Habsburg and Ottoman periods. Cultures and peoples of three continents have collided and mixed, leaving traces and consequences. On the other hand, the Balkans, as a natural bridge connecting Europe with Asia, is located in the "Geostrategic heart" of the region with two key areas of the island of Crete, which controls all the maritime corridors of the Eastern Mediterranean. The second is Southern Serbia and Kosovo, which controls all the land corridors of the region. The geographical position has given this region a very special role. Historically, the main East-West and North-South communication routes have passed through the Balkans region.[51]

For centuries, the Balkan region had multi-ethnic heterogeneity. Under Ottoman rule, these ethnic groups coexisted peacefully for a long time. During the Ottoman period, today's ethnic groups were primarily divided according to their religions and beliefs. The long-standing mutual tolerance between peoples and religions enabled the Balkan communities to live together without conflicts. Although even before the region fell victim to nationalism, the Ottoman state was not completely free from disturbances, it managed to maintain a certain undisturbed environment where all Balkan groups coexisted for centuries under one state.[52]

49 'NATO's role in Kosovo' (*North Atlantic Treaty Organization - NATO*, 20 November 2023) <https://www.nato.int/cps/en/natohq/topics_48818.htm> accessed 5 December 2023.

50 ibid.

51 Abaz Lleshi, *Gjeopolitika e Ballkanit dhe Përspektivat e Sigurisë në Rajon* (Geer 2009) 12.

52 Hans Georg Majer, 'The Ottoman Heritage Revisited' in M Hacısalihoğlu and F Aksu (eds), *Proceedings of the International Conference on Minority Issues in the Balkans and the EU*, Istanbul, Turkey, 16 May 2007 (Joint conference series, no 7, OBIV 2007) 33.

After the Balkan Wars in 1912-1914, the region was finally liberated from Ottoman control, and the Conference of Ambassadors in London redrew the new borders of the Balkans.[53] However, this new demarcation did not bring lasting peace to the region. Tendencies for territorial expansion continued in this region for nearly a century. After the end of the Second World War, the entire Western Balkans was oriented towards the communist ideology. The accumulation of nationalist tendencies was powerful and culminated in the wars of the '90s in the Socialist Federation of Yugoslavia.

Excessive nationalism and territorial intentions towards neighbours have been and continue to be among the most serious problems in the Balkan region. Interethnic conflicts are the main reason for the emergence of tensions and the threat to peace and security in this part of Europe. The wars in the former Yugoslavia have been a manifestation of nationalist policies within the former Yugoslavia, especially Serbian nationalist policies, and its territorial aims towards other units of the former Yugoslav federation. In this sense, Boriana Marinova-Zuber rightly points out that "internal nationalism was certainly the most important political factor throughout the existence of Yugoslavia."[54]

Nationalism and nationalist policies, despite the promotion of democracy by all the countries of the Western Balkans, continue to be present in this region to this day. In this regard, Jenny Nordman rightly points out that "Ethnic nationalism was a major factor in many of the tragedies the Balkan region experienced in the 1990s and a tool often used by Balkan politicians to strengthen their power. While all Balkan countries seem to have shown considerable commitment to democratic and EU-oriented reforms, tensions between ethnic groups and nationalist rhetoric among political elites nevertheless remain a feature of politics in the region."[55] Certainly, we should bear in mind that "due to the demographic complexity and historical turmoil in the Western Balkans region, issues related to ethnic and interethnic relations, minority and refugee rights are of critical importance, given that the denial of fundamental rights and freedoms means a grave violation of democratic values."[56]

The peace of the region hinges on the relations between states, with government policies and approaches playing a decisive role. Getting away from the political face of the past and creating political competition with ideas for economic development could help alleviate the lingering scars of the bloody wars of the '90s. In this regard, Lucia Vesnic-Alujevic rightly states that "The foundations of democracy, rule of law, political dialogue

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53 Orhan M Çeku, *Pavarësia e Kosovës dhe Gjeopolitika e Ballkanit Perëndimor në shekullin XXI* (KISED 2023) 112.

54 Boriana Marinova-Zuber, *The Rebirth of Nationalism in the Balkans in the 1990s: Causes, Consequences and Possible Solutions* (International relations and security network, ISN; ETH Zürich 2007) 9.

55 Jenny Nordman, 'Nationalism, EU Integration, and Stability in the Western Balkans' in IFSH (ed), *OSCE Yearbook 2015* (Nomos 2016) 151.

56 'Western Balkans' Accession to the European Union: Mission (Im)Possible' (*Friedrich Ebert Stiftung*, nd) 5 <https://library.fes.de/pdf-files/bueros/sofia/08091.pdf> accessed 5 December 2023.

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and human rights are still being laid in these countries. At the same time, all these are criteria set by the European Union for countries seeking membership, which is the goal of all Western Balkan countries."[57]

The countries of the Western Balkans are hostage to the public discourse used by nationalist politics and relics, which have been and continue to be fuelled by hate speech against ethnic groups within these states. In this context, Lucia Vesnic-Alujevic points out that "The main problem affecting relations between the countries remains the public discourse on wars, which is still isolated according to partisan perspectives. Each side has its own 'truth' regarding the interpretation of the conflict, which makes it difficult to establish good relations between neighbours. "Instead, it provides the source of hatred and conflict."[58]

It should be noted that during these two decades, since the end of the war in Kosovo in 1999, and the conflict in Northern Macedonia in 2001, a greater calm reigned in the Western Balkans region, but was expressed occasionally by interethnic tensions, where hatred is expressed from one group to another. In this regard, it is worth mentioning that Lucia Vesnic-Alujevic rightly points out that "The situation is much better than 10 to 15 years ago and negative feelings are slowly being overcome, public opinion polls show that national populations still consider neighbouring nations their greatest enemies. The main hatred exists between Serbs and Croats, Kosovo Serbs and Albanians and Serbs and Muslims."[59]

Undoubtedly, the nationalist and pro-war policies of the 1990s led by Milosevic, which led to several wars during the break-up of the former Yugoslavia, had far-reaching consequences, one of which is the enduring legacy of such actions. "After the 1990s, when policies promoting nationalism and ethnic unity culminated in a series of wars and armed conflicts, the Western Balkan countries faced the task of creating national civil identities based on international norms of democracy and human rights and free markets. All countries in the region have created such identities within the political and economic frameworks offered by international organizations including the EU, OSCE, NATO and UN."[60]

However, despite the rhetoric promoting the values championed by the organisations mentioned above, the reality has yet to be applied in practice. During the first two decades of the 21st century, nationalist and populist policies continued to dominate, with pro-European and Western policies often used merely as a tool to secure votes by political parties. In this sense, Jenny Nordman aptly points out that "International organizations have identified ethnic tensions and aggressive nationalism as threats to international democracy and security, and therefore carry out activities aimed at addressing emerging conflicts, as

57 Lucia Vesnic-Alujevic, *European Integration of Western Balkans: From Reconciliation to European Future* (CES 2012) 11-2.

58 ibid 17.

59 ibid 17.

60 Nordman (n 55) 151.

well as strengthening the capacity of institutions and promoting respect for democratic values as a means of conflict prevention in the long run. For example, the OSCE plays a role in early warning and early action, particularly through the High Commissioner on National Minorities, and is also engaged in capacity building, providing training and legal aid, and institutional building. The EU calls for improvements in minority rights and good neighbourly relations, as outlined in its acquis, as well as economic and political reforms in enlargement countries as a precondition for securing the promises related to EU integration and EU membership."[61]

It is easily noticed in Balkan politics that there is a lack of ideas and development projects. Therefore, more non-political language, populism and nationalism are used among Balkan politicians; in this regard, "Nationalist rhetoric has become more and more prominent in the political debate. In some cases, it has focused on internal divisions between ethnic groups, while in others, ethno-politics has shaped the priorities of foreign policy and regional relations."[62]

6 POLITICAL CULTURE AND DEFICITS OF DEMOCRACY

The interethnic problems that culminated in the wars of the '90s in the former Yugoslavia greatly influenced the development of democracy, political pluralism and economic and social transformation. This is especially noticeable in countries such as Serbia, Bosnia and Herzegovina, the Republic of Kosovo and North Macedonia.

For two decades, Serbian politics has spent extraordinary energy to create problems in Kosovo, aiming to portray it as a failed state. This strategy stems entirely from Serbia's nationalist policies and its inability to break away from its political past, which fueled the horrific wars of the 1990s – conflicts that Europe had not experienced since World War II.[63]

Despite the existence of political pluralism in the Western Balkans, the political culture is still far from the standards of democracy. In this regard, Dragica Vujadinović rightly emphasises when talking about the development of civil society in Serbia, Montenegro and Croatia, that "patriarchal political culture, traditionalism and orientation towards the past - with significant potential for mystification and abuse of historical memory - are the main obstacles, or the basis for all obstacles."[64]

61 ibid 151-2.
62 ibid 152.
63 Branko Milanovic, 'Why is the Serbia-Kosovo Situation Globally Serious?' (*Global Inequality and More 3.0*, 30 September 2023) <https://branko2f7.substack.com/p/why-is-the-serbia-kosovo-situation> accessed 5 December 2023.
64 Dragica Vujadinović, *Civilno Društvo i Političke Institucije: Srbija u vrtlogu promena* (Pravni fakultet Univerziteta u Beogradu 2009) 41.

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The countries of the Western Balkans have been undergoing continuous reforms for the last two decades. It should be noted that the governments of these countries "are actively engaged in building new economic (political and social) and legal institutions (and when appropriate to existing transformation) to consolidate democratic and market-oriented regimes in the European Union. In this context, extensive policy changes have been pursued in the economic, social and governance spheres, all of which aim to stimulate competition as a critical factor in generating sustainable economic growth and development."[65] However, it is clear that the transition has taken longer than expected by many scholars and government leaders of these countries anticipated. In this sense, it should be noted that nationalist, corrupt and populist policies have significantly slowed the proper development of these countries, thereby prolonging their transition.

Since the deployment of NATO in Kosovo in 1999, as well as its presence in Albania and North Macedonia, the region has found much greater security and, conditionally, a strong guardian of security and peace in this part of the European continent. In this case, it is worth mentioning that studies commissioned by the Geneva Centre for the Democratic Control of Armed Forces, funded by the Dutch Ministry of Foreign Affairs, aimed to find out how security problems in the Western Balkans are reflected in National Security or the Military Strategies of the countries of the region and to what extent these documents reflect and shape the realities on the ground. Relevant national security documents show a striking resemblance. "They all emphasize Euro-Atlantic integration - with the exception of Serbia - where NATO membership is still highly controversial and thus not reflected as a goal in national security strategies."[66] Of course, this poses a sense of danger for potential conflicts, making NATO integration and presence essential for maintaining regional security and peace.

The persistent presence of interethnic hatred and intolerance that exists in this region, coupled with ongoing nationalist political discourse, underscores the region's deep-seated challenges. As Lucia Vesnic-Alujevic points out, "Hate speech often heard during sports matches, strengthens the feeling of fear and distrust of mutual between a large part of the population. The results of opinion polls document the reality of interethnic relations and the extent to which various initiatives to promote reconciliation do not reach the citizens but remain at the level of political elites in each country. Consequently, the relationship with the past is still the main topic and an obstacle left on the road to good relations."[67]

Therefore, this shows that the presence of an external force that will maintain security, such as NATO, is still necessary for a short period of time, or until the moment of integration of the region into the European Union and membership in NATO.

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65 Margo Thomas and Vesna Bojicic-Dzelilovic, *Policy Making in the Western Balkans: Case Studies of Selected Economic and Social Policy Reforms* (Springer Dordrecht 2015) 1, doi:10.1007/978-94-017-9346-9.

66 Gyarmati and Stančić (n 6) 1-2.

67 Vesnic-Alujevic (n 57) 18.

7 CONCLUSIONS

As a collective security organisation, since its establishment, NATO has played an important role in maintaining peace and upholding democratic values in the world. It initially served as a vanguard of the communist bloc, and with the fall of communist ideology, it also undertook military operations and humanitarian interventions. One of the most significant of these was the intervention in Kosovo in 1999.

Peace and security in the Western Balkans remain vulnerable due to the open conflicts, especially the unresolved tensions between Serbia and Kosovo. The fragile functioning of the Federation of Bosnia and Herzegovina, compounded by the secessionist tendencies of the Srpska Republic from the Bosnian Federation, further destabilises the region. None of these countries – Serbia, Bosnia and Herzegovina and Kosovo – are members of NATO or the EU, which exacerbates their instability.

The situation is further complicated by external influence. Russia seeks to extend its influence in the Balkans through history and cultural ties, while China increases its presence through investments. These factors collectively contribute to the fragility of peace and security of the Western Balkans. This analysis address the first research question.

Given the security situation, NATO's presence in this region is indispensable. Since 13 June 1999, NATO has continued to be present in Kosovo, serving as a factor of peace and stability in the entire Western Balkans. As a military and political force, NATO has managed to ease conflict situations in the Balkans since its deployment. This serves to answer the second research question of this paper.

Over the past three decades, NATO's role in the Western Balkans has been extraordinary. Maintaining peace and security in this part of Europe has neither been possible nor imaginable without NATO's strong presence. The transition through wars and conflicts during the '90s, coupled with prolonged political and economic transitions, has left the region susceptible to further disruptions of regional peace and security.

Among the main challenges to maintaining peace and security in the Western Balkans region are:

- Nationalism and interethnic problems have been present for decades in this region and continue to this day to be a very pronounced factor in the emergence of problems and a threat to peace and security.
- Political culture and deficits of democracy are very important factors for the Western Balkans region in terms of maintaining regional peace and security. It should be noted that the political culture and public discourse used over the years has been entirely clothed by the pectu nacionalis, the language of interethnic hatred, and very little oriented towards development ideas and projects in the respective states.

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Therefore, regional peace and security require special attention and continuous assistance from the European Union in terms of economic growth, interethnic reconciliation, raising the level of political culture and hence the level of democracy, and strengthening the state of rights that is needed for all the states of this region.

Concrete recommendations for regional peace and security in the Western Balkans include, but are not limited to, the following:

- Dialogue and reconciliation: Achieving a legally binding comprehensive agreement between Kosovo and Serbia, with mutual recognition, should be achieved with the facilitation of the European Union and the USA. Reaching an agreement and reconciling between these two nations would reduce tensions and "provocative rhetoric" in the entire Western Balkans region.
- Regional cooperation: Increased cooperation between the Western Balkan countries and confidence-building measures between these countries through joint economic initiatives, cultural exchanges and regional security agreements.
- Rule of law and minority rights: The EU should strongly support measures to strengthen order and the rule of law in this region, in particular to fight corruption, increase the independence and effectiveness of judicial institutions, and efficiently implement standards for minority rights.
- Empowerment of Civil Society: Civil society should be empowered and actively involved in activities and initiatives for peacebuilding and conflict prevention, as it plays a crucial role in advocating for peace, human rights and democratic values.
- Sustainable economic development: Increasing economic-financial assistance for the entire Western Balkans region, contributing to sustainable economic development to address socio-economic challenges, reducing unemployment and preventing population migration.
- Modernisation and reform of the Security Sector: NATO should support the reforms and modernisation of the armed forces of the countries of the region. Building professional, responsible security forces that respect human rights standards and contribute to regional security cooperation should be a priority for the countries of the Western Balkans.
- Euro-Atlantic integration: The membership of Serbia, Kosovo, and Bosnia and Herzegovina in NATO, and the acceleration of EU membership for the countries of this region. Membership in NATO and the EU would constitute the region's final step towards lasting peace and political and economic stability.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПІВНІЧНОАТЛАНТИЧНИЙ АЛЬЯНС (НАТО) ТА ЙОГО РОЛЬ У ЗАБЕЗПЕЧЕННІ БЕЗПЕКИ НА ЗАХІДНИХ БАЛКАНАХ

Шекір Кутлловці та Орхан Чеку*

АНОТАЦІЯ

Вступ. *Північноатлантичний альянс (НАТО) є найбільшою та найпотужнішою у світі організацією колективної безпеки сучасності. Членство в цій організації є метою та зусиллями багатьох країн, у тому числі більшості країн Західних Балкан. Членство*

забезпечує колективний захист, безпеку та політичну стабільність. З моменту свого заснування НАТО стало глобальною силою безпеки та поширення миру майже по всій земній кулі. Не всі з цим погоджуються, хоча РФ бачить у ньому головного ворога. Його військові операції були зосереджені навколо захисту прав людини та підтримки миру. Найкращим прикладом цього зобов'язання є гуманітарна інтервенція НАТО в Косові, одній із країн Західних Балкан. Навіть після червня 1999 року НАТО було присутнє в цій країні і дбало про мир і безпеку на всіх Західних Балканах. Присутність цієї організації в цій частині земної кулі залишалася важливою, як і знання геополітичної історії цього регіону.

Балкани все ще страждають від націоналістичної політики та міжетнічних розбіжностей, які в будь-якому випадку залишаються дуже важливим фактором безпеки в цьому регіоні. Одними із фундаментальних питань країн Західних Балкан є прискорення економічних реформ, верховенство права та боротьба з корупцією для досягнення членства в Європейському Союзі. Замість вирішення цих важливих питань на Західних Балканах тривають зіткнення через зміни кордонів і націоналістичну риторику, яка може підірвати мир і безпеку в цьому регіоні. Нинішні проблеми Західних Балкан успадковані від розпаду Соціалістичної Федерації Югославії. Війни в колишній Югославії, хоч і стали причиною створення нових незалежних держав, не виправдали етнічних очікувань цих країн. З огляду на те, що Республіка Сербія в преамбулі Конституції 2006 року передбачає Республіку Косово як власну територію, подібні дії, які виражають територіальні претензії проти суверенної держави, становлять ризик нових конфліктів на Балканах. Ситуація з суперечливими тенденціями спостерігається і в Республіці Боснія і Герцеговина, де в офіційній політиці Сербської Республіки щодо Боснії відкрито демонструються тенденції до відокремлення від Федерації та об'єднання з Сербією.

У цій статті розглядається роль, яку відігравало і продовжує відігравати НАТО завдяки своїй присутності на Балканах у підтримці миру та безпеки, в цьому регіоні Європи, де домінують націоналістичні тенденції, а також міжетнічні проблеми, брак політичної культури та дефіцит демократії.

***Методи.** У цій статті використовувалися комбіновані наукові методи, включно з якісним методом та оглядом літератури. Якісний метод використовувався для інтерпретації наукових теорій, пов'язаних з безпекою. Вивчивши літературу, нам вдалося об'єднати результати інших досліджень, пов'язаних з темою нашої наукової розвідки. У цій роботі також використовувався метод аналізу, який допоміг нам виокремити елементи від загальної проблеми цієї праці. Історичний метод показав вісь проблеми безпеки на Балканах і пояснив розвиток НАТО.*

***Результати та висновки.** Як організація, що гарантує безпеку, під час холодної війни вона слугувала механізмом колективного захисту від ядерної загрози згідно з Варшавським договором та поширення демократичних цінностей західного світу. Після падіння «залізної завіси» вона стала організацією, яка сприяє глобальному миру та безпеці, демократії, правам людини та верховенству права. Наявність відкритих політичних питань на Західних Балканах, зокрема територіальні претензії Сербії до Косова, націоналістичні тенденції сербів з Боснії та Герцеговини до відокремлення від Федерації, спроби Росії вплинути на цей регіон, використовуючи історію, культуру і розвідувальні*

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служби, а також деякі інші проблеми, такі як відсутність політичної культури в Албанії та Чорногорії та проблеми Північної Македонії з Болгарією, створюють ризики для регіональної безпеки. У цьому геополітичному середовищі, яке називається Західними Балканами, інтеграція всіх країн до НАТО та її присутність у цьому регіоні мають важливе значення для майбутнього та безпеки. У цьому контексті членство Косова, а також Боснії та Герцеговини в НАТО має стати пріоритетом для західних країн. Членство цих двох держав сприятиме регіональному миру та безпеці.

Ключові слова: *НАТО, Альянс, Західні Балкани, безпека, міжетнічні відносини, гарантії безпеки.*

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Research Article

SOCIAL INNOVATIONS AND SOCIAL ENTREPRENEURSHIP IN THE CONTEXT OF POST-WAR RECOVERY OF UKRAINE: CONCEPTUALISATION AND LEGAL ASPECTS

Anna Zalievska-Shyshak*and Anatolii Shyshak

ABSTRACT

Background: *Global experiences of post-war and post-conflict recovery and reconstruction show that preparations for the post-war period should begin even before the conflict ends. For Ukraine's post-war recovery, promoting social entrepreneurship and implementing social innovations is crucial. These efforts will foster practical cooperation between the state, businesses, and the public, addressing various challenges collectively, solving socio-economic problems, and implementing reforms.*

The purpose of this article is to study the essence and evolution of knowledge about constructs and concepts in the fields of social innovation and social entrepreneurship, to substantiate the opportunities for the dissemination of social innovations, and to create conditions for social entrepreneurship in addressing social needs in the context of Ukraine's post-war recovery.

Given its fragmented conceptualisation and widespread use by scholars, policymakers, and practitioners, this study is driven by the need for a theoretical justification of social innovation and entrepreneurship.

Methods: *To achieve this goal and solve specific tasks, empirical and theoretical research methods were used: analysis, synthesis, and generalisation. These methods, applied at a dialectical level, provide a scientific basis for theoretical and methodological approaches to introducing social innovations in public life. With the help of multidisciplinary ontological analysis and the use of bibliometric indicators, such as citations, co-citations, bibliometric links and coincidences, the main research trends in the knowledge clusters of social innovation and social entrepreneurship were identified. This was accomplished through system mapping with the VOSviewer tool and the analysis and synthesis of publications on social innovation and social entrepreneurship for deep theoretical and practical understanding, as well as evaluation of current research at the interdisciplinary level.*

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Results and Conclusions: *Ukrainian legislation does not define the concepts of "social innovation" and "social entrepreneurship," which hinders the development and functioning of social entrepreneurship and the production of social innovations.*
The war and its aftermath have created new challenges that require new practical approaches and means of solving social problems. One of these approaches is to combine the measures of the current social policy in Ukraine, limited by the organisational and financial involvement of the state in solving social problems, with the possibilities of public participation and entrepreneurial activity. Introducing modern world practices of social innovation and social entrepreneurship, as well as regulatory regulation of social enterprises, will be an essential step towards developing the non-governmental sector of social development and social protection policy.

1 INTRODUCTION

Ukraine remains under martial law, but global studies of post-war and post-conflict recovery and reconstruction suggest that preparations for the post-war period should begin even before the war's end. By examining post-war reconstruction in Europe under the Marshall Plan, as well as cases of reconstruction in Japan, Bosnia, Kosovo, East Timor, Afghanistan, Sierra Leone, and Iraq,[1] several common conclusions can be drawn:

- preparations for the post-war period should include the participation of various possible donors, transparently defined national priorities, and a post-war government that is competent to meet the challenges of post-war recovery and reconstruction;
- the tasks of the post-war government and donors should be clearly defined and structured for their successful implementation;
- the private sector should be expected to bear the brunt of the recovery;
- measures should be organised to prevent crime from monopolising economic sectors and threatening legitimate businesses.

At the early stage of post-war recovery and reconstruction, the following measures should be implemented:

- regulation of the political status of authorities to facilitate effective recovery and economic growth;
- introduction of a transparent and modern policy-making process with reliable economic data;
- completion of the pre-war economic reform agenda;

1 Michael J Hogan, *The Marshall Plan: America, Britain, and the Reconstruction of Western Europe, 1947–1952 (Studies in Economic History and Policy: USA in the Twentieth Century)* (CUP 1987); Peter Burnham, *Political Economy of Postwar Reconstruction* (Palgrave Macmillan 2014); James Dobbins and other, *America's Role in Nation-Building: From Germany to Iraq* (RAND 2003); Roland Paris, *At War's End: Building Peace after Civil Conflict* (CUP 2004).

- establishment of politically difficult reforms and institutional changes, taking advantage of opportunities that may not arise again during the recovery process;
- establishment of new economic governance institutions;
- inclusion of social programs in recovery efforts to support the most vulnerable segments of society. [2]

The large-scale war in Ukraine, its terrible consequences, and challenges are adjusting Ukraine's post-war recovery plans - rapid recovery should take place immediately during martial law. According to the World Bank's "Ukraine: Third Rapid Damage and Needs Assessment (RDNA3), February 2022 – December 2023" (UA RDNA3 report), Ukraine's reconstruction and recovery needs amount to $486 billion.[3]

Ukraine's post-war recovery is an important task that involves the implementation of the best approaches and modern global practices of social innovation and social entrepreneurship to develop social activities and support vulnerable segments of society.

Modern processes of economic socialisation and the potential for innovation to contribute to practical solutions to the most pressing social problems prompt Ukraine's post-war recovery to form a socially oriented entrepreneurial environment as a prerequisite for community economic development, combined with the implementation of the best approaches and modern world practices of social innovation and social entrepreneurship.

Significant efforts to promote socio-economic development through private entrepreneurial initiatives were launched after World War II. Many countries worldwide have suffered incalculable losses in terms of human, social, and economic factors. This created a widespread need for poverty alleviation, social solidarity, and reconstruction initiatives. At the same time, the Marshall Plan, the creation of international organisations to support peace and human rights, and the technological developments brought about by the war created unprecedented availability of resources and opportunities for social impact in innovative ways. In 1948, Oxfam opened its first charity shop to support some of its activities from its revenues. In the 1960s, there were reports in the United States and Europe of businesses hiring vulnerable people, such as people with mental or physical disabilities, who would otherwise be excluded from the labour market.[4] The Grameen Bank, now

2 Nassrine de Rham-Azimi, Matt Fuller and Hiroko Nakayama (eds), *Post-Conflict Reconstruction in Japan, Republic of Korea, Vietnam, Cambodia, East Timor, and Afghanistan: Proceedings of an International Conference, Hiroshima, November 2002* (UNITAR Hiroshima series in post-conflict reconstruction, UNITAR 2003); James Earnest, 'Post-Conflict Reconstruction – a Case Study in Kosovo: The Complexity of Planning and Implementing Infrastructure Projects' (2015) 4(1) International Journal of Emergency Services 103, doi:10.1108/IJES-02-2015-0009; Florian Bieber, *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance* (Palgrave Macmillan 2006) doi:10.1057/9780230501379.

3 World Bank, *Ukraine: Third Rapid Damage and Needs Assessment (RDNA3), February 2022 – December 2023* (World Bank Group 2024) 10, 37.

4 'History of Oxfam: Over 75 Years. One Excellent Movement to end Poverty' (*Oxfam*, 2024) <https://www.oxfam.org.uk/about-us/history-oxfam/> accessed 02 April 2024.

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considered one of the prominent examples of social entrepreneurship, was founded in Bangladesh in the late 1970s and became an official bank in 1983.[5]

One of the so-called predecessors of social entrepreneurship is the Fair Trade movement. Its origins lie in the activities of the first non-governmental and religious organisations that began selling raw materials and handicrafts produced in rural communities worldwide. This led to the creation of the Fair Trade Foundation and related trademarks in the early 1990s.[6]

The emergence and development of various entrepreneurial forms of social impact over time has attracted the attention of many stakeholders, from governments seeking to facilitate this form of activism and citizen participation through enabling legislation to philanthropists and businesspeople seeking to support and help society in various ways. This has led to a proliferation of such initiatives and the realisation that bringing them together can help leverage more resources and support.

2 LITERATURE REVIEW AND PROBLEM STATEMENT

Throughout history, innovations have resulted from human efforts to find opportunities to improve the quality of life.[7] At the end of the nineteenth century, E. Durkheim and M. Weber took the first steps towards social innovation, arguing that innovation brings a new social order through its impact on social change and technological innovation.[8]

The concept of innovation has developed in several scientific fields, including technological research, economics, management, social psychology, and urban development. During the twentieth century, economic outcomes became paramount, focusing on increasing profits and productivity, developing new technologies, and generating new products to meet market needs.

Even though innovations were considered in terms of achieving economic results, their social aspect was also studied by scientists like J. Schumpeter. In the 1930s, Schumpeter was one of the first to study the relevance of innovation in cultural, social, and political aspects.[9] The social aspect was understood as an impact on the structure of society. Social changes were seen as an external effect of innovation processes in the economic sphere. Given this,

5 ‘Welcome to Grameen Bank (The Pioneer Microcredit Organization): Bank for the Poor’ (*Grameen Bank*, April 2024) <https://grameenbank.org.bd> accessed 02 April 2024.

6 ‘Our Movement’ (*WFTO World Fair Trade Organization*, 2024) <https://wfto.com> accessed 02 April 2024.

7 Giovany Cajaiba-Santana, ‘Social Innovation: Moving the Field Forward. A Conceptual Framework’ (2014) 82(C) Technological Forecasting and Social Change 42, doi:10.1016/j.techfore.2013.05.008.

8 Émile Durkheim, *Educación y sociología* (Paul Fauconnet pr, 2ª edn, Peninsula 2018); Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Stephen Kalberg tr and comment, OUP 2011).

9 Joseph A Schumpeter, *The Theory of Economic Development* (Redvers Opie tr, Routledge 2021).

innovation was recognised as a social phenomenon, influencing society without necessarily altering the social conditions of people's lives.[10]

The need for targeted social change has revealed the importance of the social dimension of innovation. To solve social problems and create innovative alternatives, the concept of "social innovations" is emerging - creating innovative activities and services to meet social needs.[11] J. Fills et al. expanded on this concept by defining social innovation as "a new solution to a social problem that is more effective, efficient, sustainable or equitable than existing solutions, and for which the value created primarily benefits society as a whole rather than individuals."[12] F. Muhlert et al. define social innovation as "the promotion of inclusion and well-being through improved social relations and processes, empowerment: imagining and achieving a world, nation, region, place, community that provides universal rights and is more socially inclusive."[13]

D. Conrad interprets social innovation as "responding to social challenges that cannot be solved through traditional approaches, often requiring new forms of cooperation and involving "co-creation" and "co-production" between citizens and institutional actors."[14]

Given the multidisciplinary nature of the study of social innovations, there are different interpretations of this concept: Nordberg K, Mariusen A, Virkkala S.,[15] Leitheiser S., Vollmann A.,[16] Avelino F., Wittmeyer J., Pel B., Weaver P., et al.,[17] Slee B.[18], Nicholls A and

10 European Communities, *Green Paper on Innovation: Document Drawn up based on COM(95) 688 Final* (Bulletin of the EU 5/95, Office for Official Publications of the European Communities 1996).

11 Geoff Mulgan and others, *In and out of Sync: The Challenge of Growing Social Innovations* (NESTA 2007).

12 James A Phills Jr, Kriss Deiglmeier and Dale T Miller, 'Rediscovering Social Innovation' (2008) 6(4) Stanford Social Innovation Review 34, doi:10.48558/GBJY-GJ47.

13 Frank Moulaert, Diana MacCallum and Jean Hillier, 'Social Innovation: Intuition, Precept, Concept, Theory, and Practice' in Frank Moulaert and others (eds), *The International Handbook on Social Innovation: Collective Action, Social Learning and Transdisciplinary Research* (Edward Elgar Publ 2013) 13, doi:10.4337/9781849809993.00011.

14 Diane Conrad, 'Education and Social Innovation: The Youth Uncensored Project—A Case Study of Youth Participatory Research and Cultural Democracy in Action' (2015) 38(1) Canadian Journal of Education/Revue Canadienne de l'éducation 1.

15 Kenneth Nordberg, Age Mariussen and Seija Virkkala, 'Community-Driven Social Innovation and Quadruple Helix Coordination in Rural Development: Case Study on LEADER Group Aktion Österbotten' (2020) 79 Journal of Rural Studies 157, doi:10.1016/j.jrurstud.2020.08.001.

16 Stephen Leitheiser and Alexander Follmann, 'The Social Innovation–(Re)Politicisation Nexus: Unlocking the Political in Actually Existing Smart City Campaigns? The Case of SmartCity Cologne, Germany' (2020) 57(4) Urban Studies 894, doi:10.1177/0042098019869820.

17 Flor Avelino and others, 'Transformative Social Innovation and (Dis)Empowerment' (2019) 145 Technological Forecasting and Social Change 195, doi:10.1016/j.techfore.2017.05.002.

18 Bill Slee, 'An Inductive Classification of Types of Social Innovation' (2019) 28(2) Scottish Affairs 152, doi:10.3366/scot.2019.0275.

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Ziegler R.,[19] Terstriep J., Kleverbeck M., Deserti A. and Rizzo F.,[20] Cajaiba-Santana G.,[21] Manzini E.,[22] Moulaert F., MacCallum D. and Hillier J.,[23] Martinelli F.,[24] Howaldt J. and Schwarz M.,[25] Westley F and Antadze N.,[26] Pol E. and Ville S.,[27] Phills Jr. J., Deiglmeier K. and Miller D.,[28] Hämäläinen T. and Heiskala R.,[29] Mulgan G.,[30] Moulaert F., MacCallum D., Mehmood A. and Hamdouch A.,[31] Mumford M.[32]

Most authors from the above sources argue that social challenges are better addressed through social innovation rather than technological innovation. Since the goal of social innovations is the public good, while technological innovations are mainly aimed at making a profit.[33]

Global society has faced several problems that have become more acute in recent decades, and existing social, economic, and institutional schemes cannot solve them. This stimulates the creation of alternative and innovative systems that would solve these problems

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19 Alex Nicholls and Rafael Ziegler, *An Extended Social Grid Model for the Study of Marginalization Processes and Social Innovation* (CRESSI Working Paper Series 2/2015 (rev 4/2017), CrESSI 2018).

20 Judith Terstriep and other, *Comparative Report on European Social Innovation* (Report # D3.2, SIMPACT 2015) 201-12.

21 Cajaiba-Santana (n 7).

22 Ezio Manzini, 'Ma'king Things Happen: Social Innovation and Design' (2014) 30(1) Design Issues 57, doi:10.1162/DESI_a_00248.

23 Moulaert, MacCallum and Hillier (n 13).

24 Flavia Martinelli, 'Social Innovation or Social Exclusion? Innovating Social Services in the Context of a Retrenching Welfare State' in Hans-Werner Franz, Josef Hochgerner and Jürgen Howaldt (eds), *Challenge Social Innovation: Potentials for Business, Social Entrepreneurship, Welfare and Civil Society* (Springer 2012) 169, doi:10.1007/978-3-642-32879-4_11.

25 Jürgen Howaldt and Michael Schwarz, 'Social Innovation – Social Challenges and Future Research Fields' in Sabina Jeschke and others (eds), *Enabling Innovation: Innovative Capability – German and International Views* (Springer 2011) 203, doi:10.1007/978-3-642-24503-9_22.

26 Frances Westley and Nino Antadze, 'Making a Difference: Strategies for Scaling Social Innovation for Greater Impact' (2010) 15(2) The Innovation Journal: The Public Sector Innovation Journal 2.

27 Eduardo Pol and Simon Ville, 'Social Innovation: Buzz Word or Enduring Term?' (2009) 38(6) The Journal of Socio-Economics 878, doi:10.1016/j.socec.2009.02.011.

28 Phills, Deiglmeier and Miller (n 12).

29 Timo J Hämäläinen and Risto Heiskala (eds), *Social Innovations, Institutional Change, and Economic Performance: Making Sense of Structural Adjustment Processes in Industrial Sectors, Regions, and Societies* (Edward Elgar Publ 2007).

30 Geoff Mulgan, 'The Process of Social Innovation' (2006) 1(2) Innovation: Technology, Governance, Globalization 145, doi:10.1162/itgg.2006.1.2.145.

31 Frank Moulaert and others (eds), *The International Handbook on Social Innovation: Collective Action, Social Learning and Transdisciplinary Research* (Edward Elgar Publ 2013) doi:10.4337/9781849809993.

32 Michael D Mumford, 'Social Innovation: Ten Cases From Benjamin Franklin' (2002) 14(2) Creativity Research Journal 253, doi:10.1207/S15326934CRJ1402_11.

33 Punita Bhatt and Levent Altinay, 'How Social Capital Is Leveraged in Social Innovations under Resource Constraints?' (2013) 51(9) Management Decision 1772, doi:10.1108/MD-01-2013-0041.

systematically, not partially. However, the theory of social innovation lags behind practice, and the field itself is still in its infancy, although there are many case studies, conceptual discussions, and numerous reviews of social innovation.

Social entrepreneurship has been developing globally over the past 30 years. Developed countries create appropriate conditions for this: courses on social entrepreneurship, networks that support social entrepreneurs, legislation regulating the activities of social enterprises, various funds that are ready to support social entrepreneurial initiatives, etc.

A striking example of social entrepreneurship is the activity of Grameen Bank, the first financial intermediary to provide microloans to those not served by the traditional financial system. Another example is the Aravind Eye Hospital, which pioneered eye care for those who could not afford it by standardising procedures and asking those who could afford to pay to cover the cost of surgeries for poorer patients in exchange for additional services.[34] Other examples of social entrepreneurship around the world are numerous and increasingly well-known: from bakeries that train and employ women who have suffered from domestic violence to gyms that reinvest their profits in diversity and inclusion programs, from bottled water producers that create clean water systems in Africa to organisations that provide healthcare services in rural areas using old vehicles and mobile technology.

Social entrepreneurship is a phenomenon that combines social and community issues with business thinking, entrepreneurial innovation, and market considerations. It is located between the private, public, and third sectors, combining the skills, thinking, and tools of business with the social problem understanding and proximity to beneficiaries of the third sector, as well as the commitment to promoting the public interest, welfare, and social equity of the public sector. Furthermore, it interacts collaboratively with all three sectors and seeks to compensate for their shortcomings. For example, social entrepreneurship aims to help people solve social and environmental problems that traditional sectors cannot address due to a lack of knowledge and resources or that they inadvertently exacerbate through their behaviour and policies.

Being at the intersection of these three traditional sectors means engaging in social entrepreneurship, essential to understanding their constraints and resources, treating them respectfully, and valuing their contribution to society. It also requires a commitment to double or triple the bottom line. The double bottom line combines social impact and financial sustainability, which means the ability to cover costs through various forms of financing in the medium and long term rather than profitability. The triple bottom line is the simultaneous achievement of social impact, financial sustainability, and environmental protection.

34 'Our Story' (*Aravind Eye Care System*, 2024) <https://aravind.org/our-story> accessed 02 April 2024.

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3 RESEARCH RESULTS

A review of fundamental and modern scientific works was conducted to identify the main research trends in social innovation and entrepreneurship knowledge.

The search for scientific papers was conducted using the terms "social innovations*" and "social entrepreneurship*" in the keywords, titles, and abstracts of the Scopus database. The search included scientific papers indexed in the Scopus database on social innovations and social entrepreneurship without any restrictions on the time of creation. The search resulted in 586 publications from 1989 to March 2024. The list was limited to peer-reviewed research papers (journal articles, conference papers, reviews, books, and book chapters in English), resulting in 531 publications on social innovation and social entrepreneurship suitable for analysis. The first work found in the list was published in 1989, and the last one was published in 2024, meaning there are 35 years of research on social innovation and social entrepreneurship between them.

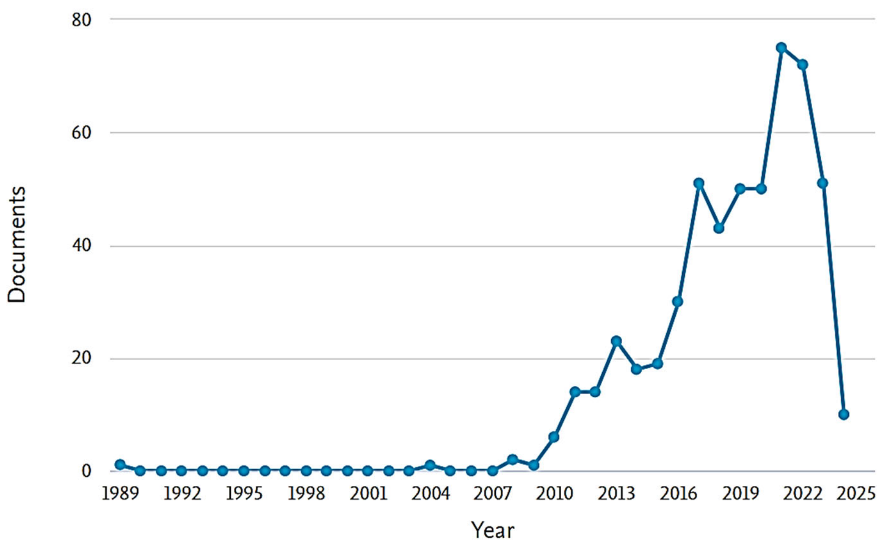

Figure 1. Growth of research in the field of social innovation and social entrepreneurship in 1989-2024[35]

35 Source: Authors.

531 social innovation and entrepreneurship publications were grouped into three periods: 1989-2010, 2011-2017, and 2018-2024.

Year	Documents	Year	Documents	Year	Documents
1989	1	2011	14	2018	43
1990-2003	0	2012	14	2019	50
2004	1	2013	23	2020	50
2005-2007	0	2014	18	2021	75
2008	2	2015	19	2022	72
2009	1	2016	30	2023	51
2010	6	2017	51	2024	10

By Schildt H.A., Zahra S.A., Sillanpaa A.[36] and Weerakoon C., McMurray A.[37] The study's citation frequency threshold was adjusted to include a volume of references for processing. Two were generated for 1989-2010 and 2011-2017, and five for 2018-2024 to obtain sufficient references for analysis. Figures 3, 4, and 5 present the generated periodic co-authorship networks.

The number of studies on social innovation is growing; this area can be characterised as phenomenal and fragmented.[38] Figure 1. shows the annual growth of research in social innovation and social entrepreneurship from 1989 to 2024 - 531 publications. The periods of growth in the number of publications can be divided into three parts: a period of slow growth between 1989 and 2010, a period of medium growth between 2011 and 2017, and a period of exponential growth since 2018. The period from 1989-2010 accounted for 11 publications or 2.07%; from 2011 to 2017, there were 169 publications - 31.8%; and from 2018 to March 2024 - 351 publications, or 66.1% of the list of 531 publications. Figure 2 provides information on the types of publications in the list.

36 Henri A Schildt, Shaker A Zahra and Antti Sillanpää, 'Scholarly Communities in Entrepreneurship Research: A Co-Citation Analysis' (2006) 30(3) Entrepreneurship Theory and Practice 399, doi:10.1111/j.1540-6520.2006.00126.x.

37 Chamindika Weerakoon and Adela McMurray, *Theoretical and Practical Approaches to Social Innovation* (Advances in knowledge acquisition, transfer, and management (AKATM), IGI Global 2021).

38 Matteo Giuliano Caroli and others, 'Exploring Social Innovation Components and Attributes: A Taxonomy Proposal' (2018) 9(2) Journal of Social Entrepreneurship 94, doi:10.1080/19420676.2018.1448296.

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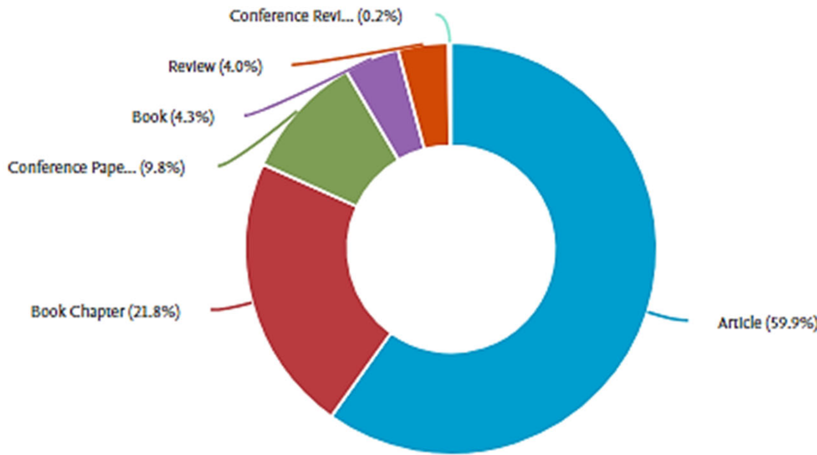

Figure 2. Types of publications on social innovation and social entrepreneurship[39]

Most publications (318) are articles in journals - 59.9% of the total volume of publications. Interestingly, these journal articles are published in 160 scientific journals in various thematic areas, emphasising the multidisciplinary nature of social innovation and social entrepreneurship research. The most significant number of articles on social innovations and social entrepreneurship is published in 15 journals, the list of which is given in Table 1.

Table 1. **15 journals with the most significant number of publications on social innovation and social entrepreneurship in 1989-2024**[40]

Source	Documents
Emerald Emerging Markets Case Studies	17
Journal Of Social Entrepreneurship	15
Sustainability Switzerland	13
Technological Forecasting And Social Change	8
Social Enterprise Journal	6
Entrepreneurship And Regional Development	5
Agriculture And Human Values	4
International Journal Of Entrepreneurial Behaviour And Research	4

39 Source: Authors.

40 ibid.

International Small Business Journal	4
Revista De Ciencias Sociales	4
Voluntas	4
European Planning Studies	3
Higher Education Skills And Work Based Learning	3
Human Service Organizations Management Leadership And Governance	3
Innovation The European Journal Of Social Science Research	3

The majority of publications (17) were published in Emerald Emerging Markets Case Studies, followed by the Journal Of Social Entrepreneurship (15), Sustainability Switzerland (13), Technological Forecasting And Social Change (8), and Social Enterprise Journal (6).

The second most significant publication type is book chapters, which account for 21.8% of the total, or 116 publications. 52 conference proceedings and 23 books together account for another 14.2% of the total publications. Recently, we have published: "Social Entrepreneurship and Grand Challenges;[41] "Social Entrepreneurship: An Innovative Solution to Social Problems";[42] "Socio-Tech Innovation: Harnessing Technology for Social Good";[43] "Social Innovation and Social Entrepreneurship: Fundamentals, Concepts, and Tools";[44] "Social Entrepreneurship and Innovation in Rural Europe";[45] "Social entrepreneurship and social innovation: Ecosystems for inclusion in Europe";[46] "Strategies and Best Practices in Social Innovation: An Institutional Perspective";[47] "Universities, inclusive development, and social innovation: An international perspective."[48]

41 Emilio Costales and Anica Zeyen, *Social Entrepreneurship and Grand Challenges: Navigating Layers of Disruption from COVID-19 and Beyond* (Springer International Publ 2022) doi:10.1007/978-3-031-07450-9.

42 Meng Zhao and Jiye Mao, *Social Entrepreneurship: An Innovative Solution to Social Problems* (Springer Singapore 2021) doi:10.1007/978-981-15-9881-4.

43 Latha Poonamallee, Joanne Scillitoe and Simy Joy, *Socio-Tech Innovation: Harnessing Technology for Social Good* (Springer International Publ 2020) doi:10.1007/978-3-030-39554-4.

44 Luis Portales, *Social Innovation and Social Entrepreneurship: Fundamentals, Concepts, and Tools* (Springer International Publ 2019) doi:10.1007/978-3-030-13456-3.

45 Ralph Richter and others, *Social Entrepreneurship and Innovation in Rural Europe* (Routledge 2019) doi:10.4324/9781351038461.

46 Mario Biggeri and others, *Social Entrepreneurship and Social Innovation: Ecosystems for Inclusion in Europe* (Routledge 2018) doi:10.4324/9781351239028.

47 Marta Peris-Ortiz, Jaime Alonso Gómez and Patricia Marquez, *Strategies and Best Practices in Social Innovation: An Institutional Perspective* (Springer International Publ 2018) doi:10.1007/978-3-319-89857-5.

48 Claes Brundenius, Bo Göransson and José Manoel Carvalho de Mello, *Universities, Inclusive Development, and Social Innovation: An International Perspective* (Springer International Publ 2016) DOI: 10.1007/978-3-319-43700-2.

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The scientific literature on social innovation and entrepreneurship has many authors writing on this topic. Among them, from the most to the least published, we can single out the following: Bellucci M., Biggeri M., Cunha J., Jia X., Roundy P.T., Testi E. (4 publications each); Bacq S., Benneworth P., Bjärsholm D., Chalmers D., Chandra Y., Cnaan R.A., De Bruin A., During R., Griffiths M., Harvey C., Kickul J., Ludvig A., Maclean M., Mueller S., Newth J., Osburg T., Persson H.T.R., Presenza A., Raja Suzana R.K., Ramírez-Montoya M.S., Rudito B, Shaw E., Tracey P., Vázquez-Parra J.C., Wong L., Woods C., Yudoko G., Zainudin A., Zulazli H. (3 publications each).

The United States (86) and the United Kingdom (66) have the most significant publications by country. They are followed by India (32), Italy (31), Spain and Portugal (29), and Germany (25).

1989-2010: Scientific research on social innovations and social entrepreneurship with a focus on ecology

Although papers were published after 2008, the research began in the 1980s. The oldest publication in the primary literature sample is "Regional Dynamics of Innovation: A Look at the Rhône-Alpes region" (1949),[49] and the oldest publication in the network of joint citations is Wicht, C.L. (1949).

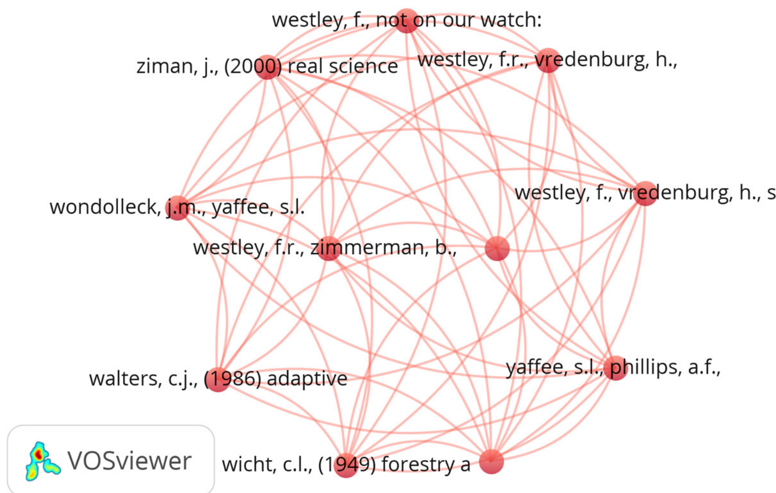

Figure 3. The network of co-citation of research in the field of social innovation and social entrepreneurship in the period 1989-2010[50]

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49 Bernard Ganne, 'Regional Dynamics of Innovation: A Look at the Rhône-Alpes Region' (1989) 1(2) Entrepreneurship and Regional Development 147, doi:10.1080/08985628900000013.

50 Source: Authors.

The main common feature of research in the Co-Citation Network is that it is devoted to solving environmental problems: management of renewable resources, cooperation on global biodiversity conservation, innovations in natural resource management, ecosystem management, cooperation between environmentalists and businesses, etc.

The research work between 1989 and 2010 was developed within the framework of journals, including the International Journal of Technology Management, Ecology and Society, Entrepreneurship and Regional Development, and the Journal of Socio-Economics.

2011-2017: Focus on urban management

Research on social innovations in urban governance was conducted from 2011 to 2017. Figure 4 shows the network of research citations for this period.

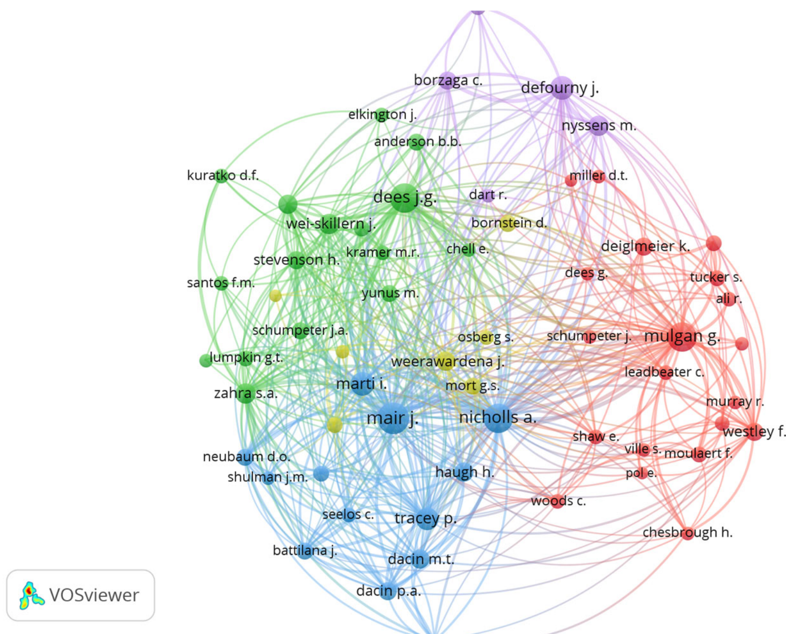

Figure 4. The network of co-citation of research in the field of social innovation and social entrepreneurship in the period 2011-2017[51]

In general, the network of citations of research on social innovation and social entrepreneurship for 2010-2017 indicates active research on urban governance and creativity. In this context, social innovation is "generating and implementing ideas about how people should organise interpersonal activities or social interaction to achieve one or

51 ibid.

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more common goals."[52] The authors believe new processes, governance, social institutions, and practices can achieve these goals.

2018-2024: The emergence of social entrepreneurship

Figure 5 illustrates the research on social innovations and entrepreneurship from 2018 to 2024, with social entrepreneurship as the primary focus.

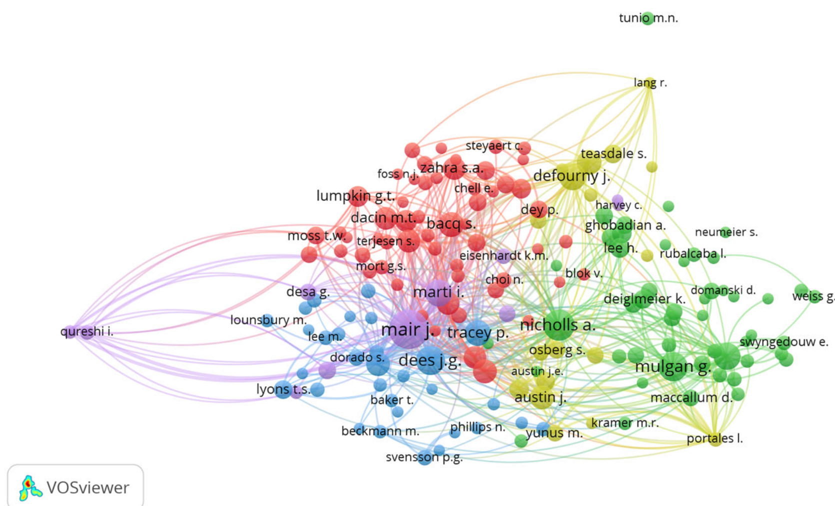

Figure 5. Co-citation network for social innovation and social entrepreneurship research during 2018-2024[53]

The 2018-2024 Social Innovation and Social Entrepreneurship Research Co-Citation Network focuses on social entrepreneurship, presenting a different view of social innovation as a central element and intersectional area[54] advocated by social entrepreneurs.[55]

Social entrepreneurship existed long before it was officially recognised as a concept. Since the Enlightenment, societies have encouraged private initiatives to generate economic and social benefits. Cooperatives and entrepreneurial support initiatives for local communities, such as colonies, have existed for almost two centuries. For example, in 1844, artisans

52 Mumford (n 32).
53 Source: Authors.
54 Jacques Defourny and Marthe Nyssens, 'Fundamentals for an International Typology of Social Enterprise Models' (2017) 28(6) Voluntas 2469, doi:10.1007/s11266-017-9884-7.
55 M Tina Dacin, Peter A Dacin and Paul Tracey, 'Social Entrepreneurship: A Critique and Future Directions' (2011) 22(5) Organization Science 1203, doi:10.2307/41303113.

founded a cooperative enterprise, the Rochdale Equitable Pioneers Society, in Rochdale, England.[56] In 1911, the Social Foundation (Fundacion Social), a foundation aimed at generating income to strengthen its social impact, was established in Colombia.[57]

Scientists Banks and Drucker were among the first to introduce the concepts of "social entrepreneur" and "social enterprise" into scientific circulation back in the 1970s in their works on social movements and corporate social responsibility, respectively.[58] Over time, Dennis Young, an American scholar, and Bill Drayton, the founder of Ashoka in the 1980s, identified "innovative nonprofit entrepreneurs" and "innovators for the public," respectively, to define what we now call social entrepreneurs.[59]

Social entrepreneurship emerged as a concept in the 1990s. In 1991, the Italian government passed a law regulating the activities of "social cooperatives",[60] which are now considered a form of social entrepreneurship. However, there was no mention of social entrepreneurship or related concepts in all these cases. These scientific terms - "social" and "entrepreneurship" - began to be used frequently in articles and reports published in Europe and the United States between 1993 and 1998.

After the first few mentions of social entrepreneurship appeared in the United States and the United Kingdom, academics, the media, and several American foundations and British think tanks picked up the idea. The latter immediately saw the great potential of legitimising entrepreneurial approaches to social impact and solving growing global problems.

Among the first supporters of social entrepreneurship was Bill Drayton, who quickly renamed social entrepreneurs "innovators for society." Supporting them with his organisation, Ashoka[61] began to think theoretically about their added value and how best to help them. His work, coupled with that of some academics and think tanks, soon inspired other philanthropic organisations, such as the Schwab Foundation[62] and the Skoll

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56 'The Rochdale Pioneers' (*International Cooperative Alliance*, 2024) <https://ica.coop/en/rochdale-pioneers> accessed 02 April 2024.

57 'Fundación Social' (*Social Protection*, 2024) <https://socialprotection.org/connect/stakeholders/fundaci%C3%B3n-social> accessed 02 April 2024.

58 JA Banks, *The Sociology of Social Movements* (MacMillan 1972); Peter F Drucker, *Innovation and Entrepreneurship: Practices and Principles* (Harper & Row 1985); Marta Mooney, Book Review: Innovation and Entrepreneurship: Practices and Principles, by Peter F Drucker (1985) 5(1) National Productivity Review 84, doi:10.1002/npr.4040050112.

59 William Drayton, 'The Citizen Sector: Becoming as Entrepreneurial and Competitive as Business' (2002) 44(3) California Management Review 120, doi:10.2307/41166136.

60 Interreg Central Europe 2014-2020, Country report on SE support services and networking initiatives: Italy <https://programme2014-20.interreg-central.eu/Content.Node/documents/Country-report-Italy.docx> accessed 02 April 2024.

61 'Ashoka Envisions a World in Which Everyone is a Changemaker' (*Ashoka US*, 2024) <https://www.ashoka.org/en-us/about-ashoka> accessed 02 April 2024.

62 *Schwab Foundation for Social Entrepreneurship* <https://www.schwabfound.org> accessed 02 April 2024.

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Foundation[63], to support people who were considered social entrepreneurs and to promote their work in elite business and government circles.

During the same period, social entrepreneurship gained popularity in the UK, where the new Labor government saw it as an opportunity to innovate and expand social services across the country. The coalition government that followed continued to invest in the sector as a way to guarantee welfare during times of austerity. The government's creation of special grants and supportive infrastructure for social enterprise eventually attracted several private actors to this new field of activity in the UK. Also, it facilitated the creation of many organisations to encourage social enterprise, such as Social Enterprise London,[64] Community Action Network[65] та School for Social Entrepreneurs.[66]

Between 2000 and 2005, social entrepreneurship gradually gained traction in Western Europe, where the cooperative movement supported the tradition of social business for decades. Social entrepreneurship took another five to ten years to take off in Eastern Europe and China, where the communist past shaped the idea that welfare and social security were the state's responsibility. In these regions, government support and local development of social entrepreneurship increased markedly around 2010-2015, as evidenced by national and local government initiatives, certification programs, and the growing number of organisations that define themselves as social enterprises or take on typical social enterprise forms, such as cooperatives or for-profit enterprises that create employment opportunities for marginalised populations.[67]

According to the analysis of academic papers and regional reports, social entrepreneurship has also seen significant growth in Asia, Africa, and Latin America since the early 2000s, with a notable surge post-2010. Notably, the Inter-American Development Bank published a report on social entrepreneurship in 2016, shedding light on its expansion.[68] In the past year, countries such as Chile, Colombia, and Mexico have demonstrated thriving, albeit still early-stage, social enterprise ecosystems. The development of social entrepreneurship in some of these countries depends on the socio-economic and political context, which is explained by a combination of factors. These include micro-entrepreneurship (sometimes under the influence of international and religious organisations) and declining donations and foundations, pushing many local charitable organisations to seek opportunities to generate revenue and develop social entrepreneurship.

63 *Skoll Foundation* <https://skoll.org> accessed 02 April 2024.
64 *Social Enterprise UK* <https://www.socialenterprise.org.uk> accessed 02 April 2024.
65 *CAN Community Action Network* <https://can100.org> accessed 02 April 2024.
66 *School for Social Entrepreneurs* <https://www.the-sse.org> accessed 02 April 2024.
67 Dacin, Dacin and Tracey (n 55).
68 'Publications' (*Inter-American Development Bank*, 2016) <https://publications.iadb.org/en/publications?keys=social+entrepreneurship> accessed 02 April 2024.

The scale of social entrepreneurship development at the global level is still being determined due to the need for comparative studies and global surveys. As of 2015, when the Global Entrepreneurship Monitor conducted its latest survey, the scale of social entrepreneurship development at the international level still needs to be determined due to the lack of comparative studies and global surveys. In 2015, when the Global Entrepreneurship Monitor conducted its latest survey (which was affected by several data and measurement issues) on social entrepreneurship, individuals who identified themselves as engaged in social entrepreneurship existed on all continents, with peaks of activity (10% or more of the adult population) in countries as diverse as Peru, Hungary, Burkina Faso, Colombia, Senegal, Poland, Chile, Cameroon, the Philippines, Luxembourg, India, and Israel.[69]

Social entrepreneurship is not new to Ukraine; in recent years, many government and business representatives, academics, specialists, and public figures have studied its theoretical provisions and practical experience. Among the Ukrainian scholars who have studied problems in the field of social entrepreneurship are L. Doluda, Y. Kirsanov, A. Kornetskyi, V. Nazaruk, A. Svynchuk, V. Smal, and others.

According to the analytical report on the economic and legal analysis of social entrepreneurship in Ukraine by the EU4Youth as of 2020, about 1000 enterprises in Ukraine could be classified as social enterprises. The rapid growth in social enterprises since 2014 (82%) responded to new categories of people needing social support, such as internally displaced persons, veterans, and the economic crisis.[70] This became a prerequisite for finding possible sources of financial support.

Social entrepreneurship in Ukraine is regulated by the norms of general entrepreneurship, within which it is not prohibited or restricted. By its origin and essence, social entrepreneurship is closer to the civil society sphere, as it emerged as a result of the commercialisation of social activities of public organisations. The market and the competitive environment are currently the regulators of social entrepreneurship development. The current state of social entrepreneurship does not allow for solving today's urgent problems, such as creating jobs for vulnerable population categories.

The development of social entrepreneurship requires a regulatory framework, legal certainty, favourable conditions for its implementation, and state and local support. This will help to distinguish social entrepreneurs from other business entities, ensure transparency of social entrepreneurship, and encourage entrepreneurs to participate in solving social issues.

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69 Donna Kelley, Slavica Singer and Mike Herrington, *Global Entrepreneurship Monitor 2015/16 Global Report* (GERA 2016).

70 IC Kamenko (ed), *Social Entrepreneurship in Ukraine: Economic and Legal Analysis* (EU4Youth, EU 2020).

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The regulatory and organisational framework for the development of social entrepreneurship should include:

- a unified approach to the definition of social entrepreneurship;
- areas of activity of social entrepreneurship;
- a list of vulnerable categories of the population to be addressed by social entrepreneurship
- ways of implementing social entrepreneurship;
- requirements to the form of management of social entrepreneurship entities;
- a mechanism for ensuring transparency and public reporting of social entrepreneurship;
- ways of state and local support for social entrepreneurship;
- measures to popularise and informationally support social entrepreneurship;

The criteria for social entrepreneurship are as follows:

- the social purpose of the business entity's activities must be enshrined in its constituent documents or contracts confirming the social orientation of its activities;
- allocation of part or all of the business entity's profit (income) for a social purpose,
- conducting the business entity's activities for social purposes, providing its goods, works, services for social purposes, and employing persons belonging to vulnerable categories of the population;
- a voluntary annual public report on the results of social entrepreneurship by specific indicators and projected results;

Thus, enshrining social entrepreneurship as a separate and guaranteed type of business in the regulatory framework will help to separate social business entities from other business entities and civil society institutions and ensure transparency of its implementation.

Therefore, establishing social entrepreneurship as a separate and guaranteed type of business in the regulatory field will help to distinguish social business entities from other business entities and civil society institutions and ensure transparency in its implementation.

4 DISCUSSION

In this study, the main research trends in knowledge about social innovation and social entrepreneurship were identified using multidisciplinary ontological analysis and bibliometric indicators. Rather than analysing these concepts in isolation, the study adopted a combined approach, recognising their inherent interconnectedness. Through the use of co-citation networks created with the help of the VOSviewer application, the study

facilitated the visualisation and analysis of the genesis of research in the field of social innovation and social entrepreneurship.

The findings indicate a fragmented conceptualisation and different understandings of existing concepts in this field among scholars. Moreover, the study reveals that while there is a significant number of case studies, conceptual discussions and numerous reviews, the theoretic framework of social innovation lags behind in practice. Despite this, it is noted that the field itself is still emerging.

The study establishes an urgent need to improve the current legislation of Ukraine in the field of innovation, develop effective mechanisms for implementing innovations and managing innovation, and ensure transparent financing methods and effective state and public control. Furthermore, it identifies an effective approach for addressing social problems amidst post-war recovery, advocating for integrating state social policies with public participation and entrepreneurial activities. The study underscores the importance of promoting social entrepreneurship and implementing social innovations to facilitate effective collaborative efforts between the State, businesses, and the public. This collaborative approach is deemed essential for addressing a set of challenges, tackling socio-economic problems, and driving reforms in post-war Ukraine.

Today, research is needed on the essence of social innovations in entrepreneurship, as existing concepts in the field remain controversial and require further consideration.

5 CONCLUSIONS

Ukrainian legislation does not define the concepts of "social innovations" and "social entrepreneurship," which hinders the development and functioning of social entrepreneurship and the production of social innovations.

There is an urgent need to improve the current legislation in the field of innovation, in particular, to adopt a new Law of Ukraine's "On Innovation Activity," which should contain an expanded list of subjects of innovation activity, improved terminology, the definition of types of innovation (product innovation, business process innovation, business model innovation, technological innovation, innovation in public administration, social innovation, etc.

The war and its consequences have created new challenges that require new practical approaches and means of solving social problems. One such approach is to combine the measures of the current social policy in Ukraine, limited by the organisational and financial participation of the state in solving social problems, with opportunities for public participation and entrepreneurial activity.

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This method of solving social development problems at the state and local authorities is actively implemented and operates in several countries. In particular, the legislations of China, Poland, Italy, Belgium, Korea, the United States, and other countries have implemented their approach to addressing social issues. At the same time, each country has formed its cooperation model between the state and business entities to resolve issues of crucial social significance. The introduction of modern global practices of social innovation and social entrepreneurship and the regulatory regulation of social enterprises will be essential to developing the non-governmental sector's social development and social protection policy.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СОЦІАЛЬНІ ІННОВАЦІЇ ТА СОЦІАЛЬНЕ ПІДПРИЄМНИЦТВО В КОНТЕКСТІ ПОВОЄННОГО ВІДНОВЛЕННЯ УКРАЇНИ: КОНЦЕПТУАЛІЗАЦІЯ ТА ПРАВОВІ АСПЕКТИ

Анна Залєвська-Шишак* та Анатолій Шишак

АНОТАЦІЯ

Вступ: *Досвід повоєнного, постконфліктного відновлення та реконструкції країн світу показує, що підготовку до повоєнного періоду слід починати ще до закінчення війни. Повоєнне відновлення України має передбачати розвиток соціального підприємництва та впровадження соціальних інновацій для того, щоб втілити практичну взаємодію держави, бізнесу та громадськості для спільного вирішення низки завдань, соціально-економічних проблем та здійснення реформ.*

Метою даної статті є дослідження сутності та еволюції знань про конструкції та концепції у сферах соціальних інновацій та соціального підприємництва, створення для них умов та обґрунтування можливостей їх поширення для того, щоб задовольнити соціальні потреби у контексті повоєнного відновлення України.

Ця робота зумовлене необхідністю теоретичного обґрунтування соціальних інновацій та підприємництва, з огляду на фрагментарну концептуалізацію та широке використання вченими, політиками та практиками.

Методи: *Для досягнення мети та вирішення поставлених завдань використано комплекс емпіричних і теоретичних методів дослідження: методи аналізу, синтезу та узагальнення, які на діалектичному рівні дозволяють науково обґрунтувати теоретико-методологічні підходи до впровадження соціальних інновацій в суспільному житті. За допомогою мультидисциплінарного онтологічного аналізу та використання бібліометричних індикаторів, таких як цитування, спільне цитування, бібліометричні посилання та збіги, було визначено основні тенденції досліджень у кластерах знань соціальних інновацій та соціального підприємництва шляхом картографування системи за допомогою інструменту VOSviewer, аналізу та узагальнення публікацій на вказану тему для глибокого теоретичного та практичного розуміння, а також оцінки актуальних праць на міждисциплінарному рівні.*

Результати та висновки: *Законодавство України не визначає понять «соціальна інновація» та «соціальне підприємництво», що перешкоджає розвитку та функціонуванню соціального підприємництва та впровадженню соціальних інновацій.*

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Війна та її наслідки створили нові виклики, які вимагають нових практичних підходів і засобів вирішення суспільних проблем. Одним із таких підходів є поєднання заходів поточної соціальної політики в Україні, обмежених організаційним і фінансовим залученням держави до вирішення соціальних проблем, з можливостями громадської участі та підприємницької діяльності. Запровадження сучасних світових практик соціальних інновацій та соціального підприємництва, а також нормативно-правове регулювання діяльності соціальних підприємств стане суттєвим кроком на шляху до розвитку недержавного сектору соціального розвитку та політики соціального захисту.

Ключові слова: *інновації, підприємництво, соціальні інновації, соціальне підприємництво, післявоєнна відбудова, правові аспекти.*

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Research Article

THE INTEGRAL ROLE OF THE ALBANIAN PARLIAMENT IN EU INTEGRATION THROUGH NATIONAL LAW APPROXIMATION (JANUARY 2018 – DECEMBER 2023)

Pranvera Beqiraj*, Dorina Gjipali and Kristinka Jançe

ABSTRACT

Background: *Albania negotiations for the country's EU membership formally began on 19 July 2022. The process will consist, among others, of approximating national legislation with the EU acquis, which is divided into six thematic clusters. Albania must achieve the country's legislation full compliance with the EU acquis and its successful implementation. Negotiations and subsequent membership in the European Union (EU) will support the democratisation and strengthening of the rule of law in Albania. This research examines the role of the Albanian Parliament in the EU integration process through the approximation of national laws. This desk research serves as a cornerstone for further research and academic studies regarding the Albanian Parliament's involvement in EU integration efforts through the process of national law approximation. Therefore, to better approximate national legislation with that of the EU, it is recommended that Parliament increases the trend of approving laws aimed at approximation.*

Methods: *A cross-sectional study was conducted to examine the legislative activity of the Albanian Parliament (Parliament hereinafter) between 2018 and 2023 in terms of approximation of national laws with the EU acquis. The study used a desk review to analyse the annual number of laws adopted and approximated to EU law. Reliable sources from the Official Journals of the Republic of Albania (Albania hereinafter) were used to collect data on laws adopted and approximated during the study period providing an understanding of the total number of laws adopted and approximated for each year, the relevant EU act, and the clusters of the negotiation chapters.*

Results and Conclusions: *Analysing the role of Parliament in EU integration through the approximation of national legislation from 2018 to 2023 highlights the multidimensional nature of the integration process and the important contribution made so far by the legislative power. During the period covered by the study, Parliament has made important efforts to approximate national legislation with EU legislation, which is proven by the study results. Based on the study data, a quantifiable difference was found between the total number of laws approved and those approximated by Parliament from 2018 to 2023. The study's conclusions and recommendations provide a comprehensive understanding of the challenges and opportunities in approximating Albanian legislation with the EU acquis and advancing the country's European integration agenda.*

1 INTRODUCTION

Integration into the EU is Albania's primary political and strategic objective. The process of EU integration promotes the democratic system in Albania, the consolidation of its institutions, and the rule of law, as well as ongoing fundamental reforms towards full membership in the EU.[1] The EU evaluated certain priorities that enabled the opening of negotiations in July 2022, including the adoption and implementation of the reform strategy for the judiciary and respect for human rights.[2] The justice reform, a package of laws approved by Parliament in 2016, with a focus on improving access to justice and its efficiency, is considered the greatest achievement for Albania in the EU integration process. However, further progress should be achieved.

For Albania and other countries aiming for EU membership, adherence to the requirements outlined in Article 2 of the Treaty on the European Union (TEU) is necessary. This provision links formal criteria with political aspects, emphasising the importance of upholding the listed values. These values, as outlined in Article 2, hold legal significance as they indicate the necessity of maintaining a democratic government that upholds the rule of law and human rights, along with other important values.[3]

1 Decision of the Council of Ministers no 16, dated 11 January 2024 'On the approval of the National Plan for European Integration 2024–2026' [2024] Official Journals of the Republic of Albania 11/2074 <http://qbz.gov.al/eli/vendim/2024/01/11/16> accessed 30 April 2024.

2 'Albania' (*European Council and Council of the European Union*, 2024). <https://www.consilium.europa.eu/en/policies/enlargement/albania/> accessed 30 April 2024.

3 Marija Vlajković and Jelisaveta Tasev, 'The challenges of approximation of national law with the EU *acquis* in the Western Balkans in light of the new enlargement tendencies' in Mareike Fröhlich, Elizabeth Harvey and Ingrid Sigstad (eds), *South Eastern Europe and the European Union - Legal Transformations* (Alma Mater 2020) 85.

One of the main issues in admitting a new member state to the EU is the approximation[4] of national legislation with the EU *acquis*, involving legal reforms to adopt new laws or amend existing ones. To become a member of the EU, a country must ensure that its legal system is approximated with all areas where the Member States have delegated their competencies to the EU.[5] For Albania, this obligation began upon the entry into force of the Stabilization and Association Agreement (SAA) on 1 April 2009. The SAA places significant emphasis on approximating Albanian legislation with that of the EU, representing a core obligation.[6]

In accordance with Article 70 of Title VI of the SAA, Albania is obliged to align its legislation with that of the EU.[7] Regarding the timeline of approximation, the study "Guidelines for Law Approximation" noted that at the time of accession, national laws, regulations, and administrative procedures necessary to implement current EU legislation would have to be adopted.[8]

Albania's Constitution is the primary source for the EU integration process regarding institutional commitments. According to Article 100, the Council of Ministers (hereinafter CoM) makes decisions to establish the primary directions of state policy. Parliament approves these policies through the laws it passes. The CoM, the executive branch of government, is primarily responsible for managing Albania's membership process to the EU. It has the authority to negotiate with the EU and plays a leading role, but it is not the sole

4 Throughout the article is used the term "approximation" in accordance with the definitions provided in the Treaty of Lisbon and the Stabilization Association Agreement, see: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007) [2007] OJ C 306/1 <http://data.europa.eu/eli/treaty/lis/sign> accessed 30 April 2024; Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part: Protocols, Declarations [2009] OJ L 107/166 <http://data.europa.eu/eli/agree_internation/2009/332/oj> accessed 30 April 2024.
The EU Treaties use the terms harmonisation, approximation, and coordination to describe the process of legal approximation, indicating the different degrees of integration between the EU and its Member States. The Treaty of Lisbon uses the first two terms to indicate the alignment of national legislation with that of the EU. In a broader sense, "coordination" is used to refer to the policies as a whole. Regarding countries that are not yet members of the EU, the term used is "approximation". The Stabilization Association Agreement refers to this as an "approximation of legislation" (Article 70). In more specific provisions such as those on transport (Article 59, paragraph 1) or consumer protection (Article 76), the term "'harmonisation" is used.

5 Qeveria e Republikës së Kosovës, 'Përafrimin e legjislacionit të Republikës së Kosovës me legjislacionin e Bashkimit Evropian' (*Zyra e Kryeministrit*, 28 Prill 2014) 69 <https://kryeministri.rks-gov.net/blog/udhezime-praktike-per-perafrimin-e-legjislacionit-te-republikes-se-kosoves-me-legjislacionin-e-bashkimit-evropian-28-04-2014/> accessed 3 April 2024.

6 Erjola Xhuvani and Naim Mecalla, 'Case Study on Integration Process of Albania Towards EU: Harmonisation of Domestic Legislation with that of EU' (2023) 6(4) Access to Justice in Eastern Europe 254, doi:10.33327/AJEE-18-6.4-n000404.

7 Stabilisation and Association Agreement (n 4) art 70.

8 Adam Lazowski and others, *Guidelines for Law Approximation* (SMEI III 2016) <https://online.pubhtml5.com/qzcc/wboq/> accessed 3 April 2024.

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actor. Under the constitutional principle of checks and balances,[9] Parliament exercises legal and political control over the European integration process. As the legislative branch, it oversees the executive branch and holds it accountable for the process. This ensures the highest degree of democratic legitimacy of the process.

Parliament's involvement in the integration process is defined in the constitutional and legal framework[10] as follows: 1. to approximate national laws with EU legislation; 2. to supervise the executive branch; 3. to cooperate with other legislative bodies. This study examines Parliament's role in European integration, with particular emphasis on its legislative function. Parliament is empowered to approve any legal act aimed at approximation, which must be enacted as a law. Based on this, the principal question addressed in this study is how the approximation of Albanian legislation with the EU *acquis*, as evidenced by the laws approved by Parliament, affects its role in the European integration process.

To achieve the aim of this study, three key objectives have been identified as follows.

The study's first objective is to examine trends in the annual number of laws adopted and approximated to EU legislation between 2018 and 2023[11]. The analysis focuses on research questions such as:

- How has Albania's Parliament's rate of approximating national laws with the EU *acquis* evolved between 2018 and 2023?
- Have there been any significant fluctuations in the yearly number of estimated laws, and what factors may have contributed?

The second objective is to investigate the fields and clusters of negotiating chapters for the approximation of national laws, to determine the following research questions:

- What are the most approximated fields between 2018 and 2023?
- What are the clusters of negotiating chapters with the highest number of approximated laws between 2018 and 2023?

9 Constitution of the Republic of Albania no 8417, dated 21 October 1998 (last amended 10 February 2022) <http://qbz.gov.al/eli/ligj/1998/10/21/8417> accessed 31 March 2024.

10 Law no 15/2015, dated 3 March 2015 'For the Role of the Assembly in the Process of Integration of the Republic of Albania into the European Union' (amended by law no 19/2023, dated 16 March 2023) <http://qbz.gov.al/eli/ligj/2015/03/05/15> accessed 4 April 2024.

11 The period selected for this study is 2018 to 2023 because the data for the period 2009 to 2018 (as of 14 June) are provided in the dissertation thesis titled "Parliamentary Sovereignty and the EU - in the view of the jurisprudence of the Court of Justice of the EU" for the Ph.D. scientific degree by the author Pranvera Beqiraj, see: Pranvera Beqiraj, 'Bashkimi Evropian dhe Sovraniteti Parlamentar: Në këndvështrimin e vendimeve të Gjykatës së Drejtësisë të Bashkimit Evropian' (doktor disertacion, Universiteti i Tiranës 2018) 156 <https://unitir.edu.al/bashkimi-evropian-dhe-sovraniteti-parlamentar-ne-kendveshtrimin-e-vendimeve-te-gjykates-se-drejtesise-te-bashkimit-evropian/> accessed 3 April 2024.

As a third objective, the study will examine data on the number of national laws approximated with the relevant EU acts and the degree of approximation. Thus, it will be determined which categories of EU acts (EU primary law, regulation, directive, decision, and recommendation) have been the focus of Parliament's approximation efforts. Also, it will be established whether the approximated laws are partially or completely approximated to the relevant EU act.

Analysing the Albanian Parliament's legislative initiatives and reforms from 2018 to 2023 can help policymakers and researchers understand the dynamics of EU integration and the role of national institutions. Thus, the research allows policymakers to evaluate Albania's progress toward EU integration, identify areas of success and challenges, and revise strategies to address gaps. It also adds valuable knowledge to comparative European legislative studies, providing insights into the complexities of legislative adaptation to EU norms and contributing to theoretical debates on legal system convergence. Disseminating findings and recommendations can enhance interested parties' comprehension of EU requirements and encourage their involvement in the integration process.

2 LITERATURE REVIEW

The process of European integration necessitates approximating national legislation with EU law. As countries pursue EU membership, their national parliaments assume a pivotal role in the adoption of legislation that aligns with EU requirements and standards. This section reviews the literature on the institutional, political, and legal aspects of the accession process for law approximation in the context of candidate countries' aspirations to join the EU.

An analysis of the relevant literature revealed that the definition of the process of national legal approximation with that of the EU is given to unify its meaning. In 2021, the Ministry of Justice of Albania published the "Manual for the Drafting of Legislation", which included significant updates to the process of national legal approximation with that of the EU. The process of approximation is defined as the procedure through which a state's laws, rules, and internal procedures are adapted to align with the entire body of the EU *acquis*, within the context of fulfilling the obligations that arise for states that aspire to join it.[12]

Furthermore, the authors of the doctrine concur that this process encompasses two interrelated aspects. The study "The Historical and Theoretical Aspect of Approximation of Law in Central Europe" states that the process of legal approximation can be divided into two components. The first is the convergence of candidate countries' legal systems with EU

12 Tedi Dobi (red), *Manual per Hartimin e Legjislacionit: Metodologjia e unifikuar shqiptare për procesin ligjvënës, hartimin e akteve normative dhe terminologjinë juridike sipas neneve 5(1) dhe 6(5) të ligjit nr 8678, datë 14.5.2001 "Për organizimin dhe funksionimin e Ministrisë së Drejtësisë"* (botimi i 3-të, Ministrisë së Drejtësisë 2021) 21 <https://www.drejtesia.gov.al/wp-content/uploads/2022/06/Manual-Shqip-E-bashkuar.pdf> accessed 2 May 2024.

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law. This can be defined as the procedure that guarantees these legal systems' degree of consistency. The second component is that of legal unification.[13]

The national parliament's role in the European integration process is mentioned explicitly in the other part of the literature review. Based on the desk research that we have conducted, the literature on the role of national parliaments of candidate countries during the European integration process is largely concerned with the political role of the parliament and its relationship with the executive power. Regarding the legislative function of the national parliament in approving laws for approximation, the studies are focused on the procedural aspect of the legislative process for approving these laws. The procedural aspect pertains to the adaptation of the stages of the national legislative process for the adoption of laws aimed at the approximation or establishment of the relevant parliamentary setup for European integration.

Academic contributions such as "Lost in Implementation: EU Law and Application in the Albanian Legal System" recognise the role of the Albanian Parliament in the approximation process and its responsibility to adopt laws that comply with EU requirements and standards. Parliament plays a pivotal role in the process of legislative approximation, as it is responsible for transposing EU directives and regulations into national laws. This is evident through an analysis of the legal framework of the role of Parliament in European integration and the Commission for European Affairs, a permanent organ of Parliament since 2004,[14] and directly involved in the legislative process of approving laws that aimed at approximation.[15]

Also, the study "The Role of the National Parliament in the European Integration Process"[16] underlines the role of the structures set up at the parliamentary level in supporting Parliament in its role in the European integration process and the importance of these structures in facilitating parliament's engagement with EU integration.

The increasing role of parliaments in candidate states in promoting the rule of law is highlighted in the academic research, "The EU and Rule of Law Promotion in Western Balkans – a New Role for Candidate States' Parliaments". It also examines how Western Balkan parliaments utilise legislative oversight, government action

13 Vlasta Kunova, 'The Historical and Theoretical Aspect of Approximation of Law in Central Europe' in Naděžda Šišková (ed), *From Eastern Partnership to the Association: A Legal and Political Analysis* (Cambridge Scholars Pub 2014) 244.

14 The Commission of European Affairs was set up with Decision No. 117, The Parliament of the Republic of Albania (2004).

15 Bojana Hajdini and Gentjan Skara, 'Lost in Implementation: EU Law Application in Albanian Legal System' (2017) 19(33) Journal of Legal Studies 49-50, doi:10.1515/jles-2017-0003.

16 Entela Nikaj, 'Roli i parlamentit kombëtar në procesin e integrimit Evropian' (2016) 6 Revista KUVENDI 67.

monitoring, and lawmaking to promote the values of the rule of law and guarantee adherence to the EU *acquis*.[17]

The other aspect of Parliament's role in European integration studied in the Albanian literature relates to inter-parliamentary cooperation with the EU. The EU's inter-parliamentary cooperation with the enlargement countries has moved closer to becoming the basis for experience-building and gradual preparation for EU membership. The Union describes its cooperation with the national parliaments of the enlargement countries as "a framework in which controversial issues can be raised" with "an element of transparency" and "proof of how deeply parliamentary democracy and pluralism have taken root". Recognising the limited role of national parliaments in previous waves of EU enlargement, the European Commission has also recently adopted a new approach that offers new opportunities for candidate countries' parliaments to fulfil their potential by "increasing 'ownership' of the reform process and informing the European Commission of non-compliance with EU rules".[18]

Most materials used to identify the clusters of negotiating chapters are technical documents. Some of these are reports from the European Commission on the fulfilment of obligations by states seeking EU membership and screening reports from the EU published at the end of the screening process for the related cluster of approximation. In addition, national acts, as the National Plan for European Integration (NPEI hereinafter), are approved by the states themselves. The NPEI defines, in addition to other important issues, a legislative agenda for the approximation of the Albanian legislation.

The NPEI is a document approved by the CoM, which must then be sent to Parliament. The obligation to send the NPEI has a purely informative character for the legislative body, as part of the government's obligation to inform it about the European integration process. This means that the NPEI does not require parliamentary approval. The actual NPEI was adopted by decision of CoM No. 16, dated 11 January 2024 "On the Approval of the National Plan for European Integration 2024-2026". The NPEI for 2024 to 2026 includes legislative and policy measures, institutional and administrative measures, and implementation measures, which extend until 2026, aiming for the gradual approximation of Albanian legislation with the EU *acquis*, as well as the strengthening of institutional capacities and their implementation. The NPEI 2024 - 2026 of Albania foresees a total of 236 detailed legislative measures, as shown in the attached table. For 2024, 102 legislative measures are

17 Alexander Strelkov, 'The EU and Rule of Law Promotion in Western Balkans – A New Role for Candidate States' Parliaments' (2016) 32(4) East European Politics 505, doi:10.1080/21599165.2016.1228529.

18 Gentiola Madhi, 'Dialogue wanted: The Experience of EU–Albania Inter-Parliamentary Cooperation' (*EU Policy Hub – Communicating Europe*, 28 April 2017) <https://www.eupolicyhub.eu/wp-content/uploads/2019/05/Dialogue_wanted_The_experience_of_EU_Alb.pdf> accessed 30 April 2024.

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foreseen and categorised as follows: 29 draft laws, 35 draft decisions of the CoM, and 38 draft ordinances or other by-laws.[19]

Based on the above literature review and legal framework, it is evident that Parliament's role in the process of approximation of legislation during European integration is seen through a qualitative approach. There is a lack of quantitative studies referring to the concrete laws that Parliament has adopted to identify the number of approximated laws, the degree and the relevant act of the EU that has been approximated, as well as the cluster related to the approximated negotiation chapter. Through this analysis, the study "The Integral Role of the Albanian Parliament in EU Integration through National Law Approximation (January 2018 – December 2023)" represents a contribution and a deeper understanding inherent to the European integration process to fill the existing gap in Albanian literature.

3 METHODOLOGY

A retrospective cross-sectional study was conducted to investigate the legislative activity of Parliament regarding the approximation of national laws with the EU *acquis* between 2018 and 2023. The research was conducted through a desk review to investigate trends in the annual number of laws adopted and those approximated to EU law. The legislative activity of Parliament was assessed using the following steps, which allowed us to achieve the study's objectives.

Data collection consisted of collecting data on adopted and approximated laws for each year between 2018 and 2023. Reliable sources from the Official Journals of the Republic of Albania have been used. These journals publish all the laws passed by Parliament. This information can be accessed online at the official website (https://qbz.gov.al). Researchers analysed all official journals containing laws passed in 2018, 2019, 2020, 2021, 2022, and 2023 twice. A two-week interval was allowed between the two separate reviews of the material to minimise bias and confusion. A final meeting with members of the research group took place to reach a consensus on our data.

In total, 1206 Official Journals were analysed.[20] The collected data were organised into different topics during the study period following the study objectives. For each approximated law, the areas and the relevant clusters of the negotiating chapter were identified. This was determined based on the scope and objective of each approximated law. It also identified the relevant EU act and whether there was a full or partial approximation. The priority of approximation in the agenda of the Albanian legislative institution for the period 2018 to 2023 has been quantified by determining the total number of laws adopted by Parliament, in addition to the number of approximated laws.

19 Decision of the Council of Ministers no 16 (n 1) 1.

20 'Arkivi i Fletores Zyrtare të Republikës së Shqipërisë' (*Qendra e Botimeve Zyrtare*, 2018-2023) <https://qbz.gov.al/eli/fz> accessed 2 April 2024.

To improve statistical analysis, the fields of approximation were narrowed down by grouping them into six clusters.

The data has been presented in tables and graphics for a better visual understanding, with the following topics: the total numbers of laws adopted and approximated for each year and for the total period of 2018 and 2023, the EU act with which the law was approximated, determining whether the law was approximated in full or partially with the relevant EU act, and the identification of the cluster of the negotiating chapter and the fields for each cluster.

To determine whether there was a statistically significant difference between the number of laws approximated during the study period and the total number of laws approved, a two-tailed paired t-test was performed. A one-way ANOVA test was conducted to identify if there was a priority cluster of approximation for 2018 to 2023 in Parliament's agenda. ANOVA, or analysis of variance, is a statistical method used to compare the means of multiple samples. It is an extension of the t-test for two independent samples to include more than two groups. The clusters of negotiating chapters are divided into six. By analysing the variances, the objective is to determine whether there are any meaningful differences between the class means.[21]

In statistical significance testing, the p-value is the probability of obtaining a test statistic result at least as extreme as the one that was observed, assuming that the null hypothesis is true. When the p-value is less than 0.05, it is generally considered statistically significant, and the null hypothesis should be rejected. A p-value greater than 0.05 indicates that the null hypothesis is not rejected because the deviation from it is not statistically significant. Our null hypothesis is that there is no statistical difference in the means of groups, and the alternative hypothesis is that there is a statistical significant difference between the means of the groups.[22]

4 DATA ANALYSIS

The study identifies the trends in the annual number of approved laws and those approximated to EU law by Parliament. To achieve this, Parliament's legislative activity in approximating national laws with the EU *acquis* was evaluated from 2018 to 2023. According to the data analysis, it was found that during this period, a total of 702 laws were approved by Parliament. Only 64 of these have been approximated with the EU *acquis*. Thus, between 2018 and 2023, there is a significant discrepancy between the number of laws approved by Parliament and those approximated to EU law (Figure 1).

21 Eva Ostertagová and Oskar Ostertag, 'Methodology and Application of One Way ANOVA' (2013) 1(7) American Journal of Mechanical Engineering 256, doi:10.12691/ajme-1-7-21.

22 Tukur Dahiru, 'P-Value, a True Test of Statistical Significance? A Cautionary Note' (2008) 6(1) Annals of Ibadan Postgraduate Medicine 21, doi:10.4314/aipm.v6i1.64038.

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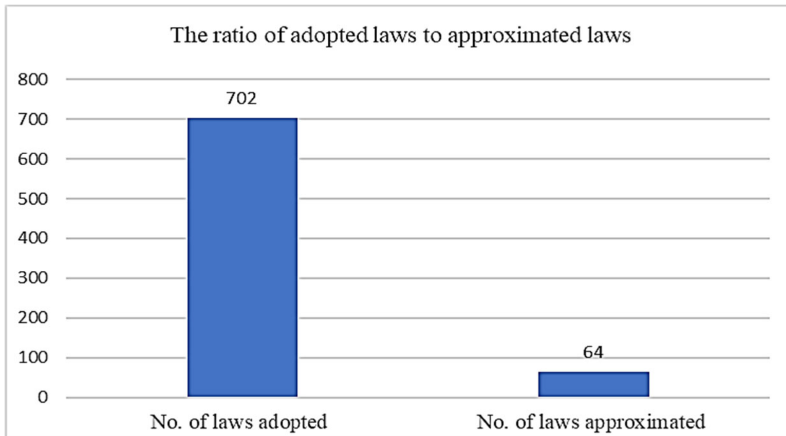

Figure 1. The ratio of adopted laws to approximated laws

To ensure data for each year from 2018 to 2023, the total number of approved laws was divided into approximated and non-approximated. The resulting data is presented in Figure 2.

First, Figure 2 shows that the year with the highest number of approximated laws is 2021 (18), followed by 2020 (16), 2023 (13), 2019 (7), and 2018 (6). 2022 is ranked last with only four approximated laws. Upon analysis of the approved laws, it is evident that the number of laws approved in 2018 is almost equal to the number approved in 2023. However, the number of approximated laws in 2023 is more than twice that in 2018.

Secondly, to obtain statistically significant results regarding the approximated laws from 2018 to 2023, we considered the ratio of approximated laws to those non-approximated, as presented in Figure 2.

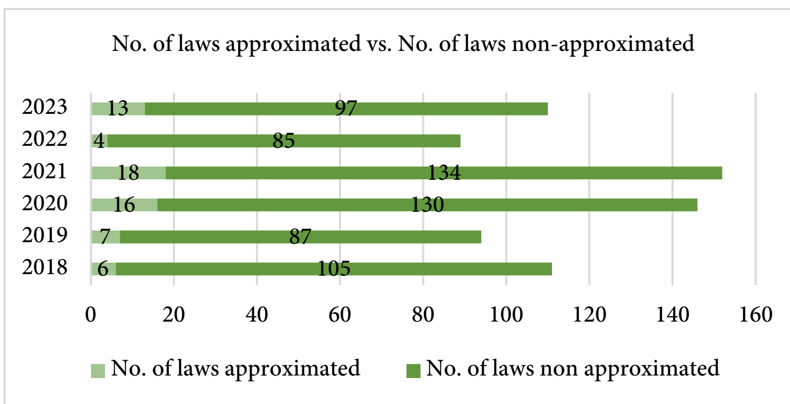

Figure 2. No. of laws approximated vs. No. of laws non-approximated

For this purpose, a two-tailed paired t-test was conducted to compare the total number of approximated and non-approximated laws for each year from 2018 to 2023. The paired samples *t-test* is a parametric test used to compare the means of the number of laws approved for each of our two groups of laws: approximated and non-approximated. It is used in hypothesis testing to determine whether two groups have differences from one another. These "paired" measurements represent two different aspects of the laws approved by Parliament for each year of the study period. The test aims to determine whether there is a statistically significant difference in the means between these paired observations.

The result of the tests showed a statistically significant difference of 3.09515E-05 ($p<0.05$). During the study period, there was a general tendency towards a small number of approximated laws compared to those approved by Parliament. The mean for approximated laws is only 10% of non-approximated laws. This result confirms the low tendency of Parliament to engage in legislative activity regarding the approximation of laws with EU *acquis* for each year from 2018 to 2023. (Table 1)

***Table* 1. Two-tailed paired t-test for approximated and non-approximated laws**

	No. of laws approximated	*No. of laws non-approximated*
Mean	10.66666667	106.3333333
Variance	33.46666667	448.6666667
Observations	6	6
Pearson Correlation	0.859602552	
Hypothesized Mean Difference	0	
Df	5	
t Stat	-14.22256778	
P(T<=t) one-tail	1.54757E-05	
t Critical one-tail	2.015048373	
P(T<=t) two-tail	3.09515E-05	
t Critical two-tail	2.570581836	

The data collected was also analysed to which act of EU law (EU primary law, regulation, directive, decision, or recommendation) the national laws are more approximated. The results in Figure 4 show that the laws are mostly approximated with EU directives (85 directives). This is followed by regulations (39), decisions (4), and recommendations (2).

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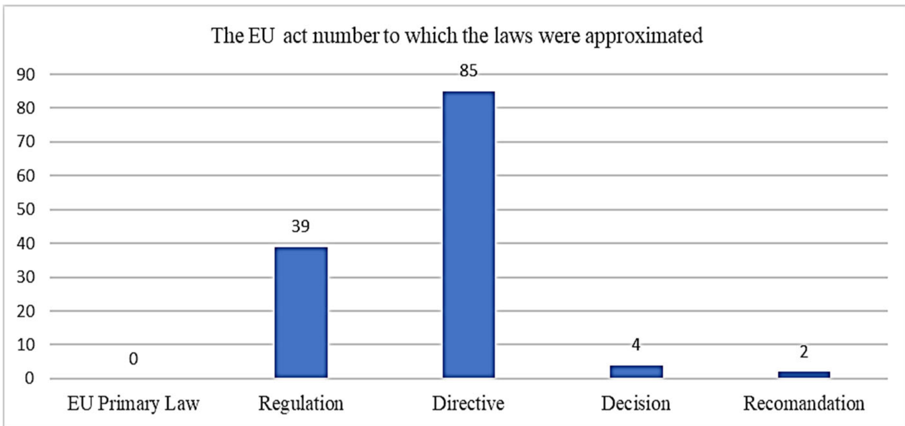

Figure 3. The EU act to which laws were approximated

The research conducted between 2018 and 2023 collected data on the degree of approximation with the relevant act of EU law of the 64 approximated laws. Of these, 63 laws were only partially approximated, while only one was fully approximated (Figure 4).

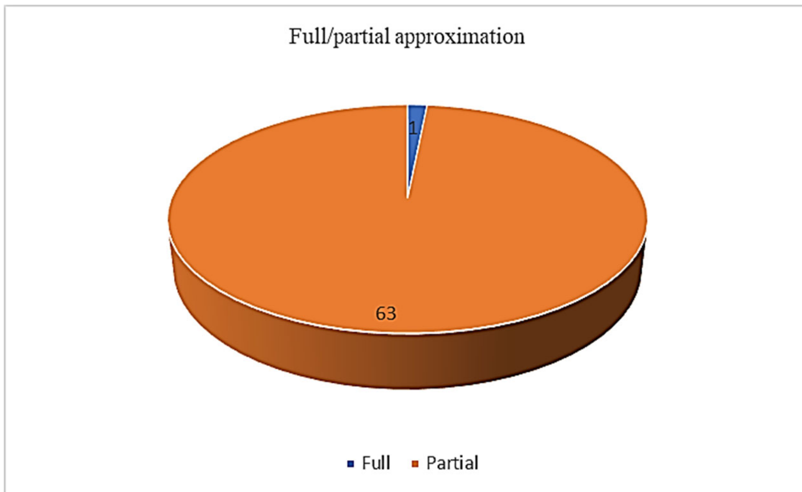

Figure 4. Full/Partial approximation

The field of approximation, which refers to the corresponding chapter of each cluster of negotiating chapters, is also important for the legislative activity of Parliament in its role on approximation issues. In February 2020, a revised methodology for the accession negotiations was introduced. As a result, the negotiating chapters are now divided into six thematic clusters: Fundamentals, Internal Market, Competitiveness and Inclusive Growth, Green Agenda, and Sustainable Connectivity, Resources, Agriculture and Cohesion, and

External Relations.[23] Identifying the field of approximation according to each chapter enabled the determination of the cluster of negotiating chapters.

A total of 24 fields from the approximated laws were identified. From 2018 to 2023, the fields with the highest number of approximated laws are consumer and health protection, taxation, and environment and climate change, each with seven laws. Additionally, justice, freedom, security, and transport policy have six approximated laws. The figure below shows the trend of approximation for other fields (Figure 5).

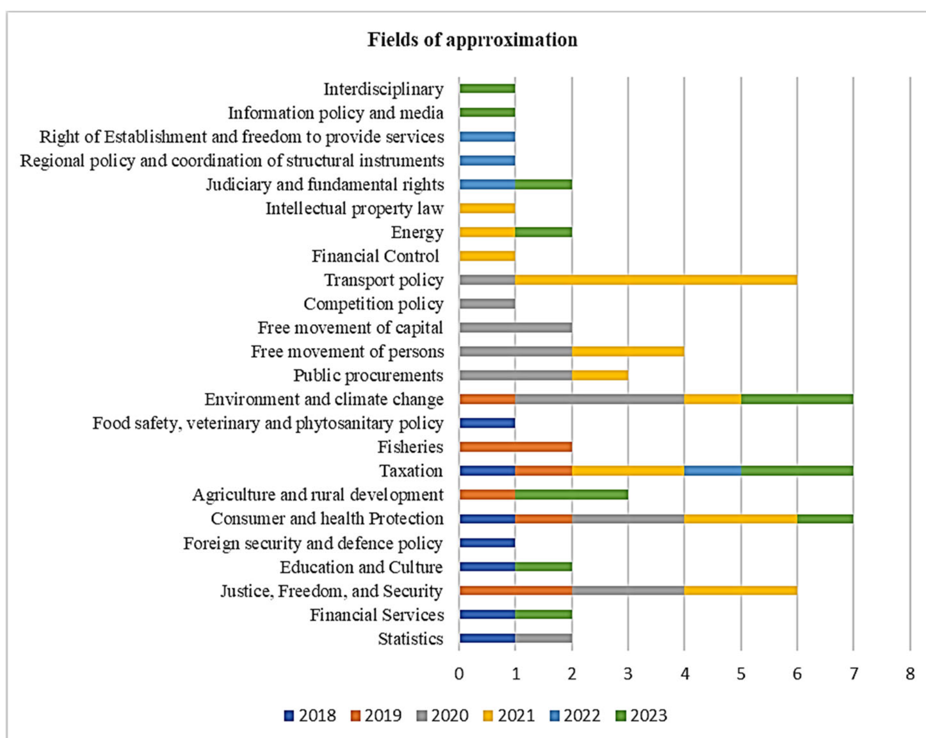

Figure 5. Fields of approximation

Based on the new methodology, each field of approximation is part of a certain cluster. For the study, the corresponding cluster of negotiating chapters has also been defined. It was found that the three clusters with the most approximate laws were Internal Market (20), Green Agenda and Sustainable Connectivity (17), and Fundamental (14) (Figure 6).

23 '2021 Enlargement package: European Commission assesses and sets out reform priorities for the Western Balkans and Turkey' (*European Commission: European Neighborhood Policy and Enlargement Negotiations (DG NEAR)*, 19 October 2021) <https://neighbourhood-enlargement.ec.europa.eu/news/2021-enlargement-package-european-commission-assesses-and-sets-out-reform-priorities-western-balkans-2021-10-19_en> accessed 30 April 2024.

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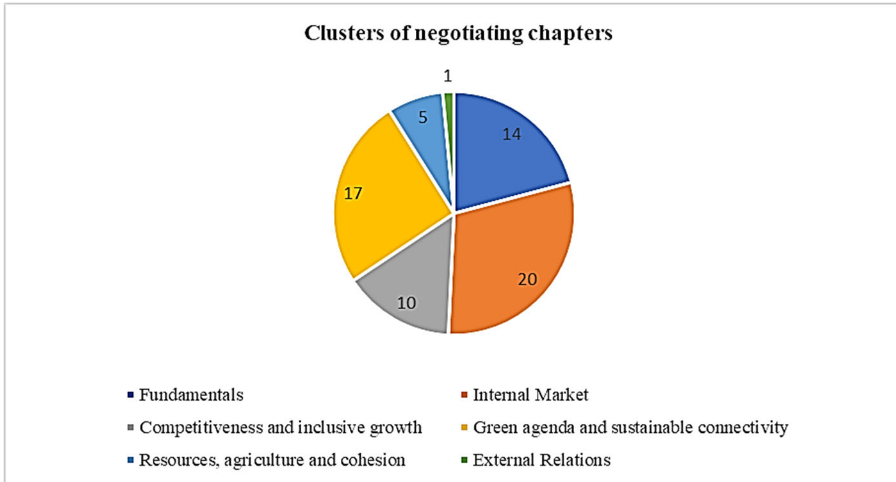

Figure 6. Clusters of negotiating chapters

In addition to identifying the total number of each cluster for 2018 to 2023, the approximation of laws with each cluster of negotiating chapters was also identified for each year. The aim was to look at the trend of law approximation with each cluster annually (Figure 7).

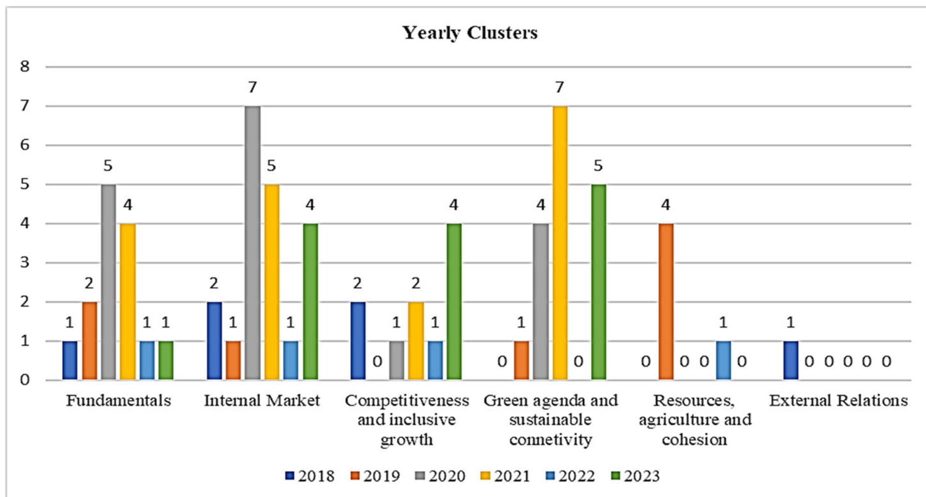

Figure 7. Yearly clusters

The one-way ANOVA test, commonly utilised to compare multiple groups, was used to analyse the difference between the means of the numbers of laws approved for each of the six fields of approximation. It determines whether the dependent variable (the number of approximated laws) changes across different categories of independent variables (the six

clusters of negotiating chapters) within the study period. ANOVA's null hypothesis (H0) is that there is no difference among group means. The alternative hypothesis (Ha) is that at least one group differs significantly from the overall mean of the dependent variable. The statistical significance of ANOVA is determined using the F-test. This method enables the comparison of multiple means simultaneously, as the error is calculated for the entire set of comparisons rather than for each two-way comparison. The F-test compares the variance in each group mean to the overall group variance. If the variance within groups is smaller than the variance between groups, the F-test will yield a higher F value, indicating a greater likelihood that the observed difference is genuine and not due to chance.[24]

By comparing the approximation of the six different clusters from 2018 to 2023 using the one-way ANOVA test, the results showed no statistical difference between the six clusters of negotiating chapters ($p = 0.06235846$). Although the result is close to being significant ($p<0.05$), it is not statistically significant. Based on the ANOVA test, there is no significant difference in the variance of means among the clusters during the study period. The Internal Market cluster had the highest priority, with 20 laws approximated and an average of 3.3 laws per year. On the other hand, the External Relations cluster was the least prioritised, with only one law approximated and an average of 0.16 laws per year (refer to Table 2).

Table 2. One-way ANOVA Test for six clusters of negotiating chapters

SUMMARY						
Groups	Count	Sum	Average	Variance		
Fundamentals	6	14	2.333333333	3.066666667		
Internal Market	6	20	3.333333333	5.866666667		
Competitiveness and inclusive growth	6	10	1.666666667	1.866666667		
Green agenda and sustainable connectivity	6	17	2.833333333	8.566666667		
Resources, agriculture, and cohesion	6	5	0.833333333	2.566666667		

24 Hun Myoung Park, 'Comparing Group Means: T-tests and One-way ANOVA Using Stata, SAS, R, and SPSS' (*Indiana University IUScholarWorks,* August 2009) <https://hdl.handle.net/2022/19735> accessed 30 April 2024.

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External Relations	6	1	0.166666667	0.166666667		
ANOVA						
Source of Variation	SS	Df	MS	F	P-value	F crit
Between Groups	43.80555556	5	8.761111111	2.378582202	0.06235846	2.53355454 8
Within Groups	110.5	30	3.683333333			
Total	154.3055556	35				

5 DISCUSSIONS

In this section, the authors will discuss the results of the data and the factors that might have influenced them. Where appropriate, the current data will be compared to those between 2009 and 2018 (as of 14 June 2018). This data is part of the author P. Beqiraj's dissertation.

First, compared to the total number of laws passed by Parliament, the number of approximated laws is low. Out of the 702 laws passed between 2018 and 2023, only 64 laws were approximated. Parliament's approval of a low number of approximated laws was also observed between 2009 and 2018 (as of June 2018). 91 laws were approximated to the EU *acquis* between 2009 and 2018 (as of June 2018) out of 1358 laws approved by Parliament during that period, as was identified in P. Beqiraj's dissertation. Since the entry into force of the SAA in 2009, only a small number of laws approved by Parliament have been approximated to the EU *acquis*. The authors attribute this low number of laws to the use of executive branch by-laws to achieve legislative approximation during this phase.

The data indicates that the number of approximated laws is low compared to those approved each year from 2018 to 2023. Upon further investigation, it was found that although the number of laws passed in 2018 is almost similar to that of 2023, the number of laws approximated in 2023 is more than double that of 2018. The variation in the number of approximated laws during the study period, with a peak in 2021 and a significant decline in 2022, suggests that external factors can influence the legislative agenda. The opening of EU negotiations with Albania in July 2022 may have contributed to the increase in approximate laws in 2023. Additionally, it demonstrates how European integration commitments can impact priorities and internal legislative processes.

Regarding the EU act to which laws were approximated, EU directives were the most used, followed by the regulations. The internal legislation of the Republic of Albania has yet to have specific rules for selecting national acts to approximate EU legislation. However, based on the Constitution, mandatory rules must be followed. Therefore, if EU acts that will be

approximated are in the field of human rights,[25] taxation,[26], etc., a law must be adopted for their approximation as the Constitution allows for the approval of a law to regulate these areas. For example, Law no. 33/2022, dated 31 March 2022, "For open data and reuse of public sector information", was adopted in the field of human rights, according to our research.27 The others were in the field of taxation.

When selecting a law to approximate, it is crucial to consider the relevant EU act. Laws must be adopted to approximate the directives that grant rights and obligations to natural and legal persons and for the approximation of regulations. Directives that aim to amend existing laws should also be transposed by a law of Parliament.[28]

Data collected from research on the approximation of laws between 2018 and 2023 shows that out of 64 approximated laws, only one is fully approximated with EU law, while the rest are only partially. Between 2009 and 2018 (as of 14 June), fewer laws were fully approximated with EU acts compared to the total number of approximated laws. Out of 91 laws, only 35 were fully approximated with an EU act, while the remaining 56 were only partially.[29] It is worth noting that the number of laws fully approximated between 2009 and 2018 (as of 14 June) was significantly higher than between 2018 and 2023. This raises questions about the pace of the approximation process and the extent to which Albanian laws comply with EU standards. However, it could be argued that the Republic of Albania is still in the pre-accession phase. Full compliance of its national legislation with EU law is a requirement for a country's membership in the EU.

Concerning the approximated fields, out of a total of 24 fields identified from the approximated laws, only two laws were approximated relating to the judiciary and fundamental rights, and six laws were approximated in the fields of justice, freedom, and security (refer to Figure 5). These fields belong respectively to Chapter 23 and Chapter 24 of the approximation or Cluster 1 "Fundamentals". This cluster is still in the process of approximation because, due to its importance, it opens first and closes last. One of the key features of the revised methodology is the focus on strengthening the rule of law conditionality, which means that negotiations will be opened and closed within the rule of law cluster.[30]

During 2024, Albania aims to align its laws with the EU *acquis* in the areas of Chapter 23 and Chapter 24 of the "Fundamentals" Cluster, which are important for access to justice and human rights. This includes the draft laws: "The Criminal Code of the Republic of Albania",

25 Constitution of the Republic of Albania (n 9) art 17.

26 ibid, art 155.

27 Law no 33/2022, dated 31 March 2022, 'For open data and reuse of public sector information' [2022] Official Journals of the Republic of Albania 65/8457 <http://qbz.gov.al/eli/ligj/2022/03/31/33> accessed 30 April 2024.

28 Lazowski and others (n 8).

29 Beqiraj (n 11) 3.

30 Vlajković and Tasev (n 3).

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"For the establishment of the Office of Asset Recovery", "For the protection of personal data", and "For concessions and public-private partnership".[31]

According to the relevant cluster of negotiating chapters, "Internal Market" is the leading cluster with 20 approximate laws. This is consistent with the period from 2009 to 2018 (as of 14 June). Even during this period, the largest number of laws has been approximated in the field of the internal market, with a total of 14 laws.[32] The obligation placed by the SAA with the approximation of the internal market from the beginning stages of the legislation approximation process is an argument for this result.[33]

6 CONCLUSIONS AND RECOMMENDATIONS

The study data revealed a quantifiable difference between the total number of laws approved and those approximated by Parliament from 2018 to 2023. Therefore, to approximate national legislation with that of the EU, Parliament should increase the trend of approving laws aimed at approximating the legislation. The executive power should play an important role in this direction. The CoM influences Parliament's legislative agenda by proposing draft laws that are later approved. The pace and efficiency of the approximation process are important to ensure full approximation of Albanian legislation with EU legislation.

The degree of full approximation of the national legislation should continue at a higher rate. From 2018 to 2023, only one law was fully approximated with the EU acquis, indicating a low degree of full approximation of our laws.

To increase access for citizens, academics, and researchers of European law, it is recommended that a parliamentary platform be drafted on the legislative activity of Parliament in the field of approximation of legislation. The official website of Parliament (https//www.parlament.al) has important gaps in the laws aligned with EU law from 2018 to 2023 in the European Integration (Approximation of Legislation) section. During the course of this study, two notable areas of concern were identified:

a. There is currently no available information on the approximated laws for the years 2018, 2019, and 2020, as well as for the periods of January to June 2021 and October to December 2023.

b. Our searches in the Official Journals of the Republic of Albania did not find some of the laws listed as approximated on the official website of Parliament:

1. Law no. 37/2022, dated 14 April 2022, "For some additions and changes in law no. 35/2016 "On copyright and other related rights" is mentioned as approximated in

31 Decision of the Council of Ministers no 16 (n 1).
32 Beqiraj (n 11) 3.
33 Stabilisation and Association Agreement (n 4) art 70, para 3.

the April - June 2022 newsletter[34] but does not appear as such in the corresponding Official Journal in which it was published.[35]

2. Similarly, Law no. 91/2021, dated 1 July 2021, "For the establishment, organization and operation of the National Authority for the Investigation of Railway and Maritime Accidents and Incidents" is mentioned as approximated in the July - September 2021 Parliament newsletter[36] but not based on the Official Journal where it was published.[37]
3. Law no. 84/2022, dated 24 November 2022, "For the 2023 Budget" is listed as approximated in the October - December 2022 newsletter,[38] yet budget laws are not approximated, as can be verified in the Official Journal where they are published.[39]

It may be worth considering revising and adjusting the information provided on Parliament's official webpage to align it with the data from the Republic of Albania's Official Journals.

Approximation contributes to the quality of the legal framework. The approximated laws are more stable and effective, with higher standards that align with the EU's. Furthermore, the improved legislative techniques in drafting approximated laws result from the collaboration between national and international experts.

The importance of increasing the approximation of Albanian legislation lies in the fact that it has a direct effect on individuals and enterprises. If national laws approximate with the EU *acquis,* they may have greater access to legal remedies. Also, the approximation process can significantly improve access to justice by fostering the growth of more transparent,

34 'Newsletter i Kuvendit mbi çështjet europiane, nr 15' (*Republika e Shqipërisë Kuvendi*, Prill-Qershor 2022) <https://kuvendiwebfiles.blob.core.windows.net/webfiles/202301051323031581Newsletter%20i%20Kuvendit%20mbi%20c%CC%A7e%CC%88shtjet%20europiane%20nr.%2015%20pe%CC%88r%20periudhe%CC%88n%20Prill-Qershor%202022.pdf> accessed 3 April 2024.

35 Law no 37/2022, dated 14 April 2022, 'For some additions and changes in Law no 35/2016 "On Copyright and other Related Rights"' [2022] Official Journals of the Republic of Albania 69/8607 <https://qbz.gov.al/eli/fz/2022/69/c657e445-6e75-4283-9042-02590484132f> accessed 3 April 2024.

36 'Newsletter i Kuvendit mbi çështjet europiane, nr 12' (*Republika e Shqipërisë Kuvendi*, Korrik-Shtator 2021) <https://kuvendiwebfiles.blob.core.windows.net/webfiles/202301051322300117Newsletter%20i%20Kuvendit%20mbi%20c%CC%A7e%CC%88shtjet%20europiane%20nr.12%20pe%CC%88r%20periudhe%CC%88n%20korrik-shtator%202021.pdf> accessed 3 April 2024.

37 Law no 91/2021, dated 1 July 2021, 'For the establishment, organization and operation of the National Authority for the Investigation of Railway and Maritime Accidents and Incidents' [2021] Official Journals of the Republic of Albania 125/12972 <https://qbz.gov.al/eli/fz/2021/125/3ad6c11a-71e1-4b1b-9150-6cdb7c00d16c> accessed 3 April 2024.

38 'Newsletter i Kuvendit mbi çështjet europiane, nr 17' (*Republika e Shqipërisë Kuvendi*, Tetor-Dhjetor 2022) <https://kuvendiwebfiles.blob.core.windows.net/webfiles/202303230832219946Newsletter%20i%20Kuvendit%20mbi%20c%CC%A7eshtjet%20europiane%20nr.%2017%20per%20periudhen%20tetor-dhjetor%202022.pdf.pdf> accessed 3 April 2024.

39 Law no 84/2022, dated 24 November 2022, 'For the 2023 Budget' [2022] Official Journals of the Republic of Albania 171/21673 <https://qbz.gov.al/eli/fz/2022/171/f8ae9877-58a5-49c2-9cc6-0eab8276df82> accessed 3 April 2024.

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accountable, and functional legal systems that defend fundamental rights and guarantee the effectiveness of the rule of law.

In conclusion, analysing the role of Parliament in EU integration through the approximation of national legislation from 2018 to 2023 highlights the multidimensional nature of the integration process and the important contribution made so far by the legislative power. The study reveals Parliament's substantial efforts in approximating national legislation with EU legislation, as proven by the results of the study. Moving forward, the CoM must address possible challenges to advance Albania's EU membership agenda. Learning from experience, Albania can and should increase its prospects for successful integration into the EU.

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ANNEXES

Annex 1. Official Journals of the Republic of Albania: Approximated laws 2018-2023

1. *Official Journal of the Republic of Albania*, no 59 (Center of Offic Publ, 26 April 2018) <https://qbz.gov.al/eli/fz/2018/59/c14940a6-c28c-4d9a-ad7f-29e85db5f113> accessed 30 April 2024.
2. *Official Journal of the Republic of Albania*, no 79 (Center of Offic Publ, 30 May 2018) <https://qbz.gov.al/eli/fz/2018/79/63abe2a7-88f8-4978-912b-681593b9e996> accessed 30 April 2024.
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4. *Official Journal of the Republic of Albania*, no 115 (Center of Offic Publ, 3 August 2018) <https://qbz.gov.al/eli/fz/2018/115/def9dedb-7e7a-475e-9d64-5bf4482e1482> accessed 30 April 2024.
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8. *Official Journal of the Republic of Albania*, no 33 (Center of Offic Publ, 18 March 2019) <https://qbz.gov.al/eli/fz/2019/33/aa64b0d9-a408-4bff-8772-a00749d75194> accessed 30 April 2024.
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11. *Official Journal of the Republic of Albania*, no 113 (Center of Offic Publ, 1 August 2019) <https://qbz.gov.al/eli/fz/2019/113/837b2b34-2833-4add-8635-994462b57cc5> accessed 30 April 2024.
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Annex 2. Approximated laws 2018-2023

The laws approximated in 2018

Official Journals of the Republic of Albania 2018, no: 59, 79, 86, 115, 162, 187:

1. Law no. 17/2018, dated 5 April 2018, 'For official statistics';
2. Law no. 25/2018, dated 1 May 2018, 'For accounting and financial statements';
3. Law no. 27/2018, dated 17 May 2018, 'For cultural heritage and museums';
4. Law no. 46/2018, dated 23 July 2018, 'For state control of international transfers of military goods and dual-use items and technologies';
5. Law no. 71/2018, dated 18 October 2018, 'For some changes and additions to Law no. 9902, dated 17 April 2008 "For consumer protection" as amended';
6. Law no. 98/2018, dated 3 December 2018, 'For some additions and changes in Law no. 61/2012 "On Excise Duty in the Republic of Albania" as amended'.

The laws approximated in 2019

Official Journals of the Republic of Albania 2019, no: 21, 33, 58, 131, 113, 111, 111:

1. Law no. 4/2019, dated 7 February 2019, 'For some changes and additions to Law no. 64/2012 "On fishing" as amended';
2. Law no 8/2019, dated 26 February 2019, 'For quality schemes of agricultural products';
3. Law no 22/2019, dated 21 September 2019, 'For some changes and additions to Law no. 103/2016 "On aquaculture"';
4. Law no 44/2019, dated 18 July 2019, 'For some additions and changes in Law no. 7895, dated 27.1.1995 "Criminal Code of the Republic of Albania" as amended';
5. Law no. 45/2019, dated 18 July 2019, 'For civil protection';
6. Law no. 46/2019, dated 18 July 2019, 'For some changes and additions to Law no. 10 006, dated 23 October 2008 "On the protection of wild fauna" as amended';
7. Law no. 56/2019, dated 18 July 2019, 'For some changes and additions to Law no. 9636, dated 6 November 2006 "On health protection from tobacco products" as amended'.

The laws approximated in 2020

Official Journals of the Republic of Albania 2020, no: 3, 23, 31, 32, 54, 118, 80, 96, 123, 104, 131, 146, 149, 222, 202, 230:

1. Law no. 87/2019, dated 18 December 2019, 'For the invoice and traffic monitoring system';
2. Law no. 4/2020, dated 30 January 2020, 'For the automatic exchange of financial account information';

3. Law no. 13/2020, dated 13 February 2020, 'For some changes and additions to Law no. 108/2013 "For foreigners" as amended';
4. Law no. 21/2020, dated 5 March 2020, 'For some additions and changes in Law no. 89/2014 "On medical devices"';
5. Law no. 22/2020, dated 5 March 2020, 'For some additions to Law no. 71/2016 "On border control";
6. Law no. 36/2020, dated 16 April 2020, 'For procurements in the field of defense and security';
7. Law no. 41/2020, dated 23 April 2020, 'For some amendments and additions to Law no. 9587, dated 20 July 2006, "On the protection of biodiversity" as amended';
8. Law no. 55/2020, dated 30 April 2020, 'For payment services';
9. Law no. 56/2020, dated 30 April.2020, 'For collective investment undertakings';
10. Law no. 57/2020, dated 30 April 2020, 'For forests';
11. Law no. 62/2020, dated 14 May 2020, 'For capital markets';
12. Law no. 96/2020, dated 23 July 2020, 'Air code of the Republic of Albania';
13. Law no. 112/2020, dated 29 July 2020, 'For the register of beneficial owners';
14. Law no. 126/2020, dated 15 October 2020, 'For metrology';
15. Law no. 128/2020, dated 22 October 2020, 'For some changes and additions to Law no. 10440, dated 7 July 2011 "On environmental impact assessment" as amended';
16. Law no. 140/2020, dated 26 November 2020, 'For the population and housing census'.

The laws approximated in 2021

Official Journals of the Republic of Albania 2021, no: 3, 5, 5, 28, 30, 52, 68, 90, 107, 107, 125, 125, 125, 125, 162, 195, 197, 197:

1. Law no. 152/2020, dated 17 December 2020, 'For some changes and additions to Law no. 74/2014 "On weapons"';
2. Law no. 154/2020, dated 17 December 2020, 'For the central register of bank accounts';
3. Law no. 155/2020, dated 17 December 2020, 'On climate change';
4. Law no. 162/2020, dated 23 December 2020, 'For public procurement';
5. Law no. 10/2021, dated 1 February 2021, 'For asylum in the Republic of Albania';
6. Law no. 28/2021, dated 8 March 2021, 'For some changes and additions to Law no. 124/2015 "On energy efficiency" as amended';
7. Law no. 32/2021 dated 16 March 2021, 'For compulsory insurance in the transport sector';

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8. Law no. 63/2021, dated 7 May 2021, 'For some additions and changes in Law no. 8378 dated 22 July 1998, "Road Code of the Republic of Albania" as amended';
9. Law no. 73/2021, dated 3 June 2021, 'For placing on the market and supervision of pyrotechnic articles';
10. Law no. 74/2021, dated 3 June 2021, 'For placing on the market and supervision of explosives for civil use';
11. Law no. 88/2021, dated 1 July 2021, 'For the establishment of the Railway Safety Authority';
12. Law no. 89/2021, dated 1 July 2021, 'For the establishment of the Railway Regulatory Authority";
13. Law no. 90/2021, dated 1 July 2021, 'For the division of the company "Albanian railway", sh. a';
14. Law no. 96/2021, dated 7 July 2021, 'For some changes and additions to Law no. 9947, dated 7 July 2008, "On industrial ownership" as amended';
15. Law no. 79/2021, dated 24 June 2021, 'For foreigners';
16. Law no. 114/2021, dated 25 November 2021, 'For some changes and additions to Law no. 61/2012 "On excise duties in the Republic of Albania" as amended';
17. Law no. 111/2021 dated 25 December 2021, 'For some additions and changes in Law no. 92/2014 "On value added tax in the Republic of Albania" as amended';
18. Law no. 120/2021 dated 2 December 2021, 'For some amendments and additions to Law no. 9917 dated 19 May 2008, "On the prevention of money laundering and financing of terrorism" as amended'.

The laws approximated in 2022

Official Journals of the Republic of Albania 2022, no: 65, 74, 90, 170:

1. Law no. 33/2022 dated 31 March 2022, 'For open data and reuse of public sector information';
2. Law no. 36/2022 dated 14 April 2022, 'For the organization and operation of local action groups';
3. Law no. 43/2022 dated 21 April 2022, 'For the development of micro, small and medium enterprises';
4. Law no. 82/2022 dated 24 November 2022, 'For some additions and changes in Law no. 92/2014 "On value added tax in the Republic of Albania" as amended'.

The laws approximated in 2023

Official Journals of the Republic of Albania 2023, No: 6, 8, 27, 59, 64, 70, 75, 101, 105, 152, 173, 187:

1. Law no. 20/2023 dated 16 March 2023, 'For beekeeping';
2. Law no. 24/2023 dated 23 March 2023, 'For promoting the use of energy from renewable sources';
3. Law no. 27/2023 dated 23 March 2023, 'For the control of trade in products which may be used for capital punishment, torture or cruel, inhuman or degrading treatment or punishment';
4. Law no. 86/2022, dated 22 December 2022, 'For viticulture and wine';
5. Law no. 95/2022 dated 22 December 2022, 'For some changes and additions to Law no. 105/2014 "On drugs and pharmaceutical service" as amended';
6. Law no. 2/2023 dated 26 January 2023, 'For fluorinated greenhouse gasses';
7. Law no. 29/2023 dated 30 January 2023, 'For income tax';
8. Law no. 30/2023 dated 13 April 2023, 'For some changes and additions to Law no. 97/2013 "For audiovisual media in the Republic of Albania" as amended';
9. Law no. 44/2023 dated 15 June 2023, 'For some additions and changes in Law no. 69/2012 "On the pre-university education system in the Republic of Albania" as amended';
10. Law no. 50/2023 dated 22 June 2023, "For some additions and changes in Law no. 9774 dated 12.7.2007 "On the evaluation and management of noise in the environment" as amended';
11. Law no. 76/2023 dated 21 September 2023, 'For private pension funds';
12. Law no. 92/2023 dated 2 November 2023, 'For some additions and changes in Law no. 116/2014 "On the accreditation of conformity assessment bodies in the Republic of Albania"';
13. Law no. 95/2023 dated 7 December 2023, 'For some additions and changes in Law no. 9920 dated 19 May 2008, "On tax procedures in the Republic of Albania" as amended'.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЛЬ ПАРЛАМЕНТУ АЛБАНІЇ В ІНТЕГРАЦІЇ ДО ЄС ЧЕРЕЗ АПРОКСИМАЦІЮ НАЦІОНАЛЬНОГО ЗАКОНОДАВСТВА (СІЧЕНЬ 2018 РОКУ – ГРУДЕНЬ 2023 РОКУ)

Пранвера Бетірай*, Доріна Діпалі та Крістінка Янче

АНОТАЦІЯ

Вступ. *Переговори Республіки Албанія (далі - Албанія) щодо членства країни в Європейському Союзі (ЄС) офіційно розпочалися 19 липня 2022 року. Процес полягатиме, зокрема, у наближенні національного законодавства до acquis ЄС, яке поділено на шість тематичних кластерів. Албанія повинна досягти повної відповідності законодавства країни до acquis ЄС та його успішного впровадження. Переговори та наступне членство в ЄС сприятимуть демократизації та зміцненню верховенства права в Албанії. У цьому дослідженні розглядається роль Парламенту Албанії (далі – Парламент) в процесі інтеграції в ЄС через апроксимацію національного законодавства. Це підготовче дослідження служить наріжним каменем для подальшої роботи над проблемою і академічних досліджень щодо участі албанського парламенту в європейській інтеграції через процес наближення національного законодавства. Таким чином, для кращої апроксимації національного законодавства до законодавства ЄС, рекомендується, щоб Парламент посилив тенденцію до ухвалення законів, спрямованих на цей процес.*

Методи. *Було проведено перехресне дослідження з метою вивчення законодавчої діяльності Парламенту у період з 2018 до 2023 роки щодо наближення національного законодавства до acquis ЄС. У дослідженні використовувався підготовчий аналіз для вивчення щорічної кількості законів, прийнятих і наближених до законодавства ЄС. Надійні джерела з Офіційних журналів Албанії були використані для збору даних про закони, прийняті та наближені протягом досліджуваного періоду, що забезпечує розуміння загальної кількості законів, прийнятих та наближених за кожен рік, а також про відповідний акт ЄС, і кластери розділів переговорів.*

Результати та висновки. *Аналіз ролі Парламенту, щодо європейської інтеграції за допомогою наближення національного законодавства з 2018 до 2023 роки, підкреслює багатовимірний характер процесу інтеграції та важливий внесок, зроблений до цього часу законодавчою владою. Протягом періоду, вказаного у статті, Парламент доклав важливих зусиль для наближення національного законодавства до законодавства ЄС, про що свідчать результати дослідження. На основі даних цієї роботи було виявлено різницю, яка піддається кількісному вимірюванню, між загальною кількістю законів, ухвалених і наближених Парламентом з 2018 до 2023 року. Висновки та рекомендації дослідження забезпечують повне розуміння проблем і можливостей апроксимації албанського законодавства до acquis ЄС та втілення програми європейської інтеграції країни.*

Ключові слова: *Парламент Албанії, процес інтеграції, апроксимація національного законодавства, acquis ЄС, Офіційний журнал.*

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Research Article

CONCEPTUAL FOUNDATIONS AND PRINCIPLES OF LEGAL REGULATION OF DECENTRALISATION IN SELECTED EUROPEAN COUNTRIES AND UKRAINE

Alina Murtishcheva*

ABSTRACT

Background: *This research paper aims to enhance theoretical understanding and explore the conceptual foundations and principles of legal regulation of decentralisation. Establishing a well-defined categorical apparatus is an important prerequisite for drafting effective legal regulation, and decentralisation is no exception. A precise understanding of this concept allows for the development of clear stages of its implementation in national legislation. No less important is the proper formulation of the principles of legal regulation of decentralisation. These principles allow further development of a system of legal regulation that will ensure the autonomy of local self-government.*

Methods: *The study provides a comparative analysis of the principle of decentralisation implementation experience in such countries as Belgium, Italy, France, Lithuania, Poland, Ukraine and the United Kingdom, which have chosen both centralised and decentralised forms of public administration. The paper employs a multi-faceted methodology to analyse legal aspects of decentralisation in countries under study, focusing on the observance of the European Charter of Local Self-government standards and the evolution of constitutional frameworks of decentralisation. This approach includes a comparative analysis of constitutional models of decentralisation and their historical backgrounds, as well as an analysis of the practical application of decentralisation and recentralisation as phenomena in modern national policy. Particular attention is given to the influence of the martial law regime on these processes in certain countries.*

Results and Conclusions: *The main research findings clarify the primary problems of European standards of local-self-government implementation in studied countries. They highlight the distinction of specific approaches to decentralisation, including its combination with deconcentration, devolution or even centralisation of power. Additionally, the research*

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provides an analysis of the historical aspect of the development of the constitutional framework for decentralisation. Lawyers and legislators can use these insights to improve the effectiveness of legislation regarding local self-government development in the studied countries.

1 INTRODUCTION

European integration processes determine the convergence of legal systems and the sharing of experience in the modernisation of constitutional institutions. Moreover, the globalisation tendency, challenges to democracy and peace caused by the Russian invasion of Ukraine, and other global conflicts require searching for general international landmarks of governmental development, including local self-government. The coordination of state authority and local self-government functioning is essential to the rational distribution of public affairs. It enables state authorities to solve the most important questions at a time of economic, political, war and other challenges. The European Charter of Local Self-Government (hereinafter the Charter) embodies the municipal values and landmarks common to European countries.[1] One of such common landmarks is considered decentralisation.

Decentralisation as a phenomenon is characteristic of most European Union (hereinafter EU) countries at different historical stages. For Ukraine, as a country that has clearly defined a European integration vector of development, understanding both the legal and theoretical basis of decentralisation processes in European countries is an important prerequisite for further reforms. However, although decentralisation is based on common ideas and values such as democracy, participation, and the rule of law, not all European countries currently implement broad decentralisation in their political, legal and economic practices. Some countries are gradually moving in this direction, while others remain quite centralised. There is also a new, insufficiently studied tendency of recentralisation, which may be defined as the strengthening of centralisation tendencies in countries previously considered decentralised.

Countries such as Belgium, Italy, France, Lithuania, Poland, Ukraine and the United Kingdom demonstrate different approaches to centralised and decentralised forms of public administration implementation. France is still considered a rather centralised European country despite the decentralisation course proclaimed in Article 1 of the Constitution. Meanwhile, Belgium, the United Kingdom and Italy are mainly regarded as decentralised. Lithuania, Poland, and Ukraine are post-Soviet countries where the development of local self-government is characterised by different tendencies. Lithuania and Ukraine remain relatively centralised, although Ukraine, from 2014 until the Russian full-scale invasion in 2022, had been carrying out decentralisation reform in several stages. At the same time,

1 European Charter of Local Self-Government (adopted 15 October 1985) ETC 122 <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=122> accessed 3 April 2024.

amendments to the Constitution of Ukraine regarding the establishment of the principle of decentralisation, which was repeatedly proposed during this period, were not officially adopted. Poland has also passed the path of decentralisation; however, now scientists, as well as the Congress of Local and Regional Authorities, have noticed recentralisation trends that require analysis.[2]

The reasons for recentralisation in Poland include the central government's desire to create appropriate conditions for the implementation of centrally-made decisions and to improve the effectiveness of public services provision. However, such a reason can serve as a kind of "cover" for the political line of limiting local self-government. Comparing recentralisation and centralisation, scholars determine the first term as strengthening (restoring) the role of central authorities at various levels of management of individual areas of public tasks. Centralisation, in turn, is related to the principle of deconcentration, where local and regional authorities perform administrative activities but are managed by the central government.[3]

Despite being recognised and implemented in European countries in the 1990s – 2000s, the concept of decentralisation has not been equally understood and assessed in the academic literature. Some authors emphasise decentralisation as a transfer of power,[4] others consider it a transfer of finances or authority, responsibility, and accountability.[5] Despite decentralisation receiving a fair amount of scholarly attention as well as the focus of legislators in European countries, this phenomenon has not received an explicitly positive assessment and, therefore, is not considered an absolute benefit. Moreover, the state development practice of specific European countries shows that national governments are developing their approaches to combining the principles of decentralisation and centralisation. Thus, scrutinising the conceptual basis of decentralisation is becoming an important and relevant scientific task.

Given the context above, the paper's main purpose is to analyse the constitutional framework of decentralisation and the level of implementation of European standards of local self-government introduced in the Charter. The research aims to identify the

2 Wirginia Aksztejn and others, 'The Multiple Faces of Recentralization: A Typology of Central-Local Interactions' [2022] Journal of Urban Affairs doi:10.1080/07352166.2022.2124916; 'Poland: Relatively Alarming Developments for Local and Regional Democracy' (*Council of Europe - Congress of Local and Regional Authorities*, 2 April 2019) <https://www.coe.int/en/web/congress/-/council-of-europe-congress-report-finds-alarming-developments-for-local-and-regional-democracy-in-poland> accessed 6 April 2024.

3 Lucyna Rajca, 'Reforms and Centralization Trends in Hungary and in Poland in a Comparative Perspective' (2020) 160(5) Przegląd Sejmowy 133, doi:10.31268/PS.2020.69.

4 Akampurira Abraham, *Decentralisation, Local Governance and Development: An Aspect of Development* (Anchor Academic Publ 2014).

5 Camille Cates Barnett, Henry P Minis and Jerry VanSant, *Democratic Decentralization* (Research Triangle Institute 1997); Eglė Gaulė, 'Public Governance Decentralization Modelling in the Context of Reforms' (2010) 32 Public Policy & Administration 47.

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main problems of the Charter implementation, classify approaches, determine constitutional models of regulation of the decentralisation principle and examine the practice of their development in the countries under study, especially under the influence of martial law in Ukraine.

The above-mentioned EU countries implement both decentralised and centralised principles of public administration and have different historical backgrounds for developing decentralisation ideas. Therefore, studying these countries is representative of understanding different political and legal scenarios and outlines development tendencies for the decentralisation concept and its legal regulation. This research will also contribute to establishing an efficient local self-government system in Ukraine following the lifting of martial law.

The main method adopted in this paper is a comparative legal analysis approach to delineate the legal framework for decentralisation in countries under the study. The critical analytical method allowed an analysis of the practical problems of implementing the Charter. The methodology involved a thorough examination of constitutional frameworks, and the study conducted an empirical examination of various state constitutional models of decentralisation regulation, determining their positive and negative peculiarities. The historical method allowed the author to identify certain features of constitutional models of regulation of the decentralisation principle. Methods employed in this study also included a review of existing literature and an analysis of case studies of decentralisation application, as well as its change and adaptation to external factors, including the war in Ukraine.

2 EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT IMPLEMENTATION

The processes of globalisation and international cooperation are becoming key areas of development in the modern world. In particular, the processes of European integration that began after the Second World War resulted in the development of common standards in various spheres of public life, including local self-government. In 1970, the Consultative Assembly of the Council of Europe (since 1974 – the Parliamentary Assembly of the Council of Europe), based on Resolution 64,[6] developed Recommendation 615, formulating the first general principles of local self-government for the Council of Europe member countries. These principles include the obligation to enshrine the principle of local autonomy in the constitution, the right of local communities to manage their finances, and the right of local communities to meet common interests and others.[7]

6 Resolution 64 (1968) on a declaration of principles of local autonomy debated by the European Conference of Local Authorities and adopted on 31 October 1968 (7th Sess, 28-31 October 1968).

7 PACE Recommendation 615 (1970) 'Declaration of Principles on Local Autonomy' (adopted 25 September 1970) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14649&lang=en> accessed 3 April 2024.

However, the general nature of the Declaration did not allow specific measures to be taken to implement it, so since 1981, at the initiative of the Standing Conference of Local and Regional Authorities of Europe, the development of a more specific document continued. A non-binding declaration "cannot do justice to local autonomy or the threats to which it is exposed".[8] This work resulted in the presentation of the European Charter of Local Self-Government at the 6th Conference of Ministers of European Countries Responsible for Local and Regional Self-Government on 6-8 November 1984 and its subsequent opening for signature on 15 October 1985.[9]

Nowadays, compliance with the principles of the Charter is often regarded as adherence to the principle of decentralisation. For instance, it is mentioned that political decentralisation has strong links to the fundamental principles of the Charter, including Art. 2, 3, 4, etc.[10] Although the Charter does not use the term "decentralisation" or the "principle of decentralisation", its preamble refers to building Europe on the principles of democracy and decentralisation of power. Some researchers point out that the Charter was signed as a treaty protecting "the autonomy of local governments versus central government".[11] The concepts of "local autonomy" and "decentralisation" are also recognised as being somewhat related, although decentralisation refers to values such as efficacy and efficiency, not limited to local autonomy.[12] Despite the fact that under this approach, decentralisation is not considered a "very meaningful concept", we would like to note that for many countries, including Ukraine, decentralisation has become not just a concept but a set of tools for implementing European standards in the field of local self-government. These standards are most fully and systematically embodied in the Charter. That is why we believe the definition of decentralisation introduced by the Organisation for Economic Co-operation and Development (OECD) is more accurate. On the contrary, the OECD considers decentralisation as the process of transfer of a range of powers, responsibilities and resources from central government to subnational governments, having some degree of autonomy.[13] Such an approach makes local autonomy and decentralisation interrelated concepts and corresponds to the spirit of the Charter.

Protecting common values, the Congress of Local and Regional Authorities provides an article-by-article comparative analysis of article ratifications and compliance in the

8 Council of Europe, *European Charter of Local Self-Government and Explanatory Report* (Local&Regional Reference, Council of Europe Publ 2010).

9 European Charter of Local Self-Government (n 1).

10 Camille Borrett and others, *Developing a Decentralisation Index for the Committee of the Regions Division of Powers Portal, European Committee of the Regions* (European Committee of the Regions CIVEX 2021) doi:10.2863/841455.

11 Frederik Fleurke and R Willemse, 'Approaches to Decentralization and Local Autonomy: A Critical Appraisal' (2004) 26(4) Administrative Theory & Praxis 524.

12 ibid 533.

13 OECD, *Making Decentralisation Work: A Handbook for Police-Makers* (OECD Multi-level Governance Studies, OECD Publ 2019) 25-58, doi:10.1787/g2g9faa7-en.

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46 member states of the Council of Europe based on the monitoring missions. Table 1 below consolidates these data for the countries under study.

***Table* 1. Current level of implementation of the principles of the European Charter of Local Self-Government in the countries under study**

Country	Non ratified articles (if any)	Articles ratified with reservation (if any)	Remarks of the Council of Europe monitoring mission
Belgium	3(2), 9(6), 9(7)	8(2), 9(2),	The most significant remark concerned the Flemish Government's influence on the burgomasters' appointment. This influence affects both compliance with Article 3 (2) of the Charter and Article 8 (3). Also, it is stressed that while the federal level discussing or adopting decisions and laws on matters that directly or indirectly concern the finances of local authorities, the latter are not consulted with (Report CG(2022)43-16; Rec 487 (2022)).[14]
France	7(2)	3(2)	Despite the fact that the right of local authorities to be consulted is considered to be one of the fundamental principles of European legal and democratic practice this right is violated in France. For instance, it was violated during the merging of regions. The second remark concerned the risk for the financial autonomy of sub-national territorial governments due to the tendency to reduce or eliminate the discretion of territorial collectives on tax rates and bases (Report CG30(2016)06; Rec 384 (2016)).[15]
Italy	12		The lack of qualified personnel was mentioned, so the requirements of Article 6 (2) are not met. Provinces do not have the adequate financial resources to accomplish their tasks so the requirements of Article 9 (1) are not met also (Report CG33(2017)17; Rec 404 (2017)).[16]
Lithuania	-	-	The Council of Europe monitoring mission stated inadequacy and insufficiency of the financial resources to the responsibilities assigned to municipalities (breach of Article 9(1) and 9(2).

14 'Belgium – Monitoring Report' (*Carta-Monitor: Monitoring of the European Charter of Local Self-Government*, 27 October 2022) <https://www.congress-monitoring.eu/en/3-pays.html> accessed 2 April 2024.

15 'France – Monitoring Report' (*Carta-Monitor: Monitoring of the European Charter of Local Self-Government*, 22 March 2016) <https://www.congress-monitoring.eu/en/1-pays.html> accessed 11 April 2024.

16 'Italy – Monitoring Report' (*Carta-Monitor: Monitoring of the European Charter of Local Self-Government*, 18 Octobe 2017) <https://www.congress-monitoring.eu/en/6-pays.html> accessed 5 April 2024.

			Moreover, the interference by state authorities within the municipal independent functions was fixed. It undermines the attribution to local authorities of full and exclusive powers (Report CPL35(2018)02; Rec 420 (2018)).[17]
Poland	-	-	Despite of Joint Commission of Government and Local Government[18] establishment the lack of consultation between central and local governments was detected. It influenced on Article 9 (6) compliance also, because the lack of consultations contradicts the finance legislation. Additionally, the requirements of Article 9 (4) are not met, as municipalities have not sufficiently diversified financial resources to enable them to carry out their tasks (Report CG36(2019)13; Rec 431 (2019)).[19]
Ukraine	-	-	The absence of appropriate administrative structures and resources for the tasks of local authorities was observed. The monitoring mission also emphasized structural weakness in local and regional authorities' financial powers, a lack of proportion between their own resources and the powers assigned, under-financing of the powers delegated by central government and other peculiarities of Ukraine's financial system (Report CG(25)8; Rec 348 (2013)).[20] As a result, Article 9 was considered to be partly complied with.
United Kingdom	-	-	The principle of local self-government is absent in domestic legislation (both in the UK and its constituent parts). A high degree of local financial dependence on national government was observed. The non-compliance of Article 9 (7) due to earmarked grants from higher-level authorities to local and regional authorities was noted. Financial systems of local

17 'Lithuania – Monitoring Report' (*Carta-Monitor: Monitoring of the European Charter of Local Self-Government*, 6 November 2018) <https://www.congress-monitoring.eu/en/28-pays.html> accessed 15 April 2024.

18 Joint Commission of Government and Local Government (JCGaLG) was established as a common body involving in developing a common position the government and local government. Created in 1993 JCGaLG was aimed to guarantee local governments' powers to influence government policy regarding local government matters. See: 'Komisja Wspólna Rządu i Samorządu Terytorialnego' (*Ministerstwu Spraw Wewnętrznych i Administracji*, 14 grudnia 2018) <https://www.gov.pl/web/mswia/komisja-wspolna-rzadu-i-samorzadu-terytorialnego> accessed 13 April 2024; 'Joint Commission of Government and Local Government', *Encyklopedia Administracji Publicznej* (2019) <http://encyklopediaap.uw.edu.pl/index.php/Joint_Commission_of_Government_and_Local_Government> accessed 13 April 2024.

19 'Poland – Monitoring Report' (*Carta-Monitor: Monitoring of the European Charter of Local Self-Government*, 2 April 2019) <https://www.congress-monitoring.eu/en/25-pays.html> accessed 9 April 2024.

20 'Ukraine – Monitoring Report' (*Carta-Monitor: Monitoring of the European Charter of Local Self-Government*, 31 October 2013) <https://www.congress-monitoring.eu/en/38-pays.html> accessed 15 April 2024.

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			government funding are diversified, but most of the resources are restricted by national governments. Local authorities do not always have sufficient level of their own financial resources; although the funding is collected locally, the central government decides how it is allocated among councils (Report CG(2022)42-18; Rec 474 (2022)).[21] All these factors give rise to the conclusion that certain paragraphs of Article 9 of the Charter are being violated.

The analysis of monitoring missions' remarks allows us to identify the main problems of Charter compliance:

1) excessive administrative supervision by the regions as well as by the central government;
2) lack of consultation between central and local governments;
3) financial resources problems, including but not limited to inadequacy and insufficiency of the funding to the responsibilities assigned to municipalities, high level of local financial dependence on national governments;
4) lack of appropriate administrative structures and qualified personnel;
5) implicit or insufficient statement of local governance foundations, including the principle of local self-government.

It is known that the principle of local self-government, according to the Charter, is recommended to be incorporated into the constitution.[22] However, this study focuses on the principle of decentralisation rather than the principle of local self-government. The principle of decentralisation is considered one of the important features of the modern democratic state, which is also recognised by the Charter. At the same time, decentralisation is not absolutely beneficial, and its practical implementation can threaten the integrity of the state. This tendency is especially dangerous for countries where decentralisation is combined with devolution.

The most general approach to decentralisation describes it as "the transfer of powers from central government to lower levels in a political-administrative and territorial hierarchy".[23] However, a specific tendency can be observed in countries that have devolved a significant part of powers to their parts (subnational entities, such as geographical and historical parts of the United Kingdom or the federal entities in Belgium). The ability to introduce their own legal regulation in such subnational entities has led to a lack of compliance with the

21 'United Kingdom – Monitoring Report' (*Carta-Monitor: Monitoring of the European Charter of Local Self-Government*, 24 March 2022) <https://www.congress-monitoring.eu/en/10-pays.html> accessed 10 April 2024.

22 European Charter of Local Self-Government (n 1) art 2.

23 Elizabeth Linda Yuliani, 'Decentralization, Deconcentration and Devolution: What do they Mean?' (Workshop on Decentralization, Interlaken, Switzerland, 27-30 April 2004) <https://www.cifor.org/publications/pdf_files/interlaken/Compilation.pdf> accessed 13 April 2024.

standards of the European Charter of Local Self-Government. As a result, the implementation of the decentralisation principle has been put into question. Another consequence of this tendency is that decentralisation in Belgium and the United Kingdom is considered of an "asymmetric" nature.[24] The United Kingdom is also recognised as an asymmetrically decentralised unitary state by the European Committee of the Regions.[25] Moreover, among asymmetrically decentralised countries, Italy is also named.[26] This asymmetry means receiving different political, administrative or fiscal powers by local self-government bodies of the same order. Some scholars consider asymmetric decentralisation effective for countries where there are regions with cultural, ethnic, linguistic or historical differences or where some regions have had historical experience of autonomy.[27] Despite this, it can negatively influence the implementation of European standards. Therefore, the principle of decentralisation constitutional framework and the reasons for its asymmetry is an important aspect of the research.

3 CONSTITUTIONAL FRAMEWORK OF DECENTRALISATION

The Constitution, being the fundamental law of any law-governed and democratic state, should establish the basic principles of public authority organisation. According to this research topic, the principle of decentralisation was scrutinised. The results of the analysis are presented in table form (Table 2) and the following comments.

***Table* 2. Constitutional level of regulation of the decentralisation principle**

Country	Main constitutional provisions concerning the decentralisation principle
Belgium	Art. 162: Provincial and municipal institutions are regulated by the law. The law guarantees the application of the following principles: … the decentralisation of competences to provincial and municipal institutions".[28]
France	Art. 1: "France shall be an indivisible, secular, democratic and social Republic… It shall be organised on a decentralised basis".[29]

24 UCLG, CEMR and PLATFORMA, *The Localization of the Global Agendas: How local action is transforming territories and communities: The GOLD V Regional Report on Europe* (UCLG 2020).

25 'United Kingdom' (*European Committee of the Regions: Division of Powers*, 2020) <https://portal.cor.europa.eu/divisionpowers/Pages/UK-intro.aspx> accessed 11 April 2024.

26 Saldi Isra, Bertus de Villiers and Zainal Arifin, 'Asymmetry in a Decentralized, Unitary State: Lessons from the Special Regions of Indonesia' (2019) 18(2) Journal on Ethnopolitics and Minority Issues in Europe 44.

27 OM Boryslavska and others, *Decentralization of Public Authority: The Experience of European Countries and Prospects for Ukraine* (CPLR 2012) 77.

28 Constitution of Belgium of 7 February 1831 (amended 2014) <https://www.constituteproject.org/constitution/Belgium_2014> accessed 6 April 2024.

29 Constitution of France of 4 October 1958 (amended 8 March 2024) <https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958> accessed 8 April 2024.

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Italy	Art. 5: “The Republic is one and indivisible. It recognises and promotes local autonomies, and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation”.[30]
Lithuania	*The principle of decentralisation is not incorporated in the Constitution of the Republic of Lithuania*
Poland	Art. 15: “The territorial system of the Republic of Poland shall ensure the decentralisation of public power”.[31]
Ukraine	Art. 132: “The territorial structure of Ukraine shall be based on the principles of unity and integrity of the State territory, the combination of centralisation and decentralisation in the exercise of the state power…”.[32]
United Kingdom	*The laws and rules composing the United Kingdom constitution are not codified.*

The countries under study can be categorised into the following groups based on their constitutional approaches to decentralisation:

1. Those where decentralisation is included among their fundamental principles (Italy and France).
2. Those where decentralisation principles are integrated into their territorial system (Poland and Ukraine).
3. Those specifically addressing decentralisation within special chapters focused on municipal authorities (Belgium).
4. Those that do not explicitly mention decentralisation as a constitutional principle (Lithuania and the United Kingdom).

For the former group, decentralisation is included among the list of fundamental principles as an attempt to introduce new governmental approaches in response to the mid-20th century crisis caused by the Second World War. Neither the Albertine Statute[33] nor the Constitution of the French Fourth Republic and Constitutional Laws of 1875, which established the Third French Republic, mentioned decentralisation, although they regulated local self-government. In addition, decentralisation in Italy was a reaction to Fascist Dictatorship (from 1922 until 1943). It manifested liberation from the dictatorial regime and its accompanying high centralisation.

In our opinion, the attempt to strengthen local self-government as an institution led to the mention of decentralisation as a fundamental principle of the constitutional order in Italy

30 Constitution of the Italian Republic of 22 December 1947 (amended 7 Novembre 2022) <https://www.senato.it/sites/default/files/media-documents/COST_INGLESE.pdf> accessed 9 April 2024.

31 Constitution of the Republic of Poland of 2 April 1997 (amended 21 October 2009) <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> accessed 8 April 2024.

32 Constitution of Ukraine of 28 June 1996 no 254 k/96-BP (amended 01 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 8 April 2024.

33 Albertine Statute (“Statuto Albertino” in Italian) – the constitution of the Kingdom of Italy being in force science 1848 until 1948.

and France. Moreover, the Italian constitution specified the type of decentralisation – administrative one. In France, the constitutional provision regarding decentralisation is detailed in the General Code of Local Authorities.[34] Book 1 of this Code is called "General Principles of Decentralisation" and includes ethical principles for local elected representatives (Art. L1111-1-1), principles of public engagement in local life (Art. L1111-2), prohibition of some local self-government bodies to control others (Art. L1111-3), differentiation of powers, taking into account objective differences in the position of territorial authorities (Art. L1111-3-1), principles of division of powers (Art. L1111-4), principles of delegation of powers (Art. L1111-8 to L1111-8-2) and others.

It should be noted that France has been on a long path of decentralisation, starting at the turn of the 18th and 19th centuries when the departments were created in France to decentralise power and establish real local government. However, Alexis Tocqueville, who considered a decentralised state synonymous with a democratic state, wrote of France that in the 18th century, the government was "already highly centralised, very powerful, prodigiously active".[35] The modern stage of decentralisation reforms in France dates back to the end of the 20th century. However, the reform itself is considered to be ongoing. Furthermore, France is still considered to be centralised.[36]

The situation differs in the second group of countries, represented by Poland and Ukraine. Both countries have a historical tradition of local self-government. For instance, local government was proclaimed in the Polish Constitution adopted in 1921[37] and the Constitution of the Ukrainian People's Republic of 1918.[38] However, having in mind their experiences under Soviet Union influence, these countries aimed to establish a fundamentally new approach to the public authorities in the 1990s after the collapse of the Soviet Union. Despite their effort, their lack of prior decentralised governance experience affected their constitutional framework.

As a result, the principle of decentralisation was included not in the special chapter concerning the local self-government but as a territorial structure principle. Following this

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34 Code général des collectivités territoriales (amended 7 June 2024) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070633> accessed 15 June 2024.

35 Alexis de Tocqueville, *The Old Regime and the Revolution* (Harper & Brothers 1856) III.

36 Stéphanie Jamet, 'Meeting the Challenges of Decentralisation in France' (2007) 571 OECD Economics Department Working Papers 29, doi:10.1787/127050885680.

37 Ustawa z dnia 17 marca 1921 'Konstytucja Rzeczypospolitej Polskiej' <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19210440267> accessed 8 April 2024.

38 Constitution of the Ukrainian People's Republic (Statute on the State System, Rights and Freedoms of the Ukrainian People's Republic) of 29 April 1918 <https://zakon.rada.gov.ua/laws/show/n0002300-18#Text> accessed 14 April 2024.

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idea, the Constitutional Court of Ukraine stressed that the decentralisation of state power in Ukraine as a unitary state is the formation of the Autonomous Republic of Crimea.[39]

The positive feature of the Ukrainian Constitution is that it links two principles: centralisation and decentralisation. This combination is also called "optimal decentralisation" in Ukrainian science.[40] Moreover, some scholars associate optimal decentralisation with compliance with the subsidiarity principle.[41] While there is no single optimal model of decentralisation, countries are encouraged to strive for a balance.

At the same time, Ukraine's constitutional framework explicitly aims for this balance. However, recent events, such as the full-scale invasion in 2022, have necessitated some centralised powers. After all, in a crisis, efficiency and promptness of decision-making may sometimes be put above democracy. It is premature to label the functioning of public authority during martial law as a process of recentralisation. Nonetheless, there are several indicators that local democracy is threatening.

The Law on the Legal Regime of Martial Law,[42] in the event of martial law, allows temporary state bodies called military administrations. If such administrations are established at the level of districts (*rayons*) or regions (*oblasts*), they can function simultaneously with local self-government bodies. This is confirmed in practice, as the military administrations of the regions were formed on the first day of the full-scale invasion and have been successfully operating alongside the local governments of the regions ever since. However, the situation is more complicated when military administrations of settlements are introduced.

According to this law, "*military administrations of settlements are formed within the territories of territorial communities where village, town, city councils and/or their executive bodies and/or village, town, city mayors do not exercise the powers assigned to them by the Constitution and laws of Ukraine, as well as in other cases provided for by this law*" (Pt. 3, Art. 4).[43] These cases may include facts of violation of the Constitution or laws of Ukraine by village, town or city mayors in the exercise of additional powers granted by the Law on the Legal Regime of Martial Law (Pt. 4-6, Art. 9).

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39 'Local Self-Government; Decentralisation of Power', *Catalogue of Legal Positions of the Constitutional Court of Ukraine (by decisions, conclusions)* (Constitutional Court of Ukraine 2023) <https://ccu.gov.ua/storinka-knygy/39-misceve-samovryaduvannya-decentralizaciya-vlady> accessed 12 April 2024.

40 Anatoly P Hetman, 'Modernisation of the Territorial Structure of Ukraine as a Factor of the Ecological Paradigm' (Decentralisation of Power as a Factor in the Development of Agrarian, Environmental, Land and other Natural Resource Branches of Law: All-Ukrainian Round Table, Kyiv, 22 September 2017) 18.

41 Vasyl Melnychuk, 'Implementation of the Principles of the European Charter of Local Self-Government in the Context of Decentralisation of Power' (2019) 1(13) Bulletin of the Precarpathian University, Political Science 113.

42 Law of Ukraine no 389-VIII of 12 May 2015 'On the Legal Regime of Martial Law' (amended 18 May 2024) art 4 <https://zakon.rada.gov.ua/laws/show/en/389-19?lang=uk#Text> accessed 4 June 2024.

43 ibid, art 4, para 3.

Previously, Pt. 3, Art. 4 (until May 2022) clarified that failure to exercise the power is, in particular, the actual self-dissolution or self-disposition from the exercise of powers. Consequently, while the simultaneous operation of military administrations and local self-government bodies at the level of cities, settlements, and villages is not explicitly provided for, it is not prohibited by law. The introduction of military administrations indicates the institution of local self-government is temporarily invalid. This is further evidenced by the geographical placement of military administrations in areas primarily affected by active hostilities.

For example, Presidential Decree № 406/2022 of 11 June 2022 established the Lysychansk City Military Administration,[44] Presidential Decree № 374/2023 of 5 July 2023 on the establishment of military administrations of settlements in Zaporizhzhia region,[45] among others.

Scholars argue that the main purpose of military administrations should not be to replace the local self-government system but to respond institutionally to military aggression, enabling rapid, operational decision-making.[46] Additionally, the purpose of military administrations of settlements introduction is to ensure the exercise of public authority where local self-government cannot fulfil its tasks.

However, there is a tendency towards some recentralisation of public power through the introduction of military administrations in settlements without sufficient grounds. For example, Presidential Decree № 69/2023 of 7 February 2023[47] established the Chernihiv City Military Administration without sufficient evidence. The only formal reason was the removal from office of the Chernihiv city head. At the same time, according to the Law on Local Self-Government in Ukraine,[48] mechanisms exist to temporarily transfer the city head's powers to the secretary of the local council, thereby enabling the preservation of local self-government functions without state interference.

Moreover, as mentioned above, the Law on the Legal Regime of Martial Law does not explicitly require the termination of local self-government bodies' powers in the event of the introduction of military administrations in settlements. Moreover, Pt. 2 of Art. 9 underlines that local authorities and bodies of state power should continue to exercise their

44 Decree of the President of Ukraine no 406/2022 11 June 2022 'On the Establishment of a Military Administration' [2022] Official Gazette of Ukraine 49/2747.

45 Decree of the President of Ukraine no 374/2023 of 5 July 2023 'On the Establishment of Military Administrations of Settlements in Zaporizhzhia Region' [2023] Official Gazette of Ukraine 66/3774.

46 Oleksii Lialiuk, 'Military and Military-Civil Administrations in the System of Territorial Organization Power in Ukraine: A Comparative Analysis' (2022) 157 Problems of Legality 6, doi:10.21564/2414-990X.157.256296.

47 Decree of the President of Ukraine no 69/2023 of 7 February 2023 'On the Establishment of a Military Administration' [2023] Official Gazette of Ukraine 22/1196.

48 Law of Ukraine no 280/97-BP of 21 May 1997 'On Local Self-Government in Ukraine' (amended 18 May 2024) <https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80?lang=en#Text> accessed 4 June 2024.

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powers. Art. 10 also provides that *in case of establishment of the military administration of a settlement (settlements), the Verkhovna Rada of Ukraine, upon the proposal of the President of Ukraine, may decide that during the period of martial law and 30 days after its termination or cancellation, the head of the military administration, in addition to the powers referred to his competence by this Law, shall exercise the powers of a village, settlement, city council, its executive committee, village, settlement, city head.*[49]

The Verkhovna Rada of Ukraine has already made such decisions in relation to the settlements of the Kherson region,[50] and the President of Ukraine has submitted a draft of a similar resolution regarding Chernihiv to the Verkhovna Rada of Ukraine in February 2023.[51] However, this resolution has not yet been approved by the parliament, and now Chernihiv has both local self-government authorities and military administration. The case of Chernihiv consequently threatens the local self-government as an institution.

Since any kind of election is prohibited during martial law, establishing military administrations may serve to strengthen state power and de facto recentralisation.[52] Ukraine, in this regard, is navigating a unique experience of fully transferring municipal powers to state bodies, potentially resulting in adverse political consequences. A clear manifestation of this is the conflict between local self-government and the Chernihiv City Military Administration. In fact, this conflict has already arisen. For instance, the city's military administration filed a lawsuit against the council secretary concerning the exercise of self-government powers, particularly budget authority.[53] Furthermore, the head of Chernihiv City Military Administration explicitly stated that while decentralisation is crucial, martial law necessitates a centralisation of authority in the face of war challenges.[54]

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49 Law of Ukraine no 389-VIII of 12 May 2015 'On the Legal Regime of Martial Law' (amended 18 May 2024) <https://zakon.rada.gov.ua/laws/show/en/389-19?lang=uk#Text> accessed 7 April 2024.

50 Resolution of the Verkhovna Rada of Ukraine no 2778-IX of 16 November 2022 'On the Exercise by the Heads of Military Administrations of Settlements in Kherson Region of the Powers Provided for in Part Two of Article 10 of the Law of Ukraine "On the Legal Regime of Martial Law"' [2022] Official Gazette of Ukraine 93/5789.

51 Draft Resolution of the Verkhovna Rada of Ukraine no 9055 of 23 February 2023 'On the Exercise by the Head of the Chernihiv City Military Administration of the Chernihiv District of the Chernihiv Region of the Powers Provided for in Part Two of Article 10 of the Law of Ukraine "On the Legal Regime of Martial Law"' <https://itd.rada.gov.ua/billInfo/Bills/Card/41434> accessed 15 April 2024.

52 Alina Murtishcheva, 'The Concept of Decentralization: Modern Challenges for the EU Countries, Prospects for Further Implementation in Ukraine' (IRC 2023 XVII international research conference, Istanbul, Türkiye, 17-18 August 2023) 177.

53 'Chernihiv Military Administration demands in court to withdraw funds to support military units and budget payments from 10,000 Chernihiv residents - Lomako' (*Interfax-Ukraine: Ukraine news Agency*, 25 April 2023) <https://interfax.com.ua/news/political/906083.html> accessed 15 June 2024.

54 Valentina Havrylenko, 'Dmytro Bryzhynskyi: "Military administration is a bridge between the war and people who have forgotten about it"' (*0462: Chernihiv city website*, 3 June 2023) <https://www.0462.ua/news/3606738/dmitro-brizinskij-vijskova-administracia-ce-mist-miz-vijnou-i-ludmi-aki-pro-nei-zabuli> accessed 15 June 2024.

Belgium represents the third group. This country's legislative framework of local self-government, including the principle of decentralisation, stands out among other countries under study for several reasons. Firstly, the state is an untypical federation with elements of confederation. Secondly, it has such a form of government as a monarchy, which determines the specificity of sources of law in various areas, including local self-government.

In accordance with Art. 162 of the Belgian Constitution, the decentralisation of competencies to provincial and municipal institutions is guaranteed by law. Historically, Belgium's approach to decentralisation dates back to its 1831 Constitution, which emphasised the decentralised nature of the country, applying the best British and French experience of this period. While the original Constitution of 1831 does not explicitly recognise decentralisation as a principle, Art. 108 established fundamental aspects of local self-government. These included direct election, the relegation to provincial and communal councils of all provincial and communal affairs, the publicity of council sittings, the publicity of budgets and accounts, and the provisions for intervention by the King or legislative power in cases where local councils exceeded their powers.[55]

After Belgium transformed into a federal state, it organised communities and regions while preserving its foundational system of municipalities and provinces. Moreover, the principle of decentralisation appeared in the Belgian Constitution. At the same time, another important foundation, the principle of local self-government, although not explicitly mentioned in the constitutional text, is deemed protected and included by the Congress of local and regional authorities.[56] It is considered that "the right to local self-government is explicitly included in and protected by the constitution".[57]

Belgium, as a federal country, has dissimilar legislation. Regions have the authority to amend municipal legislation, leading to varying approaches across the country. For example, Flanders adopted the Municipal Decree of 15 July 2005[58] modifying the "New Municipalities Act".[59] This Decree does not proclaim the principle of decentralisation, focusing on the principle of subsidiarity in determining the competence of the municipalities. Similarly, the Flemish Decree on Local Government of

55 John Martin Vincent and Ada S Vincent, 'Constitution of the Kingdom of Belgium' (1896) 7 The Annals of the American Academy of Political and Social Science 297 <https://www.jstor.org/stable/1009491?seq=39> accessed 15 April 2024.

56 Belgium – monitoring report (n 14).

57 Boštjan Brezovnik, Istvan Hoffman and Jarosław Kostrubiec (eds), *Local Self-Government in Europe* (Institute for Local Self-Government Maribor 2021) 3, doi:10.4335/978-961-7124-00-2.

58 Décret communal du Gouvernement Flamande du 15 juillet 2005 <https://etaamb.openjustice.be/fr/decret-du-15-juillet-2005_n2005036063.html> accessed 11 April 2024.

59 The Royal Decree of 24 June 1988 on the codification of municipal law called "New Municipal Law" became an important normative act on the issue of local self-government development, see: L'arrêté royal du 24 juin 1988 'Nouvelle loi communale' <https://wallex.wallonie.be/eli/loi-decret/1988/06/24/1111111111/1989/06/01?doc=7577&rev=6844-2130> accessed 14 April 2024.

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22 December 2017[60] continued this approach, replacing the Municipal Decree of 15 July 2005, which introduced the same approach to the principles of local self-government. Wallonia, in turn, enshrined the principle of decentralisation while adopting the Code of Local Democracy and Decentralisation.[61]

Belgium's decentralisation process is intended to maintain political unity without weakening it, but the country's experience indicates otherwise. The challenge of sovereignty preservation is significant, especially as a member of the EU, where sovereignty is inherently limited for all member states. However, Belgium, additionally, has taken the second step – since 1970, the federal authority has been transferring its legislative and executive powers to two types of federated entities. The Belgian logic is therefore considered as a dissociation mechanism.[62]

This tendency extends to the local governance, where federated entities' authority to legislate on local self-government can restrict local self-government and abolish decentralisation. While the ongoing transfer of powers is intended to address political problems, it paradoxically exacerbates these issues by complicating the governance structure.

Lithuania and the United Kingdom represent the fourth group of countries. As already indicated above, the United Kingdom does not explicitly recognise the principle of local self-government in its domestic legislation. Instead, the House of Commons recognises the potential for establishing joint principles of union and devolution,[63] emphasising the idea that the United Kingdom comprises four countries.

As it is known, the United Kingdom has no written constitution; hence, there can be no formal "protection" for or entrenchment of local government in the constitutional order. Despite this, British scientists consider the local government a strong constitutional characteristic.[64] However, the Council of Europe monitoring mission thinks otherwise, stressing that it is of high importance to comply both with the spirit and the letter of the Charter.[65]

For a country with an unwritten constitution like the United Kingdom, one potential solution could be to incorporate the principle of local self-government in domestic legislation. However, the lack of influence of the national parliament over the legislative

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60 Decreet over het lokaal bestuur van 22 december 2017 <https://codex.vlaanderen.be/PrintDocument.ashx?id=1029017&datum&geannoteerd=true&print=false> accessed 14 April 2024.

61 Code de la démocratie locale et de la decentralization (en vigueur du 30/09/2019). <https://wallex.wallonie.be/files/medias/10/CDLD.pdf> accessed 6 April 2024.

62 Étienne Arcq, Vincent de Coorebyter et Cédric Istasse, 'Fédéralisme et Confédéralisme' (2012) 1(79) Dossiers du CRISP 11, doi:10.3917/dscrisp.079.0011.

63 UK Parliament House of Commons, *The UK Constitution: A Summary, with Options for Reform* (Political and Constitutional Reform Committee 2015) 14.

64 Angel-Manuel Moreno, *Local Government in The Member States of the European Union: A Comparative Legal Perspective* (INAP 2012) 663-83.

65 United Kingdom – monitoring report (n 21).

actions of its constituent parts contributes to the absence of clear decentralisation and local self-government principles in practice.

The United Kingdom has a specific understanding of the principle of decentralisation, which is transferring and devolving legislative competence to constituent units.[66] This understanding of decentralisation has a historical basis. After all, even though the country is considered unitary, English scholars note that it is also described as a "union state" of four countries (England, Scotland, Wales and Northern Ireland) retaining territorial, legal and cultural distinctions of their own.[67] However, devolution is also considered a principle with different meanings.

Comparing decentralisation and devolution, experts from the OECD highlight that devolution is a subcategory and a stronger form of decentralisation.[68] The nature of devolution transfers powers not to the local self-government institutions but to the lower-level autonomous government, which is recognised as a distinct level of government.

Moreover, in the context of the United Kingdom, the process of devolution is underscored by the concept of "localism", which involves transferring power from the state to civil society and local governments.[69] Thus, the political processes in the UK show an exaggerated decentralisation, which is associated with the transfer of legislative powers to the constituent parts of the country. At the same time, such processes do not always indicate that local government autonomy is being strengthened. Therefore, they cannot be assessed as positive.

The Constitution of Lithuania does not explicitly include the principle of decentralisation, nor does it provide a clear answer to whether, as a country, it is centralised. However, scholars suggest that there are grounds to consider the country a unitary and fairly centralised one due to administrative supervision, the inability of local budgets to receive tax revenues directly and the lack of regional traditions.[70] Moreover, the inability of municipalities to collect taxes negates municipalities' constitutional right to a separate, autonomous budget free from central government influence.

4 CONCLUSIONS

The European Charter of Local Self-Government plays a crucial role in protecting local autonomy by establishing guarantees and promoting decentralisation in European countries. However, there are many problems with meeting the standards set by the Charter.

66 Amir Asgari Dehabadi and Erfan Shams, 'The British Perception of Decentralization' (2022) 4(11) The Journal of Modern Research on Administrative Law 117, doi:10.22034/mral.2022.549394.1277.
67 Moreno (n 64) 663.
68 OECD (n 13) 26.
69 ibid 26-7.
70 Vaidotas A Vaičaitis, 'The Republic of Lithuania' in Leonard Besselink and others (eds), *Constitutional Law of the EU Member States* (Kluwer 2014) 1051.

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Chief among these problems is the complex relationship between local self-government, regional authorities, and national governments. We consider it the core issue, influencing the sufficiency of financial resources and the intention of central authorities to consult local self-government. Furthermore, such a relationship is directly connected with administrative supervision because the latter reflects the degree of local self-government autonomy guaranteed by the central government.

The analysis of the countries under study reveals varied approaches to constitutional regulation of the decentralisation principle. While this principle may be defined as an important foundation of local self-government, its constitutional guarantee is not universal. Also, even in countries where decentralisation is enshrined in legislation, its effective implementation is not always ensured. The practice of implementing this principle is also asymmetrical and flexible, with varying combinations of deconcentration, devolution or centralisation of power.

Under the influence of the principle of devolution, decentralisation may have a different meaning. Namely, it means increasing the powers of subnational units, which does not ensure the broad autonomy of local governments at the basic level. Countries that have little experience in democratic state-building may not seek to implement the decentralisation principle on a large scale, leaving political manoeuvre for recentralisation tendencies. Therefore, it is important for countries that are on the way to reforming local self-government to find their national way of implementing the decentralisation principle. For Ukraine, the legal regime of martial law also affects the next steps of the reform of decentralisation. Further implementation of the decentralisation principle should consider the need for effective centralised decision-making during post-war reconstruction, combined with the gradual restoration of local autonomy.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

КОНЦЕПТУАЛЬНІ ЗАСАДИ ТА ПРИНЦИПИ ПРАВОВОГО РЕГУЛЮВАННЯ ДЕЦЕНТРАЛІЗАЦІЇ В ОКРЕМИХ ЄВРОПЕЙСЬКИХ КРАЇНАХ ТА В УКРАЇНІ

Аліна Муртіщева*

АНОТАЦІЯ

Вступ. *Ця наукова стаття має на меті покращити теоретичне розуміння концептуальних основ та принципів правового регулювання децентралізації та дослідити їх. Встановлення чітко визначеного категоріального апарату є важливою передумовою для розробки ефективного правового регулювання, і децентралізація не є винятком. Точне розуміння цього поняття дозволяє розробити чіткі етапи його впровадження в національне законодавство. Не менш важливим є правильне формулювання засад правового регулювання децентралізації. Ці принципи дозволяють надалі розвивати систему правового регулювання, яка забезпечить автономію місцевого самоврядування.*

Методи. *У дослідженні проведено порівняльний аналіз досвіду впровадження принципу децентралізації в таких країнах, як Бельгія, Італія, Франція, Литва, Польща, Україна та*

Велика Британія, які обрали як централізовану, так і децентралізовану форми державного управління. У статті використовуються загальноправові методи для аналізу правових аспектів децентралізації в досліджуваних країнах, увага зосереджується на дотриманні стандартів Європейської хартії місцевого самоврядування та еволюції конституційних засад децентралізації. Цей підхід передбачає здійснення порівняльного аналізу конституційних моделей децентралізації та їх історичного походження, а також аналізу практичного застосування децентралізації та рецентралізації як явищ у сучасній національній політиці. Особливу увагу приділено впливу режиму воєнного стану на ці процеси в окремих країнах.

Результати та висновки. *Основні результати дослідження з'ясовують головні проблеми впровадження європейських стандартів місцевого самоврядування в досліджуваних країнах. Вони підкреслюють різницю між конкретними підходами до децентралізації, включно з деконцентрацією, передачею або навіть централізацією влади. Крім того, дослідження містить аналіз історичного аспекту розвитку конституційних засад децентралізації. Юристи та законодавці можуть використати ці знання для підвищення ефективності законодавства щодо розвитку місцевого самоврядування в досліджуваних країнах.*

Ключові слова: *конституційні принципи, децентралізація, Європа, Європейська хартія місцевого самоврядування, місцева автономія, місцеве самоврядування, воєнний стан, рецентралізація.*

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Research Article

DISSENTING OPINION: A DIFFICULT PATH TO FINDING THE TRUTH (BASED ON THE EXAMPLE OF UKRAINIAN JUDGES' INTERPRETATION OF CRIMINAL PROCEDURAL LAW)

Oksana Kaplina*, Anush Tumanyants, Olena Verkhoglyad-Gerasymenko and Liudmyla Biletska

ABSTRACT

The article is devoted to the issue of the dissenting opinion of a judge, which is relevant to modern law enforcement practice and legal theory and which may be expressed when a judge who participated in a collegial consideration of a case does not agree with the position of the majority of the panel of judges. The authors analyse the existing approaches to the institution of dissenting opinions in different legal systems, the factors that negatively affect the existence of dissenting opinions in the justice system, provide examples of dissenting opinions of Ukrainian judges expressed in different jurisdictions, their significance for law enforcement practice and the public outcry they caused. It addresses the procedural issues that may potentially arise during the judicial proceedings and the formation of a dissenting opinion of a judge.

The authors conclude that the institution of dissenting opinion is of undoubted value for justice and the authority of the court in the State and emphasise that the specifics of the text of a judge's dissenting opinion against the background of lapidary normative regulation by the rules of procedural law may indicate the genre independence of the content of a dissenting opinion in judicial discourse as compared to a court decision.

The authors propose the concept of dissenting opinion, by which they mean an official legal position of a judge which is formed during collegial consideration of a case as a result of an internal conviction which does not coincide (partially does not coincide) with the position of the majority of judges in terms of reasoning or final conclusion, and which is formalised in a procedural document which is an act of competent (professional) and doctrinal judicial casual interpretation. In addition, the authors present synthesised features which characterise a judge's legal opinion as a dissenting opinion, including the statement that it is undoubtedly a phenomenon of a democratic society; it has the features of an institution of law, albeit with lapidary normative regulation; it is issued by a judge within his/her competence as a result of judicial discretion and inner conviction; has a prognostic and forward-looking character, since

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it sometimes serves as a means of overcoming outdated views that impede progressive legal development, evolution of sustainable approaches, and as a basis for the formation of a new legal position, which in the future may be transformed into a majority position and become a sustainable practice; besides, it is derivative, optional, as it is not binding, unlike a court decision, and is not an act of justice, as it is not issued in the name of the state and is not a mandatory part of a court decision.

1 INTRODUCTION

The topic of dissenting opinions of judges in the doctrine of law – whether from a judge in the first instance, court of appeal, Supreme Court, Constitutional Court or the European Court of Human Rights – remains poorly studied. Several factors contribute to this situation. Among them is the lapidary nature of the statutory regulation of the institute of dissenting opinion, its insufficient prevalence, and the absence of binding legal force, as dissenting opinions generally do not have legally significant consequences, particularly in Romano-Germanic legal systems. It should be noted that scholars and practitioners have recently started to refer to this institution more often, especially regarding the study of its phenomenon in constitutional jurisdiction. However, this increased attention is insufficient to develop a coherent concept of a dissenting opinion of a judge, particularly in Ukrainian criminal procedural law.[1]

The significance of a judge's dissenting opinion is profound, reflecting the judge's independent and deep thinking and expressing their individual legal consciousness. Such opinions provide insights into the material and procedural aspects considered during the trial and help understand the essence of controversial approaches that judges interpret differently.

A judge's dissenting opinion typically reflects their originality, independence of judgment, freedom of will, individual creativity, worldview, intelligence, and perhaps even emotional state. When a judge disagrees with the majority opinion and presents a dissenting opinion, he/she is entrusted with a much greater responsibility since the reasoning of the opinion, in this case, must match or surpass the reasoning of the court

1 Victor Horodovenko, 'Dissenting Opinion of a Judge as a Creative Understanding of the Subject of Constitutional Proceedings' (2020) 1 Public Law 9, doi:10.37374/2020-37-01; Olena Kibenko, 'Dissenting Opinion of the Supreme Court Judge - A Diversion or a Heroic Act?' *Legal Newspaper online* (Kyiv, 20 August 2018) 26 <https://yur-gazeta.com/publications/practice/inshe/okrema-dumka-suddi-verhovnogo-sudu--diversiya-chi-geroyichniy-vchinok.html> accessed 3 March 2024; Irina Levandovska, 'On the Issue of Defining the Category of "Dissenting Opinion of a Judge" in Modern Constitutional Law' (2021) 9 Law of Ukraine 163, doi:10.33498/louu-2021-09-163; TV Stepanova and VD Nayflesh, *Dissenting Opinion of a Judge as a Component of Judicial Review in Commercial Proceedings* (Feniks 2015); Oleksandr Yu Vodyannikv, 'The Role of Dissenting Opinion of a Judge in the Development of Constitutional Jurisdiction' (2016) 3 Bulletin of the National Academy of Legal Sciences of Ukraine 15.

decision itself, making it more convincing and valuable. This opinion captures the discussion in the deliberation room and is implicitly embedded in the content of the reasoning of the court decision. In such cases, the depth of thought, rational and logical components, and emotional intensity should prevail over the standard presentation inherent in court decisions, even if most judges were monolithically united.

Thus, this article's subject matter is the phenomenon of a judge's dissenting opinion, its concept, legal essence, legal consequences of its preparation, and problematic aspects of procedural nature that may arise in court proceedings. In addition, to understand the importance of dissenting opinions in the search for truth in justice, the authors have referred to specific dissenting opinions of Ukrainian judges attached to court decisions, analysed their content and demonstrated their value.

2 DISSENTING OPINION OF THE JUDGE: STATEMENT OF THE PROBLEM

The institute of dissenting judge's opinion, despite having a long-term history, still belongs to the poorly studied phenomena that scholars do not often address in their research. An attempt to identify the reasons for this situation has allowed the authors to generate the following observations. Firstly, not all states perceive dissenting opinions as a legal phenomenon and envisage their existence in legislation. To cite the statistics on constitutional justice provided by the European Commission for Democracy through Law in its report "On Separate Opinions of Constitutional Courts", most EU Member States allow constitutional judges to submit separate opinions whenever they disagree with the court's judgment. The vast majority of Member States of the Venice Commission allow separate opinions in constitutional jurisdiction. However, some EU Member States either prohibit separate opinions or have no relevant provisions, rejecting this practice. Notable examples include Algeria, Andorra, Austria, Belgium, France, Italy, Liechtenstein, Luxembourg, Malta, San Marino, Switzerland, and Tunisia.[2]

As Jean-Paul Costa has noted, in countries with an Anglo-Saxon tradition, such as the United Kingdom and the United States of America, it has long been the practice that a judge who disagrees with the majority of their colleagues and, therefore, with a court decision, has the right to express their minority opinion publically.[3] The US Supreme Court, for example, makes less than half of all its court decisions unanimously.[4]

2 Opinion no 932 / 2018 of European Commission for Democracy Through Law (Venice Commission) 'Report on Separate Opinions of Constitutional Courts' AD(2018)030 (17 December 2018) paras 7, 13 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)030-e> accessed 3 March 2024.

3 Jean-Paul Costa, 'En quoi consistent les opinions séparées, dissidentes ou concordantes? Quels en sont leurs mérites?' (*Justice-en-ligne*, 13 January 2012) <https://www.justice-en-ligne.be/En-quoi-consistent-les-opinions> accessed 3 March 2024.

4 Igor Kirman, 'Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions' (1995) 104(8) Columbia Law Review 2083.

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Secondly, an analysis of current Ukrainian legislation, as well as the legislation of some foreign countries, reveals another factor contributing to the limited study of dissenting opinions is the rather lapidary regulatory framework for this institution. For instance, Part 3 of Article 375 of the Criminal Procedure Code of Ukraine (hereinafter - the CPC of Ukraine) states, "Each judge of the panel of judges has the right to write a separate opinion, which is not announced in court, but is attached to the materials of the proceedings and is open for review."[5] Almost verbatim, this provision is reproduced in Part 4 of Article 391 of the CPC "Procedure for voting in the jury," with the only difference being the name of the panel of judges – "each of the jurors".[6] The right to dissent is granted to a judge of the court of cassation who disagrees with the decision to transfer (refuse to transfer) criminal proceedings to a chamber, joint chamber or the Grand Chamber of the Supreme Court. In this case, he/she has the right to state his/her dissenting opinion in writing in the decision to transfer the above criminal proceedings or in the decision adopted as a result of the cassation review (Part 5 of Article 434-2 of the CPC).

Despite the Ukrainian legislator's careful regulation of the legal content of any court decisions, their components, and the procedural order of their adoption, it is not as thorough in regulating the content of the dissenting opinion, leaving full discretion to the judge who does not agree with the majority. The law does not define what types of dissenting opinions can be expressed by judges, how they should be constructed, and whether there are limits to the judge's investigation of the actual circumstances of the case or the subsequent fate and legal significance of the dissenting opinion.

There are only minor differences in the legal regulation of dissenting opinions in other countries. In particular, according to the criminal procedural legislation of Kazakhstan and Latvia, the dissenting opinion of a judge is sealed in an envelope and attached to the criminal case. Only a Higher Court may open the envelope and read the dissenting opinion during the trial (Part 2 of Article 54 of the CPC of Kazakhstan,[7] Part 2 of Article 516 of the CPC of Latvia[8]).

According to Part 6 of Article 299 of the Lithuanian CPC, a judge with a "dissenting opinion during the sentencing process has the right to express it in writing. The dissenting opinion shall not be taken into account when pronouncing the verdict but shall be noted in the case file."[9] In the authors' opinion, such concealment of judges' individual opinions

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5 Code of Ukraine no 4651-VI of 13 April 2012 'Criminal Procedure Code of Ukraine' (CPC of Ukraine) <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 27 February 2024.

6 ibid.

7 Code of the Republic of Kazakhstan no 231-V of 4 July 2014 'Criminal Procedure Code of the Republic of Kazakhstan' (CPC of Kazakhstan) <https://online.zakon.kz/Document/?doc_id=32707007#activate_doc=2> accessed 27 February 2024.

8 Law of the Republic of Latvia of 21 April 2005 'Criminal Procedure Law' (CPC of Latvia) <https://likumi.lv/ta/en/en/id/107820> accessed 27 February 2024.

9 Law of the Republic of Lithuania no IX-785 of 14 March 2002 'Criminal Procedure Code' <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.163482/asr> accessed 27 February 2024.

does not align with the transparency of court decisions, the essence of justice, and the principle of judicial independence.

In Estonia, the issue of dissenting opinions is dealt with differently, though not fundamentally. In Estonia's criminal procedure legislation, dissenting opinions are attached to the case file but are not announced during the verdict (Article 306(4) of the Code of Criminal Procedure of Estonia). However, they are attached to the decisions of the State Court and published along with them (Article 23(6) of the CPC of Estonia).[10] Moreover, the legislator provides that a judge who remained in the minority during the voting may submit his/her dissenting opinion. This means that only a judge who voted against the decision made by the panel can file a dissenting opinion, which means that his or her position can be the subject of a dissenting opinion. In other words, it cannot be submitted to support the position of the panel, but with different arguments, as is possible, in particular, in the European Court of Human Rights or the Constitutional Courts.

Under Moldovan law, the dissenting opinion is attached to the court decision in the same way. However, unlike in Estonia, those present in the courtroom are informed about the dissenting opinion, and it is published together with the court decision on the official website of the court (Article 340(3-4) of the CPC of Moldova).[11]

Attention should be drawn to the approach of the Georgian legislator, who provided for the delivery of a dissenting opinion together with the verdict to the convicted or acquitted person within five days, and in complex cases involving many persons, within 14 days after the verdict is pronounced (Article 278 of the CPC of Georgia).[12]

More detailed regulation is found in Poland's legislation. In particular, a dissenting opinion must be delivered together with the court decision. The CPC of Poland establishes the content of the dissenting opinion, indicating that it must state in which part and on which issue the judge disagrees with the court decision. Moreover, the legislation states that a dissenting opinion may also relate to the reasoning of the decision itself. In such cases, such an opinion is indicated when signing the reasoning. Procedural issues are also regulated, namely, "if the law does not require immediate justification of the court decision, in case of dissenting opinion, the justification of the court decision must be drawn up *ex officio* within seven days from the date of the decision, and the judge who delivered the dissenting opinion

10 Law of the Republic of Estonia (RT I 2003, 27, 166) of 12 February 2003 'Criminal Procedure Code' <https://www.riigiteataja.ee/akt/106012016019> accessed 27 February 2024.

11 Code of the Republic of Moldova no 122-XV of 14 March 2003 'Criminal Procedure Code of the Republic of Moldova' <https://www.legis.md/cautare/getResults?doc_id=123540&lang=ro> accessed 27 February 2024.

12 Law of Georgia no 1772 of 9 October 2009 'Criminal Procedure Code of Georgia' <https://matsne.gov.ge/en/document/view/90034?publication=162> accessed 27 February 2024.

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shall attach the justification to it within the next seven days; such obligation does not apply to the people's assessor" (Article 114).[13]

Thus, with rather rare exceptions, the legislation is limited to a few phrases of regulatory regulation of the institution of dissenting opinion, leaving gaps in regulation, wide scope for judicial discretion, promoting the emergence of informal practices and giving the authority of dissenting opinion a secondary (optional) meaning.

The third factor that, in the authors' opinion, reduces interest in the institution of dissenting opinions is their lack of prevalence in different judicial jurisdictions. A dissenting opinion may only be issued in cases where a panel of judges considers the proceedings, and panels primarily consider cases in the appellate or cassation instance. Thus, according to the Unified State Register of Court Decisions of Ukraine, between 2020 and 2023, 272 dissenting opinions were issued in courts of all instances: criminal jurisdiction - 272 (an average of 6 per year), civil jurisdiction - 737 (approximately 16 per year); administrative courts - 1138 and commercial courts - 498 dissenting opinions (24 and 10 per year, respectively).

The fourth factor is the non-binding nature of the dissenting opinion and the absence of legally significant consequences. In some states, the existence of a dissenting opinion is not disclosed when a court decision is made; it is hidden in a sealed envelope and attached to the case file (Part 2 of Article 54 of the CPC of Kazakhstan,[14] Part 2 of Article 516 of the CPC of Latvia[15]).

Another factor is the occasional negative attitude toward dissenting opinions on the part of judges within a court or panel of judges. A survey conducted by the authors of this article, which included 157 judges, lawyers, prosecutors and academics, revealed that it is judges and prosecutors who sometimes view dissenting opinions negatively. They believe these opinions can create obstacles to understanding the court decision as lawful and justified. Specifically, 19 people (13% of the total number of respondents) expressed this view, comprising twelve judges and seven prosecutors. Although this percentage is relatively small, it nevertheless indicates that some colleagues do not accept the position of the author of the dissenting opinion. They view it as an "encroachment" on the unity of the panel's approaches and perceive the legal stance of the dissenting judge as excessive activism.

Despite the above factors that explain the lack of interest in the institution of dissenting opinion, important factors increase its importance for the judiciary and make it necessary to turn to this institution at the doctrinal level. In particular, a dissenting opinion increases the interest of society or individual lawyers in a court decision, as it is usually

13 Law of the Republic of Poland of 6 June 1997 'Criminal Procedure Code' <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970890555> accessed 27 February 2024.
14 CPC of Kazakhstan no 231-V (n 7).
15 CPC of Latvia of 21 April 2005 (n 8).

expressed on the most controversial issues. The reasoning behind a dissenting opinion is particularly valuable to lawyers, who often use it to appeal court decisions; all 26 lawyers who were interviewed for this study have encountered a judge's dissenting opinion in their practice of law.

Dissenting opinions also hold doctrinal importance. Scholars study these opinions because they often deal with controversial issues that have ambiguous approaches to specific law enforcement issues. Therefore, the interpretation of a legal provision that may be the subject of scientific discussion, as indicated by 48 scholars interviewed, shapes the discourse of social and political dialogue. Moreover, the institution of dissenting opinions in the United States is a matter of particular pride for the American justice system, and they are said to be a treasure of "legal thought".[16]

3 DISSENTING OPINIONS OF JUDGES IN SPECIFIC CASES: THE RIGHT TO DISAGREE WITH THE MAJORITY

Turning to the dissenting opinions expressed during the constitutional proceedings before the Constitutional Court of Ukraine and the criminal proceedings before the Ukrainian Supreme Court, this analysis aims to classify these opinions, demonstrate their significance for law enforcement practice and democratic justice, ensuring the internal independence of the court. Please note that the most relevant court decisions have been selected for analysis, as they are of constant law enforcement and scientific interest, resonate with the public, and feature differing approaches to the interpretation of the law. These decisions may also be of great interest to foreign scholars and practitioners in terms of comparative research.

The issue of presumption of innocence and liability for illicit enrichment. In 2019, 59 people's deputies of Ukraine filed a constitutional petition with the Constitutional Court of Ukraine to recognise Article 368-2 of the Criminal Code of Ukraine (hereinafter - the CCU)[17] as inconsistent with the Constitution of Ukraine (unconstitutional). According to Article 368-2 of the Criminal Code of Ukraine, "acquisition by a person authorised to perform the functions of the state or local self-government of assets in a significant amount, the legality of the grounds for which is not confirmed by evidence" was recognised as punishable. In the opinion of the subject of the right to constitutional petition, Article 368-2 of the Criminal Code of Ukraine is inconsistent with the provisions of a number of articles of the Constitution of Ukraine, namely Article 1, Part 1 of Article 3, Part 1 and 2 of Article 8, Article 58, Part 1 of Article 61, Article 62, Part 1 of Article 63, Part 1 of Article 64, and

16 Edward Dumbauld, 'Dissenting Opinions in International Abjudication' (1942) 90 University of Pennsylvania Law Review 929.

17 Code of Ukraine no 2341-III of 5 April 2001 'Criminal Code of Ukraine' (CCU) <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240519#top> accessed 27 February 2024.

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Paragraphs 1 and 3 of Part 2 of Article 129 of the Constitution of Ukraine.[18] Among the reasons for the constitutional petition, the people's deputies pointed out that the article of the Criminal Code of Ukraine in question does not meet the requirements of the presumption of innocence; namely, it imposes on a person the *obligation to prove his or her innocence of committing a crime*, forces to give testimony or explanations about himself or herself, family members or close relatives, which is unacceptable in view of the constitutional provisions of the presumption of innocence contained in Article 62 of the Constitution of Ukraine,[19] and reflected in Paragraph 1 Article 11 of the Universal Declaration of Human Rights,[20] Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[21] Article 14(2) of the International Covenant on Civil and Political Rights.[22]

To realise the significance of this Decision of the Constitutional Court of Ukraine for Ukrainian society, it is necessary to point out the background against which it was discussed. The problem stirred up the whole society and left no lawyer indifferent. It was discussed at the doctrinal level by research teams and at numerous scientific and practical conferences. Many scholars and practitioners have expressed their attitude to the main components of society's awareness of the principle of presumption of innocence and, most importantly, to the key issue, namely, who bears the burden of proving the illegality of the acquisition of assets by a person authorised to perform state functions.

On 26 February 2019, the Constitutional Court adopted the Decision.[23] Moreover, seven judges out of 18 expressed dissenting opinions, indicating the extreme relevance for society and the ambiguity of approaches to the interpretation of constitutional provisions. In particular, the Constitutional Court of Ukraine proceeded from the fact that combating corruption in Ukraine is a task of exceptional social and state importance, and criminalisation of illicit enrichment is an important legal means of implementing state policy in this area. At the same time, when defining illicit enrichment as a crime (Article 368-2 of the Criminal Code of Ukraine), it is necessary to take into account the constitutional provisions that establish the principles of legal responsibility, human and

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18 Decision no 1-p/2019 in Case no 1-135/2018(5846/17) on the constitutional petition of 59 people's deputies of Ukraine regarding the conformity of the Constitution of Ukraine (constitutionality) with Article 368-2 of the Criminal Code of Ukraine (Constitutional Court of Ukraine, 26 February 2019) [2019] Official Gazette of Ukraine 36/1291.

19 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (amended 1 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> accessed 27 February 2024.

20 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 3 March 2024.

21 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 3 March 2024.

22 International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) <https://undocs.org/en/A/RES/2200(XXI)> accessed 3 March 2024.

23 Decision no 1-p/2019 in Case no 1-135/2018(5846/17) (n 18).

civil rights and freedoms, as well as their guarantees. According to Articles 62 and 63 of the Constitution of Ukraine, the legislative wording of the crime of illicit enrichment cannot impose on a person the obligation to confirm with evidence the legality of the grounds for acquiring assets, i.e. to prove his/her innocence; give the prosecution the right to demand from a person to confirm with evidence the legality of the grounds for acquiring assets; allow bringing a person to criminal liability only based on the absence of evidence of the legality of the grounds for acquiring assets; allow bringing a person to criminal liability only on the basis of the absence of evidence of the legality of the grounds for acquiring assets. Thus, Article 368-2 of the Criminal Code of Ukraine was declared unconstitutional by the Constitutional Court.

Recognising this article as unconstitutional resulted in the closure of criminal proceedings that had brought certain individuals to criminal liability.

As already noted, seven judges of the Constitutional Court of Ukraine expressed their dissenting opinions. Judge Viktor Kolisnyk justified the need for a dissenting opinion on issues not covered in the Decision but were crucial to the case. Some judges, like Judge Oleg Pervomaiskyi, spoke out about the legal position of the Constitutional Court of Ukraine regarding the lack of approaches to the interrelation of the concepts of democratic, legal state, rule of law and anti-corruption state in the Decision. Judge Vasyl Lemak rebuked the Court for defects in the Judgment's methodology. Judge Viktor Horodovenko conducted an in-depth analysis of foreign anti-corruption legislation, emphasised the problem of harmonious implementation of Article 20 of the United Nations Convention against Corruption of 2003 and pointed out the risks of recognising the unconstitutional provision of the Criminal Code of Ukraine. Judge Stanislav Shevchuk explained in more depth and detail the issues raised in the Decision. Judge Ihor Slidenko provided arguments in favour of the opinion that the constitutional gift was unjustified. Notably, only Judge *Serhiy Holovaty* called his dissenting opinion divergent, pointing out that he did not vote with the majority of judges to declare Article 368-2 "Illegal enrichment" of the Criminal Code of Ukraine unconstitutional because he did not agree in general with the legal position of the Court, on which this decision was based. He reproached the judges for the falsity of their approaches and substantiated the legality of the article and its compliance with the requirements of Part 1 of Article 8, Article 62, and Part 1 of Article 63 of the Constitution of Ukraine.

The key approaches of Judge Serhiy Holovaty are worth highlighting, as his approach is important for the development of the doctrine of constitutional law, criminal procedure and criminal law. He proceeded from the fact that Article 4 368-2 of the Criminal Code of Ukraine does not require the guilty person to provide any explanations and does not explicitly oblige him to provide information. In the judge's opinion, the defendant has the right, but not the obligation, to provide explanations as to the origin of the assets whose "illegality" is claimed by the prosecution. The prescription of the Criminal Code of Ukraine

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and the disposition of the article (cited above) does not *per se* establish any burden of proof in terms of providing evidence. This is the subject of regulation exclusively by the rules of criminal procedure law. In addition, "the special status of the person to whom this provision applies ("a person authorised to perform the functions of the state or local self-government") entails that any *public official* is aware in advance that the standards of integrity applicable to him/her during his/her tenure are too high; Similarly, such person is aware in advance that holding a certain position in the public service entails for him/her the corresponding obligations to declare and explain (justify) his/her income in accordance with the procedures established by the provisions of national law".

The argumentation of the judge of the Constitutional Court is important for Ukrainian society, doctrine and law enforcement practice in terms of not so much changing the paradigmatic content of the presumption of innocence - of course, its components, which are enshrined at the constitutional level, cannot be questioned or erased. Attention must be drawn to this dissenting opinion, which does not coincide with the decision of the Constitutional Court of Ukraine because the entire Ukrainian society should change the vector of approach to understanding the requirements for *public officials* who should be subject to increased requirements for their income statements. Such agents of the state should not hide behind the provisions of the presumption of innocence as a democratic value, violating these values through their irresponsible behaviour towards society. One of the key elements of the concept of "illicit enrichment" is the lack of explanation (justification) for the legitimacy (confirmation) of the growth of wealth (property) in a significant amount. At the same time, it is quite easy for an official to provide satisfactory and convincing explanations for acquiring certain assets that are subject to public and law enforcement attention.

To further affirm the solidarity of the authors of the article with the opinion of Judge Serhiy Holovaty, the ECHR judgment in the case of *John Murray v. UK* can be cited. This judgment explicitly states: "...in each case, the question is whether the evidence presented by the prosecution is sufficiently convincing to require a response. A National Court cannot conclude that the accused is guilty merely because he prefers to remain silent. Only if the evidence against the accused "requires" some explanation that the accused is likely to be able to provide, the failure to provide any explanation "may, in the eyes of common sense, lead to the conclusion that there is no explanation and that the accused is guilty". Conversely, if the evidence presented by the prosecution is so weak that no explanation is required, the failure to provide one cannot support a finding of guilt".[24]

The problem of establishing procedural filters regarding appeals to the investigating judge. Continuing the analysis of individual opinions of judges, it is worth referring to the legal positions developed by judges of the Supreme Court of Ukraine and the Supreme Court.

24 *John Murray v the United Kingdom* App no 18731/91 (ECtHR, 8 February 1996) para 51 <https://hudoc.echr.coe.int/eng?i=001-57980> accessed 3 March 2024.

For example, it is known that the issue of appealing against the investigating judge's rulings issued outside the scope of his/her clearly defined powers[25] in the law has been and remains relevant to criminal proceedings since the top priority areas of Ukraine's course towards building a state governed by the rule of law are the recognition, observance and protection of constitutional rights and freedoms of man and citizen. They are of particular importance in the field of criminal procedure, where the rights and freedoms of a person, in particular, the right to liberty and security of person, inviolability of the home, secrecy of correspondence, telephone conversations, telegraph and other correspondence, non-interference in personal and family life, collection, storage, use and dissemination of confidential information, are subject to significant restrictions in connection with criminal proceedings.[26] This necessitates the creation of effective mechanisms for the realisation of the right to judicial protection – "a fundamental human right which is a guarantee of protection of other human rights, freedoms and legitimate interests, and the level of its provision characterises the democracy of the state and its legal nature".[27] One of such mechanisms aimed at ensuring judicial protection of the rights and legitimate interests of participants in criminal proceedings is the institute of appealing against the decisions of the investigating judge during the pre-trial investigation, regulated in Paragraph 2 of Chapter 26 of the CPC of Ukraine.[28]

The conceptual legislative approach is to establish in Article 309 of the CPC of Ukraine the possibility of appealing only an exhaustive list of rulings of investigating judges. However, based on the systematic interpretation of a number of provisions of the criminal procedural law, the rulings of the investigating judge issued in accordance with

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25 In particular, this refers to decisions on the obligation of the investigator to recognize non-residential premises as material evidence: Case no 642/831/18 (Criminal Court of Cassation of the Supreme Court of Ukraine, 15 November 2018) <http://reyestr.court.gov.ua/Review/77969039> accessed 3 March 2024; transfer of seized property to the operational management of the State: Case no 522/20851/16-к (Criminal Court of Cassation of the Supreme Court of Ukraine, 10 April 2018) <http://reyestr.court.gov.ua/Review/73469580> accessed 3 March 2024; or for safekeeping: Case no 229/1542/17 (Criminal Court of Cassation of the Supreme Court of Ukraine, 12 December 2018) <http://reyestr.court.gov.ua/Review/78627676> accessed 3 March 2024; appointment of unscheduled inspections within criminal proceedings: Case no 237/1459/17 (Marinsky District Court of Donetsk Region, 13 April 2017) <https://reyestr.court.gov.ua/Review/65971799> accessed 3 March 2024; the obligation of the prosecutor to issue a decision to close criminal proceedings on the basis of paragraph 10 of part 1 of Article 284 of the CPC: Case no 757/26714/22-k (Criminal Court of Cassation of the Supreme Court of Ukraine, 5 December 2023) <https://reyestr.court.gov.ua/Review/115617715> accessed 3 March 2024.

26 AR Tumaniants, 'European Standards of Human Rights Protection in Appealing against Decisions of the Investigating Judge During the Pre-Trial Investigation' (2013) 6(2) Scientific Bulletin of Kherson State University. Series: Legal Sciences 143.

27 Olha G Shilo, *Theoretical and Applied Bases of Realization of the Constitutional Right of a Person and Citizen to Judicial Protection in pre-Trial Proceedings in the Criminal Process of Ukraine* (Pravo 2011) 25.

28 CPC of Ukraine no 4651-VI (n 5).

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Part 2 of Article 117, Part 7 of Article 583, Part 9 of Article 584, Part 6 of Article 591 of the CPC of Ukraine may also be appealed.[29]

In law enforcement practice, the problem of the possibility or impossibility of appealing a separate category of decisions of investigating judges, namely decisions issued outside the powers exhaustively defined in the Criminal Procedure Code, has arisen. The first legal position on this issue was formulated by the Supreme Court of Ukraine in its ruling of 12 October 2017 and was as follows: “If the investigating judge issues a ruling that is not provided for by the criminal procedural rules to which the provisions of Part 3 of Article 309 of the CPC refer, the court of appeal may not refuse to verify its legality by referring to the provisions of Part 4 of Article 399 of the CPC. The right to appeal against such a court decision is subject to the provisions of Paragraph 17 of Part 1 of Article 7 and Part 1 of Article 24 of the CPC, which guarantee it, taking into account the provisions of Part 6 of Article 9 of the CPC, which establishes that in cases where the provisions of the CPC do not regulate or ambiguously regulate the issues of criminal proceedings, the general principles of criminal proceedings determined by part one of Article 7 of the CPC shall apply.”[30]

In explaining the approach of the Supreme Court of Ukraine, it is notable that the judges justified the positive ruling on this issue by referring to the general principles of criminal proceedings, namely, the principle of criminal proceedings contained in Article 24 of the CPC “Ensuring the right to appeal against procedural decisions, actions and inaction”, which, without reference to specific decisions that may be appealed (listing them), formulates a rule of law in general: “Everyone is guaranteed the right to appeal against procedural decisions, actions or omissions of a court, investigating judge, prosecutor, or investigator in the manner prescribed by this Code”.[31]

This approach was further confirmed in the decision of the Grand Chamber of the Supreme Court on 23 May 2018, which stated: “verification of the legality of the investigating judge's rulings by the court of first instance during the preparatory proceedings is not an effective remedy for a possible violation of Article 8 of the ECHR and Article 1 of the First Protocol to the Convention, because: firstly, not all criminal cases in which unscheduled inspections were carried out will be brought to court with an indictment; secondly, the preparatory hearing in the court of first instance, even if the indictment is brought to court, may take place too late to be able to remedy the violation; thirdly, during the preparatory hearing, the judge does not have the authority to take actions and make decisions that may lead to the remedy of the violation of the Convention caused by state interference. The Grand Chamber concluded that Part 3 of Article 309 of the CPC applies only to those rulings, the

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29 ibid.

30 Case no 757/49263/15-к (Supreme Court of Ukraine, 12 October 2017) <http://reyestr.court.gov.ua/Review/70326277> accessed 3 March 2024.

31 CPC of Ukraine no 4651-VI (n 5).

possibility of which is expressly provided for by the CPC. If the possibility of making a certain type of court ruling is not directly provided for by the CPC, then there is neither permission nor prohibition to appeal such court rulings. Such rulings include rulings on granting permission to conduct unscheduled inspections. In such cases, the general principles of criminal proceedings should be applied. Given the lack of reliable procedural mechanisms for protecting rights during the preparatory proceedings, the Grand Chamber considers the right to appellate review of such rulings at the pre-trial investigation stage to be practical and effective. Thus, the appellate courts are obliged to open appeal proceedings on complaints against the decisions of investigating judges to grant permission for unscheduled inspections".[32]

In this case, Judge Natalia Antoniuk expressed an alternative dissenting opinion, in which she emphasised: "... it is unlikely that the approach to the possibility of appealing absolutely all decisions of investigating judges that are not directly provided for by the provisions of the CPC during the pre-trial investigation can be considered correct since it will actually lead to the abandonment of the so-called 'filters' for appealing decisions of investigating judges determined by the legislator during the pre-trial investigation".[33]

A few issues should be noted when analysing the legal position of the Supreme Court and the dissenting opinion of Judge Natalia Antoniuk. Ukraine's European integration processes require implementing European standards into national legislation. Based on the provisions of the Law of Ukraine, "On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights",[34] the judgments of the European Court of Human Rights are the benchmark that ensures the effectiveness of criminal justice.

The European Court of Human Rights has repeatedly stated in its judgments that the Convention for the Protection of Human Rights and Fundamental Freedoms does not oblige States parties to establish courts of appeal or cassation, but where such courts exist, the guarantees of everyone to a fair hearing by a court established by law, as set out in Article 6 of the Convention, must be observed (Paragraph 22 of the judgment in the case of Sokurenko and Strygun v. Ukraine).[35] Therefore, if the state provides for appellate review of the investigating judge's decisions made at the pre-trial

32 Case no 237/1459/17 proceedings no 13-19кс18 (Grand Chamber of the Supreme Court of Ukraine, 23 May 2018) <http://reyestr.court.gov.ua/Review/74475877> accessed 3 March 2024.

33 Dissenting Opinion of Judge NO Antoniuk in Case no 243/6674/17-к (Grand Chamber of the Supreme Court of Ukraine, 23 May 2018) <http://reyestr.court.gov.ua/Review/74688072> accessed 3 March 2024.

34 Law of Ukraine no 3477-IV of 23 February 2006 'On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights' <https://zakon.rada.gov.ua/laws/show/3477-15> accessed 3 March 2024.

35 *Sokurenko and Strygun v Ukraine* App nos 29458/04, 29465/04 (ECtHR, 20 July 2006) <https://hudoc.echr.coe.int/ukr?i=001-76467> accessed 3 March 2024.

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investigation stage, such review must meet a number of standards,[36] including proportionality of restrictions on the right to appeal against procedural decisions made at the pre-trial investigation stage.

According to Clause 8, Part 2 of Article 129 of the Constitution of Ukraine, the basic principles of judicial proceedings include the right to appeal against a court decision and, in cases specified by law, to cassation.[37] According to the legal position of the Constitutional Court of Ukraine, the right to appeal against court decisions in the courts of appeal and cassation is a component of the constitutional right to judicial protection. This right is guaranteed by the basic principles of judicial proceedings defined by the Constitution of Ukraine, which are mandatory for all its forms and courts, particularly by ensuring appeal and cassation appeal of court decisions, except in cases established by law (Clause 3.2 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 11-рп/2012 dated 25 April 2012).[38]

This position was further developed in the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on the compliance of the provisions of Part 2 of Article 171-2 of the Code of Administrative Procedure of Ukraine of 8 April 2015 with the Constitution of Ukraine (constitutionality), which states that the right to judicial protection includes, in particular, the possibility of appealing against court decisions in appeal and cassation, which is one of the constitutional guarantees of the realisation of other rights and freedoms, protection against violations and unlawful actions.[39]

Thus, according to the Constitution of Ukraine, it is possible to restrict the right to appeal and cassation of a court decision, but it cannot be arbitrary and unfair.[40] Such restrictions must be established exclusively by the Constitution and laws of Ukraine, pursue a legitimate goal and be conditioned by the social need to achieve this goal proportionately and justly. In case of restriction of the right to appeal against court decisions, the legislator is obliged to introduce such legal regulation that will allow to achieve the

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36 See, for more details: ME Savenko, 'Appeal and Review of Rulings of the Investigating Judge Issued During the Pre-trial Investigation' (PhD (Law) thesis, Yaroslav Mudryi National Law University 2020) 50-77.

37 Constitution of Ukraine (n 19).

38 Decision no 11-рп/2012 in Case no 1-12/2012 On the constitutional petition of citizen Oleksiy Leonidovych Shapovalov regarding the official interpretation of provisions of paragraph 20 of part one of Article 106, part one of Articles 111-13 of the Commercial Procedural Code of Ukraine in connection with provisions of paragraphs 2, 8 of part three of Article 129 of the Constitution of Ukraine (Constitutional Court of Ukraine, 25 April 2012) [2012] Official Gazette of Ukraine 36/1341.

39 Decision no 3-рп/2015 in Case no 1-6/2015 On the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on the compliance of the provisions of Part 2 of Article 171-2 of the Code of Administrative Procedure of Ukraine with the Constitution of Ukraine (constitutionality) (Constitutional Court of Ukraine, 8 April 2015) [2015] Official Gazette of Ukraine 32/926.

40 Constitution of Ukraine (n 19).

legitimate goal with minimal interference with the right to judicial protection and not violate the essential content of such a right.

Therefore, it should be noted that the restriction in the Criminal Procedure Law of Ukraine on the possibility of appealing against the decisions of the investigating judge at the pre-trial investigation stage should be considered an effective procedural filter that protects the national judicial system from unjustified overload. The correctness of the point of view of Judge N. Antoniuk, expressed in the dissenting opinion, is also indicated by further law enforcement practice. Thus, according to the conclusion on the application of procedural law outlined in the decision of the Joint Chamber of the Criminal Court of Cassation of 31 May 2021 in case No. 646/3986/19: "... only the decisions of the investigating judge, which are related to the possibility of significant restriction of the rights, freedoms and interests of a person or are crucial for the progress of the pre-trial investigation or criminal proceedings in general, are subject to review in the appellate instance".[41]

The above problem can also be viewed from a different perspective. A practical situation of no considerable interest arises when authorised entities do not comply with the procedural procedure for exercising the powers provided for by the CPC. For instance, on 11 December 2017, an investigating judge of the Novohrad-Volynskyi City District Court of Zhytomyr region granted the motion by the senior investigator of the Investigation Department of the Novohrad-Volynskyi Police Department of the Main Directorate of the National Police in Zhytomyr region. This motion, agreed upon by the prosecutor of the Novohrad-Volynskyi Local Prosecutor's Office, allowed the compulsory taking of the suspect's bust images (photos) for forensic portrait examination. The said ruling was appealed by the suspect's defence counsel on the grounds that the investigating judge had issued the ruling beyond his authority. However, on 19 December 2017, a judge of the Zhytomyr Regional Court of Appeal denied the opening of the appeal proceedings.

Subsequently, the Supreme Court, by the panel of judges of the First Judicial Chamber of the Criminal Court of Cassation, concerning the legal position of the Grand Chamber of the Supreme Court expressed in the decision of 23 May 2018 in case No. 243/6674/17-k (discussed above), granted the cassation appeal of the defence counsel, stating that "...the court of appeal, by refusing to open the appeal proceedings, significantly violated the requirements of the criminal procedural law, as it deprived the participant of the court proceedings of the right to appeal the procedural decision".[42]

Analysing the above decision of the panel of judges of the Supreme Court in terms of the identity of these procedural situations, the authors of this paper support the position of Supreme Court judge *Arkady Bushchenko,* who expressed in his dissenting opinion: "a

41 Case no 646/3986/19 proceedings no 51-3335км20 (Criminal Court of Cassation of the Supreme Court of Ukraine, 31 May 2021) <https://reyestr.court.gov.ua/Review/97429838> accessed 3 March 2024.

42 Case no 285/1673/17 (Criminal Court of Cassation of the Supreme Court of Ukraine, 13 September 2018) <https://reyestr.court.gov.ua/Review/76822780> accessed 3 March 2024.

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judgment of the judiciary that grants the executive branch powers not provided for by law, thus levelling the restrictions established by law, and a judgment of the judiciary that confirms the validity of the executive branch's use of the powers granted to it by law, even if it is not obliged to apply to the court for such confirmation, are fundamentally different in terms of legal characteristics and legal significance. Applying to the court for permission to exercise a power that a party has the right to exercise without the permission of the judiciary cannot be equated with applying to the court for additional powers not provided for by law".[43]

In this context, it is worth noting that the court practice takes into account this position. In particular, the panel of judges of the Second Judicial Chamber of the Cassation Criminal Court of the Supreme Court, in its decision of 21 December 2023 in case No. 757/10151/23-к concluded that the decision of the investigating judge to engage a forensic psychologist to conduct a forensic psychological examination using a computer polygraph is not subject to appeal.[44]

The problem of involvement of an insurance company which is an insurer of civil liability of a vehicle owner as a civil defendant in criminal proceedings. In national court practice, there is no unity in approaches to resolving the issue of application of Articles 35, 37 of the Law of Ukraine "On Compulsory Insurance of Civil Liability of Owners of Land Vehicles" (hereinafter - the Law of Ukraine "On Compulsory Insurance"),[45] as well as Part 1 of Article 128 of the CPC of Ukraine[46] in cases where the victim has not sought compensation from the Motor (Transport) Insurance Bureau of Ukraine (hereinafter: MTIBU). The MTIBU's obligations, although derived from the law, are identical in nature to those of the insurer.

The legal challenge arises when a victim, instead of following the procedure set out in Article 35 of the Law of Ukraine "On Compulsory Insurance", directly files a civil claim directly to the court in criminal proceedings. To address the above procedural anomaly and promote a unified law enforcement practice, the criminal proceedings on the cassation appeal of the representative of the civil defendant MTIBU against the verdict of the Frankivsk District Court of Lviv dated 28 February 2017[47] and the decision of the Court of

43 Dissenting Opinion of Judge AP Bushchenko in Case no 285/1673/17 (Criminal Court of Cassation of the Supreme Court of Ukraine, 13 September 2018) <http://reyestr.court.gov.ua/Review/76822714> accessed 3 March 2024.

44 Case no 757/10151/23-к (Criminal Court of Cassation of the Supreme Court of Ukraine, 21 December 2023) <https://reestr.court.gov.ua/Review/115822461> accessed 3 March 2024.

45 Law of Ukraine no 1961-IV of 1 July 2004 'On Compulsory Insurance of Civil Liability of Owners of Land Vehicles' <https://zakon.rada.gov.ua/laws/show/1961-15#Text> accessed 3 March 2024.

46 CPC of Ukraine no 4651-VI (n 5).

47 Case no 465/4621/16-к (Frankivsk District Court of Lviv, 28 February 2017) <https://reyestr.court.gov.ua/Review/65064437> accessed 3 March 2024.

Appeal of Lviv Region dated 27 November 2017[48] in case No. 465/4621/16-к were accepted for consideration by the Grand Chamber of the Supreme Court on 14 May 2019.[49]

Based on the results of the consideration, the Grand Chamber of the Supreme Court formulated several legal positions. First, a civil claim may be filed within criminal proceedings against the MTIBU as a civil defendant, given its obligations arising from the provisions of the Law of Ukraine "On Compulsory Insurance of Civil Liability of Owners of Land Vehicles". Second, to satisfy a civil claim of a victim against the MTIBU for recovery of damage caused as a result of a criminal offence under Article 286 of the Criminal Code of Ukraine,[50] the victim's prior application to the MTIBU for payment of insurance indemnity in accordance with the procedure established by Article 35 of the Law of Ukraine "On MTPL" is not mandatory.[51] However, not all judges agreed with the conclusion on the application of the rule of law of Part 1 of Article 128 of the CPC of Ukraine,[52] in terms of the possibility of filing a civil claim by the victim in criminal proceedings under Article 286 of the Criminal Code of Ukraine[53] against the Motor (Transport) Insurance Bureau of Ukraine as a legal entity. Four judges of the Grand Chamber of the Supreme Court expressed a dissenting opinion, arguing that "in the course of criminal proceedings, the relevant person may not file a civil claim against the MTIBU as a legal entity, since the Bureau is not legally liable for damage caused by the actions of a suspect, accused or insane person who committed a socially dangerous act".[54]

Expressing their view of the above problem, the authors consider it necessary to point out the following. Indeed, the CPC of Ukraine does not contain a provision that directly addresses whether a claim can be brought against an insurance company for compensation for damage caused by a road traffic accident within criminal proceedings.

According to Part 1 of Article 128 of the CPC of Ukraine, "a person to whom property and/or moral damage has been caused by a criminal offence or other socially dangerous act has the right during criminal proceedings before the start of the trial to file a civil lawsuit against the suspect, the accused or against a natural or legal person who by law bears civil responsibility for damage caused by the actions of a suspect, accused or unconvicted person who committed a socially dangerous act".[55]

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48 Case no 465/4621/16-к (Court of Appeal of the Lviv Region, 27 November 2017) <https://reyestr.court.gov.ua/Review/70652458> accessed 3 March 2024.

49 Case no 465/4621/16-к (Grand Chamber of the Supreme Court of Ukraine, 14 May 2019) <https://reyestr.court.gov.ua/Review/81753336> accessed 3 March 2024.

50 CPC of Ukraine no 4651-VI (n 5).

51 Case no 465/4621/16-к (Grand Chamber of the Supreme Court of Ukraine, 19 June 2019) <https://reyestr.court.gov.ua/Review/82703512> accessed 3 March 2024.

52 CPC of Ukraine no 4651-VI (n 5).

53 CCU no 2341-III (n 17).

54 Dissenting opinion of the judges of the Grand Chamber of the Supreme Court in Case no 465/4621/16-к (Grand Chamber of the Supreme Court of Ukraine, 19 June 2019) <https://reyestr.court.gov.ua/Review/82915306> accessed 3 March 2024.

55 CPC of Ukraine no 4651-VI (n 5).

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Therefore, the starting point for obtaining the result of scientific understanding in this direction is the concept of a civil claim in criminal proceedings, which, based on the analysis of the legal content of Articles 127, 128, and 129 of the CPC of Ukraine,[56] is defined as a claim of a victim of a criminal offence, a natural person, a legal entity or its representative, and in the cases provided by law - the prosecutor for compensation for property and moral damage directly caused by a criminal offence to a suspect, accused person or to a natural or legal person who by law bears civil responsibility for damage caused by the actions of a suspect, accused person or an unconvinced person who committed a socially dangerous act action in the form determined by law, which is subject to consideration in the order of criminal proceedings.

Although the phrase "directly caused by a criminal offence" is not used in any of the mentioned articles of the CPC, their current version leaves no doubt about the procedural content of the concept of a civil claim, which constitutes the subject of a civil claim and the grounds (procedural prerequisites) of a civil claim. The subject of a civil lawsuit in criminal proceedings is the material and legal claims of the plaintiff or the prosecutor to the suspect, the accused or the civil defendant for compensation for the damage caused by them. The grounds for a civil lawsuit are legal facts from which the plaintiff or prosecutor derives his claims and with the presence of which the law connects the emergence of a legal relationship between the specified subjects: 1) commission of a criminal offence or a socially dangerous act; 2) the presence of property or moral damage caused by this act; 3) the presence of a direct causal connection between the act and the damage caused.

Part 1 of Article 128 of the CPC of Ukraine defines the circle of participants in criminal proceedings against whom a civil lawsuit may be brought: in addition to the suspect, the accused, these are natural or legal persons who, by law, bear civil responsibility for the damage caused by a criminal offence and are defined by the Code of Criminal Procedure as civil defendants (Part 1 of Article 62 of the CPC of Ukraine).[57] An analysis of the current legislation allows the authors to attribute to the latter the persons referred to, in particular, in Part 1 of Article 1172, Articles 1178-1184, Part 2 of Article 1186, and Article 1187 of the Civil Code of Ukraine.[58]

Since indemnification is a liability and not a monetary obligation that arises from a contractual relationship, the insurer is not an entity that is legally liable civilly for damages caused by a criminal violation in a criminal proceeding. One of the main arguments for such a conclusion is that in the situations provided for in Part 1 of Article 128 of the CPC, there must be a causal connection between the committed criminal offence and its harmful consequences.[59] It is absent in relation to the losses suffered by

56 ibid.
57 ibid.
58 Code of Ukraine no 435-IV of 16 January 2003 'Civil Code of Ukraine' <https://zakon.rada.gov.ua/laws/show/435-15#Text> accessed 3 March 2024.
59 CPC of Ukraine no 4651-VI (n 5).

the insurer after paying the insurance compensation and the damage caused by the criminal offence committed by the insured.

The Law of Ukraine "On Compulsory Civil Liability Insurance of Owners of Land Vehicles"[60] confirms this position, where the preamble states that this law regulates relations in the field of compulsory civil liability *insurance* of owners of land vehicles and is aimed to *ensure* compensation for the damage caused. Therefore, the insurer carries out civil liability insurance activities and is not liable under the law. Such relations, in the event of a dispute between the parties to the contract, are governed by the norms of civil procedural legislation.

It should be noted that despite the legal position expressed in the decision of the Grand Chamber of the Supreme Court, the dispute regarding the correctness of the conclusions made does not subside, and the judges who expressed a separate opinion have many supporters.

The problem of appointing an expert examination by an investigator who did not conduct a pre-trial investigation (was not a member of the group of investigators in this criminal proceeding). One of the key legislative provisions determining the rule on the proper subject of investigative, covert investigative and other procedural actions as a criterion for the admissibility of evidence is the normative provision contained in Paragraph 2 of Article 3 of Article 87 of the CPC of Ukraine: "3. Evidence obtained: ... 2) after the commencement of criminal proceedings by the pre-trial investigation or prosecution authorities exercising their powers not provided for by this Code to ensure pre-trial investigation of criminal offences is also inadmissible".[61]

For a long time, the Supreme Court has consistently defended the position that only those subjects of the prosecution who are part of the group of prosecutors or investigators in a specific criminal proceeding based on the relevant resolution are empowered to conduct a pre-trial investigation. In particular, the authors refer to the decisions of the Joint Chamber of the Criminal Court of Cassation of the Supreme Court from:

(1) 7 August 2019, which states: "Since the investigator did not have the authority to decide on the appointment of a forensic medical examination, as he was not a member of the group of investigators entrusted with the pre-trial investigation, the expert's opinion is inadmissible as evidence";[62]
(2) 22 February 2021 in case No. 754/7061/15, which states: "Within the meaning of Articles 36, 37, 110 of the CPC, the decision to appoint (determine) a prosecutor who will exercise the powers of a prosecutor in a particular criminal proceeding,

60 Law of Ukraine no 1961-IV (n 45).

61 CPC of Ukraine no 4651-VI (n 5).

62 Case no 555/456/18 (Criminal Court of Cassation of the Supreme Court of Ukraine, 7 August 2019) <https://reyestr.court.gov.ua/Review/83617115> accessed 3 March 2024.

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and, if necessary, a group of prosecutors who will exercise the powers of prosecutors in a particular criminal proceeding, must be made in the form of a resolution, which must be contained in the pre-trial investigation materials to confirm the fact of the existence of authority. Such a resolution must meet the requirements for a procedural decision in the form of a resolution stipulated by the CPC, including being signed by the official who adopted it. The absence of such a ruling in the pre-trial investigation materials or its non-signature by the head of the relevant prosecutor's office results in the inadmissibility of evidence collected during the pre-trial investigation as such that was collected under the supervision and procedural guidance of a prosecutor (prosecutors) who did not have the legal authority thereto."[63]

(3) 24 May 2021, in which the conclusion was drawn: "The ruling on entrusting the pre-trial investigation to another pre-trial investigation body, its justification and motivation must be the subject of a court investigation in each criminal proceeding, which is carried out taking into account its specific circumstances. The results of such research form the basis for further evaluation of the evidence obtained as a result of the conducted pre-trial investigation from the point of view of admissibility. In the case of entrusting the Prosecutor General, the head of the regional prosecutor's office, their first deputies and deputies to carry out a pre-trial investigation of a criminal offence to another pre-trial investigation body without establishing the ineffectiveness of the pre-trial investigation by the pre-trial investigation body specified in Article 216 of the CPC, the specified authorised persons will act outside the scope of their powers. In such a case, there will be non-compliance with the proper legal procedure for the application of Part 5 of Article 36 of the Criminal Code and violation of the requirements of Articles 214 and 216 of the Criminal Code. The consequence of non-compliance with the proper legal procedure as a constituent element of the principle of the rule of law is the recognition of evidence obtained during the pre-trial investigation as inadmissible on the basis of Article 86 and Part 2, Part 3 of Article 87 of the CPC as collected (obtained) by unauthorised persons (authorities) in specific criminal proceedings, in violation of the procedure established by law";[64]

(4) 4 October 2021, in which the position was formulated: "According to the provisions of Articles 39 and 110, Part 1 of Article 214 of the CPC, the decision to appoint (determine) a group of investigators who will conduct a pre-trial investigation, the determination of a senior investigative team that will supervise the actions of other investigators must be made in a form that must meet the requirements for a procedural decision in the form of a resolution specified by the criminal procedural

63 Case no 754/7061/15 (Criminal Court of Cassation of the Supreme Court of Ukraine, 22 February 2021) <https://reyestr.court.gov.ua/Review/95139651> accessed 3 March 2024.

64 Case no 640/5023/19 (Criminal Court of Cassation of the Supreme Court of Ukraine, 24 May 2021) <https://reyestr.court.gov.ua/Review/97286253> accessed 3 March 2024.

> law. The absence of such a procedural decision in the criminal proceedings results in the inadmissibility of evidence collected during the pre-trial investigation as collected by an unauthorised person".[65]

It is evident that Ukrainian law enforcement practice has long had a steady tendency to literally interpret the provisions of the law and has not known any exceptions to the relevant provisions regarding the proper subject of procedural actions.

At the same time, on 31 August 2022, the Grand Chamber of the Supreme Court, in its decision, actually deviated from the above legal positions. However, and this should be emphasised, it did not mention this fact in its decision, which was in one of the dissenting opinions expressed in this criminal proceeding.[66]

The legal position of the Grand Chamber of the Supreme Court regarding the application of the rule of law in case No. 756/10060/17 (in question) is as follows: "In case of appointment of an expert examination by an investigator who is not a member of the investigative team determined in the criminal proceedings, the court, when deciding on the admissibility of the expert's opinion as evidence, must, within the arguments of the parties, check whether the method of appointment of the examination leading to a violation of certain human rights and freedoms provided for by the Convention and/or the Constitution of Ukraine. If the evidence is found to be inadmissible, the court must substantiate its conclusions about a significant violation of the requirements of the criminal procedure law, indicating which and whose rights and freedoms were violated and how this was expressed. When assessing the evidence for admissibility in accordance with the criteria established by the criminal procedure law, the court proceeds from the circumstances of a particular case and must also give reasons for its decision".[67]

At a first approximation, it may seem that the Supreme Court provided a proper justification that can be fully supported by scholars and law enforcement officers (mainly representatives of the prosecution), whose key approach is the desire to protect law enforcement practice from excessive formalism not related to the violation of the rights and legitimate interests of persons involved in criminal proceedings. However, the decision of the Supreme Court was extremely negatively perceived by the legal community, and the judges issued eight separate opinions on the position of the Supreme Court, which can be seen as a factor that may subsequently determine possible changes in the legal position of the Supreme Court.

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65 Case no 724/86/20 (Criminal Court of Cassation of the Supreme Court of Ukraine, 4 October 2021) <https://reyestr.court.gov.ua/Review/100214751> accessed 3 March 2024.

66 Dissenting Opinion (partially divergent) of the judge of the Grand Chamber of the Supreme Court in Case no 756/10060/17 (Grand Chamber of the Supreme Court of Ukraine, 31 August 2022) <https://reyestr.court.gov.ua/Review/106243431> accessed 3 March 2024.

67 Case no 756/10060/17 (Grand Chamber of the Supreme Court of Ukraine, 31 August 2022) <https://reyestr.court.gov.ua/Review/106141457> accessed 3 March 2024.

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Indeed, the possibility of departing from its previous conclusions does not contradict the principle of legal certainty since such a need (as an indicator of the effectiveness of judicial practice) may be due to functional interpretation based on changes in law enforcement and social relations. In its ruling of 4 September 2018 in case No. 823/2042/16, the Grand Chamber of the Supreme Court, which made such a derogation, provided the following arguments for its legal position: "The reasons for the departure may be defects in the previous decision or group of decisions (their inefficiency, unclearness, inconsistency, unreasonableness, imbalance, error); changes in the social context".[68]

However, in the practical case under consideration, there are no such reasons. This is confirmed by the dissenting opinions of the judges in this proceeding, in which they argued their disagreement both in terms of the law, domestic case law and the ECHR case law, and based on doctrinal approaches and general principles of criminal proceedings. In particular, it was noted: "A systematic analysis of the above provisions leads to the conclusion that only those procedural subjects, including investigators, who are members of the relevant group in a particular criminal proceeding on the basis of a relevant resolution, are empowered to conduct procedural actions during the pre-trial investigation. They are the only ones who have the legal authority to make specific decisions during the pre-trial investigation. If an investigator who is not defined in accordance with the requirements of the criminal procedure law as conducting a pre-trial investigation (being a member of the group of investigators) in a particular criminal proceeding performs actions provided for in Article 40 of the CPC of Ukraine, these actions should be qualified as those performed by an improper subject. At the same time, conducting a pre-trial investigation by unauthorised persons is a significant violation of human rights and fundamental freedoms, regardless of other circumstances of a particular case".[69]

In summary, the decision of the Grand Chamber of the Supreme Court has significantly changed the decade-long judicial practice, caused outrage among legal professionals, and requires careful further reflection.

4 DISSENTING OPINION: A GENERAL THEORETICAL APPROACH

Familiarisation with the judicial practice of dissenting opinions by judges reasonably raises several important general theoretical issues for the authors of the article. In particular, regarding the definition of the concept of dissenting opinion. It should be noted that the authors have not found its legal definition in any law of Ukraine. Perhaps this is understandable since even in a country with a continental legal system, where law

68 Case no 823/2042/16 (Grand Chamber of the Supreme Court of 4 September 2018) <https://reyestr.court.gov.ua/Review/77969515> accessed 3 March 2024.

69 Dissenting Opinion (convergent) of the judges of the Grand Chamber of the Supreme Court in Case no 756/10060/17 (Grand Chamber of the Supreme Court of Ukraine, 13 September 2022) <https://reyestr.court.gov.ua/Review/106205018> accessed 3 March 2024.

enforcement officers are accustomed to clear algorithms and regulations, procedural codes and other laws cannot be turned into dictionaries. However, this again underlines the conclusion that there needs to be proper legal regulation of the institution of dissenting opinion.

However, the definition of the term "dissenting opinion" is explained in the Procedure for Maintaining the Unified State Register of Court Decisions,[70] which states that a "dissenting opinion of a judge" is a written document formed by a judge, serving as a form of expressing the judge's own position in case of disagreement with the decision (conclusion) made (given) or a statement of circumstances that supplement the reasoning part of the decision (conclusion). The dissenting opinion reflects the legal position of the judge in a particular case considered by the court and is aimed at challenging, clarifying or substantiating the conclusions in the court decision.[71]

Referring to doctrinal sources also does not clarify the scientific understanding of this phenomenon. The scientific mainstream addresses the question of the legitimacy of the institution of dissent in general and attempts to argue various approaches. Scholars are divided into two sides, either defending the democratic nature and importance of the dissenting opinion phenomenon[72] or denying its existence, emphasising its harmfulness to the authority of court decisions and judges, its negative impact on public trust in the court and its legitimacy, and its potential to disclose the secrecy of judges' deliberations.[73]

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70 Decision of the High Council of Justice no 1200/0/15-18 of 19 April 2018 'On the approval of the Procedure for Maintaining the Unified State Register of Court Decisions' <https://zakon.rada.gov.ua/rada/show/v1200910-18#Text> accessed 3 March 2024.

71 This Provision is issued pursuant to the Laws of Ukraine "On the Judiciary and the Status of Judges" and "On Access to Court Decisions" by the High Council of Justice of Ukraine and is aimed at organising the functioning of the Unified State Register of Court Decisions as part of the state information system to ensure collection, recording, accumulation, storage, protection, search and review of information resources of the Register. Unlike the procedural codes, the Provisions provide, albeit incompletely, for the procedure for issuing a dissenting opinion. In particular, an electronic copy of the dissenting opinion of a judge is produced by the court in the automated court document management system on the day of the court decision or production of its full text in paper form, in case of collegial review, signed by qualified electronic signatures of the judge, and stored in a state that makes it impossible to further adjust it (clause 1).

72 For more on the arguments of the dissenters, see, inter alia: Catarina Santos Botelho, 'Veni, vidi, vici: Quem tem medo dos votos de vencido?' in Walter Claudius Rothenburg (ed), *Direitos fundamentais, dignidade, constituição: Estudos em homenagem a Ingo Wolfgang Sarlet* (Editora Thoth 2021) 655; Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) 14(8) German Law Review 1345; Rosa Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States: Study* (European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs 2012) para 1.2.3, 9.

73 For the arguments of those who oppose the existence of dissenting opinions, see, inter alia: Nancy Amoury Combs, 'The Impact of Separate Opinions on International Criminal Law' (2021) 62(1) Virginia Journal of International Law 1; Julia Laffranque, 'Dissenting Opinion and Judicial Independence' (2003) 8 Juridica International 162; Raffaelli (n 72) 9; David Vitale, 'The Value of DIssent in Constitutional Adjudication: A Context-Specific Analysis' (2014) 19(1) Review of

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Considering the essence of the dissenting opinion, the question also arises of whether it constitutes as an act of justice and its relationship with the court decision it accompanies. In answering this question, it may be noted that, despite being written by a judge who was part of the panel of judges, a dissenting opinion is not an act of justice. In support of this point of view, it may be pointed out that a dissenting opinion is not delivered in the name of the state either in constitutional or any other type of proceedings, which, among other things, determines the perception of a court decision as an act of justice.

To further elaborate this point of view, a court decision is known to be an act of justice, a casual interpretation of the law, and it is subject to significant requirements, as, for example, in Articles 89 and 90 of the Law of Ukraine "On the Constitutional Court of Ukraine",[74] Article 370 of the CPC of Ukraine,[75] Article 265 of the CPC.[76] The law does not set forth any requirements as to the content and procedural procedure for issuing or formalising dissenting opinions. Judges are trying to overcome this gap by developing their own approaches.

In this context, the authors recommend referring to the dissenting opinion of the Constitutional Court of Ukraine Judge Serhiy Holovaty, cited above,[77] and can, without exaggeration, be called unique for the constitutional judiciary of Ukraine. In particular, Judge Holovaty's dissenting opinion is well-structured, providing the grounds for its presentation and his vision of interpreting the relevant articles of the Constitution of Ukraine. He includes an appendix elaborating on his understanding of the Rule of Law and its key element, legal certainty. He explains his vision of the fallacy of the approach of judges when forming their legal position, compares the Constitution of Ukraine in terms of the issues under constitutional submission with the norms of international law and the practice of the European Court of Human Rights, and references the Amicus Curia from the Anti-Corruption Initiative of the European of the Union (EUACI). Additionally, he discusses the international experience of introducing and improving criminal liability for crimes of "illegal enrichment" as a tool for overcoming corruption, foreign practices of constitutional courts, general theoretical issues, and the semantics of individual words and phrases and their adequate translation.

Constitutional Studies 83; James R Zink, James F SpriggsII and John T Scott, 'Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions' (2009) 71(3) Journal of Politics 909, doi:10.1017/S0022381609090793.

74 Law of Ukraine no 2136-VIII of 13 July 2017 'On the Constitutional Court of Ukraine' <https://zakon.rada.gov.ua/laws/show/2136-19#Text> accessed 3 March 2024.

75 CPC of Kazakhstan no 231-V (n 7).

76 Code of Ukraine no 1618-IV of 18 March 2004 'Civil Procedure Code of Ukraine' <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 3 March 2024.

77 See: Dissenting Opinion of Judge Serhiy Holovaty in the Case no 1-135/2018 (5846/17) on the constitutional petition of 59 people's deputies of Ukraine on the compliance of Article 368-2 of the Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality) (decision no 1-p/2019) (Constitutional Court of Ukraine, 26 February 2019) [2019] Official Gazette of Ukraine 36/1291.

A dissenting opinion should not be considered part of a court decision. The author's approach can be explained by the fact that the court decision has legal significance and is subject to execution. In many jurisdictions, a dissenting opinion is not even announced in court when the judgment is delivered, and the dissenting opinion itself is only attached to the proceedings, although it is open for review. Thus, this gives grounds to conclude that a dissenting opinion results from the judge's discretion and internal conviction, reflects his/her legal position that developed during the trial and the adoption of the court decision, and often contains an alternative position with detailed arguments. However, it is an independent document, which is certainly a procedural document. Hence its name, "dissenting opinion", symbolises no monolithic unity in the court decision. On the contrary, there is a dissenting (separate) position, which, as a rule, does not coincide with the majority opinion.

Also, in this context, the authors would like to express their position that the dissenting opinions of judges in any jurisdiction should not be neglected. When announcing a court decision, it is necessary to indicate the existence of a dissenting opinion and to provide the parties with the opportunity to read it.

By concluding that a dissenting opinion is not part of a court decision, the question arises whether it is an act of interpretation. In this regard, it may be noted that given that in any case, a judge applying a rule of law interprets that rule, which is the first element in the law application process, since to apply it, it is first necessary to understand the meaning of that rule of law,[78] the legal position of a judge formulated in a dissenting opinion is also an act of interpretation, but the legal consequences of such interpretation are different. Before applying a rule of law, it is necessary to find its meaning and establish its content, i.e. to interpret it. Interpretation penetrates all stages of the application of legal norms, constantly accompanies this process, and is a means of feedback between the actual circumstances of the case and legal qualification, application of procedural and substantive rules and their interpretation. Therefore, a dissenting opinion reflects the judge's discretion regarding the casual professional interpretation of a particular rule of law or factual circumstances of a case. In addition, it is not known what position on the legal content of the rule will be taken by the higher court when reviewing a court decision. It may likely take the legal position expressed in the dissenting opinion.[79] The legislator also does not prohibit the judge from changing his approach in another decision, which he formulated in a dissenting opinion.

78 See: Aaron Barak, *Judicial Discretion* (Centre for Educational Literature 2022) 90-1; OV Kaplina, *Law Enforcement Interpretation of Criminal Procedure Law* (Pravo 2008) 17, 36, 59-60.

79 By the way, in this sense, a dissenting opinion is sometimes called a kind of constituent metalanguage, because a dissenting opinion today may turn into a majority position tomorrow. See: Nuno Garoupa and Catarina Santos Botelho, 'Judicial Dissent in Collegial Courts: Theory and Evidence' in WR Thompson (ed), *Oxford Research Encyclopedia of Politics* (OUP 2022) art 19, doi:10.1093/acrefore/9780190228637.013.1990.

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With regard to constitutional interpretation, the Constitutional Court of Ukraine, like the constitutional court of any state, is a body of constitutional jurisdiction that ensures the supremacy of the Constitution of Ukraine. It decides on the compliance of the laws of Ukraine and, in cases provided for by the Constitution of Ukraine, other acts with the Constitution of Ukraine, and provides an official interpretation of the Constitution of Ukraine (Article 1 of the Law of Ukraine "On the Constitutional Court of Ukraine"[80]). Decisions of the Constitutional Court have significant consequences for the state: it recognises acts (or their individual provisions) as constitutional or unconstitutional and provides an official interpretation of the Constitution of Ukraine. Its decisions are final and not subject to appeal.

In addition, judges of constitutional courts often make decisions on politically sensitive issues of the state,[81] formulate legal positions on key issues of law enforcement,[82] which a priori necessitates detailed arguments, creative understanding of the subject of constitutional proceedings,[83] justification of the content of the rule of law as understood by the judge. These decisions are often the focus of society's attention. The decision of the Constitutional Court itself changes the legal regulation, transforms the understanding of the content of the interpreted provision, its compliance with the Constitution, and so forth.

The decision of a court of any jurisdiction, including the Constitutional Court, is subject to mandatory execution, as it is part of the right to a fair trial, enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6).[84] Failure to comply with a judgment of a court of any jurisdiction or the Constitutional Court of Ukraine shall result in the perpetrators being brought to justice in accordance with the law.

A dissenting opinion does not have such legal consequences. While it is an act of casual interpretation, a dissenting opinion cannot be a source of law. This is the key difference between a legal position contained in a court judgment and a dissenting opinion. In a court judgment, which usually consists of three parts (introductory, motivational and operative), the court resolves the issues that were the subject of the court proceedings. Moreover, the Ukrainian legislator strictly regulates the content of each court decision: ruling, verdict, and resolution. The legislator does not impose such a requirement on dissenting opinions.

Thus, the above leads to the approach that a separate opinion of a judge is an act of competent professional interpretation of a rule (or norms) of law but is not binding and is not part of a court decision, as it may be issued situationally.

80 Law of Ukraine no 2136-VIII (n 74).

81 See: Dmytro Vovk and Iurii Barabash, '"Justices have a Political Sense": The Constitutional Court of Ukraine's Jurisprudence in Politically Sensitive Cases' (2021) 2(18) Ideology and Politics Journal 312, doi:10.36169/2227-6068.2021.02.00014.

82 Tetiana Slinko and others, 'The Rule of Law in the Legal Positions of the Constitutional Court of Ukraine' (2022) 5(1) Access to Justice in Eastern Europe 165. doi:10.33327/AJEE-18-5.1-n000099.

83 Horodovenko (n 1).

84 Council of Europe (n 21).

The authors consider it appropriate to refer to the axiological significance of the dissenting opinion and its positive legal and social value features. The existence of a dissenting opinion of a court indicates the democratic nature of justice and the internal and external independence of the court and judges. According to scholars, "in any legal state, the judiciary has a special place as a guarantor of justice and the fundamental values of democracy. The effective functioning of the judiciary is a necessary condition for implementing the rule of law doctrine in any democratic state. The judge, who represents the judiciary in society as a person who administers justice, will always be the focus of the public, experts, and all those involved in the creation of judicial reform in Ukraine. Through the prism of assessing the judge's behaviour and his/her statements, both in and out of court, a public image of a fair trial and trust in the judiciary is formed. That is why it is important that a judge's motives and reflections correspond to the existing values and norms of morality in society...".[85]

Thus, a dissenting opinion, the right to express which is granted to a judge, clearly demonstrates the state's attitude to justice, is a way of finding the truth, ensuring the right to a fair trial, and sometimes is a means of overcoming outdated views that impede progressive advancement.

Considering the essence of a judge's dissenting opinion, questions of a procedural nature also arise. In particular, whether a judge should refuse to sign a court decision if he or she decides to write a dissenting opinion and whether he or she should announce when delivering a court decision that he or she disagrees with the panel and will write a dissenting opinion. In answering the first question, it can be noted that Ukrainian law does not provide for the right of a judge to refuse to sign a court decision. The decision is made by the panel of judges. The legal nature of a dissenting opinion is that if a judge does not agree with the reasoning or with the court decision in general, he or she issues a dissenting opinion. If a judge disagrees with the decision of the panel of judges, he or she should vote against it but sign the judgment. As to whether a judge must inform the panel that he or she will deliver a dissenting opinion, the law does not provide for such a requirement. Hypothetically, it can be imagined that the decision to present one's view of the argumentation or the opposite position may come to the judge later, and such notification of the panel of the intention, or rather the absence thereof, will be an obstacle to the dissenting opinion. Certainly, such notification of colleagues would be desirable but not mandatory.

Another crucial question is if a judge participates in proceedings with similar issues on which he or she has already issued a dissenting opinion. Should he or she write a separate opinion again, or should he or she somehow communicate that he or she already has a separate opinion on the same or similar issue? It seems that the judge in such a situation

85 See: Oksana Khotynska-Nor and Lidiia Moskvych, 'Limits of a Judge's Freedom of Expressing his/her own Opinion: The Ukrainian Context and Ecthr Practice' (2021) 4(3) Access to Justice in Eastern Europe 171-2, doi:10.33327/AJEE-18-4.3-n000077.

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should use his or her own discretion. Since the law does not directly prohibit or oblige a judge to express a dissenting opinion on any decision. However, if a judge has formed a strong legal position on a particular issue, then from the point of view of ethics and professional integrity, he or she should write a dissenting opinion with reference to the previous legal position expressed in the dissenting opinion. In addition, it is possible to formulate additional justification since there will always be new arguments that were not given in the previous position.

5 CONCLUSIONS

The authority of the court rests not on formal power or its external attributes but on the persuasiveness of judges' decisions. The quality of a court decision depends primarily on the persuasiveness of its reasoning, which cannot be neglected at the expense of speed of trial. Fair judgment is a key component of the rule of law, crucial for the functioning of the entire judicial system, and an indicator of the quality of justice in a country. Achieving a fair judgment is the most challenging task facing every judge at any level of the judicial system who resolves a case. Undoubtedly, the adoption of a court decision is preceded by the titanic work of a judge or a panel of judges to understand the actual circumstances of the case, to qualify, examine and evaluate evidence and the actual circumstances of the case, summarise national court practices, consider foreign experiences, and reference the European Court of Human Rights case law, which guides existing human rights standards. Thus, the main vector for improving judicial professionalism is constantly honing the art of writing judgments and enriching the judicial experience with positive knowledge of its motivation and internal structure.

Dissenting opinions by judges signify the democratic nature of justice. They demonstrate respect for the authority of the judiciary in the state and the judge as its bearer, provide an opportunity to exercise personal, professional and individual traits for the sake of the authority of justice and are a way of seeking justice and evolutionary interpretation of the law, which is especially felt at the turn of the century when the stuck rules of law slow down society's progress.

The specifics of the text of a dissenting opinion, which has a personalised character and significantly differs in its individual authorial style and the special purpose pursued by its author, allow us to speak of the genre independence of a dissenting opinion in judicial discourse.

Based on the conducted research, it can be concluded that a dissenting opinion is an official legal position of a judge formed during a collegial consideration of a case as a result of an internal conviction which does not coincide (partially does not coincide) in terms of reasoning or final conclusion with the position of the majority of judges and is formalised in a procedural document which is an act of competent (professional) and doctrinal judicial casual interpretation.

The features of a dissenting opinion include several key aspects: 1) is a phenomenon of a democratic society; 2) has the features of an institution of law, albeit with lapidary normative regulation; 3) is issued by a judge within his/her competence as a result of judicial discretion, internal conviction, formation of a legal position that does not coincide with the majority of judges in terms of motivation or final conclusion; 4) it is a vivid example of internal and external independence of courts and judges in states, a guarantee of justice, an indicator of freedom of judicial discretion; 5) it combines competent (professional) and doctrinal judicial casual interpretation; 6) it shapes public and legal opinion, promotes the development of doctrine, scientific concepts, and enriches science; 7) has a prognostic and prospective character, as it sometimes serves as a means of overcoming outdated views that impede progressive advancement, evolution of sustainable approaches, and is the basis for the formation of a new legal position, which in the future may be transformed into a majority position and become a sustainable practice; 8) promotes the search for truth (or the comprehensiveness and completeness of proceedings); 9) is distinguished by an individual author's style, which allows us to speak of its genre independence; 10) is derivative, optional, as it is not binding, unlike a court decision; 11) is not an act of justice, as it is not delivered in the name of the state; 12) is not a mandatory part of a court decision.

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***Keywords:** justice, trial, dissenting opinion of a judge, legal position, judicial discretion, right to a fair trial, court decision.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ОКРЕМА ДУМКА: СКЛАДНИЙ ШЛЯХ ПОШУКУ ІСТИНИ (НА ПРИКЛАДІ ТЛУМАЧЕННЯ КРИМІНАЛЬНОГО ПРОЦЕСУАЛЬНОГО ЗАКОНОДАВСТВА УКРАЇНСЬКИМИ СУДДЯМИ)

Оксана Капліна*, Ануш Туманянц, Олена Верхогляд-Герасименко та Людмила Білецька

АНОТАЦІЯ

Стаття присвячена актуальному для сучасної правозастосовної практики та теорії права питанню щодо окремої думки судді, яка може бути висловлена у разі незгоди судді, який брав участь у колегіальному розгляді справи, з позицією більшості суддівської колегії. Автори проаналізували наявні підходи до інституту окремої думки в різних правових системах, фактори, що негативно впливають на існування окремої думки в системі правосуддя, навели приклади окремих думок українських суддів, які були висловлені в різних юрисдикціях, їх значення для правозастосовної практики та той суспільний резонанс, який вони викликали; було розглянуто процесуальні питання, які потенційно можуть виникнути під час здійснення судочинства та формування окремої думки суддів. Автори також роблять висновок про безумовну цінність інституту окремої думки для правосуддя та авторитету суду в державі, також наголошують на тому, що специфіка тексту окремої думки судді на тлі лапідарного нормативного регулювання нормами процесуального права може вказувати на жанрову самостійність змісту окремої думки в судовому дискурсі порівняно з судовим рішенням. У статті автори також пропонують визначення поняття окремої думки, під яким розуміють офіційну правову позицію судді, що формується під час колегіального розгляду справи за внутрішнім переконанням, яке не збігається (частково не збігається) із позицією більшості суддів у частині аргументації чи остаточного висновку. Також автори зазначають, що вона має бути оформлена процесуальним документом, який є актом компетентного (професійного) та доктринального суддівського казуального тлумачення. Крім того, автори навели синтезовані ознаки, які характеризують правову позицію судді як окрему думку, серед яких твердження про те, що вона є, безперечно, феноменом демократичного суспільства; має ознаки інституту права, хоч і з лапідарним нормативним регулюванням; ухвалюється суддею в межах його компетенції за суддівським розсудом і внутрішнім переконанням; має прогностично- перспективний характер, оскільки іноді є засобом подолання застарілих поглядів, які перешкоджають прогресивному розвитку права, еволюції сталих підходів, а також основою для формування нової правової позиції, яка в майбутньому може трансформуватися в позицію більшості і бути сталою практикою; крім того, вона є похідною, факультативною, оскільки є необов'язковою для виконання, на відміну від судового рішення, і не є актом правосуддя, адже не ухвалюється іменем держави і не є обов'язковою частиною судового рішення.

Ключові слова: *правосуддя, судовий розгляд, окрема думка судді, правова позиція, суддівський розсуд, право на справедливий суд, судове рішення.*

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Research Article

DISCIPLINARY PROCEEDINGS AGAINST JUDGES IN UKRAINE: CURRENT ISSUES OF LEGISLATION

Maryna Stefanchuk*

ABSTRACT

Background: *The paper highlights some current issues of the legislation of Ukraine in the field of disciplinary proceedings against judges. Special attention is drawn to the legal regulation of the time limits for imposing disciplinary sanctions on judges and standards of proof in disciplinary proceedings against judges, prerequisites, and tendencies predetermining their formation.*

This study was carried out to answer the following questions: how did the chosen approaches to reforming the High Council of Justice in Ukraine lead to the crisis of the disciplinary function of this judicial governance body? What were the prerequisites for accumulating a great number of pending disciplinary complaints against judges and the disciplinary body being overloaded? Which legislative provisions on the disciplinary procedure for judges require conceptual substantiation to simplify its procedures? To what extent do the statutory time limits for imposing disciplinary sanctions on judges meet the criteria of a reasonable time for consideration of a case? Is there any uniformity in the legislative approaches to setting such time limits for prosecutors and attorneys as representatives of related legal institutions in the Ukrainian justice system? How have the approaches to the formation of the standard of proof in disciplinary proceedings against judges changed, and what factors have influenced this? What are the tendencies in the development of legislation on disciplinary proceedings against judges? Will they contribute to achieving the aim of simplifying the procedures of such proceedings while guaranteeing reasonable time limits for consideration of such cases and ensuring guarantees of judicial independence?

The article aims to provide a conceptual justification for the legislative approaches to the disciplinary procedure for judges in Ukraine, identify the defects in legislation giving rise to the crisis in the disciplinary function of the High Council of Justice, and make proposals for ensuring high performance of this legal institution with due regard for international standards and best practices.

Methods*: To achieve the research goals, general scientific and unique scientific research methods were applied. The concept of this paper is underpinned by fundamental sources of literature, including scientific papers, legislative acts, international conventions, and judicial practice. To meet the nature of the problem raised in the paper, research works, information, analytical reports, and practice summaries from respective reputable organisations were used. The methodological framework is based on an analysis method, a synthesis method, and a comparative method. The analysis method helped scrutinise relevant legal provisions and case law, while the synthesis method was used as part of the comparative methods. Thus, to meet the objective of the study, the Ukrainian legislation on the specifics of reforming the High Council of Justice at this stage of its development and on the peculiarities of disciplinary proceedings against judges in Ukraine was analysed. This helped outline the approaches entailing the crisis of the disciplinary function of this body, identify the prerequisites for a great number of pending disciplinary complaints against judges accumulated, and highlight the provisions of legislation in this area that require conceptual justification. A comparative legal analysis of disciplinary procedures against judges, prosecutors, and attorneys in Ukraine helped reveal a lack of a unified legislator's conceptual approach in this regard and the existence of discriminatory features in disciplinary procedures against judges. A legal analysis of the case law of the European Court of Human Rights carried out in the framework of this study leads to the conclusion that the legal position of this court has changed as to the applicability of the Convention's criminal procedural guarantees to cases of disciplinary liability of judges.*

The study highlights the doctrinal approaches shaping the legal concept of "standards of proof", the generalisation of which enabled their grouping according to the features inherent in the Anglo-American and continental systems of law. The legal analysis of these approaches helped identify the tendency in the development of legislation on disciplinary proceedings against judges, the controversy of which lies in the statement that Ukrainian law is shifting the approach to the standard of proof towards the distinction between civil and criminal cases, following the model of common law countries, even though, in general, the continental law system is not characterised by such differentiation.

The use of the latest empirical data facilitated the proper argumentation of the author's conclusions. For example, the materials of the Summary of the practice for considering disciplinary cases against judges by Disciplinary Bodies were used in the study, the legal analysis of which showed that different standards of proof are applied in disciplinary proceedings against judges and that there is no clear legislative regulation of such a standard. The study employs the statistical data of the High Council of Justice shown in the Annual Report on the Status of Judicial Independence in Ukraine for 2022, as well as in the information and analytical report on the activities of this body in 2023 and 2024, as of the date of this study, which illustrate the quantitative indicators and dynamics of consideration of disciplinary complaints against judges, which enabled testing the hypothesis of whether the legislative provisions contribute to achieving reasonable time limits for consideration of such cases and ensuring guarantees of judicial independence.

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Results and Conclusions: *it has been established that the legislative regulation of disciplinary proceedings against judges in Ukraine currently bears a range of deficiencies that entailed the so-called crisis of the disciplinary body and the accumulation of disciplinary complaints against judges left without consideration. It has been argued that the operative legislation, setting out limitation periods for imposing disciplinary sanctions on judges, necessitates a certain balance to ensure the principle of inevitability of legal liability and the principles of legal certainty and reasonable time limits. It has been ascertained that modern legal regulation of disciplinary proceedings against judges points to the shift in the approaches to the standard of proof toward differentiation of civil and criminal cases, which is predetermined, inter alia, by the impact of the case law of the European Court of Human Rights. The reasonableness of applying the "intime conviction" standard and the highest standards of procedural guarantees to judges in disciplinary proceedings, from the point of view of the judicial independence guarantees ensured, has been brought into focus. The prospective tendencies in developing the legislation on disciplinary proceedings against judges toward simplifying the procedures while simultaneously guaranteeing reasonable time limits for the consideration of such cases, as well as ensuring the guarantees of judicial independence on the pathway of achieving the due standard of proof.*

1 INTRODUCTION

Since the imposition of martial law, the State of Ukraine has consistently and convincingly pursued the aspirations of European integration for its citizens. A remarkable milestone in this process has been the decision of the European Council to open the negotiations on the accession of Ukraine to the European Union (hereinafter – the EU).[1] This preceded the Council's earlier decision to grant candidate status to Ukraine[2] and the Recommendation of the European Commission to grant Ukraine a perspective of EU membership, provided that the range of criteria are met.[3]

The European Commission's EU Enlargement Policy Report on Ukraine assessed the progress across several clusters, with special attention given to the issues of ensuring the

1 European Council, 'European Council Conclusions on Ukraine, Enlargement and Reforms' (1042/23, 14 December 2023) <https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/european-council-conclusions-on-ukraine-enlargement-and-reforms/> accessed 21 March 2024.

2 European Council, 'European Council Conclusions on Ukraine, the Membership Applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans and External Relations' (611/22, 23 June 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/06/23/european-council-conclusions-on-ukraine-the-membership-applications-of-ukraine-the-republic-of-moldova-and-georgia-western-balkans-and-external-relations-23-june-2022/> accessed 21 March 2024.

3 Press and information team of the Delegation to Ukraine, 'EU Commission's Recommendations for Ukraine's EU candidate status' (*Delegation of the European Union to Ukraine*, 17 June 2022) <https://www.eeas.europa.eu/delegations/ukraine/eu-commissions-recommendations-ukraines-eu-candidate-status_en?s=232> accessed 21 March 2024.

supremacy of law. This included assessing the effectiveness of the organisation and functioning of various legal institutions of justice systems within Ukraine's justice system, which was in line with the declared goal of building a system of sustainable justice in Ukraine. In general, that report can claim to be one of the crucial modern indicators of topical issues that, in the opinion of European development partners, should determine the vectors of future reform steps in the justice sector in Ukraine in terms of its European integration and post-war reconstruction.

The report focuses on key aspects of justice, particularly the effectiveness of the organisation and the functioning of its components, including the disciplinary liability of judges and prosecutors in Ukraine. It "red-flagged" the issues pertinent to the consideration of disciplinary cases against judges as one of the key functions of the High Council of Justice (hereinafter – HCJ). Such attention has been caused by the partial dysfunction of the HCJ due to changes in the legislative regulation of its disciplinary function, which resulted in the temporary suspension of its function for more than two years and the accumulation of more than 11,500 pending disciplinary cases against judges at the time the report.

Given that the competent body for disciplinary proceedings against judges faced such a lasting incapacity to consider disciplinary complaints about the conduct of judges for the first time, the Committee on Legal Policy of the Verkhovna Rada of Ukraine adopted a decision where it clarified how certain legislative provisions on disciplinary proceedings against judges should apply[4]. That decision specifies the legislative provisions for determining the period included in the relevant disciplinary proceedings against a judge. This explanation deserves special research attention, given the peculiarity of determining the limitation period for imposing disciplinary sanctions on judges in Ukrainian legislation, which takes no regard to the duration of disciplinary proceedings.

In such circumstances, finding effective ways to resolve the crisis of the HCJ's disciplinary function as one of the components of the mechanism for restoring civil society's trust in the judiciary is becoming more relevant.

To achieve the goal of building a system of sustainable justice in Ukraine, there is a need for legal analysis and conceptual justification of legislative approaches to the disciplinary procedure concerning judges in Ukraine, search for legislative defects that provoke the probability of crises in the HCJ's disciplinary function, and also for proposals for improvements of this legal institution, considering international standards and best practices, which determines the aim of this study.

4 Decisions of the Committee on Legal Policy of the Verkhovna Rada of Ukraine of 21 July 2023 'On the Committee's explanation of the application of certain provisions of the laws of Ukraine "On the High Council of Justice" and "On the Judicial System and Status of Judges" in terms of disciplinary proceedings against judges' <https://kompravpol.rada.gov.ua/uploads/documents/34298.pdf> accessed 21 March 2024.

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2 TIME LIMITS FOR IMPOSING DISCIPLINARY SANCTIONS ON JUDGES: THE EUROPEAN STANDARDS AND UKRAINIAN PRACTICES

First of all, it should be noted that European standards of judicial independence and the practice of the European Court of Human Rights (hereinafter – ECtHR) require that disciplinary proceedings fall under a range of guarantees of court proceedings. In particular, Recommendation CM/Rec(2010)12 **stipulates that:**

> *"Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction".*[5]

The European Charter on the statute for judges stipulates that:

> *"The dereliction by a judge of one of the duties expressly defined by the statute may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation".*[6]

The ECtHR consistently maintains that empowering a disciplinary body, rather than a court, with authority to adopt decisions on disciplinary offences committed by judges and impose respective sanctions is nevertheless compatible with the requirements of para. 1 Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention).[7] At the same time, when the Member States of the Council of Europe choose such an approach, a disciplinary body must comply with the requirements of para. 1 Art. 6 of the Convention (i.e. to be "an independent and impartial tribunal established by law"); otherwise, its decision shall be subject to sufficient court control from the body complying with the requirements of independence and impartiality.[8]

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5 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (adopted 17 November 2010) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78> accessed 21 March 2024.

6 The European Charter on the statute for judges and Explanatory Memorandum (Strasbourg, 8-10 July 1998) para 5.1 <https://rm.coe.int/090000168092934f> accessed 21 March 2024.

7 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms) (ECHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_ENG> accessed 21 March 2024.

8 *Tsfayo v the United Kingdom* App no 60860/11 (ECtHR, 14 November 2006) <https://hudoc.echr.coe.int/eng?i=001-77995> accessed 21 March 2024; *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) <https://hudoc.echr.coe.int/fre?i=001-115871> accessed 21 March 2024; *Kamenos v Cyprus* App no 147/07 (ECtHR, 31 October 2017) <https://hudoc.echr.coe.int/eng?i=001-178174> accessed 21 March 2024; *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) <https://hudoc.echr.coe.int/eng?i=001-186216> accessed 21 March 2024; *Donev v Bulgaria* App no 72437/11 (ECtHR, 26 October 2021) <https://hudoc.echr.coe.int/eng?i=001-212697> accessed 21 March 2024.

In the seminal cases concerning Ukraine,[9] the ECtHR considered these factors exactly when verifying the adherence to the requirements of independence and impartiality by a disciplinary body.

One of the guarantees of the court proceedings under the provisions of para. 1 of Art. 6 of the Convention is the consideration of a case by the court within a reasonable time. The national legislation of Ukraine (para. 11 Art. 109 of the Law of Ukraine "On the Judiciary and the Status of Judges") foresees the time limit for imposing a disciplinary sanction on a judge: *not later than three years after the offence, excluding the time of temporary incapacity to work or vacation, or relevant disciplinary proceedings.*[10]

Excluding *the time of temporary incapacity to work or vacation of a judge from* this time is thoroughly acceptable, as in the event of such circumstances, it is objectively impossible for the body responsible for observing the statutory deadline for bringing a judge to disciplinary responsibility to conduct disciplinary proceedings due to objective circumstances beyond the control of this body (a judge's vacation, and therefore the exercise of the right to rest guaranteed to him/her, and a judge's temporary incapacity, and therefore the exercise of the right to healthcare and medical assistance guaranteed to him/her).

At the same time, the legislator excluded the time of the relevant disciplinary proceedings from these three years for imposing a disciplinary offence on a judge, which, to some extent, levelled the legal significance of this time limit as such for the individual being held accountable. Such legislative regulation of the limitation period for imposing a disciplinary sanction on a judge is likely to allow us to characterise it as a *"sham" period or a period fixed without the intention to motivate the body conducting disciplinary proceedings against the judge to comply with it, and without the intention to guarantee the occurrence of relevant legal consequences for both the person being disciplined and the body conducting the disciplinary proceedings*.

The legal institution of closing disciplinary proceedings due to the expiry of time limits for applying legal liability measures (in this case, disciplinary sanctions) is very indicative of the efficiency of the competent body because the statistics of terminated (closed) disciplinary proceedings on this ground, de facto, shows organisational deficiencies in the operation of this body, either of a subjective nature (low-level organisation of disciplinary proceedings) or an objective nature (deficiencies in the legal regulation of the disciplinary procedure: defects of the legislation).

On the other hand, the legal institution of discontinuation of disciplinary proceedings on the grounds of expiry of the limitation period for bringing a person to such liability is an

9 *Oleksandr Volkov v Ukraine* (n 8) paras 112-115; *Denisov v Ukraine* (n 8) para 65.

10 Law of Ukraine no 1402-VIII of 2 June 2016 'On the Judiciary and the Status of Judges' (amended 26 March 2024) <https://zakon.rada.gov.ua/laws/show/1402-19/ed20240326#Text> accessed 27 March 2024.

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important guarantee of ensuring and exercising the right to a fair trial guaranteed by para. 1 Art. 6 of the Convention,[11] as it is aimed at ensuring the right to due process for a person held liable for such an offence. An important element of this procedure is to guarantee a reasonable timeframe for the consideration of the case.

Exercising the right to a fair trial in various aspects through the prism of national legislation has some peculiarities that have been the subject of various scientific studies[12]. Ensuring a judge's right to a fair trial in the context of disciplinary proceedings against him or her has become particularly important in the context of the ECHR case law. It is worth recalling international standards in the field of disciplinary liability of judges *in terms of the timing of disciplinary proceedings*: disciplinary cases should be considered within a reasonable time, and time limits should be set for opening disciplinary proceedings and imposing disciplinary sanctions. Thus, according to para. 17 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by General Assembly resolutions 40/32 28 of 29 November 1985 and 40/146 of 13 December 1985:

> *"A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under appropriate procedure".*[13]

Following Principle VI-3 of the Recommendation No. R(94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of the Judges, dated 13 October 1994:

> *"The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance, that the case should be heard within a reasonable time and that they should have a right to answer any charges".*[14]

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11 Council of Europe *(n 7)* art 6, para 1.

12 Olena Boryslavska, 'Judicial Reforms in Eastern Europe: Ensuring the Right to a Fair Trial or an Attack on the Independence of the Judiciary?' (2021) 4(1) Access to Justice in Eastern Europe 122, doi:10.33327/AJEE-18-4.1-a000049; Natalia Sakara, 'The Applicability of the Right to a Fair Trial in Civil Proceedings: The Experience in Ukraine' (2021) 4(1) Access to Justice in Eastern Europe 199, doi:10.33327/AJEE-18-4.1-n000053; Maryna Stefanchuk, Oleksandr Hladun and Ruslan Stefanchuk, 'The right of access to a court in Ukraine in the light of the requirements of the Convention on Protection human rights and fundamental freedoms' (2021) 4(1) Access to Justice in Eastern Europe 186, doi:10.33327/AJEE-18-4.1-n000052; Yuriy Prytyka, Iryna Izarova, Liubov Maliarchuk and Olena Terekh, 'Legal Challenges for Ukraine under Martial Law: Protection of Civil, Property and Labour Rights, Right to a Fair Trial, and Enforcement of Decisions' (2022) 5(3) Access to Justice in Eastern Europe 219, doi:10.33327/AJEE-18-5.4-n000329.

13 Basic Principles on the Independence of the Judiciary (adopted 6 September 1985) <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> accessed 21 March 2024.

14 Recommendation no R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (adopted 13 October 1994) <https://www.legal-tools.org/doc/d67e7z/> accessed 21 March 2024.

In para. 3.12 of the Recommendation of the European Network of Councils for the Judiciary in Europe dated 2011:

> *"Lengthy investigations, which could negatively impact upon the career of a judge, should be avoided in disciplinary proceedings".*[15]

In this context, it seems controversial, from the point of view of ensuring reasonable time limits for consideration of cases, to enshrine the provision that the time of the relevant disciplinary proceedings shall not be taken into account in the time of imposing disciplinary sanction on a judge in the national legislation of Ukraine. *In our opinion, under such circumstances, the statutory guarantee of resolving the issue of imposing a disciplinary sanction on a judge within a legally defined period from the moment of its commission or limitation period for imposing a disciplinary sanction is levelled out, and this period becomes unlimited and depends solely on the discretion and capacity of the body that decides on the imposition of such a sanction, which is inconsistent with the guarantees of judicial independence.*

Moreover, notwithstanding the principle of inevitability of legal liability, we believe that such legislative provisions that envisage an unlimited period for deciding on the application of disciplinary sanctions to a judge can, with some probability, be characterised as *discriminatory* as compared with the legislative regulation of the time limits for applying disciplinary sanctions to other legal professionals in the justice system in Ukraine. In particular, according to the Law of Ukraine "On the Public Prosecutor's Office" (para. 4 Art.48):

> *"A decision to impose a disciplinary sanction on a prosecutor or a decision on the impossibility of further holding the position of a prosecutor may be made no later than one year after the date of the offence is committed, without taking into account the time of temporary incapacity or vacation of the prosecutor".*[16]

According to the Law of Ukraine, "On the Bar and Practice of Law", the attorney may be brought to disciplinary liability within one year from the date of committing a disciplinary offence (para. 2 Art. 35).[17]

The previous version of the Law of Ukraine, "On the Judiciary and the Status of Judges", dated 7 July 2010, provided that the disciplinary sanction shall apply to a judge no later than three years from the date of the offence, without considering the period of temporary incapacity for work or vacation (para. 4 Art. 96).[18]

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15 European Network of Councils for the judiciary, *Councils for the Judiciary: Report 2010-2011* (ENCJ 2011) <https://www.encj.eu/images/stories/pdf/workinggroups/report_project_team_councils_for_the_judiciary_2010_2011.pdf> accessed 21 March 2024.

16 Law of Ukraine no 1697-VII of 14 October 2014 'On the Public Prosecutors Office' (amended 1 January 2024) <https://zakon.rada.gov.ua/laws/show/1697-18#Text> accessed 21 March 2024.

17 Law of Ukraine no 5076-VI of 5 July 2012 'On the Bar and Practice of Law' (amended 3 August 2023) <https://zakon.rada.gov.ua/laws/show/5076-17#Text> accessed 21 March 2024.

18 Law of Ukraine no 2453-VI of 7 July 2010 'On the Judiciary and the Status of Judges' (amended 15 April 2020) <https://zakon.rada.gov.ua/laws/show/2453-17#Text> accessed 21 March 2024.

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In this context, it is appropriate to point out the Decision of the Constitutional Court of Ukraine No. 19-rp/2004 dated 1 December 2004, which stated that:

> *"The independence of judges is a constitutional principle of the organisation and functioning of courts; it is ensured, in particular, by a special procedure for bringing judges to disciplinary liability; it is not allowed to reduce the level of guarantees of independence and immunity of judges in the event of the adoption of new laws or amendments to operative laws (subparagraph 1.1, second indent of subparagraph 1.3 of paragraph 1 of the operative part)".*[19]

Indicative is the legal position of the ECHR in the case of Oleksandr Volkov v. Ukraine (App no21722/11), which stated that the limitation period should serve several purposes, in particular:

> *"The Court has held that limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time".*[20]

At the same time, although the ECtHR does not consider it appropriate to indicate how long the limitation period should be in national law, it has eventually recognised the approach that if the period of disciplinary liability in disciplinary cases concerning judges is uncertain, this poses a serious threat to the principle of legal certainty and therefore constitutes a violation of para. 1 Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms[21].

The legislator attempted to provide legal certainty in para. 13 Art. 49 of the Law of Ukraine "On the High Council of Justice," according to which the Disciplinary Chamber shall consider the disciplinary case within ninety days from the date of its opening. This period may be extended by the Disciplinary Chamber for no more than thirty days in exceptional cases if additional verification of the circumstances and/or materials of the disciplinary case is required.[22]

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19 Decision no 19-рп/2004 in Case no 1-1/2004 'On the constitutional petition of the Supreme Court of Ukraine on the official interpretation of the provisions of parts one and two of Article 126 of the Constitution of Ukraine and part two of Article 13 of the Law of Ukraine "On the Status of Judges" (the case on the independence of judges as a component of their status)' (Constitutional Court of Ukraine, 1 December 2004) [2004] Official Gazette of Ukraine 49/3220.

20 *Oleksandr Volkov v Ukraine* (n 8) para 137.

21 ibid, para 139.

22 Law of Ukraine no 1798-VIII of 21 December 2016 'On the High Council of Justice' (amended 30 December 2023) <https://zakon.rada.gov.ua/laws/show/1798-19#Text> accessed 21 March 2024.

In this regard, it should be noted that the Law of Ukraine, "On the High Council of Justice", has been recently amended with provisions establishing the total duration of disciplinary proceedings without considering the period of suspended consideration of the disciplinary case into account.[23]

At the same time, the law[24] does not stipulate the period of suspension of a disciplinary case, not counted in the total duration of disciplinary proceedings, but only the grounds upon which the Disciplinary Chamber may suspend the consideration of a disciplinary case, including the existence of other circumstances that make it impossible to consider such a case.

In view of the foregoing, the enshrining of a non-exhaustive list of circumstances in the law that may be recognised as grounds for suspension of disciplinary proceedings against a judge at the discretion of the competent body is questionable in terms of compliance with the principle of legal certainty in proceedings related to bringing a judge to disciplinary responsibility, as well as guarantees of judicial independence.

To sum up, we believe that the failure to take the period of disciplinary proceedings on imposition of a disciplinary sanction against a judge into account in the limitation period for imposing such a sanction and the establishment of a non-exhaustive list of circumstances that may be recognised as grounds for suspension of disciplinary proceedings against a judge at the discretion of the respective competent body raises the issue of compliance of such legislation with para. 1 of Art. 6 of the Convention in terms of ensuring such a component of the right to a fair trial as a reasonable time for consideration of the case. Moreover, such provisions of the national legislation of Ukraine can, with some probability, be characterised as discriminatory to disciplinary proceedings against judges as compared with the rules of disciplinary procedure for other legal professionals in the justice system in Ukraine, such as prosecutors and attorneys.

3 STANDARD OF PROOF IN DISCIPLINARY PROCEEDINGS AGAINST JUDGES

3.1. "Beyond a reasonable doubt" or "balance of probabilities"

For a long time, Ukrainian legislation has not specified which standard of proof should apply in disciplinary proceedings against judges. As stated in the Summary of the practice for considering disciplinary cases against judges by HCJ and its disciplinary bodies (based on the case records of 2017-2021), developed by a working group established in the HCJ

23 Law of Ukraine no 3378-IX of 6 September 2023 'On Amendments to the Law of Ukraine "On the Judiciary and Status of Judges" and Certain Laws of Ukraine on Changing the Status and Procedure for Forming the Service of Disciplinary Inspectors of the High Council of Justice' [2023] Official Gazette of Ukraine 96/5695.

24 ibid.

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Secretariat,[25] contrary to the procedure codes, no standards of proof were set in disciplinary proceedings against judges, which led to that disciplinary bodies applied different standards.

During the legal analysis of the practice of the HCJ disciplinary bodies, the working group identified cases when the "beyond reasonable doubt" standard, usually used in criminal proceedings, was applied when deciding on the disciplinary liability of judges. At the same time, the Disciplinary Body referred to the decision of the Grand Chamber of the Supreme Court dated 8 October 2019 (case No. 9901/855/18), which states:

> *"When choosing the standard of proof to be used in disciplinary proceedings, and considering the public law nature of disciplinary liability, the standard of "beyond reasonable doubt" should be preferred to the standard of "balance of probabilities". It means that there should be no reasonable doubt as to the authenticity of the fact (the person's guilt). This does not mean that there are no doubts about its authenticity at all, but it does mean that all alternative explanations for the evidence are highly improbable. The "beyond a reasonable doubt" standard is based on a fundamental value of society: it is worse to convict an innocent person than to allow a guilty person to escape punishment; accordingly, a society that values the good name and freedom of everyone should not convict a person when there is reasonable doubt about his or her guilt".*[26]

At the same time, in other cases, the Disciplinary Chambers pointed out that:

> *"The presumption of innocence guaranteed by para. 2 of Art. 6 of the Convention applies to a procedure which is inherently criminal and in which the court concludes that the person is guilty in the criminal law sense (ECtHR judgment dated 11 February 2003 in Ringvold v. Norway', App no34964/97). Therefore, disciplinary proceedings, which, according to para. 1 of Art. 6 of the Convention, are within the scope of the concept of a dispute over rights and obligations of a civil nature (the standards of proof in disciplinary proceedings and criminal proceedings differ significantly), cannot fall under the said guarantee".*[27]

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25 High Council of Justice, *Summary of the Practice of Considering Disciplinary Cases against Judges by the High Council of Justice and its Disciplinary Bodies (Based on the Materials of Cases from 2017-2021)* (HCJ 2023) <https://hcj.gov.ua/sites/default/files/field/uzagalnennya_dysc.praktyky_ost.pdf.crdownload> accessed 21 March 2024.

26 Case no 9901/855/18 (Grand Chamber of the Supreme Court of Ukraine, 8 October 2019) para 74 <https://reyestr.court.gov.ua/Review/84900516> accessed 21 March 2024.

27 Decision no 1956/3dp/15-20 (High Council of Justice, 24 June 2020) <https://hcj.gov.ua/doc/doc/7103> accessed 21 March 2024; Decision no 2932/0/15-20 (High Council of Justice, 22 October 2020) <https://hcj.gov.ua/doc/doc/4154> accessed 21 March 2024.

This legal position was formed in some resolutions of the Grand Chamber of the Supreme Court.[28]

In recent legislative amendments, an attempt has been made to bring legal certainty to the debate on the legal nature of the standard of proof in disciplinary proceedings against judges by supplementing the Law of Ukraine "On the High Council of Justice" with provisions, under which:

> *"The grounds for bringing a judge to disciplinary liability shall be deemed established by the Disciplinary Chamber (High Council of Justice) upon consideration of the disciplinary case if the evidence provided and obtained within the disciplinary proceedings is clear and convincing to confirm the existence of such grounds. Clear and convincing evidence is the evidence that, from the viewpoint of an ordinary reasonable person, in its totality, allows one to conclude that there are or are not circumstances that constitute grounds for bringing a judge to disciplinary liability."*[29]

Experts characterise this standard as similar to the one used in civil proceedings, namely the "balance of probabilities".[30]

In this regard, it should be noted that the concept of the standard of proof has been relatively unknown in Ukrainian law until recently. The experts note that, given that this issue has hardly been addressed in the scientific literature and the absence of any legislative provisions to the contrary, the general expert opinion was that in both civil and criminal cases, the judge must be equally convinced of the truthfulness of the parties' statements. The Civil Procedure Code of Ukraine reiterated the provisions of the Criminal Procedure Code of Ukraine, according to which proof cannot be based on assumptions.[31]

At the same time, the legal concept of "standards of proof" has been developed in both Anglo-American and continental legal systems. Thus, in the common law system, researchers distinguish (at least) two different standards of proof: one for civil cases and the other for criminal cases. The standard of proof in civil cases is called

28 Case no 800/547/17 (П/9901/87/18) (Grand Chamber of the Supreme Court of Ukraine, 25 April 2018) <https://reyestr.court.gov.ua/Review/73837584> accessed 21 March 2024; Case no 800/454/17 (П/9901/141/18) (Grand Chamber of the Supreme Court of Ukraine, 22 January 2019) <https://reyestr.court.gov.ua/Review/79958086> accessed 21 March 2024; Case no 11-39sap20 (Grand Chamber of the Supreme Court of Ukraine, 3 June 2021) <https://reyestr.court.gov.ua/Review/97566010> accessed 21 March 2024.

29 Law of Ukraine № 3378-IX (n 23) art 49, para 16.

30 High Council of Justice (n 25) 25.

31 Bohdan Karnaukh, 'Standards of Proof: A Comparative Overview from the Ukrainian Perspective' (2021) 4(2) Access to Justice in Eastern Europe 34, doi:10.33327/AJEE-18-4.2-a000058.

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"preponderance of the evidence" (or "balance of probabilities" in English law).[32] According to this standard, an assertion (of fact) shall be deemed proven if the factfinder, after considering all the evidence, concludes that the assertion is true, is greater than the probability that it is not. Therefore, this standard is also known as the 50+ standard, which means that to prove a statement, it is sufficient that its probability exceeds 50%.[33]

One of the main differences between the common law and continental law systems is the standard of persuasion applied in either system in civil (non-criminal) cases. In most continental law jurisdictions, it is generally accepted that the standard of persuasion is the same for criminal and civil proceedings. Such a standard is sometimes interpreted as equivalent to the common law standard of proof beyond a reasonable doubt and is called "intime conviction", which is suggested to mean "...an inner, personal, subjective conviction or belief in the truth of the facts in question",[34] "...constituting a method to assess the evidence, entails a concept of conviction which comes close to certainty, leaving no reasonable doubt".[35] At the same time, although it is recognised that absolute certainty is impossible to achieve, the required degree of belief is often expressed in terms of virtual certainty or at least a very high probability.[36] Thus, in general, the continental law system does not differentiate between civil and criminal law by the standard of proof, unlike the Anglo-American system of law.

In Ukrainian law, the approach to the standard of proof, as noted by scholars, is shifting timidly and haphazardly, but still towards the distinction between civil and criminal cases, following the model of common law countries, due, among other things, to the influence of the ECHR case law, which recognises that the standard applicable in criminal cases is "beyond reasonable doubt", and the standard for civil cases should be lower.[37]

Given the above, the legal analysis of para. 16 Art. 49 of the Law of Ukraine "On the High Council of Justice," which enshrines the requirement to establish the grounds for bringing

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32 Kyriakos N Kotsoglou, 'How to Become an Epistemic Engineer: What Shifts When We Change the Standard of Proof?' (2013) 12(3/4) Law, Probability & Risk 275, doi:10.1093/lpr/mgt002; Mark Schweizer, 'The Civil Standard of Proof – What is it, Actually?' (2013) 12 Preprints of the Max Planck Institute for Research on Collective Goods 1-2, doi:10.2139/ssrn.2311210; Richard W Wright, 'Proving Facts: Belief versus Probability' in Helmut Koziol and Barbara C Steininger (eds), *European Tort Law 2008* (Springer 2009) 80, doi:10.1007/978-3-211-92798-4_5.

33 Karnaukh (n 31) 28; Michael S Pardo, 'The Paradoxes of Legal Proof: A Critical Guide' (2019) 99(1) Boston University Law Review 245-6; Vern R Walker, 'Preponderance, Probability and Warranted Factfinding' (1996) 62 Brooklyn Law Review 1079-80; Wright (n 32) 87.

34 Richard W Wright, 'Proving Causation: Probability Versus Belief' in Richard Goldberg (ed), *Perspectives on Causation* (Hart Publishing 2011) 195.

35 Kai Ambos, '"Intime Conviction" in Germany: Conceptual Foundations, Historical Development and Current Meaning' (2023) 4(1) Quaestio Facti 167, doi:10.33115/udg_bib/qf.i1.22839.

36 Karnaukh (n 31) 28; Wright (n 34) 195.

37 Karnaukh (n 31) 35.

a judge to disciplinary responsibility by clear and convincing evidence, which, from the viewpoint of an ordinary reasonable person, in their totality, allow one to conclude that such circumstances exist or not, with a certain probability, gives grounds to refer this legal provision to the "intime conviction" standard, which, in our opinion, is more justified from the point of view of ensuring guarantees of judicial independence.

3.2. Applicability of criminal procedural or civil procedural guarantees under Article 6 of the Convention

As noted above, the standard of proof in disciplinary proceedings against judges is enshrined in Ukrainian legislation due to the established practice of the ECtHR, which has formed legal positions that disciplinary sanctions, unlike criminal sanctions, are usually intended to ensure that members of certain groups act by special rules governing their behaviour, i.e. apply only to a limited number of persons who have a special right. Therefore, they are not subject to one of the criteria applied by the ECtHR to determine cases where criminal charges are involved.[38] These criteria serve as a yardstick for determining the applicability of criminal procedure guarantees under Art. 6 of the Convention, i.e. the applicability of criminal liability, including *legal qualification of the offence under national law; the range of persons (usually an indefinite range of persons) to whom the rule may apply; the severity of the punishment that the person concerned is at risk of incurring.*

According to these criteria, it is obvious that disciplinary proceedings fail to meet them, especially in terms of the first two criteria: *legal qualification of the offence under national law and the range of persons, since the legal norms defining disciplinary liability* apply only to a limited range of persons with special rights. Concerning the third criterion – *the degree of severity of the punishment that the person concerned is at risk of incurring* – the ECtHR set out an exception to the general rule that disciplinary proceedings do not meet the criteria for the applicability of criminal liability in Engel and Others v. the Netherlands (App no. 5100/71),[39] in which the ECtHR recognised disciplinary proceedings against persons liable for military service as a criminal charge within the meaning of the Convention because the relevant offences were punishable by long-term imprisonment.

At the same time, in the case of Philis v. Greece (no. 2) (App no. 19773/92), the ECtHR stated that disciplinary proceedings concerning the right of a person to continue to carry out professional activities are classified as civil rights disputes within the meaning of para. 1 of Art. 6 of the Convention.[40] This approach is applied by the ECtHR to proceedings in various

38 *Weber v Switzerland* App no 11034/84 (ECtHR, 22 May 1990) para 33 <https://hudoc.echr.coe.int/eng?i=001-57629> accessed 21 March 2024.

39 *Engel and Others v the Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976) para 81 <https://hudoc.echr.coe.int/tur?i=001-57479> accessed 21 March 2024.

40 *Philis v Greece* (no 2) App no 19773/92 (ECtHR, 27 June 1997) para 45 <https://hudoc.echr.coe.int/eng?i=001-58049> accessed 21 March 2024.

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professional disciplinary bodies, confirming its applicability to disciplinary proceedings against judges in Baka v. Hungary (App no20261/12).[41] And in the case of Ramos Nunes de Carvalho e Sá v. Portugal, the ECtHR held a legal position that proceedings in a disciplinary body should provide not only procedural guarantees but also measures for proper fact-finding when the applicant may be subjected to severe punishments.[42]

Regarding the classification of an act as a disciplinary or criminal offence at the national level, the ECHR has formed a legal position in the leading case Engel and Others v. the Netherlands, according to which the Convention allows states to establish a distinction between criminal and disciplinary law in the exercise of their functions as guardians of the public interest provided that such freedom does not entail results incompatible with the purpose and object of the Convention.[43]

At the same time, the expert community expresses reservations that:

> *"...there are no convincing reasons for sanctions, such as suspension or dismissal from the exercise of the judicial profession, to be found "non-criminal" in nature".*[44]

Thus, the ECHR's approach to disciplinary proceedings against judges has changed, departing from its previous practice and excluding disciplinary proceedings against judges from the scope of application of criminal procedure guarantees provided for in Article 6 of the Convention. Such an approach has not been unanimously accepted due to the lack of logical arguments that would convince that disciplinary sanctions aimed solely at regulating a particular profession and applied only to certain persons engaged in such a profession cannot be criminal.[45] Moreover, the expert community emphasises that such disciplinary proceedings should provide for the highest standards of procedural guarantees, as there is always a risk that they will be arbitrarily used or even abused to exert undue pressure on judges, which necessitates a review of the ECtHR's legal position, given the importance of protecting judicial independence in democratic societies.[46]

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41 *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016) paras 104, 105 <https://hudoc.echr.coe.int/fre?i=001-163113> accessed 21 March 2024.

42 *Ramos Nunes de Carvalho E Sá v Portugal* App nos 55391/13, 57728/13, 74041/13 (ECtHR, 6 November 2018) paras 197, 198 <https://hudoc.echr.coe.int/eng?i=001-187507> accessed 21 March 2024.

43 *Engel and Others v the Netherlands* (n 39).

44 Lorena Bachmaier, 'Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court: Pragmatism or another Twist towards Further Confusion in Applying the Engel Criteria?' (2022) 4 Eucrim 263, doi:10.30709/eucrim-2022-018.

45 Pedro Caeiro, 'The Influence of the EU on the 'Blurring' Between Administrative and Criminal Law' in Francesca Galli and Anne Weyembergh (eds), *Do Labels Still Matter? Blurring Boundaries Between Administrative and Criminal Law. The Influence of the EU* (European Studies, Editions de l'Université de Bruxelles 2014) 187.

46 Bachmaier (n 44) 264.

4 DISCIPLINARY PROCEEDINGS AGAINST JUDGES IN UKRAINE: RELEVANT STATISTICS

In the Annual Report on the Status of Judicial Independence in Ukraine for 2022,[47] the main factor that made it impossible to ensure guarantees of judicial independence regarding the special procedure for bringing judges to disciplinary responsibility, as defined by the relevant legislation, was the absence of the HCJ's competent composition and the ability of its disciplinary bodies to function for a long time in 2022.

The necessity of unblocking the disciplinary procedure against judges, optimising the grounds for disciplinary liability of judges, effectively addressing the problem of accumulation of disciplinary complaints against judges' misconduct, and developing and approving criteria for prioritising disciplinary cases were stated among the topical issues of the judiciary outlined in the same document to be addressed urgently.[48]

The problem outlined above is caused by legislative changes, which suspended the HCJ's consideration of disciplinary complaints and appeals against decisions in disciplinary cases against judges from 5 August 2021 to 1 November 2023.

According to the information and analytical report on the HCJ's activities in 2023, from the date of resumption of distribution of disciplinary complaints from 1 November to 31 December 2023, 14,004 disciplinary complaints were distributed. These included complaints whose disciplinary proceedings were not completed by the previous HCJ and complaints received from 5 August 2021 to 31 December 2023. Of these, 2,125 of which were fully completed in 2023.[49] In January-February 2024, the HCJ considered another 1,921 complaints and received another 1,525 disciplinary complaints.[50]

In this context, the expert community quite rightly notes that the above statistics demonstrate the need to address the issue of a significant number of pending disciplinary complaints against judges and confirm the difficulty of bringing judges to disciplinary responsibility, in particular in the context of regulatory provisions that allow for an expanded interpretation of its grounds and unlimited discretion in its

47 High Council of Justice, *On the State of Ensuring the Independence of Judges in Ukraine: Annual Report for 2022* (HCJ 2023) <https://hcj.gov.ua/page/shchorichna-dopovid-pro-stan-zabezpechennya-nezalezhnosti-suddiv-v-ukrayini> accessed 21 March 2024.

48 ibid 73.

49 High Council of Justice, *Information and Analytical Report on the Activities of the High Council of Justice in 2023* (HCJ 2024) <https://hcj.gov.ua/statistics/informaciyno-analitychnyy-zvit-pro-diyalnist-vyshchoyi-rady-pravosuddya-u-2023-roci> accessed 21 March 2024.

50 'Work of the High Council of Justice' (*High Council of Justice*, 2024) <https://hcj.gov.ua> accessed 21 March 2024.

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application, which may lead to negative consequences of a significant administrative burden of the disciplinary body.[51]

In 2023, the Directorate of Justice and Criminal Justice of the Ministry of Justice of Ukraine proposed to give feedback on some issues of improving the legal regulation of certain provisions on the disciplinary liability of judges. The feedback was collected from stakeholders, including judges, representatives of the judiciary, representatives of other public authorities, lawyers, law firms and practising lawyers, private notaries, NGOs and professional associations, representatives of scientific and expert institutions whose professional activities and functional focus are related or tangential to the judiciary and the status of judges. According to the results of this survey, 58.82% of respondents upheld that there was a need to further improve and simplify the procedures for disciplinary proceedings against judges,[52] which, in my opinion, deserves support and should set the prospects for further research.

5 CONCLUSIONS

One of the crucial factors of the European integration progress of the Ukrainian state is the achievement of its declared goal of building a sustainable justice system in Ukraine, the achievement of which is assessed through the prism of the effectiveness of the organisation and functioning of its various legal institutions, including the disciplinary responsibility of judges and prosecutors in Ukraine.

The current state of legislative regulation of disciplinary proceedings against judges is characterised by several defects that have caused the so-called crisis of the HCJ's disciplinary function, entailed by changes in the legislative regulation of its disciplinary function, which led to the temporary suspension of the exercise of this function for more than two years, and the accumulation of a significant number of pending disciplinary complaints.

One of the controversial legislative provisions that raise the issue of legislation compliance with para. 1 of Art. 6 of the Convention, which guarantees the right to a fair trial within a reasonable time, is the failure to take the period of disciplinary proceedings on imposition of a disciplinary sanction against a judge into account in the limitation period for the imposition of such a sanction, as well as the consolidation of a non-exhaustive list of circumstances that may be recognised as grounds for suspension of disciplinary proceedings against a judge at the discretion of the body conducting the disciplinary proceedings. Such legislative provisions are likely to be characterised as discriminatory to

51 Ministry of Justice of Ukraine, *Monitoring Report 2023* (Pravo-Justice, Directorate of Justice and Criminal Justice 2024) 46, 59 <https://www.pravojustice.eu/ua/post/minyust-prezentuvav-monitoringovij-zvit-2023> accessed 21 March 2024.

52 ibid 61.

disciplinary proceedings against judges in comparison with the rules of disciplinary procedure for other legal professionals in the Ukrainian justice system, such as prosecutors and lawyers. Given this, the operative legislation of Ukraine requires achieving a certain balance between ensuring the principle of inevitability of legal liability and the principles of legal certainty and reasonableness of the timeframe for consideration of such cases.

As for standards of proof in disciplinary proceedings against judges, Ukrainian legislation has not specified for a long period which standard should apply in such proceedings, which led to disciplinary bodies applying different standards. In some cases, the disciplinary bodies applied the standard of proof "beyond reasonable doubt", usually used in criminal proceedings, while in others – denied the possibility of applying such a standard in these proceedings, given that the criminal law guarantees set out in Article 6 of the Convention cannot apply to disciplinary proceedings covered by the concept of a dispute over rights and obligations of a civil nature.

The current legal regulation of disciplinary proceedings against judges points to a shift in the approach to the standard of proof towards differentiating civil and criminal cases due, among other things, to the influence of the ECtHR case law, which recognises that the standard applicable in criminal cases is "beyond reasonable doubt", while the standard for civil cases should be lower, in particular, "balance of probabilities" or "intime conviction", which seems more justified to be applied in terms of ensuring guarantees of judicial independence.

The ECHR's approach to disciplinary proceedings against judges has changed, now excluding such proceedings from the scope of application of criminal procedural guarantees set out in Art. 6 of the Convention. This shift has been met with mixed reactions from the expert community. In this context, the requirement to ensure that disciplinary proceedings against judges are subject to the highest standards of procedural safeguards deserves support, given the importance of protecting judicial independence in democratic societies.

The current statistical data on disciplinary proceedings against judges in Ukraine shows the need to address the issue of a significant number of pending disciplinary complaints against judges and to address the defects in the legislation allowing for an expanded interpretation of the grounds for disciplinary liability of judges and unlimited discretion of disciplinary bodies in applying such legislation, which leads to the administrative burden.

Thus, the current state of the legislation on disciplinary proceedings against judges requires further improvement aimed at simplifying its procedures while guaranteeing reasonable time limits for consideration of such cases, as well as ensuring guarantees of judicial independence in the regulation of the standard of proof in these proceedings, which should set prospective areas for further research.

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Summary: 1. Introduction. – 2. The time limits for imposing disciplinary sanctions on judges: the European standards and Ukrainian practices. – 3. The standard of proof in disciplinary proceedings against judges. – *3.1. "Beyond a reasonable doubt" or "balance of probabilities".* – 3.2. *The applicability of criminal procedure or civil procedure guarantees.* – 4. The process of disciplinary proceedings against judges in Ukraine: relevant statistics. – 5. Conclusions.

Keywords: *disciplinary proceedings against judges, judiciary, disciplinary authorities, access to justice, legal certainty, defects in legislation, time limits for imposing disciplinary sanctions on judges, standard of proof.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДИСЦИПЛІНАРНЕ ПРОВАДЖЕННЯ ЩОДО СУДДІВ В УКРАЇНІ: АКТУАЛЬНІ ПИТАННЯ ЗАКОНОДАВСТВА

Марина Стефанчук*

АНОТАЦІЯ

Вступ. *У роботі висвітлено деякі актуальні питання законодавства України у сфері дисциплінарного провадження щодо суддів. Особливу увагу приділено правовому регулюванню строків накладення дисциплінарних стягнень на суддів та стандартам доказування у дисциплінарному провадженні щодо суддів, а також передумовам і тенденціям, що зумовлюють їх формування.*

Це дослідження було здійснено, щоб надати відповіді на такі запитання: як обрані підходи до реформування Вищої ради правосуддя в Україні призвели до кризи дисциплінарної функції цього органу суддівського врядування? Які були передумови для накопичення великої кількості нерозглянутих дисциплінарних скарг на суддів та перевантаження дисциплінарного органу? Які законодавчі положення стосовно дисциплінарного

провадження проти суддів потребують концептуального обґрунтування для того, щоб спростити процедуру? Чи встановлені законом строки притягнення суддів до дисциплінарної відповідальності не суперечать критеріям розумного строку розгляду справи? Чи існує єдність у законодавчих підходах до встановлення таких строків для прокурорів та адвокатів як представників суміжних правових інституцій у системі українського правосуддя? Як змінилися підходи до формування стандарту доказування у дисциплінарних провадженнях щодо суддів та які чинники на це вплинули? Які тенденції розвитку законодавства стосовно дисциплінарного провадження щодо суддів? Чи сприятимуть вони досягненню мети спрощення процедур такого провадження, якщо гарантуватимуть розумні строки розгляду цих справ та забезпечать незалежність суду?

Метою статті є концептуальне обґрунтування законодавчих підходів до дисциплінарного провадження щодо суддів в Україні, виявлення недоліків законодавства, що спричинили кризу дисциплінарної функції Вищої ради правосуддя, та внесення пропозицій щодо забезпечення високої ефективності діяльності цього правового інституту з урахуванням міжнародних стандартів і найкращих практик.

***Методи.** Для досягнення зазначених цілей було застосовано загальнонаукові та спеціальні наукові методи дослідження. Концепція даної роботи підкріплена фундаментальними літературними джерелами, зокрема науковими працями, законодавчими актами, міжнародними конвенціями та судовою практикою. Відповідно до характеру проблеми, порушеної в цій статті, було використано науково-дослідні роботи, інформацію, аналітичні звіти та узагальнення практики відповідних авторитетних організацій.*

Методологічна база ґрунтується на таких методах, як аналіз, синтез та порівняння. Метод аналізу допоміг уважно вивчити відповідні законодавчі положення та судову практику, тоді як метод синтезу використовувався як частина порівняльних методів. Таким чином, для досягнення мети дослідження було проаналізовано українське законодавство щодо особливостей реформування Вищої ради правосуддя на даному етапі його розвитку та особливостей дисциплінарного провадження щодо суддів в Україні. Це дозволило окреслити підходи, що призводять до кризи дисциплінарної функції цього органу, виявити передумови накопичення великої кількості нерозглянутих дисциплінарних скарг на суддів, висвітлити положення законодавства у цій сфері, які потребують концептуального обґрунтування. Порівняльно-правовий аналіз дисциплінарних проваджень щодо суддів, прокурорів та адвокатів в Україні дозволив виявити відсутність єдиного концептуального підходу законодавця стосовно цього та наявність дискримінаційних ознак у дисциплінарних провадженнях щодо суддів. Правовий аналіз практики Європейського суду з прав людини, здійснений у межах дослідження, дозволяє зробити висновок про зміну правової позиції цього суду щодо застосування кримінально-процесуальних гарантій Конвенції до справ про дисциплінарну відповідальність суддів.

У дослідженні висвітлено доктринальні підходи до формування правового поняття «стандарти доказування», узагальнення яких дозволило згрупувати їх за ознаками, що притаманні англо-американській та континентальній системам права. Правовий аналіз цих підходів дозволив виявити тенденцію розвитку законодавства стосовно дисциплінарного провадження щодо суддів, суперечливість якої полягає в тому, що в

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українському законодавстві відбувається зміщення підходу до стандарту доказування в бік розмежування цивільних і кримінальних справ, за зразком країн загального права, хоча загалом для континентальної системи права така диференціація не характерна.

Використання новітніх емпіричних даних сприяло належній аргументації висновків автора. Наприклад, у дослідженні були використані матеріали Узагальнення практики розгляду Вищою радою правосуддя та її дисциплінарними органами дисциплінарних справ щодо суддів, правовий аналіз яких показав, що в дисциплінарних провадженнях щодо суддів задіюються різні стандарти доказування та немає чіткого законодавчого врегулювання. У дослідженні використано статистичні дані Вищої ради правосуддя, наведені у звіті «Про стан забезпечення незалежності суддів в Україні» за 2022 рік, а також в інформаційно-аналітичному звіті про діяльність цього органу у 2023 та 2024 роках станом на час проведення цього дослідження, які ілюструють кількісні показники та динаміку розгляду дисциплінарних скарг на суддів, що дало змогу перевірити гіпотезу про те, чи сприяють законодавчі норми досягненню розумних строків розгляду таких справ та забезпеченню гарантій незалежності суддів.

***Результати та висновки.** Встановлено, що законодавче регулювання дисциплінарного провадження щодо суддів в Україні на сьогодні має низку недоліків, які спричинили так звану кризу дисциплінарного органу та накопичення залишених без розгляду дисциплінарних скарг на суддів. Було аргументовано, що чинне законодавство, у якому встановлено строки давності для накладення дисциплінарних стягнень на суддів, вимагає певного балансу для того, щоб забезпечити принцип невідворотності юридичної відповідальності, принципи правової визначеності та розумних строків. Встановлено, що сучасне правове регулювання дисциплінарного провадження щодо суддів вказує на зміну підходів до стандарту доказування в бік розмежування цивільних і кримінальних справ, що зумовлено, у тому числі, впливом прецедентної практики Європейського суду з прав людини. Наголошено на доцільності застосування стандарту «intime conviction» та найвищих стандартів процесуальних гарантій до суддів у дисциплінарному провадженні з погляду забезпечення незалежності суддів. Визначено перспективні тенденції розвитку законодавства щодо дисциплінарного провадження проти суддів у напрямі спрощення процедури з одночасним забезпеченням розумних строків розгляду таких справ, а також гарантій незалежності суддів на шляху до досягнення належного рівня доказування.*

***Ключові слова:** дисциплінарне провадження щодо суддів, судочинство, дисциплінарні органи, доступ до правосуддя, правова визначеність, недоліки законодавства, строки накладення дисциплінарних стягнень на суддів, стандарт доказування.*

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Research Article

THE IMPACT OF THE MATRIMONIAL PROPERTY REGIME ON COMMERCIAL COMPANIES ACCORDING TO ALBANIAN LEGISLATION

Eniana Qarri* and Xhensila Kadi

ABSTRACT

Background: *The purpose of this study is to examine the interaction between the legal discipline of matrimonial property regimes and the commercial activities of spouses that are established before or during marriage. It aims to investigate how the legal community impacts commercial companies, specifically in the hypothesis where the shareholder of the company is married. There is ongoing debate within legal circles about whether shares of a commercial company established by one spouse during marriage or acquired through a legal transaction are part of the legal community. Regarding this matter, several issues arise: whether the participation in the company's initial capital is governed by community administration rules, which is the legal nature of shares acquired by one spouse, and how the marital community regime interplays with commercial legislation. Another issue that has engaged legal doctrine is whether the spouse of a shareholder is recognised as a shareholder and can participate in the company administration. Albanian Family Code lacks specificity on shares, mainly addressing small family businesses. The study of the interaction of these two disciplines aims to assist jurisprudence because, despite some cases of the Supreme Court and the Constitutional Court in recent years, this is still a relatively new field for Albanian doctrine and jurisprudence.*

Methods: *The research methodology adopted for this paper employs a multi-faceted approach, integrating desk research, legal analysis, case law review, and a comparative study. It encompasses an examination of relevant national legislation, as well as foreign legislation from civil law tradition countries such as France and Italy. Furthermore, European soft law, notably the principles of the European Commission of Family Law (CEFL) focusing on matrimonial property issues, has been reviewed.*

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Our research methodology includes gathering and analysing existing studies and academic literature on matrimonial property regimes. To better understand the norms of the Family Code regarding matrimonial property regimes, we will analyse Italian and French doctrine and jurisprudence, as well as the legal systems based on which the Albanian Family Code has been drafted.
It should be emphasised that while this paper's primary aim is not solely comparative analysis, it strives to assist in better understanding and implementation of the legal community regime as the most used regime by spouses in practice. Also, a comprehensive comparative analysis has been conducted, comparing Albanian legislation and the CEFL Principles, to identify key similarities, differences, and potential areas for enhancement within legal frameworks. Moreover, the jurisprudence of both Albanian and foreign High courts has been extensively utilised to enrich the analysis and provide insights into practical applications of legal principles.
Results and Conclusions: *The solution to the abovementioned issues depends on the company's legal structure and articles of participation rules and requires a combined interpretation of matrimonial property regimes and commercial law. In this combined interpretation of the rules, protecting the rights and interests of all involved subjects, the interests of the spouses and those of the commercial company as a legal entity is crucial.*

1 INTRODUCTION

The interaction between commercial legislation and matrimonial property legislation naturally raises the discussion of the influence that legal community norms have on commercial companies when one of the company's shareholders is married.

Since the 1990s, following changes in Albania's political-economic system, especially in recent years, economic-commercial relations between spouses have increasingly become the subject of legal disputes. The Family Code 2003[1] marks the first explicit regulation of the legal regime governing commercial activities in relation to the legal community. The Family Code does not explicitly regulate the shares acquired by one of the spouses during marriage. Therefore, the analysis will be based on the norms of the Family Code regulating the legal community and the provisions of the law "On Entrepreneurs and Commercial Companies".[2] The interpretation of these two legal disciplines must be based on the legislator's intent and the principles that have inspired their legal regulation.

It appears the interpretative process seeks to achieve a fair balance between competing interests, including the property interests of the family (interests of the legal community) and the interests surrounding the existence and survival of the commercial company, the

1 Law of the Republic of Albania no 9062 of 8 May 2003 'Family Code' [2003] Official Journal 49/1907 <http://qbz.gov.al/eli/ligj/2003/05/08/9062> accessed 23 March 2024.

2 Law of the Republic of Albania no 9901 of 14 April 2008 'On Entrepreneurs and Commercial Companies' [2008] Official Journal 60/2631 <http://qbz.gov.al/eli/ligj/2008/04/14/9901> accessed 23 March 2024.

freedom of economic activity of each spouse (a constitutional right), the interests of the creditors of the entrepreneur spouse, and, to a macro level, the development and economic stability of the country. The coordinated interpretation of these two legal disciplines presents difficulties due to the drafting of commercial and family legislation based on legal models of different states and their drafting at different times.

Based on Art. 66 of the Family Code,[3] spouses have the right to choose, through the marital contract, the matrimonial property regime they desire. The legal regime will only apply in the absence of contractual regulation of the matrimonial property regime.

The legal community regime is based on the French and Italian models and considers the Family Code of the People's Socialist Republic of Albania of 1965 (entered into force on 1 January 1966).[4]

Based on the socio-economic conditions of Albanian society, a community of acquisitions regime, known as the "legal community regime", has been chosen as the legal regime. This regime recognises the equal participation (contribution) of both spouses in the acquisition and increase of wealth during marriage. At its core lies the principle of marital solidarity, which equally values the monetary contribution with the in-kind contribution of each spouse.[5] The legal community regime makes both spouses joint owners in equal shares of the property acquired during marriage and gives them equal rights in the administration of common property.[6]

The property of the spouses under the legal community regime consists of the property for which the spouses are joint owners and the personal property of each of them. The spouses are joint owners of:[7]

a) property acquired by both spouses, together or separately, during marriage;
b) income and gains from the separate activity of each spouse during marriage, if not consumed until the end of joint ownership;
c) the fruits of each spouse's personal property, which are received and not consumed until the end of joint ownership;
d) commercial activities created during marriage.[8]

3 Law of the Republic of Albania no 9062 (n 1) art 66.
4 Tefta Zaka, 'Kodi i ri i Familjes - Një hap në zhvillimin e marrëdhënieve familjare' (2004) 2 Jeta Juridike 11.
5 Cesare Massimo Bianca, 'Il regime della comunione legale' in CM Bianca (ed), *La Comunione Legale* (Giuffré 1990) 2.
6 ibid 5.
7 Law of the Republic of Albania no 9062 (n 1) art 74.
8 The Family Code also contains other provisions regarding commercial activities that are personal property of one of the spouses. According to the second paragraph of Art. 74, if the commercial activity belonged solely to one of the spouses before marriage but is managed by both spouses during marriage, the community only includes the profits and the increase in production. Meanwhile, Art. 75 provides that the property created during marriage, designated for the management of the commercial activity of one of the spouses and its production additions, are subject to joint ownership only if they exist as such at the time of marriage dissolution.

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According to Albanian doctrine, based on the moment of entry of the property into the legal community, the common property (mentioned above) is divided into two categories: (i) actual community, property provided for in Art. 74 (a) and (ç); and (ii) eventual community, property provided for in Art. 74 (b) and (c).[9] Upon the actual community property, spouses become joint owners immediately upon the acquisition of property by each of them. On the other hand, for eventual community property, spouses become joint owners only if this property is unconsumed at the end of the legal community.

On the other hand, under the legal community regime, each spouse has personal property, which they enjoy the right of possession, enjoyment, and disposal independently of the other spouse. The personal property of each spouse consists of:[10]

a. assets, which before marriage was in the joint ownership of the spouse with other persons or against which he/she held a real right of use;
b. assets acquired during marriage through donation, inheritance, or bequest when the act of donation or testament does not specify that they are given in favour of the community;
c. strictly personal belongings of each spouse and properties acquired as accessories to personal assets;
d. necessary tools for the exercise of the profession of one of the spouses, except those designated for the administration of a commercial activity;
e. assets acquired from compensation for personal damages, except for income derived from a pension obtained due to partial or total loss of work capacity;
f. assets acquired from the alienation of the above-mentioned personal assets;
g. their exchange, when expressly declared in the act of acquisition.

The category of personal assets provided for in Art. 77 of the Family Code is an exhaustive list. There are no other personal assets than those listed in Art. 77. If the property is acquired during marriage and does not belong to the category of personal assets, then it is presumed to belong to the community.[11]

The legal community does not represent a separate legal entity independent of the spouses; it has no legal personality. Spouses cannot alienate their ideal share, not because this right belongs to the community, but because in the hypothesis of alienating the ideal share by one spouse to a third party, this would result in the termination of the community for the alienated property and the creation of a joint ownership between the third party and the other spouse. In the legal community regime, the rights and obligations belong to the spouses, not the community.[12]

9 Sonila Omari, *E Drejtë Familjare* (Morava 2015) 95.
10 Law of the Republic of Albania no 9062 (n 1) art 77.
11 For this opinion see: Omari (n 9) 105.
12 Bianca (n 5) 8-9.

Community of acquisitions is the default regime in countries of the Romanic legal tradition such as France, Italy, Belgium, Spain, Portugal, and in most of the Central and Eastern European countries.[13] The Italian legal model, which is followed *mot a mot* from Albanian legislator, is presented slightly differently. According to this model, the property of spouses in the community regime is divided into community property, personal property, and eventual property (*comunità di residuo*).[14] This is the reason why handling one of the most controversial issues in the practice of the community of acquisitions regime, such as the legal nature of the participation of one of the spouses in commercial partnerships during marriage, is of interest to Albania and to the countries of Central and Eastern Europe too. Given that this regime has been implemented in Italy and France since the mid-1970s and 1980s, these countries' doctrinal debates and jurisprudence can also assist legal practitioners in Albania and Central and Eastern Europe when facing the same issues.

2 A COMPARATIVE ANALYSIS BETWEEN ALBANIAN LEGISLATION AND PRINCIPLES OF EUROPEAN COMMISSION ON FAMILY LAW REGARDING MATRIMONIAL PROPERTY REGIMES

Due to numerous divergences in the field of marriage, inheritance, and specifically in the field of matrimonial property regimes,[15] there are no unified or harmonised substantive norms for these issues at the European level. These divergences are rooted in the cultural, economic, social, religious, and political values of European countries.[16] As a result, it is a challenge to create uniform mandatory rules in the field of family law for Europe.[17] The European Union has unified the rules of private international law in the field of matrimonial property regimes with the adoption of 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.[18] This Regulation is applicable to cross-border marriages only.

13 Jens M Scherpe, 'Financial Consequences of Divorce in a European Perspective', in JM Scherpe (ed), *European Family Law*, vol 3: *Family law in a European Perspective* (Edward Elgar 2016) 151; Frédèrique Ferrand, 'The Community of Acquisitions Regime' in K Boele-Woelki, N Dethloff and W Gephart (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (European Family Law Series, Intersentia 2014) 38.

14 Scherpe (n 13) 151.

15 For more about these divergencies see: ibid 148.

16 Katharina Bolele-Woelki, 'The Impact of the Commission on European Family Law (CEFL) on European Family Law' in JM Scherpe, *European Family Law*, vol 1: *The Impact of Institutions and Organisations on European Family Law* (Edward Elgar 2016) 221.

17 ibid 230.

18 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' [2016] OJ L 183/1 <http://data.europa.eu/eli/reg/2016/1103/oj> accessed 23 March 2024.

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In recent years, the Commission on European Family Law (CEFL)[19] has undertaken significant initiatives to create unified substantive norms in the field of family law. Established on 1 September 2001, CEFL comprises a group of 26 renowned experts in family and comparative law from all European Union countries and some other European countries. Its primary goal is the harmonisation of family law in Europe through comparative analyses aimed at identifying commonalities and better legal solutions provided by the national family law of different European countries. For this purpose, CEFL has published four sets of *Principles*: 1) Principles on Divorce and Maintenance Between Former Spouses (2004); 2) Principles on Parental Responsibilities (2007); 3) Principles on Property Relations between Spouses (2013); 4) Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in *de facto* Unions (2023).[20] The purpose of these principles is their use in the process of harmonisation of family law in Europe.[21] Although the CEFL rules, known as *Principles*, are non-binding instruments, they constitute important acts that aim to assist European countries in reforming and modernising family law.[22] These principles represent model legal rules.[23]

The 2013 publication by CEFL, titled "Principles of European Family Law Regarding Property Relations Between Spouses,"[24] consists of three chapters covering all aspects of matrimonial property relations and contains 58 principles. Each principle consists of four elements: the text in English, French, and German, a description of international and European instruments in the field of matrimonial property regimes, a comparative overview of 26 European jurisdictions, and explanations for each principle.[25]

The first chapter, known as the general part of the *Principles*, governs "general rights and duties" of spouses, such as the equality of spouses, legal capacity of spouses, their duty to contribute to the needs of the family, the protection of the family home and household

19 Hereinafter we will refer to the Commission on European Family Law with the acronym CEFL. All information about the CEFL on the official website (ceflonline.net).
20 For a brief analyse of this group of four Principles see: 'Principles of European Family Law' (*CEFL Commission on European Family Law*, nd) <https://ceflonline.net/principles/> accessed 23 March 2024.
21 Katharina Bolele-Woelki, 'General Rights and Duties in the CEFL Principles on Property Relations between Spouses' in K Boele-Woelki, N Dethloff and W Gephart (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (European Family Law Series, Intersentia 2014) 6; Bolele-Woelki (n 16) 218.
22 Bolele-Woelki (n 16) 209-10.
23 ibid 216.
24 Katharina Boele-Woelki and other, *Principles of European Family Law Regarding Property Relations Between Spouses* (European Family Law Series, Intersentia 2013); CEFL, 'Principles of European Family Law Regarding Property Relations Between Spouses' in K Boele-Woelki and other, *Principles of European Family Law Regarding Property Relations Between Spouses* (European Family Law Series, Intersentia 2013) 345-56.
Hereinafter we will refer to the CEFL Principles on Property Relations Between Spouses as the *Principles*.
25 Bolele-Woelki (n 21) 4.

goods, the protection of the leased family home, the duty of spouses to inform each other about their assets and obligations, the right of spouses to represent each other, and the spouses right to enter into matrimonial property agreements.[26] These rights and duties, known in legal doctrine as primary regime, are mandatory and apply irrespective of the matrimonial property regime that governs the property relations between spouses, whether contractual or default.[27]

Similarly, the Albanian legislation, like the 26 legislations studied by CEFL,[28] foresees several rights and obligations for spouses that apply *ex lege* upon marriage, regardless of the matrimonial property regime, such as equality of spouses, the obligation of spouses to contribute to the needs of the family, protection of the family home and household goods, joint responsibility for obligations related to family maintenance and the upbringing and education of children, etc. The Albanian Family Code aligns with the principles provided in the First Chapter of the CEFL *Principles*. However, unlike CEFL Principles, the Albanian Family Code regulates only the protection of the family home, which is the private property of the spouses but does not provide for the protection of the leased family home.

The second chapter governs the matrimonial property agreements. Future spouses can choose their matrimonial property regime before marriage or modify it during marriage.[29] These *Principles* aim to find a fair balance between spouses' party autonomy to make property agreements and the need to protect each spouse and third parties.[30] The *Principles* provide some legal conditions for the validity of the agreements such as the notarial deed; they foresee obligation for notaries; regulate the effects of the agreements against third parties; and prescribe the duty of spouses to disclosure to each other their assets before entering into a matrimonial property agreement. In cases of exceptional hardship, the *Principles* give authority to the competent authority (ex. court) to set aside or adjust a matrimonial property agreement[31] (Principle 4:15).

Unlike the legislation of the socialist state,[32] the Albanian Family Code provides for the right of spouses to choose the matrimonial property regime (Art. 66 of the Family Code). Similarly to the CEFL *Principles*, the Family Code of Albania stipulates several conditions for concluding the matrimonial property agreement, such as the notarial form.

26 CEFL (n 24) principles 4:1-4:9, 345-7.
27 Bolele-Woelki (n 21) 12.
28 ibid 12.
29 CEFL (n 24) principles 4:10-4:15, 347-6.
30 Nigel Lowe, 'Matrimonial Property Agreements', in K Boele-Woelki, N Dethloff and W Gephart (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (European Family Law Series, Intersentia 2014) 14.
31 ibid 20-1.
32 The Albanian Family Code of the People's Republic of Albania of 1965 and the Albanian Family Code of the People's Socialist Republic of Albania of 1982, together with the Albanian Civil Code of the People's Socialist Republic of Albania of 1981, did not allow spouses the possibility of choosing a matrimonial property regime by agreement.

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Differently from the *Principles* of CEFL, the Albanian Family Code does not provide for the duty of spouses to disclosure and does not permit the judicial authority to intervene in cases of exceptional hardship. Another distinction between CEFL *Principles* and Albanian Family Code is that the latter foresees that a minor spouse who has entered marriage has no right to enter into a matrimonial property agreement (Art. 70 of the Albanian Family Code). It also foresees that spouses during marriage can change their matrimonial property regime only after two years have passed from the application of the first regime (Art. 72 para. 1 of the Albanian Family Code). To summarise, the spouses' party autonomy to enter matrimonial property regimes is wider in the CEFL Principles compared to the Albanian Family Code.

The third chapter governs the default matrimonial property regime applicable if spouses have not agreed otherwise. Considering that European states have divergences among them regarding the type of legal regime, the CEFL *Principles* have drafted two models of property regimes:

a) participation in acquisition regime,[33] similar to German, Swiss and Greek legal regimes;[34] and
b) community of acquisition regime,[35] similar to the legal regime in France, Italy, Belgium, Spain, etc.[36]

CEFL decided to draft two default regimes because of the lack of uniformity in European countries regarding the default regime. European countries have two different default regime models: the community of property model and the participation in gains (acquisition) model.[37]

In the community of acquisitions regime, governed by the CEFL *Principles*, the property of spouses is divided into three groups: the community property, the personal property of the husband, and the personal property of the wife.[38] The CEFL *Principles* foresee rules regarding the composition of community property and personal property of each spouse, rules for the community debts and separate debts of each spouse and their recovery, rules of administration of community property and rules regarding the dissolution and liquidation of community property.

The default regime governed by the Albanian Family Code, the community of acquisitions regime, known by legal doctrine as legal community,[39] is similar to the CEFL *Principles*'

33 CEFL (n 24) principles 4:16-4:32, 348-51.
34 Dieter Martiny, 'The Participation in Acquisition Regime' in K Boele-Woelki, N Dethloff and W Gephart (eds), *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (European Family Law Series, Intersentia 2014) 26.
35 CEFL (n 24) principles 4:33-4:58, 351-56.
36 Ferrand (n 13) 38.
37 ibid 39.
38 ibid 42.
39 Omari (n 9) 92.

community of acquisitions regime. Arts. 74 and 77 of the Family Code, which regulate the community assets and spouses' personal property, are almost identical to Principles 4:35 and 4:36 of the CEFL *Principles*. However, there exists a slight difference. Unlike the Albanian Family Code, the CEFL *Principles* do not expressly govern the participation of spouses in commercial companies during marriage.

3 PARTICIPATION OF ONE OF THE SPOUSES IN A COMMERCIAL COMPANY

There are several discussions in legal doctrine regarding whether shares of a commercial company established by one of the spouses during marriage or shares acquired through an onerous legal transaction by one of the spouses are included *ex lege* in the legal community.[40] It should be noted that a commercial company obtains legal personality acquired at the time of its registration with the National Business Centre.[41] In contrast, the legal community is not endowed with legal personality; it is a *sui generis* co-ownership. Consequently, according to the criteria we will analyse in this study, the shareholder is not the community but one or both spouses.[42]

The shareholder has a set of rights and obligations derived from the ownership of the share, such as the right to participate and vote in the General Meeting, the right to benefit from dividends, the right to information, the right to dispose of the shares, the right to profit in case of share liquidation, etc.[43]

Several issues arise from the interaction between the matrimonial property regime and the legislation that governs commercial companies. First, it involves determining whether investment into a company's initial capital or the purchase of shares from one spouse comply according to the rules of administration of the legal community provided by the Family Code. Second, questions arise regarding the legal nature of shares acquired by one spouse in relation to the legal community regime and whether they automatically become part of the community. Additionally, understanding how the legal community functions alongside commercial companies raises concerns about the non-shareholding spouse's recognition as a shareholder and their rights to participate in management activities, i.e. exercise the rights

40 If the shares are acquired during marriage by one of the spouses, through a gratuitous legal transaction, such as donation or inheritance, then according to Art. 77(b) of the Albanian Family Code, they are not included in the legal community but are personal assets of the owner spouse.

41 Law of the Republic of Albania no 131/2015 of 26 November 2015 'On the National Business Centre' [2015] Official Journal 215/14332. The Law amended respectively act no. 9723/2007 'On the National Registration Centre', and act no. 10081/2009 'On licenses, authorizations and permits in the Republic of Albania'. This law governs the registration and licensing of businesses.

42 Andre Colomer, *Les Regimes Matrimoiaux et le Droit Commercial,* vol 2: *Les sociétés commerciales et les régimes matrimoniaux* (Defrénois 1984) 11.

43 ibid 13.

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derived from the ownership of the share[44], such as the right to vote in the General Meeting. The administration of shares also poses challenges in determining whether family law or commercial legislation governs their management and transfer.[45] Moreover, questions arise concerning the applicable rules in case the shareholder spouse decides to transfer the shares to a third person through a sale contract or donation – is it regulated by legal community administration or commercial laws? Lastly, the dissolution of the legal community prompts inquiries into its impact on share ownership.

There are no specific provisions for shares in the Family Code. The Code governs, in general, the commercial activities[46] founded by one or both spouses, independently of their form of organisation. In our opinion, while drafting the Code, it appears that the legislator's focus was on small family businesses, aligning with traditional family models where the wife is the caretaker at home, while the husband is the breadwinner. Generally, the regulation of the object of the legal community, the category of personal assets of each spouse and the rules of administration of the legal community are more suited to a community consisting only of real rights, not considering credit rights. There is a "lack" of regulation of those forms of wealth that are characteristic of a capitalist economy, such as credit titles, treasury bonds, quotas, shares, etc.[47] It seems that the legal regime of the community does not adapt to the developments of the capitalist society nowadays in Albania.

The solution to the abovementioned problems will be realised by applying the provisions of the Family Code of the legal community (Arts. 74, 75 and 77 of the Family Code) in coordination with commercial legislation.

4 THE ACQUISITION OF SHARES DURING MARRIAGE

An important issue to address is whether the acquisition of shares, through the contribution to the initial capital or through an onerous contract, represents an act of ordinary or non-ordinary administration of the shareholder spouse in accordance with the regime of the legal community.

44 Regarding the presentation of this problem see: Enrico Saccà e Teresa Mollura, *Impresa Collettiva Societaria e Comunione Legale tra Coniugi (Società fra coniugi - partecipazione di uno dei coniugi a società)* (Giuffrè 1981) 115.

45 ibid 145.

46 Law of the Republic of Albania no 9901 (n 2). The Law "On Entrepreneurs and Commercial Companies" does not provide a definition of the notion of "commercial activity" but provides a list of those activities that are considered commercial, a list which is not exhaustive. Thus, based on Art. 2 of the Law "On Entrepreneurs and Commercial Companies", the term commercial activity will include not only those commercial activities created in the form of a commercial company (limited partnership, general partnership, limited liability company and joint stock company), but will also include any natural person who exercises an independent economic activity that requires an ordinary commercial organization, designated as an entrepreneur by the law on commercial companies.

47 Ennio Russo, *L'oggetto della comunione legale e i beni personali, Artt 177-179* (Il Codice Civile Commentario, Giuffrè 1999) 277-8.

The acquisition of shares by one spouse during marriage represents a legal transaction, generally a contract. From the point of view of family law, it is important to determine whether this legal transaction, performed by one spouse without the consent of the other spouse, is valid in relation to the legal community regime.[48]

If the shares are acquired using personal property (Art. 77 of the Family Code) or by using the property of the eventual community (Art. 74 para. 1(b), (c) of the Family Code), there is no need for the consent of the other spouse, because the owner spouse enjoys the freedom of administration and possession of his property. If the shares are acquired by using the personal property of one spouse, then the shares are the personal property of the owner's spouse, as it represents a substitution of personal assets. If the incomes used to acquire the shares are part of the eventual community, then in principle, both spouses are co-owners, as provided by Art. 74 para. 1(a) of the Family Code.[49] However, a distinction must be made between the quotas of general partnership and limited partnership companies (partnerships)[50] in relation to the shares of limited liability and joint stock companies (corporations).[51]

Whereas, suppose the participation in the commercial company or the acquisition of shares is realised by using community property, then the issue is whether this is an action of ordinary or non-ordinary administration. According to French doctrine, participation in a commercial company using community property represents an act of non-ordinary community administration. It represents an investment made by the community property, an investment which not only benefits the community but also burdens it with obligations. It represents an onerous legal transaction. Therefore, the other spouse's consent is also required as a condition for the validity of the legal action of participation in the company.[52]

5 THE LEGAL NATURE OF SHARES ACQUIRED BY ONE SPOUSE IN RELATION TO THE LEGAL COMMUNITY REGIME

In parenthesis, it should be noted that, according to Art. 77 (a), (b), (dh), (e) of the Family Code, are personal assets of one of the spouses the shares that: a) are acquired before marriage, regardless of the title of their acquisition; b) are acquired during marriage by inheritance, donation or bequest, except the donation which is made in favour of the community; c) are acquired as a result of the alienation of personal property of the spouses. In these cases, the profits from the shares, as part of the eventual community, will be included in the community only if they are unconsumed at the end of it, according to the

48 Colomer (n 42) 23.
49 Law of the Republic of Albania no 9062 (n 1).
50 Hereafter, the term "partnerships" encompasses both general partnership and limited partnership companies.
51 Hereafter, the term "corporations" encompasses both limited liability and joint stock companies.
52 Colomer (n 42) 46.

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provisions of Art. 74 para. 1(c) of the Family Code, such as the dividends.[53] The assets acquired from the liquidation of shares are personal property, representing the counter value of personal property.[54]

The most delicate issue is determining whether the shares acquired by one of the spouses during marriage, except for those included in Art. 77 (a), (b), (dh), (e) of the Family Code are included in the current community or the eventual one.[55] The legal doctrine has divergent positions regarding this issue. Italian and French legal doctrine, in relation to the legal regime to which the shares acquired by one of the spouses during marriage are subject, do not make any distinction whether the shares are acquired by contribution to the initial capital of the company, or whether one spouse enters an existing company through acquisitions of shares from the shareholders of the company, or subscribing quotas, in case of an increase of the initial capital of the company, etc.[56]

Another issue that arises where a distinction can be made between quotas of general partnership and limited partnership companies and shares of limited liability and joint stock companies. Both Italian and French doctrine have generally followed two lines of thought:

a) the monist theory, according to which there is a single solution, regardless of the nature of the commercial company: if the shares are acquired during marriage they are included in the legal community since the date of their acquisition; and
b) the dualist theory, according to which to determine the legal nature of the shares, a distinction should be made between the quotas of partnerships and the shares of corporations. In partnerships, the personal qualities of the partners are essential, while in corporations, these qualities are, in principle, irrelevant.

The Albanian doctrine aligns with the Italian doctrine and distinguishes between the quotas of general partnership and limited partnership companies and the shares of limited liability and joint stock companies. The shares of limited liability and joint stock companies are included in the community at the moment of their acquisition by one of the spouses. While the quotas of general partnership and limited partnership companies are the personal property of the shareholder spouse.[57] The same position has been held by the First Instance Court of Tirana.[58] The court, while deciding the validity of two sale contracts concluded between the shareholder's spouse and two other persons for the transfer of the property of

53 M Tanzi, 'Comunione legale e partecipazioni a società lucrative' in CM Bianca (ed), *La comunione legale*, vol 1 (Giuffrè 1989) 311.
54 Saccà and Mollura (n 44) 202.
55 Patrizia Di Martino, 'La cominione legale tra coniugi: l'oggetto', in G Bonilini e G Cattaneo (eds), *Il diritto di famiglia*, vol 2: *Regime patrimoniale della famiglia* (UTET 1997) 78-9.
56 N Tabanelli, 'La comunione legale: l'azienda coniugale' in A Arceri e M Bernardini (eds), *Il regime delle partecipazioni sociali' in Il regime patrimoniale della famiglia* (Maggioli 2009) 530.
57 Omari (n 9) 96-7.
58 Decision no 3873 (Court of the Judicial District of Tirana, 9 May 2016).

60% of the shares of the company, has mentioned that the quotas of partnerships are not included in the community.

In the last years, there have been several court decisions regarding the shares of corporations acquired by one of the spouses during marriage, but there have been no decisions about partnerships. The Albanian High Court has stated that the shares of a limited liability company[59] and the shares of a joint stock company,[60] which are acquired by one of the spouses during marriage, are included *ex lege* in the current community, pursuant Art. 74 para. 1(a) of the Albanian Family Code.

Given that Albanian legal doctrine and jurisprudence frequently align with the reasoning of Italian and French doctrines, it is crucial to consider the stance of these doctrinal perspectives.

5.1. The position of Italian legal doctrine

Part of Italian legal doctrine contends that any form of participation in a commercial company acquired by one spouse during a marriage is deemed part of the legal community because it represents an investment of the gains and incomes of each spouse.[61] This group of authors uses two basic arguments in support of their position: a) the term "property" of Art. 74 para. 1(a)[62] of the Family Code should not be interpreted narrowly, including only tangible (material) items and b) if the assets are gained during marriage by each spouse and are not personal property as provided by Art. 77 of the Family Code, then they are community property as provided by Art. 74 para. 1(a). Art. 74 para. 1(a) is drafted in a general way, including in it any "asset" that can be an object of a subjective right.[63]

Contrary to the abovementioned position, few authors, based on the argument that non-tangible (non-corporeal) assets are not included in the community, exclude from the legal community all types of shares, regardless of whether they belong to partnerships or corporations.[64] However, many legal scholars have criticised this stance, contending that

59 Decision no 340 (High Court of the Republic of Albania, Civil Chamber, 26 June 2012).

60 Decision no 13 (High Court of the Republic of Albania, Civil Chamber, 18 January 2023); Decision no 00-2009-391 (High Court of the Republic of Albania, Civil Chamber, 8 May 2009).

61 In favour of this position are: L Gatti e G Scardaccione, 'Titolarita' Delle Partecipazioni Sociali in Regime di Comunione Legale' (1978) Vita Notarile 270-1. According to these authors, any share acquired by one spouse during marriage is included in the current community, based on Art. 177 para. 1(a) of the Italian Civil Code (equivalent to Art. 74 para.1(a) of the Albanian Family Code), regardless of the type of commercial company (with limited or unlimited liability of the partners), because each share represents an "asset". These authors criticize that part of the doctrine that gives a different solution based on the type of responsibility that the share entails for the partner.

62 Because Art. 74 of the Albanian Family Code is drafted according to Art. 177 of the Italian Civil Code, the Italian legal doctrine is used to interpret the Albanian law, see: Italian Codice Civile (1942) <https://www.trans-lex.org/601300/_/italian-codice-civile/> accessed 23 March 2024.

63 Regarding the position of this group of authors, see: Tanzi (n 53) 307.

64 For more about the position of these authors see: ibid 306.

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such an exclusion contradicts the legislative intent and the fundamental essence of the legal community regime. Contrary to Art. 77 of the Family Code (categories of personal properties), which is regulated by the legislator in detail, Art. 74 para.1(a) is regulated in a general way, including in it any property acquired jointly or separately by each spouse. The principle sanctioned by Art. 74 and Art. 76 of the Family Code is the *favor communionis* principle.[65]

Other authors do not include all forms of participation in a commercial company in the same legal discipline but use the criteria of the shareholder's responsibility in the company to determine if the shares acquired by one spouse during marriage are community or personal property.[66] According to this opinion, shares of limited liability and joint stock companies are included *ex lege* in the community from the moment of their acquisition by one of the spouses because in these companies, the shareholders have limited property liability.[67] On the other hand, the quotas of general and limited partnerships are included in the "eventual" community. If we accept these quotas' inclusion in the current community, we would expose all the community property to the company's creditors.[68] Also, an additional argument is that another partner would be added to the company - the spouse of the new partner - who is unknown to the company's existing partners and "is not reliable" both to the partners and their creditors.[69] We recall that, in general partnership and limited partnership companies, the personal qualities of the partners are of great importance in the company's reliability, especially in its relations with third parties. Furthermore, other authors argue that the Articles of Association,[70] when they do not allow new shareholders into the company, should also be considered.[71] In companies with unlimited liability partners, it is implied that the acceptance of new shareholders, such as the spouse of one of the shareholders, necessarily requires the amendment of the Articles of Association of the company itself.[72]

Furthermore, another approach disregards the differences between partnerships and corporations, focusing instead on the purpose behind acquiring shares – whether for investment purposes or active participation of the shareholder in the company's activity.[73] Under this perspective, shares of partnerships and corporations are included in the community since the moment of their acquisition, except for those shares representing an

65 For more on this position see: ibid 311-2.
66 For more on this position see: Raffaele Caravaglios, *La Comunione Legale*, vol 1 (Giuffrè 1995) 527-8; Russo (n 47) 286-7; Tanzi (n 53) 307.
67 Russo (n 47) 291.
68 ibid 290.
69 ibid 290.
70 Caravaglios (n 66) 529-30.
71 ibid 528.
72 ibid 528-9.
73 For this opinion see: Francesco Corsi, *Il regime patrimoniale della famiglia*, vol 2: *Le convenzioni matrimoniale, famiglia e impresa* (Giuffrè 1984) 139.

instrument of economic initiative. These shares are included in the eventual community.[74] Based on these arguments, the quotas of partnerships can also be part of the current community; likewise, on the other hand, the shares of a corporation can be part of the eventual community. If the quotas of partnerships are included in the community from the moment of their acquisition, due to their acquisition with investment purpose, then their inclusion in the company has only an *inter partes* effect (between the spouses) and has no effects in relation to the company[75]. If the other shareholders of the company have not approved the recognition of the other spouse as a shareholder of the company, then he/she cannot exercise any rights deriving from the ownership of the share, but the exercise of these rights belongs only to the shareholder spouse.

In decision no. 7409, dated 12 December 1986, the Italian Court of Cassation ruled that the partner's participation in partnerships represents a "strictly personal" participation. The alteration in the company's partners necessitates a corresponding modification in the contractual relationships among them, which cannot be executed without the unanimous consent of all partners or unless explicitly stipulated in the Articles of Association. Whereas the Court continues its reasoning, in corporations, the solution is different. In joint stock companies, the transfer of shares is governed by securities legislation. The quotas of limited liability companies are also freely transferable through *inter vivos* and *mortis causae* legal transactions.[76] Following this reasoning, the Italian Court of Cassation has decided that the shares of joint stock companies are tangible movable items (Cass, 6 April 1982, no. 2103), while the shares of limited liability companies are non-tangible movable items (Cass 11 September 1991, no. 9513), and as such are subject to the right of ownership, therefore freely transferable from one subject to another.[77] For this opinion, see other decisions of the Italian Court of Cassation: Cass. Civ. No. 7437/ 1994; Cass. Civ. No. 9355/ 1997; Cass. Civ. No. 5172/ 1999; Cass. Civ. No. 1363/ 1999.[78]

5.2. The position of French legal doctrine

In French legal doctrine, a distinction has traditionally been made between the shares of partnerships and corporations. According to the doctrine, shares of corporations, in which the personal qualities of the partners are irrelevant to the company, are included in the community from the moment of their acquisition. In this case, there is no conflict between the law of matrimonial property regimes and the law of commercial companies.[79] There are three different opinions reflected in French doctrine regarding the quotas of personal

74 Russo (n 47) 286; Tanzi (n 53) 308.
75 For more on this discussion see: Corsi (n 73) 148-9.
76 Caravaglios (n 66) 554-5.
77 ibid 556.
78 Note of: Tabanelli (n 56) 534.
79 For more information see: Colomer (n 42) 105.

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partnerships: a) according to the first opinion the quotas are personal property of the partner spouse;[80] b) based on the second opinion, the quotas are included in the community, from the moment of their acquisition;[81] and c) the last is the dualistic position.

The dualistic theory tries to find an intermediate solution between two monistic theories, recognising the dualistic character of the quotas of partnerships.[82] There are two dualistic theories, the traditional and the contemporary one. The traditional dualistic theory distinguishes between the monetary value of the quota and the title (*titre et finance*). According to this position, the quotas are the personal property of the partner spouse, but their monetary value is included in the community.[83] The modern dualist theory distinguishes between "quota" and "partnership quality". On the one hand, while the "quota" itself as a property right is included in the community, on the other hand, the "quality of partner", as a personal non-property right, is a personal right of the partner spouse. Only the partner spouse has the right to vote.[84] If the company's Articles of Association allow it, the partner's spouse has the right to request to be recognised as a partner of the company. He/she gains the right to vote only after being recognised as a partner and registering in the Partners' Register.[85] In case of alienation of the quota, the consent of the other spouse is necessary according to the regime of non-ordinary administration of the legal community.

The modern dualistic theory seems to be the most preferred in French doctrine due to its ability to harmonise the interests of the commercial company with the property interests of the family and the interests of each spouse.[86] This solution is portrayed as the best option in accordance with the laws governing matrimonial property regimes and commercial companies.[87]

80 ibid 106. These authors base their position on the *intuitu personae* character of the quotas of partnerships. Since they are *intuitu personae*, closely related to the personal qualities of partner, they cannot be included in the community, but are personal property of the partner spouse.

81 ibid 106. These authors base their position entirely on the legal provisions that govern the community property. Given that quotas are assets and according to the French Civil Code assets acquired during marriage are part of the community (Art. 77 para. 1(a) of the Albanian Family Code), then the shares, regardless of their type, are included in the legal community from the moment of acquisition. See, Code civil des Français (1804) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721> accessed 23 March 2024.

82 Colomer (n 42)105.

83 For more about this doctrinal position see: Jacques Flour e Gérard Champenois, *Les régimes matrimoniaux* (Armand Colin 1995) 278-9; Colomer (n 42) 106.

84 For more about this doctrinal position see: Francis Caporale, 'Société et communauté entre epoux' in A Couret e altro, *Le droit des affaires a la confluebce de la theorie et de la practique: Melanges en l'honour du Professeur Paul Le Cannu* (Dalloz; LGDJ; IRJS 2014) 675-6; Flour and Champenois (n 83) 279.

85 Caporale (n 84) 676.

86 ibid 676.

87 Colomer (n 42) 118.

6 THE ADMINISTRATION OF THE SHARES DURING MARRIAGE BY THE SHAREHOLDER SPOUSE: THE PARALLEL FUNCTIONING OF COMMERCIAL COMPANIES WITH THE LEGAL COMMUNITY

When considering shares as community property, it is crucial to address the legal framework regulating the administration of shares owned by the shareholder's spouse. We advocate for the administration of these shares to be accomplished through a complementary integration of commercial laws and matrimonial property legislation.[88] The administrative rights of the shareholder spouse can be divided into two groups: first, the administrative rights exercised in the relations between the spouses and second, the administrative rights exercised in their relation to the commercial company and third parties.

Generally, the inclusion of shares in the legal community has only *inter partes* effects, and, therefore, the rights deriving from the possession of the shares can be exercised only by the shareholder spouse.[89] However, within the limits determined by the commercial legislation and the Articles of Association, the spouse of the shareholder has the right to be formally recognised as a shareholder of the company through approval by the General Meeting or a court decision. At this point, which legal regime is applicable to the shares in the relations between the spouses themselves? There are two alternative solutions: a) the division of the shares between the spouses, or 2) the recognition of both spouses as co-owners of the shares, according to commercial legislation, keeping the share/s undivided. In the last alternative, the spouses must appoint a common representative to exercise the rights derived from the shares.[90] Based on Art. 72 of the Law on Entrepreneurs and Commercial Companies (co-ownership of shares in limited liability companies) and Art. 121 of the Law on Entrepreneurs and Commercial Companies (co-ownership of shares in a joint stock companies),[91] the common representative can be one of the spouses or a third person. We believe this is the most appropriate solution.

For the appointment of the common representative, it is disputable if the rules of joint ownership of the Civil Code are applicable or the rules of the administration of the community property of the Family Code. This solution, although practical, may affect the future of the company, potentially influencing its decision-making process because of eventual conflicts in spouses' marital relationships.[92]

According to French doctrine, a proposed solution is to include clauses in the company's Articles of Association that prevent the spouses of shareholders or future shareholders from

88 For this doctrinal position see also: ibid 132.

89 Di Martino (n 55) 82.

90 Tommaso Auletta, 'La comunione legale: oggetto' in T Auletta (ed), *Il diritto di famiglia*, vol 3, *I rapporti patrimoniali fra conugi* (Trattato di diritto di famiglia, diretto da Mario, Giappichelli 2011) 370.

91 Law of the Republic of Albania no 9901 (n 2).

92 For this opinion see: Caporale (n 84) 672.

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participating in the company's decision-making process.[93] Similarly, Italian doctrine suggests that if the Articles of Association do not allow the shareholder's spouse to be recognised as a partner of the company, then only the economic value of the shares is included in the community,[94] with voting rights retained solely by the shareholder spouse.

When only one spouse is registered as a shareholder of the company, the alienation of shares is governed by the administration rules of the matrimonial property regime. According to Art. 90 of the Family Code, each spouse can carry out actions of ordinary administration separately from the other spouse, but for actions of non-ordinary administration, the joint consensus of the spouses is necessary. If one spouse carries out actions of non-ordinary administration without the consent of the other, the act may be annulled by the court upon the request of the non-consenting spouse (Art. 94, para. 1 of the Family Code). According to the Albanian High Court,[95] if one spouse sells shares that are part of the community property, the consent of the other spouse is necessary. The court decision has effects not only on the shareholder spouse but also on the company and the third person to whom the shares have been alienated, even if the latter is not aware and does not have the obligation to be informed about the civil status of the shareholders of the company. The Albanian[96] and Italian[97] legal doctrines have the same stance.

However, there are exceptions for acts of joint administration where one spouse can act without the consent of the other, but upon court authorisation (e.g. the sale of shares) when the other spouse is in the situation of the impossibility of expressing their consent or refuses to give their consent and the action is necessary for the interests of the family (Arts. 91, 92, 93 of the Family Code).[98]

7 ISSUE AND LIQUIDATION OF SHARES

The legal nature of shares becomes a complex issue when one spouse's main professional activity involves "buying and selling shares," prompting questions about whether these shares constitute part of the legal community (current/eventual) or personal property.[99] Part of the Italian legal doctrine distinguishes between professional stock market speculation and sporadic trading.[100] According to this group of authors, shares used in the exercise of a spouse's profession are considered personal property to avoid discrimination against this

93 ibid 670.
94 Tabanelli (n 56) 540.
95 Decision no 13 (High Court of the Republic of Albania, Civil Chamber, 18 January 2023)
96 Omari (n 9) 125.
97 Auletta (n 90) 368-9.
98 For this doctrinal position see: Corsi (n 73) 150-1.
99 For more about this problem see: Tanzi (n 53) 329.
100 For this doctrinal position see: Auletta (n 90) 360.

form of economic activity compared to other professions.[101] It is important that the activity of speculation in the stock market has the nature of the exercise of the profession; it should not be a casual activity.[102] Whereas, according to the same line of thought, when the purchase for the purpose of resale of shares is carried out sporadically, then the shares and the profit realised from their resale are part of the current community.

In line with the abovementioned doctrinal opinion, if shares are deemed personal property under Art. 77 (ç) of the Family Code, profits realised from the purchase and resale of the shares are part of the eventual community, as incomes from the separate activity of spouses (Art. 74 para. 1(b) of the Family Code). These profits are subject to division only if they remain unconsumed at the end of the community. The articles of the Family Code should be interpreted in accordance with the right of "freedom of economic activity" enjoyed by every individual, a freedom guaranteed by the Albanian Constitution. If the purchase and resale of shares is not a professional activity but is conducted casually, then according to Art. 74 para.1(a) of the Family Code, the shares and their profits are current community property.

If the company rewards its employees with shares issued *ad hoc*, then the shares are included in the eventual community, according to Art. 74 para. 1(c) of the Family Code,[103] as they represent income from the beneficiary spouse's own activity.

Another issue regards the effects that the increase of the initial capital of the company will have on the community property when the initial shares are considered the personal property of one spouse. The question arises: will the newly issued shares be included in the community?[104]

According to Italian doctrine, it is essential to distinguish whether the issuance of shares is made onerously or gratuitously. If the new shares are acquired through gratuitous issuance, they are deemed personal property of the shareholder spouse because they do not represent a new value but merely a materialisation of a previous stock value.[105] Conversely, if the new shares are acquired through onerous issuance, they are included in the current community property as property acquired during marriage.[106]

Regarding the liquidation of shares, the doctrine suggests that the proceeds obtained from the liquidation will adhere to the same legal regime applicable to the shares themselves. If the shares are included in the community property, the proceeds obtained from their liquidation are also included in the community property. If the shares are personal property, then the liquidation's proceeds are personal property, too.[107]

101 For further information on these arguments, see: Russo (n 47) 296-7.
102 Giovanni Gabrielli, *Comunione coniugale ed investimento in titoli* (Giuffrè 1979) 28-9.
103 Tanzi (n 53) 327.
104 ibid 337-8.
105 Gabrielli (n 102) 33-4; Saccà and Mollura (n 44) 205.
106 Gabrielli (n 102) 364.
107 Auletta (n 90) 363.

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Furthermore, according to the same doctrine, the shares of corporations formed by the conversion from a partnership, in which one of the spouses was a partner,[108] are deemed part of the existing community property unless the shares were considered personal property of the shareholder spouse.

8 CONCLUSIONS

To protect the rights and interests of all involved subjects, the interests of spouses and those of the commercial company as a legal entity, it is crucial to coordinate the commercial legislation with the legislation of matrimonial property relations.

Based on Albanian, French, and Italian doctrine, it is necessary to distinguish between partnerships and corporations. While the solution lies in the Family Code for corporations, the same solution cannot be used for quotas of partnerships. Shares of corporations acquired during marriage by one spouse are included *ex lege* in the community property. In partnerships, a distinction must be made between the quota and its value. While the quota remains the separate property of the partner spouse, its value is included in the community. This solution favours the protection of the interests of partnerships on the one hand and protects the community from the company's creditors, on the other hand.

When shares are included *ex lege* in the current community, this inclusion has effects only *inter partes*, i.e. only between the spouses, while exercising the rights in the company belongs only to the shareholder spouse. The other spouse cannot exercise these rights until he/she is recognised as a shareholder. If there are clauses in the company's Articles of Association that prevent the entry of new shareholders in the company, then the other spouse cannot be recognised as a shareholder. In such a hypothesis, the "economic value" of the shares in the community, and only the spouse who appears as a shareholder in the shareholder register can exercise the rights in relation to the company.

However, when the other spouse is recognised as a shareholder, the spouses are co-owners of the shares. The exercise of the rights in the company will be subject to the Law on Entrepreneurs and Commercial Companies, which regulates the co-ownership of shares. According to Arts. 72 and 121 of this Act, the co-owners of shares (the spouses) administer the shares in an agreement between them or with the court's intervention in the absence of an agreement.

In any case, the alienation of shares from the shareholder spouse, as an action of non-ordinary administration of the legal community, needs the other spouse's consent.

Through a careful and combined analysis of the CEFL *Principles*, specifically within the community of acquisitions default regime, we assert that shares acquired by one of the spouses during marriage are community property, based on two arguments: first, shares are

108 ibid 361.

not mentioned in the category of personal property; second, assets acquired by each spouse during marriage by means of spouses' income and gains and do not fall in the category of personal property (Principle 4:35 (b), are presumed community property. Assets acquired by each spouse during marriage are presumed to be community property unless they are proven to be personal property. Since shares of commercial companies are assets, if acquired during marriage using one spouse's income and gains, they are presumed to be community property according to Principle 4:53 (b).

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ВПЛИВ СПІЛЬНОЇ ВЛАСНОСТІ ПОДРУЖЖЯ НА КОМЕРЦІЙНІ КОМПАНІЇ ЗГІДНО ІЗ ЗАКОНОДАВСТВОМ АЛБАНІЇ

Еніана Тяррі* та Дженсіла Каді

АНОТАЦІЯ

Вступ. *Мета цього дослідження полягає в тому, щоб вивчити взаємодію правового врегулювання спільної власності подружжя та комерційної діяльності, яка ведеться до або під час шлюбу. У статті зазначено, як право спільної власності впливає на комерційні компанії, зокрема, коли акціонером компанії є один із подружжя. У юридичних колах тривають дебати щодо того, чи є акції комерційної компанії, створеної одним із подружжя під час шлюбу або придбані у результаті юридичної операції, частиною права спільної власності. З огляду на це виникає кілька питань: чи регулюється участь у початковому капіталі компанії правилами спільного управління, якою є правова природа акцій, придбаних одним із подружжя, і як взаємодіє правове врегулювання спільної власності подружжя з комерційним законодавством. Ще одне питання, яким займається правова доктрина, полягає в тому, чи визнається чоловік/дружина акціонера акціонером і чи може брати участь в управлінні компанією. У Сімейному кодексі Албанії, який, зокрема, головним чином регулює малі сімейні підприємства, немає конкретики щодо акцій. Дослідження взаємодії цих двох дисциплін має на меті допомогти юриспруденції, оскільки, незважаючи на деякі справи Верховного Суду та Конституційного Суду за останні роки, це все ще відносно нова сфера для албанської доктрини та юриспруденції.*

Методи. *Багатогранний методологічний підхід цієї статті охоплює дослідження літератури, правовий аналіз, перегляд судової практики та порівняльний аналіз. Було вивчено відповідне національне законодавство, а також законодавство країн, що належать до цивільно-правової традиції, таких як Франція та Італія. Крім того, було переглянуто європейське «м'яке право», зокрема принципи Комісії з європейського сімейного права (Commission on European Family Law — CEFL), які зосереджуються на питаннях спільної власності подружжя.*

Наша методологія дослідження містить збір та аналіз існуючих досліджень і наукової літератури щодо питання спільної власності подружжя. Щоб краще зрозуміти норми Сімейного кодексу щодо спільної власності подружжя, ми проаналізували італійську та французьку доктрину, судову практику, а також правові системи, на основі яких був розроблений Сімейний кодекс Албанії.

Слід підкреслити, що основною метою цієї статті є не лише порівняльний аналіз, вона прагне допомогти в кращому розумінні та застосуванні правового врегулювання спільної власності подружжя, що найчастіше використовується на практиці. Крім того, було проведено комплексний порівняльний аналіз албанського законодавства та принципів CEFL, щоб визначити основні подібності, відмінності та потенційні сфери для покращення в його правових межах. Крім того, судова практика як албанських, так і іноземних вищих судів була широко використана для збагачення аналізу та надання розуміння практичного застосування правових принципів.

Результати та висновки. *Вирішення вищезазначених питань залежить від юридичної структури компанії та правил участі, вимагає комбінованого тлумачення спільної власності подружжя та комерційного права. У такому комбінованому тлумаченні правил вирішальне значення має захист прав та інтересів усіх залучених суб'єктів, подружжя та комерційного товариства як юридичної особи.*

Ключові слова: *шлюб, подружжя, спільна власність подружжя, право спільної власності, комерційні компанії, акції, акціонер.*

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Research Article

CRIMINAL LIABILITY FOR ANALYSING GENOMIC DATA WITHOUT OWNER'S CONSENT: A COMPARATIVE STUDY

Fatiha Mohammed Gourari and Mohammad Amin Alkrisheh*

ABSTRACT

Background: *In the rapidly evolving landscape of genomics and biotechnology, the United Arab Emirates (UAE) has launched the Emirates Genome Program to harness the potential of genomic technologies for advancing healthcare services. Central to this initiative is the informed and voluntary participation of citizens in genetic research aimed at contributing to national health objectives through genetic data utilisation. Notably, the enactment of UAE Decree-Law No. (49) of 2023 underscores the importance of safeguarding genomic privacy as a foundational element for data security and individual rights.*

This study addresses the challenge of striking a delicate balance between individual genetic rights and the pressing scientific and medical needs of genomic research. It aims to analyse the right to genomic privacy and examine crimes associated with the unauthorised analysis of biological samples.

Methods: *This research employed an analytical legal methodology and a comparative approach to explore the crime of disclosing genomic data. By analysing Decree-Law No. (49) of 2023 and other relevant Emirati legislation, we examined the legal framework governing genomic research and data protection in the UAE. Comparative legal analysis was then conducted between Emirati and French laws to identify similarities and differences in approaches to genomic data disclosure crimes. The study also considered international standards and ethical principles to provide a comprehensive, multidisciplinary understanding of the intersection of law, ethics, and science in genomic privacy.*

Results and conclusions: *This study's findings underscore the necessity of establishing a robust legal framework that safeguards individual rights and ensures the confidentiality of genetic data. Such measures are crucial for fostering public trust in genomic research and aligning the UAE's genomic endeavours with rigorous ethical and legal standards. Ultimately, Decree-Law No. (49) of 2023 exemplifies the state's commitment to promoting ethical and legal practices in genomic research, thereby facilitating sustainable advancements in medical science.*

1 INTRODUCTION

The world is witnessing rapid advancements in biotechnology and genomics, with unprecedented progress leading to an increased use of genetic experiments for medical and non-medical purposes. As the pace of genetic sciences and technology accelerates, scientists continue to make genetic discoveries related to the human body's makeup and the causes and effects of potential diseases and disabilities in the future. Humans are increasingly relying on advanced scientific technologies to explore the secrets of genetics and determine human genetic makeup, allowing for the estimation of the likelihood of genetic diseases even before birth. We are beginning to see advanced steps towards genetic prediction, which aids in the early detection of individuals' genetic tendencies to develop serious diseases, alongside the development of now-possible early genetic testing. Genetic scientists are continuously exploring new possibilities in understanding human genetic material[1], aiming to intervene, modify, and reorganise it when necessary, including programming and altering its designs in complex and innovative ways.

Genomic data plays an important role in advancing medical advancement and scientific research. It is instrumental in understanding genetic diseases, developing targeted treatments, improving medical diagnosis, and potentially bringing about radical changes in the future human constitution in biological, psychological, and mental aspects, all under the guise of achieving medical and therapeutic human goals. Due to concerns surrounding these changes and their potential negative impact, as genomic data contains sensitive information related to individuals and carries unique details about their genes and genetic heritage, and recognising the complexity and breadth of this topic, as well as the urgent need to establish principles and standards to be adopted internationally, UNESCO issued the Universal Declaration on the Human Genome and Human Rights (1997),[2] and the International Declaration on Human Genetic Data (2003),[3] thereby establishing the rules and provisions to ensure and guarantee the sanctity of genomic data.[4]

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1 Mohamed Misbah Al-Naji, 'Constitutional Guarantees for the Protection of Genetic Privacy: A Comparative Analytical Study' (2023) 9(4) Journal of Legal and Economic Studies 749; Sandi Dheensa and others, 'Towards a national Genomics Medicine Service: The Challenges Facing Clinical-Research Hybrid Practices and the Case of the 100 000 Genomes Project' (2018) 44(6) Journal of Medical Ethics 398, doi:10.1136/medethics-2017-104588; Jodi Halpern and others, 'Societal and Ethical Impacts of Germline Genome Editing: How Can we Secure Human Rights?' (2019) 2(5) The CRISPR Journal 293, doi:10.1089/crispr.2019.0042.

2 Universal Declaration on the Human Genome and Human Rights (adopted 11 November 1997) <https://www.ohchr.org/en/instruments-mechanisms/instruments/universal-declaration-human-genome-and-human-rights> accessed 1 April 2024.

3 International Declaration on Human Genetic Data (adopted 16 October 2003) <https://www.unesco.org/en/legal-affairs/international-declaration-human-genetic-data?hub=66535> accessed 1 April 2024.

4 Shawn HE Harmon, 'The Significance of UNESCO's Universal Declaration on the Human Genome & Human Rights' (2005) 2(1) SCRIPTed 25, doi:10.2966/scrip.020105.20; Ana Nordberg and Luisa Antunes, *Genome Editing in Humans: A Survey of Law, Regulation and Governance Principles* (STOA 2022) <https://lup.lub.lu.se/search/publication/3971eee6-b208-468c-82a3-1a4f781a10c7> accessed 1 April 2024.

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Driven by its commitment to enhancing healthcare, the United Arab Emirates launched the Emirates Genome Program,[5] a national initiative aimed at utilising genetic information to identify and treat genetic diseases. This project seeks to leverage the capabilities of genome technology to improve the quality of healthcare services provided to citizens, supporting the achievement of national health objectives through the use of Emirates citizens' genetic data to improve the overall health status of Emirati citizens. Recognising the importance of privacy protection and ensuring the ethical and legal use of genomic data, the UAE legislature issued Decree-Law No. (49) of 2023 on regulating the use of the human genome.[6]

The significance of this research lies in demonstrating how Decree-Law No. (49) of 2023 on regulating the use of the human genome keeps pace with these developments by providing a legal framework that ensures the use of the human genome in a way that respects rights and privacy. The study focuses on the importance of genomic privacy as an integral part of human rights, exploring how the legal decree contributes to protecting this privacy through the necessity of participants' prior consent to undergo genetic testing, with participants' informed consent based on fundamental ethical principles that must be observed when conducting biomedical and behavioural research involving humans. These principles are based on the foundations of informed consent, which fundamentally rely on three key elements: providing information, achieving understanding, and voluntary participation.

The research problem lies in the challenge faced by the UAE legislature in achieving a balance between individuals' rights to genomic privacy and the scientific and medical necessity of conducting scientific experiments and developing medical research related to the human genome. This balance is essential to ensure the effective and safe use of genomic data, maximising the benefits of scientific research in the field of the human genome.

From here, the question arises whether the UAE legislature has successfully managed to balance individuals' rights to maintain their genomic privacy and the growing need to develop medical research and enhance public health. What are the possible legal mechanisms to ensure the non-violation of individuals' rights and obtain informed and voluntary consent before taking biological samples?

2 RESEARCH METHODOLOGY

In this study, we adopted an in-depth analytical approach focused on examining the legal texts related to Decree-Law No. (49) of 2023, which outlines the frameworks for regulating the use of the human genome in the United Arab Emirates. This methodology

5 ‘The Emirati Genome Programme’ (*UAE*, 14 August 2023) <https://u.ae/en/information-and-services/health-and-fitness/research-in-the-field-of-health/the-emirati-genome-programme> accessed 1 April 2024.

6 Federal Law by Decree no (49) of 2023 ‘Regulating the Use of the Human Genome’ [2023] Official Gazette 762 <https://uaelegislation.gov.ae/en/legislations/2195> accessed 1 April 2024.

allows us to scrutinise the legal and regulatory foundations accurately, considering international approaches through comparative legislation in specific areas to extract the best practices and lessons.

The study primarily aims to explore and analyse the fundamental concepts related to genomic privacy by delving into understanding the nature of the right to privacy and defining the concept of genomic data. Subsequently, it will investigate the criminal liability arising from analysing biological samples without the consent of their owner, with a particular focus on the context of UAE legislation and its comparison with other legal systems.

3 THE NATURE OF THE RIGHT TO GENOMIC PRIVACY

In addressing the intricate subject of genomic privacy, this paper will delve into two main topics. Initially, we will explore the concept of the right to privacy, elucidating its fundamental significance and how it underpins the broader discourse on individual autonomy over personal information. Following this, we will turn our attention to the concept of genomic data, delineating its unique characteristics and the specific privacy considerations it entails.

3.1. Concept of the Right to Privacy

Privacy is a fluid concept with no fixed boundaries, reflecting various aspects of human life. It varies from one society to another, influenced by prevailing customs and traditions and even by individual circumstances, distinguishing those who guard their privacy closely from those who live as an open book.[7] Thus, defining privacy or finding a precise and logical formula for it is challenging, as it remains a delicate issue that stirs debate and disagreement in jurisprudence and comparative law.

Definitions of this right are diverse, articulating its essence and the way its boundaries are determined. Some provide a general descriptive definition, while others focus on identifying the key elements that comprise its content, leaving room for modifications that evolution might necessitate. For instance, a segment of French jurisprudence adopts a negative definition of private life (defining it as everything that does not constitute public life). Public life is described as the aspect of our lives that unfolds in the presence of or before the public, our public contribution to the life of the state or nation[8]. On the other hand, another school of thought within jurisprudence has opted for a positive definition of privacy,

7 Hossam Eldin Al-Ahwani, *The Right to Respect for Private Life* (Dar Al-Nahda Al-Arabiya 1978) 47; Mamdouh Khalil Baher, 'Protection of Private Life in Criminal Law: A Comparative Study' (PhD thesis, Cairo University 1983) 163.

8 Robert Badinter, 'Le droit au réspect de lavie privée' (1968) 2136 JCP 1.

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conceptualising it as "the sphere or the secretive zone of life, or rather, the area over which an individual has the authority to exclude others from...".[9]

The definitions of the right to privacy posited by jurisprudence reveal considerable variations in the perception of what this right entails. It is challenging to establish a criterion that fully distinguishes between private and public life, making it difficult to assert that there exists a comprehensive, all-encompassing definition of this right. This variability stems from the evolving concept of the right to privacy across different times and places. Social, economic, and cultural developments, along with prevailing customs and traditions, vary significantly from one society to another, influencing the understanding and application of privacy rights. This diversity reflects the dynamic nature of privacy as a concept that adapts to the changing contexts of human societies, underscoring the need for a flexible approach to defining and protecting privacy in the legal domain.

The UAE Constitution has incorporated individual privacy or private life within its provisions. Specifically, Article 26 states that personal freedom is guaranteed for all citizens. It addresses the sanctity of domicile in a separate article, Article 36, which prohibits entering homes except in cases specified by law and in the manner prescribed therein. Furthermore, Article 31 ensures the sanctity of a person's postal, telegraphic, and other forms of communication, making it illegal to examine, monitor, or detain such communications except in situations defined by law.[10]

The UAE legislature has adhered to this principle in the Law of Crimes and Punishments under Article 31, where this provision defines the principle of protecting the sanctity of private life by penalising any infringement on it. The forms of such infringement include eavesdropping or spying using any means, including audio recording or photography, and the public dissemination of private life secrets through any means of disclosure.[11]

In the legislators' continuous effort to enhance digital security and protect privacy, the Federal Decree-Law No. 34 of 2021 on combating rumours and cybercrimes stands out. Article 6 of this law strengthens the legal protection of data and personal information by imposing penalties on anyone who obtains, possesses, modifies, damages, discloses, leaks, deletes, copies, or publishes electronic personal data without authorisation. The penalties are more severe if the data pertains to medical records, reflecting the utmost importance of protecting such information.[12]

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9 Jean Carbonnier, *Droit Civil*, t 1: *Les Personnes, Personnalite, Incapacites, Personnes Morales* (Themis Droit Picé, PUF 1995) 254.

10 Constitution of the United Arab Emirates [1971] Official Gazette 1 <https://uaelegislation.gov.ae/en/legislations/1000> accessed 1 April 2024.

11 Federal Law by Decree no (31) of 2021 'Promulgating the Crimes and Penalties Law' [2021] Official Gazette 712 <https://uaelegislation.gov.ae/en/legislations/1529> accessed 1 April 2024.

12 Federal Law by Decree no (34) of 2021 'On Countering Rumors and Cybercrimes' [2021] Official Gazette 712 <https://uaelegislation.gov.ae/en/legislations/1526> accessed 1 April 2024.

Furthermore, Article 44 highlights crimes of invasion of privacy and disclosure of secrets through information systems, specifying penalties for those who use these technologies to eavesdrop, take pictures without permission, or publish information intending to harm others. Article 45 penalises the disclosure of confidential information obtained by virtue of one's work or profession, emphasising the necessity of maintaining the confidentiality and security of this information.[13]

In addition to the efforts made to protect private life, the UAE legislature has given special attention to the protection of genomic data, considering it an integral part of an individual's privacy. In this context, the Federal Decree-Law No. 49 of 2023 regarding the regulation of the use of the human genome was issued, establishing specific legal frameworks for the collection, use, and preservation of genomic data.[14]

From the foregoing, it is evident that the UAE legislature has sought to find a balance between encouraging scientific and technological research and protecting individuals' rights and privacy. This demonstrates a balanced approach that aims for scientific advancement without sacrificing the fundamental values of privacy and human rights. This approach highlights the United Arab Emirates' commitment to international human rights standards and reflects a proactive vision in addressing emerging issues in the field of privacy and genomic data.

3.2. Concept of Genomic Data

The term "genetic data" refers to data that can be extracted from biological samples, which determine the inherited or acquired genetic characteristics of an individual (including unique information about that individual's physiology or health).[15] More importantly, genetic testing can reveal extensive information not limited to the physical aspects of an individual but also encompass deeper dimensions such as emotional traits and personality characteristics. Humans are increasingly relying on advanced scientific technologies to explore the secrets of genetics and analyse human genetic structures, opening the door to the possibility of predicting genetic risks for certain diseases before birth and early detection of individuals' genetic predispositions to serious diseases through advanced genetic testing.[16]

13 ibid.

14 Federal Law by Decree no (49) of 2023 (n 6).

15 Róisín Á Costello, 'Genetic Data and the right to Privacy: Towards a Relational Theory of Privacy?' (2022) 22(1) Human Rights Law Review ngab031, doi:10.1093/hrlr/ngab031.

16 James Brian Byrd and others, 'Responsible, Practical Genomic Data Sharing that Accelerates Research' (2020) 21(10) Nature Reviews Genetics 615, doi:10.1038/s41576-020-0257-5; Fruzsina Molnár-Gábor and others, 'Harmonization after the GDPR? Divergences in the rules for genetic and health data sharing in four member states and ways to overcome them by EU measures: Insights from Germany, Greece, Latvia and Sweden' (2022) 84 Seminars in Cancer Biology 271, doi:10.1016/j.semcancer.2021.12.001.

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Genomics scientists are harnessing immense potential in the field of understanding the intricate details of human genetic material, aiming for intervention, modification, and reorganisation where necessary, in addition to the possibility of programming it according to specific requirements. These capabilities extend beyond medical and therapeutic goals, raising ethical challenges about the sanctity of life and interventions in the genetic foundations of humans in ways that could radically alter their biological composition and mental and psychological traits, all under the guise of achieving medical humanitarian objectives.[17]

Some view their genetic information as private or sensitive data, given that each person's genome is unique, differing from others, and serves as a life book revealing many aspects of one's future. Moreover, genetic data is not limited to the person undergoing genetic testing but also unveils information about their close or distant biological relatives. This means that accessing the genetic data of one individual could result in the disclosure of the genetic information of their entire family, necessitating the provision of strong legal protection for genetic privacy. This necessity has led some legislations to consider this.

3.2.1. The Universal Declaration on the Human Genome and Human Rights

The Universal Declaration on the Human Genome and Human Rights[18] is the first international document to formally address the relationship between genetic engineering technologies and human rights, offering principles that summarise the global vision of the importance of finding a balance between scientific progress in medical sciences and ensuring the protection of human rights.[19] Symbolically, as stipulated in Article 1 of the Declaration, the human genome is considered "the heritage of humanity." Article 2 emphasises the right of every individual to respect their dignity and rights regardless of their genetic characteristics. At the same time, Article 5 mandates the necessity of obtaining prior, free, and informed consent from the person before conducting any genetic examination on their biological sample, respecting their wish to know or not know the results of this examination and its implications.

Article 7 of the Declaration emphasises the necessity of protecting the confidentiality of genetic information pertaining to any identifiable person, whether this information is stored or processed for research purposes or otherwise. Article 9 states that no restrictions may be imposed on the principle of consent and the confidentiality of an individual's data except through the law for justified reasons and within the limits allowed by international law and international human rights law. Although the Declaration is not binding like international treaties, it holds significant importance due to the consensus among UNESCO

17 Abdulrazzaq Al-Dawai, 'The Revolution in Genetic Engineering and Human Rights: The Problematic of Human Cloning' (2003) 31(4) World of Thought 123; Dheensa and others (n 1).

18 Universal Declaration on the Human Genome and Human Rights (n 2).

19 Costello (n 15) 22; Lee A Bygrave, 'Privacy and Data Protection in an International Perspective' (2010) 56(8) Scandinavian Studies in Law 165.

member states on its formulation, enhancing its status as a detailed reference document addressing human rights in the context of genetic technologies.[20]

It is worth mentioning here that, in adherence to the definition provided in Article 1 of the Universal Declaration of Human Rights, considering the human genome as "the heritage of humanity," and in light of the significant achievements witnessed in science and technology regarding the understanding and development of the human genome, a need arises for a comprehensive global responsibility. This responsibility should not only fall on the shoulders of states and governments alone but should also encompass the entire international community. Through a review of the provisions of the Declaration, it emphasises the following:[21]

1. The necessity of obtaining voluntary prior consent without unjustifiable inducements before conducting any research or testing in the field of human genetics or by the person's legal representative if they lack or have limited capacity.
2. Exceptions may be allowed if there are compelling reasons in accordance with local law and international human rights law.
3. The necessity of informing potential participants of their rights and providing them with the objectives, benefits, burdens, and expected outcomes of the research. This includes the right to withdraw from the research at any time, which should only be subject to limited exceptions.
4. The individual's right to decide whether or not to be informed of the research results and the consequences of genetic testing should be respected.
5. Disclosure of genomic data to a third party without the individual's consent is not permitted, and to protect the confidentiality of an individual's genetic characteristics, human genetic data and biological samples collected for research purposes should usually be anonymised.

3.2.2. The French Legislation

Under Chapter One of the French Personal Data Protection Act No. (493), issued on 20 June 2018, and its amendments, the French legislature adopted the definition provided in Article 4 of the General Data Protection Regulation (GDPR) of 2016.[22] This definition identifies personal data as "any information relating to an identified or identifiable individual." The data subject is defined as the individual who can be identified, directly or indirectly, by

20 Tariq Jumah Al-Sayed, 'The Legal Protection of the Right to Genetic Data Privacy: A Comparative Analytical Study' (2020) 8(12) Legal Journal 3920, doi:10.21608/JLAW.2020.141898; Bygrave (n 19).

21 Universal Declaration on the Human Genome and Human Rights (n 2); CIOMS, *International Ethical Guidelines for Biomedical Research Involving Human Subjects* (WHO 2002); 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 119/1.

22 Loi n°2018-493 du 20 juin 2018 'Relative à la protection des données personnelles' <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000037085952> accédé 1 avril 2024.

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reference to specific identifiers such as name, identification number, location data, electronic identifier, or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that person, The French National Commission on Informatics and Liberty (CNIL) defines genetic data as "any information relating to an identified or identifiable natural person, either directly or indirectly." However, it specifies that genetic data is "not personal data like any other data".[23]

In circumstances involving the handling of personal data, French law mandates obtaining clear and informed consent from the individuals concerned by the data processing operation. Additionally, individuals responsible for data processing or those with the right to access the data must adhere to professional confidentiality. Breaching this obligation exposes them to penalties stipulated in Article 226-13 of the French Penal Code.[24]

3.2.3. The Emirati Legislation

The Federal Decree-Law No. (49) of 2023 on regulating the use of the human genome establishes a cornerstone in the country's legal system regarding genomic data.[25] The Emirati law recognises the importance of genomic data as a critical tool in developing healthcare and personalised medicine. This reflects the legislators' commitment to utilising this information to improve the health of citizens, enhance disease prevention, and provide customised treatments. This commitment is evidenced by the definition of key terms in Article 1 of the Decree-Law.

The genome is defined as all the genetic material in an organism, including the genes (alleles) that contain all the biological information needed for the construction and continuity of another organism similar to it and distinctive for its species. The human genetic stock consists of (46) tightly packed molecules of DNA called chromosomes, in addition to the mitochondrial genes. A gene is the fundamental unit for transmitting hereditary traits from parents to offspring, consisting of a DNA sequence occupying a specific position on a chromosome.

The legislators distinguished between genetic testing and genomic screening, indicating that genetic testing involves the analysis of one or several genes of individuals identified by their names, and it allows access to specific genetic regions in the DNA determined by the purpose of the test. Whereas, genomic screening involves the analysis of the complete

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23 Ruth Horn and Jennifer Merchant, 'Managing Expectations, Rights, and Duties in Large-Scale Genomics Initiatives: A European Comparison' (2023) 31(2) European Journal of Human Genetics 142, doi:10.1038/s41431-022-01247-y; Marie Gaille and Ruth Horn, 'The Ethics of Genomic Medicine: Redefining Values and Norms in the UK and France' (2021) 29(5) European Journal of Human Genetics 780, doi:10.1038/s41431-020-00798-2.

24 Taher Abdel-Mutalib and Al-Nahwi Sulaiman, "Legal Frameworks Established for the Protection of the Right to Genetic Privacy in International Charters and in Algerian and French Legislation' (2021) 6(1) Professor Researcher Journal for Legal and Political Studies 2121.

25 Federal Law by Decree no (49) of 2023 (n 6).

genetic material of individuals known by their names, allowing access to all genetic regions in the DNA.

The legislators also differentiated between genetic screening and genomic screening, stating that genetic screening is the process through which genetic analysis is performed on a wide scale that includes a group of individuals identified based on one or more common traits among them, not based on prior knowledge of their names, according to what is decided by the regulatory or implementing body for genetic screening. On the other hand, genomic screening is the process through which an analysis of all genes is performed on a wide scale that includes a group of individuals identified based on one or more common traits among them, not based on prior knowledge of their names, according to what is decided by the regulatory or implementing body for genomic screening.

Article 1 of the law defines genomic data as the information related to the complete genetic material of an individual obtained through genomic testing or screening and after analysing the biological sample. Genetic data is the information related to a part of an individual's genetic material, which may include their genetic fingerprint, obtained within the framework of genetic testing or screening or genetic fingerprint examination and after analysing the biological sample. The law specifies the establishments through which the collection, preservation, storage, and distribution of biological samples such as blood, tissues, cells, etc., and associated information for future use are conducted. Examples include blood banks, umbilical cord blood banks, stem cell banks, and others.

From the foregoing, it is evident that Article 1 of the Emirati Human Genome Law reflects a comprehensive and precise approach towards genetic and genomic data. This indicates an advanced appreciation of the importance of this information in the healthcare and scientific research sectors. This goes beyond merely defining basic concepts; it distinguishes between different types of tests and screenings to ensure a thorough understanding and appropriate application of these technologies. The distinction between genetic and genomic testing underscores the need to handle each type of information differently, with considerations for ethics and privacy.

By defining the nature of genetic and genomic data and how it is collected and used, the law establishes a foundation for protecting individuals' privacy and ensuring that their genetic data is handled responsibly. It emphasises the necessity of obtaining prior and explicit consent from individuals before collecting and using their genomic data for research or other purposes.[26] Consent is taken according to guidelines set by Article 6 of the law, stating: "Informed consent of the participant in the genetic or genomic testing or screening, or their legal representative if they lack or have limited capacity, is taken according to the following controls: 1. The individual or their legal representative must be provided with all the

26 Bruce Budowle and Antti Sajantila, 'Revisiting Informed Consent in Forensic Genomics in Light of Current Technologies and the Times' (2023) 137(2) International Journal of Legal Medicine 551, doi:10.1007/s00414-023-02947-w.

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information related to the test or screening, ensuring they understand its purpose and potential implications. 2. The consent must be written and explicit according to the form approved by the health authority."

From the foregoing, it is evident that within the framework of the Emirati legislature's commitment to international standards, it has adopted the principles of the Universal Declaration on the Human Genome, thereby reaffirming its commitment to protecting human rights in the context of genomic research. By requiring prior voluntary consent, ensuring that participants are informed of their rights and the details of the research, and respecting their wishes regarding being informed of the research results, the Emirati law reinforces the principle of genomic data confidentiality. It implements specific rules concerning non-disclosing such data to any third party without the individual's consent. Thus, the Emirati law aligns with the provisions of the Universal Declaration, showing an advanced understanding of the challenges and opportunities related to genetic and genomic data. It balances the protection of privacy with the encouragement of scientific progress. This approach serves as a model that other countries could follow in developing their legislation related to genomic data, ensuring effective privacy protection while supporting innovation and scientific research.

4 THE CRIME OF OBTAINING GENOMIC DATA WITHOUT THE OWNER'S CONSENT

Most legislation has worked to protect individuals' will against the advances in biological science and the resultant genomic and genetic testing used for medical, scientific, or other purposes. To this end, these legislations,[27] including Emirati law, have stipulated the requirement to obtain prior consent from the person concerned with undergoing genomic or genetic testing and have penalised conducting such testing without the consent of the concerned individual.

In this regard, Article 4 Clause 1 of the Emirati Law Regulating the Use of the Human Genome stipulates that "no person shall be subjected to genomic or genetic testing without obtaining his consent or the consent of his legal representative if he is of limited or no capacity, or at his request...". Similarly, Article 5 Clause 2 of the same law states that "no person shall be subjected to genomic or genetic screening without obtaining his consent or the consent of his legal representative if he is of limited or no capacity...".[28]

Furthermore, Article 30 of the mentioned law provides that "anyone who subjects a person to participate in any voluntary genomic or genetic test or screening without obtaining his consent or the consent of his legal representative if he is of limited or no capacity, according to the provisions of Clause 1 of Article 4 and Clause 2 of Article 5 of

27 Nordberg and Antunes (n 4).
28 Federal Law by Decree no (49) of 2023 (n 6).

this Decree-Law, shall be punished with a fine not less than ten thousand Dirhams and not exceeding one hundred thousand Dirhams".[29]

In the same context, the examination of a person's genetic characteristics in French law is subject to the provisions of Article 16-10 of the Civil Code,[30] which states that the examination of a person's genetic characteristics is conducted for medical purposes or scientific research, and requires obtaining the person's written consent prior to conducting the examination.[31] The French legislature has specified crimes that constitute an infringement on genetic privacy in the Penal Code,[32] in Articles 226-25 to 226-30. Article 226-25 penalises the conduct of genetic testing without obtaining the consent of the concerned individual.[33]

4.1. Elements of the Crime of Obtaining Genomic Data Without the Owner's Consent

Obtaining genomic data without the owner's consent involves several key elements that legally constitute the offence. Understanding these elements is crucial for defining the crime and enforcing the law. The main elements will be described below.

4.1.1. The Material Element of the Crime of Obtaining Genomic Data Without the Owner's Consent

The material element (or the actus reus) of this crime involves any action or series of actions that result in the unauthorised acquisition, access, or control over an individual's genomic data. This encompasses a wide range of activities, including but not limited to:

1. **Collection**: Actively gathering genomic data from various sources without consent, whether through direct extraction from biological samples or unauthorised access to medical records, databases, or other repositories where such data is stored.
2. **Copying or Replication**: Making copies of genomic data, regardless of the means or format, without the permission of the data owner.

29 ibid.

30 Code civil (version 21 février 2024) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/> accédé 1 avril 2024.

31 Philippe Pédrot, 'Le traitement des données médicales informatisées: un nouveau défi à la traçabilité' en *Traçabilité et responsabilité* (Economica 2003) 137; T Lemmens et L Austin, 'Les defis poses par la réglementation de L'utilisation de l'information genetique' (2021) 2(3) Isuma 28.

32 Code penal (adoption 22 juillet 1992) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/> accédé 1 avril 2024.

33 International Bioethics Committee, 'Report of the International Bioethics Committee (IBC) on Updating Its Reflection on the Human Genome and Human Rights: Final Recommendations' (2015) 43 Rev Derecho Genoma Hum 195 <https://pubmed.ncbi.nlm.nih.gov/27311162/> accessed 1 April 2024; Tania Ascencio-Carbajal and others, 'Genetic/Genomic Testing: Defining the Parameters for Ethical, Legal and Social Implications (ELSI)' (2021) 22 BMC Medical Ethics 156, doi:10.1186/s12910-021-00720-5; Katie Nolan, 'Ethics Challenge Winner 2016/ 2017: Gene Editing' (2017) 10(1) Royal College of Surgeons in Ireland, Journal contribution 6.

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3. **Transmission or Disclosure**: Sharing or disseminating genomic data to third parties without the explicit consent of the individual concerned. This could involve the physical transfer of data, electronic communication, or publication in any form.
4. **Use**: Employing the genomic data for any purpose, such as research, profiling, or commercial use, without obtaining prior consent from the data subject.
5. **Accessing**: Illegally accessing databases or systems where genomic data is stored, whether through hacking, deception, or exploitation of security vulnerabilities.

Article (30) of the Emirati Law Regulating the Use of the Human Genome references specific criminal acts by stipulating the crime of conducting genomic or genetic testing, as well as genomic or genetic screening of an individual without their consent or the consent of their legal representative, which results in accessing genetic regions in the DNA.[34]

It is noted that genetic testing involves the analysis of a gene or several genes for one or more people. In comparison, genomic testing is the analysis of the complete genetic material of one or more people, regardless of their purpose. Accordingly, genetic testing represents the part, considering the subject of the analysis is one or more genes, while genomic testing represents the whole, considering the subject of the analysis. Genetic scanning is essentially the same as the aforementioned genetic testing, but it is typically carried out on a larger scale, potentially involving a broader scope of genes or individuals.

Based on the principle that what applies to the part applies to the whole, and vice versa, the UAE legislature could have simply criminalised the act of genetic testing without the consent of the sample donor, and this would apply to the other mentioned forms, including genetic screening and genomic screening. This is the approach adopted by the French legislature under Article 226-25 of the French Penal Code.[35] The French law penalises the examination of a person's genetic characteristics without obtaining their consent for medical or scientific purposes (paragraph 2 of Article 226-25). If genetic characteristics are examined for purposes other than medical or scientific research or anti-doping efforts, the act is punishable regardless of the consent of the individual, whether obtained or not, according to paragraph 1 of the same provision. Moreover, examining genetic characteristics for anti-doping purposes without informing the individual, regardless of their consent or refusal, is also punishable under paragraph 3 of the mentioned article.[36]

Therefore, the mentioned criminal behaviour involves a dual act: firstly, obtaining a biological sample from the human body, such as blood, urine, or others, and secondly, examining the genes of the sample's owner by any means to access genetic information. This is done without the consent of the individual. Thus, taking the biological sample alone does not constitute a crime. However, if done without the consent of the individual, it constitutes an assault on bodily integrity.

34 Federal Law by Decree no (49) of 2023 (n 6).
35 Code penal (n 32).
36 Marie-Louise Briard, 'Encodrement juridique de La genetique en France' (2001) 34 Médecine prédictive: mythe et réalité 38.

The UAE legislature requires the validity of consent, termed in Article 6 of the Human Genome Regulation Law as "informed consent," for genetic testing or genomic examination. This consent entails two conditions:

1. Providing the individual or their legal representative with all information concerning the examination or survey, ensuring their understanding of its purpose and potential consequences.
2. The consent must be written, explicit, and obtained according to the approved model by the healthcare authority, preceding the examination.

Conversely, Article 16-10 of the French Civil Code stipulates the conditions for consent in cases of genetic testing for medical purposes or scientific research.[37] It mandates that consent precedes the examination, based on informing the individual of the nature and purpose of the test, whether for medical or scientific research purposes and must be in writing.

Based on the foregoing, if any of the mentioned conditions for the validity of consent are absent, its effect in authorising genetic testing or genomic examination is nullified, and the crime is committed.[38] Therefore, the consent of the party concerned is negated by taking a biological sample from their body without their knowledge, such as in cases of exploitation of diminished capacity, coercion, or consent that does not meet the conditions of validity. Consent for genetic testing must be obtained directly from the individual or their legal representative if they lack capacity.[39]

4.1.2. The Moral Aspect or Criminal Intent

Committing the offence of obtaining genetic data without the owner's consent is an intentional crime that requires criminal intent. The criminal intent required for this crime is general intent, which entails knowledge of the elements and components of the crime, along with the direction of the will towards the criminal act and achieving the result. Therefore, the perpetrator must be aware of the nature of obtaining a biological sample from a person's body or its secretions and subjecting it to genetic testing by analysing one or more genes to access genetic information, whether whole or partial, without the consent of the sample owner as required by law. Then, the perpetrator's will is directed towards committing the criminal act and achieving the criminal result. Thus, if knowledge or the chosen will is absent, criminal intent is also absent.

37 Code civil (n 30).

38 Yann Padova et Charles Morel, 'Droit des Fichiers, droit des personnes' *Gazette du palais* (Paris, 10 janvier 2004) 2; Elsa Supiot, 'Empreintes génétiques et droit penal: Quelques aspects éthiques et juridiques' (2015) 4(4) Revue de science criminelle et de droit pénal comparé 833, doi:10.3917/rsc.1504.0827.

39 Halpern and others (n 1) 297.

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It is worth noting here that the concept of criminal intent in the context of crimes related to obtaining genetic data without consent reveals various challenges concerning privacy in the era of advanced technology. One of these challenges is proving the perpetrator's knowledge and deliberate intent to violate genetic privacy, which requires a meticulous analysis of available digital and technological evidence. Compared to other privacy crimes, criminal intent in genetic data crimes requires a higher level of awareness and scientific understanding, placing additional pressure on the judicial system to develop new investigations and evidence techniques. This underscores the urgent need to train judges and prosecutors to understand the complexities of genetic technology and its impact on personal rights. In addition, the importance of awareness and legal and ethical education for professionals in the medical and research fields is highlighted to shed light on the dangers of encroaching on genetic privacy and the necessity of respecting the rights of patients and research participants. These professionals must be familiar with the legal standards required for obtaining informed consent and how to apply them to ensure the protection of individual rights and enhance trust in the research and medical processes.

4.2. The Criminal Penalty Prescribed for the Crime

The criminal penalty prescribed for the offence varies depending on the jurisdiction and the severity of the crime. In the United Arab Emirates, for example, Article 30 of the Human Genome Regulation Law stipulates fines ranging from ten thousand to one hundred thousand dirhams for individuals who subject others to genetic testing or surveys without their consent or the consent of their legal representatives.[40] Additionally, in the French Penal Code, Article 226-25 penalises genetic testing without the individual's consent for medical or scientific purposes with imprisonment and fines.[41] The severity of the penalty reflects the seriousness with which the legal system views violations of genetic privacy and underscores the importance of obtaining informed consent in genetic testing and research.

Therefore, the penalties stipulated in the Emirati Human Genome Law reflect the legislature's commitment to safeguarding genomic privacy while considering the ethical and legal dimensions of the individual. However, considering the rapid scientific and technological advancements and their potential for genomic privacy violations, there is a need to reconsider penalties to include custodial sentences that enhance the deterrent nature of the law. Such a step would demonstrate a greater commitment to protecting genomic data and a deeper appreciation of the seriousness of related crimes.

40 Federal Law by Decree no (49) of 2023 (n 6).
41 Code penal (n 32).

5 CONCLUSIONS

The study's conclusion discusses the complexities surrounding the right to privacy, evidenced by varying definitions across different jurisdictions. These definitions reflect unique challenges distinguishing between an individual's private and public aspects, underscoring the pluralistic conceptualisations influenced by social, cultural, and traditional contexts. Notably, the Universal Declaration on the Human Genome and Human Rights marks a significant step as the first international document that intertwines genetic technologies with human rights, advocating for a balance between scientific progress and human rights protection. In the UAE, the Federal Decree-Law No. (49) of 2023 illustrates the national legislature's commitment to safeguarding genomic data as a crucial aspect of individual privacy. This law not only aligns with international standards, as articulated in the Universal Declaration on the Human Genome, by mandating prior voluntary consent for genomic research and ensuring confidentiality but also demonstrates its unique approach by imposing fines—ranging from ten thousand to one hundred thousand dirhams—for unauthorised access to genetic information, diverging from practices that include imprisonment. This tailored approach reflects an evolving legal framework that promotes transparency, integrity, and respect in handling genomic data.

6 RECOMMENDATIONS

To address the complexities of genetic data management within the legal framework, it is imperative to refine specific articles of the Emirati Human Genome Law to enhance compliance and protection of individual genetic rights. A key amendment is proposed for Article (30), where introducing imprisonment as a punitive option and fines would significantly bolster the law's deterrent capabilities. Such a measure would grant courts the discretion to apply a more stringent penalty when necessary, thus fortifying the protective measures around individuals' genetic information.

Further modification is suggested for Article 25 to adapt to the evolving needs of genetic data handling. It is recommended that the law includes provisions for the controlled disclosure and exchange of genetic or genomic data, contingent upon the individual's consent. Particularly in cases of inherited genetic diseases that pose significant threats to the health or safety of relatives, provisions should allow for the informed exchange of data. Such exchanges would be strictly regulated to ensure that individuals are not only aware but also have the potential to access preventive or therapeutic interventions.

Moreover, the importance of comprehensive education and training cannot be understated. There is a pressing need to enhance the understanding of genetic technologies and their implications among judicial bodies and public prosecutors. This initiative should foster greater legal and ethical awareness among medical and research

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professionals. By deepening their appreciation of the nuances of genetic privacy and the rights of patients and research participants, we can ensure a more informed, ethical approach to genomic research and healthcare.

By implementing these enhancements, the legal system can better safeguard genetic rights and adapt to the rapid advancements in genetic technology, ensuring that protections are robust and reflective of contemporary ethical standards.

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Without the Owner's Consent. – 4.1.1. The Material Element of the Crime of Obtaining Genomic Data Without the Owner's Consent. – 4.1.2. The Moral Aspect or Criminal Intent. – 4.2. The Criminal Penalty Prescribed for the Crime. – 5. Conclusions. – 6. Recommendations.

Keywords: *criminal protection, genomic privacy right, informed consent, UAE human genome law, genomic data, genomic testing, genomic screening, genomic research ethics.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

КРИМІНАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЗА АНАЛІЗ ГЕНОМНИХ ДАНИХ БЕЗ ЗГОДИ ВЛАСНИКА: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ

Фатіха Мохаммед Гурарі та Мохаммад Амін Алкріше*

АНОТАЦІЯ

Вступ. *В умовах швидкого розвитку геноміки та біотехнологій Об'єднані Арабські Емірати (ОАЕ) започаткували Програму генома Еміратів, щоб використовувати потенціал геномних технологій для вдосконалення послуг охорони здоров'я. Центральне місце в цій ініціативі посідає інформована та добровільна участь громадян у генетичних дослідженнях, спрямованих на внесок у досягнення цілей забезпечення національного здоров'я шляхом використання генетичних даних. Зокрема, уведення в дію Закону ОАЕ № (49) від 2023 р. підкреслює важливість захисту конфіденційності генома як основного елемента безпеки даних і прав особи.*

У пропонованому дослідженні розглянуто проблему встановлення балансу між індивідуальними генетичними правами та нагальними науковими й медичними потребами геномних досліджень. Воно спрямоване на аналіз правового регулювання питань конфіденційності генома та дослідження злочинів, пов'язаних із несанкціонованим аналізом біологічних зразків.

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Методи. *У дослідженні використано аналітичний юридичний метод і порівняльний підхід для дослідження злочинів щодо розкриття геномних даних. Аналізуючи Закон № (49) від 2023 р. й інші закони, було охарактеризовано законодавство, що регулює геномні дослідження та захист даних в ОАЕ. З метою визначення схожості та відмінностей у підходах до злочинів, пов'язаних із розкриттям геномних даних, було проведено порівняльний правовий аналіз законів ОАЕ та Франції. У роботі також досліджувалися міжнародні стандарти й етичні принципи, щоб забезпечити комплексне міждисциплінарне розуміння перетину права й етики в геномній конфіденційності.*

Результати та висновки. *У висновках щодо цього дослідження підкреслено необхідність створення надійної законодавчої бази, яка б захищала права особи та гарантувала конфіденційність генетичних даних. Такі заходи мають вирішальне значення для зміцнення суспільної довіри до геномних досліджень й узгодження зусиль ОАЕ, спрямованих на популяризацію геномних досліджень, із суворими етичними та правовими стандартами. Зрештою, Закон № (49) від 2023 р. можна вважати прикладом зобов'язання держави надавати підтримку етичним і правовим практикам у геномних дослідженнях, сприяючи таким способом стійкому прогресу в медичній науці.*

Ключові слова: *кримінальний захист, геномне право на конфіденційність, інформована згода, право ОАЕ про геном людини, геномні дані, геномне тестування, геномний скринінг, етика геномних досліджень.*

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Research Article

RENUNCIATION OF INHERITANCE BY KOSOVAR WOMEN: DESIRE OR INJUSTICE? A CASE LAW PERSPECTIVE

Detrina Alishani Sopi*

ABSTRACT

Background: *The right to inherit is one of the rights guaranteed by the Constitution and legal provisions. Every citizen is entitled to this privilege without exception. Even though this right is protected by the Constitution, barely 23% of women in Kosovo are officially registered as heirs. When women exercise their right to refuse inheritance, they mostly give up that privilege in favour of male heirs. Unquestionably, customary law impacts this choice.*

Influenced by religious and customary rights that stipulate that men are entitled to inherit, women prefer to give up their claim to inherit, which accounts for the low percentage of female heirs. Despite the fact that the right of inheritance is regulated by law under the principle of equality, the real situation shows something else.

This article will analyse inheritance law and the influence of customary law, which has led many women to forfeit their rights. This issue discriminates against Kosovar women, denying them their rightful inheritance. These analyses will determine whether customary law or other factors have impacted Kosovar women's unequal inheritance rights compared to men. Ultimately, it raises the question: are these women victims of injustice, or have they freely decided to give up their inheritance?

Methods: *In this paper, several methods were employed to reach a conclusion, including analytical, comparative, historical and normative approaches. The analytical method was used to examine the phenomenon of women renouncing their inheritance rights and the judicial decisions where women have given up their right of inheritance. The normative method examined the legal provisions that directly regulated the right to renounce the inheritance. The historical method played a crucial role in illustrating the evolution of inheritance rights and its influence on women's contemporary perspectives. Finally, the comparative method facilitated a comparison of the legal regulation of inheritance rights in Kosovo with those in other countries in the region.*

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Results and Conclusions: *In legal terms, the right of inheritance treats all heirs equally, regardless of gender, but in practice, a very low percentage of women inherit, mostly giving this right to male heirs. Many factors have influenced this result, such as the influence of customary law and religious law, but also the low number of employed women. After analysing this matter, it was seen that the main solution is to raise awareness among women that all heirs are equal, regardless of gender, ensuring the law is applied fairly to all heirs. To address the reduction of women renouncing their inheritance, several legal changes are recommended. One such change is requiring the declaration of renunciation of inheritance to be made before a notary and registered in court to determine legal deadlines. Additionally, the reasons for renouncing inheritance should be explicitly stated within the set timeframe.*

A more radical measure that would ensure that women do not renounce their rightful inheritance according to the law, and in this way, they would be free from the influences of society, is to change the law by removing the right to renounce the inheritance. Thus, all legal heirs would be forced to accept the inheritance due to them by law.

1 INTRODUCTION

Inheritance law is one of the positive rights of the Republic of Kosovo that enables the transfer of property from the deceased to their heirs. Due to its importance in daily life and to avoid the situation of property being left without an owner, it has become possible to pass the property from the deceased person to the heirs, either by will or law.[1] Regardless of how the property is transferred, it is crucial that, based on legislation in force, the heirs are equal in terms of their rights.

However, in Kosovo, the results of inheritance do not show equal figures in terms of gender. It has been estimated that until now, only about 23% of women have registered or accepted their legally entitled inheritance,[2] while the majority of declared heirs are men. This gender disparity arises precisely because women have been called to inherit but have declared that they are renouncing this right. Since we do not have official data on the exact number of women who have given up on inheritance or their reasons for doing so, secondary data and interviews with some women have been conducted to analyse the causes and consequences of giving up inheritance.

The Constitution of the Republic of Kosovo states that the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, property rights, environmental protection, social justice, pluralism,

1 Law no 2004/26 of 28 July 2004 'Law on Inheritance in Kosovo' [2006] Official Gazette of the Provisional Institutions of Self-Government in Kosovo 3, art 8.

2 KWN, 'According to the NGO "Norma," in Kosovo, Only 23 Percent of Women and Girls Inherit Property' (*KWN Kosovo Women's Network*, 29 September 2023) <https://womensnetwork.org/according-to-the-ngo-norma-in-kosovo-only-23-percent-of-women-and-girls-inherit-property/> accessed 25 April 2024.

separation of powers and the market economy form the foundation of the constitutional order. Article 24 of the same constitution, however, declares that no one may be subjected to discrimination on the grounds of race, colour, gender, language, religion, political opinion, or any other basis and that everyone is equal before the law.[3] International agreements that the Republic of Kosovo has ratified, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocol, the Universal Declaration of Human Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, guarantee equality.[4] Equal rights between heirs are also provided by the current inheritance law. The inheritance order is regulated by this law, but it never discriminates between the heirs. All natural persons under the same conditions inherit equally, according to Article 3 of this law.[5]

Based on several reports and studies in Kosovo, it has been observed that men have benefited more from inheritance than women, even in the face of gender equality and legal restriction. Many reasons contribute to the low proportion of female heirs, including the influence of customary law, religious law, women's unemployment and economic dependence, and the legal possibility of renouncing the right of inheritance.[6]

When family relations were regulated through customary and religious law, the man was the person who was obliged to provide income for the family. In contrast, the wife was obliged to care for the children and housework. Consequently, it was considered that the woman did not generate income or contribute to the creation of wealth, so she did not receive the inheritance. If we go back to the historical development of law, the regulation of inheritance law has long been done by customary and religious rights. This long application of these rights is ingrained in the minds of the people and is difficult to change.

This mentality has begun to change among women living in urban areas, but the situation remains different in rural areas. The inheritance process now frequently relates to both religious and customary law, leading to women being frequently excluded from

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3 Constitution of the Republic of Kosovo K-09042008 of 9 April 2008 (amended 30 September 2020) <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 25 April 2024.

4 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 25 April 2024; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 25 April 2024; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979) < https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women > accessed 25 April 2024.

5 Dita Dobranja, Rozafa Jahaj and Jeta Loshaj, *Gender Analysis: A Multifaceted Overview of Gender Justice in Kosovo* (Friedrich-Ebert-Stiftung 2024) 22.

6 Simeana Beshi, 'Property Inheritance by Women in Kosovo' in Kıymet Tunca Çalıyurt (ed), *New Approaches to CSR, Sustainability and Accountability*, vol 1 (Accounting, Finance, Sustainability, Governance & Fraud: Theory and Application, Springer 2020) 159, doi:10.1007/978-981-32-9588-9_9.

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inheritances. To avoid conflict with customary law, women legally renounce their inheritance rights, effectively passing these rights to male heirs.

Despite an increase in employment among women, with an unemployment rate of somewhere around 25% compared to 19% for men in Kosovo, many women continue to act as if high unemployment for women is still prevalent.[7] Consequently, they continue to renounce their inheritance, adhering to what the customary law dictates.

However, this does not mean that women have not sometimes accepted their right to inherit. These are sadly rare situations, mostly related to procedural or legal inadequacies that have resulted in the acceptance of inherited rights. Bearing in mind that women in Kosovo leave fewer wills than men below, a more complete analysis will be made of the factors that prevent women from inheriting.

2 INHERITANCE ACCORDING TO POSITIVE LAW IN KOSOVO

Kosovo's Law on Inheritance governs inheritance rights, among people's fundamental rights. This legislation states that the testator's property is passed to the heirs in accordance with the will or the law.[8] The same law states, in Article 3, that all heirs will be treated equally and without prejudice based on their gender. Only two types of inheritance are recognised by our legal system: by will or by statute.[9] However, any arrangement for an inheritance that has not yet been opened between the prospective heirs or with outside parties is deemed void.[10] This indicates that inheritance contracts and other agreements are not allowed in the legislation of Kosovo.

It should be mentioned that in this instance, the order of inheritance has been established, which is one method of determining inheritance. The legislation specifies the sequence in which inheritance is divided and who inherits first. Generally speaking, the following individuals are regarded as the decedent's heirs at law: the decedent's children and their descendants, their adoptees and their descendants, their spouse, parents, siblings, grandparents and their descendants.[11]

When someone who possessed property passes away, the process of identifying heirs is triggered. After learning that someone has passed away, the interested parties, the court, or the notary public may start this process.[12] Initially, their children and spouse have the

7 ibid.
8 Law no 2004/26 (n 1) art 3.
9 ibid, art 8.
10 ibid.
11 ibid, art 11.
12 Law no 03/L-007 of 20 November 2008 'On Out Contentious Procedure' [2009] Official Gazette of the Republic of Kosovo 45, art 127.

right to inherit according to the law. The division of property between these persons must be done equally.[13] In cases when these heirs are missing; it is passed to the second row where the spouse and the parents of the testator inherit.[14] Whereas if even the persons designated in the second row are absent, the inherited property passes to the grandparents who belong to the third row.

The procedure for reviewing the inherited property is done by the courts or by notaries who ascertain who the heirs are and identify the inherited property of the deceased. This procedure is initiated by the court or notaries as soon as they are informed that a person has died or has been declared dead.[15] The municipal body that maintains the death registers provides the court or notary with information about a deceased person's passing and the need to start the process of inspecting inherited property.

Therefore, in accordance with the law, the municipal body responsible for maintaining the death register must send the death certificate to the hereditary court or notary within 15 days of the death being registered.[16] Since the death certificate is a document submitted to the court or notary to examine the inherited property and to determine the heirs, it is important to understand who compiles it.

The death certificate is created using information from the deceased's relatives, cohabitators, and other potential sources of information that may be included in the certificate in accordance with the law on non-contentious procedures. This law serves as the foundation for evaluating inherited property. The document, essential for identifying heirs, is prepared using information from the testator's relatives and submitted to the notary public or court.[17] Since the testator's heirs are included in this document, it has frequently happened that the women were not listed, which prevented the court or the notary from calling them to participate in the inheritance process.

In a research conducted in the framework of the project "Women Agents for Property Rights," approximately 300 women from various municipalities were asked about their property rights. Their responses were shocking. When asked if they had gone through the inheritance process in their maternity families, about 31% of women stated that they had. Among these women, 88% reported not receiving anything from this inheritance process.

13 Law no 2004/26 (n 1) art 12.
14 ibid, art 14.
15 Law no 06/L-010 of 23 November 2018 'On Notary' [2018] Official Gazette of the Republic of Kosovo 23, art 4.
16 Law no 03/L-007 (n 12), art 133.
17 EULEX Kosovo, *Women and Inheritance Rights to Real Estate in Kosovo* (Advisory Unit on Justice 2016) 5 <https://www.eulex-kosovo.eu/eul/repository/docs/Inheritance_2N.pdf> accessed 25 April 2024.

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Additionally, 12% declared that they had been excluded through a will, while 5% stated that they were not listed as heirs in the death certificate of the deceased.[18]

These findings reflect a deeply ingrained mentality in Kosovar society. This is because, according to customary law, daughters did not have the right to inherit either in their parents' or husbands' house. Also, religious law greatly influences this mentality. Under religious law, it is believed that a girl, at the moment of marriage, will be financially supported by her husband and thus does not need to inherit from her parents. The husband has a duty to ensure that his wife has all she needs for a happy existence and to cover any costs associated with meeting the family's demands. Even though a woman may own property, she is not required to use it to support the family. To cover the family's costs, the husband inherits twice as much as the wife.[19]

According to Islamic law, more specifically Sharia law, even though the husband holds some power in the family, in terms of property rights, women still have the right to keep their marriage gift as their property.[20] This conclusion aligns with research conducted by Eulex, which found that the lack of a reliable central registry of civil status in Kosovo means municipal offices do not have accurate information on how many members a family has.[21] Without a system to verify the data declared in death certificates, the possibility of some heirs not being listed remains significant. This way of declaring the heirs in the act of death increases the risk that women's rights will be violated as it is known that, as a people, we still have evidence of the impact of customary law that women do not have the right to inherit in the maternity family.

Although the non-declaration of all family members in the death certificate is one reason women lose their right to inheritance, it should be known that this issue stems from the entrenched influence of customary law on the mentality of Kosovo citizens. Even in cases when women are not included in the death certificate, they often do not claim their share of the inheritance, considering it normal not to have this right or choose to remain silent, believing that the inheritance belongs only to male heirs.

For this reason, it is crucial to examine customary law in Kosovo in more detail. It has historically governed the division of inherited property and continues to impact current practices.

In Kosovo, customary law has long been applied to regulate civil relations and, more specifically, inheritance relations. According to author Statovci, Albanian customary law

18 'The project "Women Agents for Property Rights"' (*Kosova - Women for Women (K-W4W)*, 2018) <https://www.k-w4w.org/en/> accessed 25 April 2024.

19 Shefik Kurdiq, *Marriage and intimacy in Islam* (Shb Sira 2003) 42.

20 Majid Khadduri, 'Marriage in Islamic Law: The Modernist Viewpoints' (1978) 26(2) The American Journal of Comparative Law 213, doi:10.2307/839669.

21 EULEX Kosovo (n 17).

represents a Corpus Iuris, which was born at the time of the disintegration of the tribal system and great social controversy.[22] Specifically, in Kosovo, the Kanun of Leke Dukagjini has been used to govern inheritance relations. Due to its long-standing application and the sense of obligation it created, this canon retains an important place in the history of law in Kosovo and many Albanian territories.

The enduring importance of this canon has still left an indelible mark on Kosovo's mentality, alongside the impact of Sharia law based on religion. Even with the occupation of Kosovo by the Ottoman Empire, civil and inheritance relations were regulated in parallel by these two legal systems.

Although the number of employed women and those completing university education has increased in Kosovo, the number of women who inherit property remains low. Despite research and the inability to obtain accurate statistics, it is estimated that only about 23% of women in Kosovo have inherited property, compared to 77% of men.[23] This disparity is largely attributed to the legal right to renounce inheritance, which many women exercise.

To improve this situation, it is important to understand why women continue renouncing their inheritance. Once these reasons are known, the state must either make legal changes or organise more robust awareness campaigns to address and reduce the pronounced inequality in inheritance.

3 THE IMPACT OF CANON OF LEKE DUKAGJINI

The Canon of Leku Dukagjini is one of the canons which, for years, has regulated social relations. Leke Dukagjini is a historical figure who lived between 1410-1481, who, in addition to his deeds for the protection of Albanian lands after his death, left behind this canon legacy which regulates a wide range of relationships ranging from the Church or religious relationships, family, and marriage matters.[24]

According to this canon, women were placed in an unfavourable position, always under the authority of their fathers or husbands. Due to this position, the woman did not recognise the right to inheritance at all. More specifically, the canon stated that a wife had no right to inherit from her parents or her husband's estate.[25] Additionally, parents had no obligation to provide a dowry or anything else for their daughter; this responsibility fell to the family of the man she married.[26]

22 Abdulla Aliu, *E Drejta Civile: Pjesa e Përgjithshme* (Universiteti i Prishtinës 2013).
23 KWN (n 2)
24 Shtjefan Gjecovi, *Kanuni i Lekë Dukagjinit* (Shkodër 1933).
25 ibid, art 20.
26 ibid.

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Furthermore, a woman who remarried for the second time did not have the right of inheritance either. According to the canon, the widow would live on the income of her second husband and could not take any wealth from her first deceased husband. In every situation, women were denied the right to inherit, whether unmarried, married or remarried.

Unfortunately, this mentality has persisted in society today, where it is still commonly believed that women should not inherit. Although there has been progress due to the emancipation of women, the influence of this outdated belief remains evident. This is best shown in the figures, which show that a very small number of women seek their right to inheritance.

The perception of the canon stems from the view that marriage adds another person to the house, primarily for domestic chores and childbearing.[27] Under this view, since women are considered slaves in terms of labour and the birth of children, they are not expected to have more rights, especially in inheritance law. Despite the canon stipulating that husbands are responsible for their wives' needs and wives are under no obligation to support the family financially, women who contribute to household chores still lack inheritance rights within their husbands' families.

A 2011 survey conducted by a gender studies organisation found that 46.25% of women attribute their reluctance to claim inheritance rights to customary law.[28] This suggests that although inheritance law in Kosovo is now regulated by law and gender equality is ensured, women's awareness of participation in inheritance is still influenced by customary law, particularly those reflected in the Canon of Leke Dukagjinti. These customs dictate that women should not inherit property from either their parents or husbands. Additionally, Islamic law, followed by the majority of the population in Kosovo, stipulates that the wife inherits less than the husband due to the husband's responsibility for all family expenses. For this reason, according to Islamic law, a woman inherits less than a man. The marital gift that the wife receives from the husband on the occasion of the marriage is intended to empower the woman financially, especially in case of divorce.[29]

Although Islamic law allows women to inherit from their parents, albeit less than men, societal norms still hinder women from fully exercising their right to inherit. Consequently, many women voluntarily renounce their inheritance rights, despite constitutional and legal guarantees, due to these deeply ingrained influences.

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27 ibid, art 11.

28 Luljeta Vuniqi and Sibel Halimi, *Women's Property Inheritance Rights in Kosovo* (Kosovar for Gender Studies Center 2011) 32.

29 Hammude Abdulati, *Struktura Familjare në Islam* (Logos-A 1995).

4 RENUNCIATION OF INHERITANCE AND ANALYSIS OF COURT CASES

The Law on Inheritance in Kosovo governs the division and transfer of inherited property from the deceased to their heirs. One fundamental principle of this law is equality among heirs, which includes the option for heirs to renounce their inheritance. Renunciation of inheritance grants the right to formally decline their inheritance through a statement in court or before a notary.[30] This right can be exercised by the heir until the conclusion of the inheritance review hearing.

But what are the consequences of renouncing inheritance? If an heir renounces their inheritance without excluding their descendants, this declaration of renunciation applies to their descendants.[31] As per Article 130 of the Law on Inheritance, relinquishing inheritance makes it impossible for the heir's descendants to inherit. Alternatively, if the heir renounces inheritance solely in their own name, it is as if they were never an heir under the law.[32] In such cases, the part of the inheritance that would belong to them passes to their descendants through the right of representation, governed by Articles 137 and 13. Article 137 specifies that the renounced inheritance is treated as if the heir had died before the testator, thereby activating the right of representation.[33] Based on Article 13, the right of representation means:

> *"If one of the children died before the decedent, his place is taken by the decedent's grandchildren from the deceased child, but if specific circumstances foreseen by this law do not provide for these grandchildren, then the great-grandchildren will inherit without any limits".*[34]

Delving deeper into Article 13, it is evident that the spouse of a deceased heir is excluded from inheritance. When the right of representation is applied, it means that only the children of the deceased heir, not their spouses, inherit. Consequently, if legal heirs exercise their right to renounce inheritance solely in their own name, the right of representation ensures that only the heirs of the renouncing heir inherit, excluding spouses.[35]

Two notable cases in Kosovo illustrate this situation. The most serious case involves Sh.B, a woman who lost her husband and children during the war in Kosovo. The house where she lived with her family was owned by her father-in-law. Due to the application of the right to representation, the court ruled that only the descendants of her deceased child could inherit the property where she had lived with her family, effectively denying Sh.B her inheritance

30 Law no 2004/26 (n 1) art 130.
31 ibid, art 130.2.
32 ibid, art 130.4.
33 ibid, art 137.
34 ibid, art 13.
35 Guranda Misabishvili, 'Legal Features of Renunciation of Inheritance' (2023) 9(25) Law and World 131, doi:10.36475/9.1.13.

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rights.[36] For 13 years, she pursued legal avenues to inherit the property where she had lived together with her husband and children. However, as a consequence of the right of representation, she was unable to inherit the part of the property that would have belonged to her husband if he were alive. Eventually, after a marathon of trials, she succeeded in inheriting a portion of the property under family law, which acknowledged her husband's contribution to its acquisition.

Similarly, another case in S.B. involved a woman whose husband died. She managed to secure her inheritance only after the court verified that her husband contributed 30% towards the construction of the house through a loan and his salary at the time. In this case, she inherited her husband's property based on his financial contribution.[37]

For these reasons, the right of representation is considered one of the shortcomings of the Law on Inheritance. These cases underscore how the law excludes spouses from inheritance when heirs renounce their inheritance rights solely in their own name. Many women who have lost husbands have been unable to inherit from their husband's families because the property, which would rightfully belong to their husbands if they were alive, passes only to their children.

For this reason, it is recommended that, based on the right of representation, not only the children but also their spouses should be recognised as heirs. This adjustment could be justified by including children and their spouses within the first circle of heirs, ensuring that both parties are considered for inheritance.

Waiver of inheritance is an institute foreseen in the legislation of many European countries, but in Kosovo, it is used mainly by women.[38] Research conducted in Kosovo indicates that women often relinquish their inheritance, transferring their share to male heirs. The other situation is when the wife is not foreseen as an heir in case the heir dies before the testator. According to a survey conducted on women's rights in inheritance, 46.25% of women from 1050 surveyed believe that according to custom, women should not inherit.[39] In fact, this continues to be the main reason why women in Kosovo continue to give up inheritance.

Recent studies, such as one published in 2023, reveal that only 23% of women in Kosovo have inherited property or have successfully claimed their inheritance rights.[40] This low figure of women who inherit reflects broader societal challenges, including the non-

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36 Dorentina Thaqi, 'Shyhrete Berisha's Two-Decade Long Battle for Inheritance Remains Without an Epilogue' (*KOHA*, 22 August 2022) <https://www.koha.net/en/arberi/341081/beteja-dydekadeshe-e-shyhrete-berishes-per-trashegimine-mbetet-pa-epilog> accessed 25 April 2024.

37 *Case C nr 362/11* (Basic court of Prishtina, 26 April 2016) <https://kallxo.com/wp-content/uploads/2016/05/Aktgjykimi-Shukrije-Berisha-.png> accessed 25 April 2024.

38 Sandra F Joireman, 'Securing Property, Rights for Women (and Men) in Kosovo' (2013 World Bank Conference on Land and Poverty, 8-11 April 2013, Washington DC) doi:10.2139/ssrn.2279955.

39 Vuniqi and Halimi (n 28) 8, 32.

40 KWN (n 2); 'The project "Organizational support"' (*Shoqata e Juristeve Norma*, 7 April 2022) 2023 <https://www.norma-ks.org/projekte/projekti-1/> accessed 25 April 2024.

registration of marital property in the name of women. Currently, only 19.87 % of properties in Kosovo are registered under women's names, with the majority registered under men's names.[41] In response, since 2016, the Government of the Republic of Kosovo, with the aim of strengthening the position of women in society, has undertaken awareness campaigns for the registration of joint property of spouses in the name of both spouses. Thus, people who register property in the name of both spouses are exempted from paying property tax, and this has made the number of properties registered in 2016 in the name of women increase to 122,350 in 2024.[42] This number includes properties registered in the name of both spouses, properties registered only in the name of women, and properties registered in the name of women who have acquired them through inheritance.

Aware of the low number of women who have acquired property through the inheritance process in Kosovo – where approximately only 23% of women have realised their right to inheritance – the authors have examined court judgments to gain insight into this issue. In several cases reviewed by the Basic Court in Pristina, women frequently renounced their inheritance rights through statements made in court. One notable case involved declaring a daughter as the heir, a rare instance among the judgments examined.[43]

In another case, renunciation of inheritance was found through a formal declaration before the court. However, it is notable that heirs are not legally obliged to provide reasons for renouncing their inheritance,[44] but only that they transfer the inheritance to the designated heir.[45]

Across various cases in the Basic Court of Ferizaj during the same year, numerous instances were identified where women renounced their inheritance. For example, in case CT 2023:046090, a deceased heir left behind a wife, three sons, and a daughter. In this case, only the sons were declared legal heirs, as the wife and daughter renounced their inheritance[46]. Similarly, in case CT 2021:208069, the court declared only three sons as heirs, while five daughters were excluded because they renounced their inheritance during the judicial procedure.[47] This pattern was repeated in the case CT 2021:194720, where only the son was declared the legal heir while three daughters gave up their inheritance in favour of their

41 Vuniqi and Halimi (n 28) 9, 28.
42 *Kosovo Cadastral Agency* <https://akk-statistics.rks-gov.net> accessed 25 April 2024.
43 *Case 2023:064671 CT nr 1/2023* (Basic court of Prishtina) <https://prishtine.jjyqesori-rks.org/wp-content/uploads/verdicts/PR_LI_CT_2023-064671_SQ.pdf> accessed 25 April 2024.
44 *Case 2020-133557 CT nr 4/2020* (Basic court of Prishtina) <https://prishtine.jjyqesori-rks.org/wp-content/uploads/verdicts/PR_DR_CT_2020-133557_SQ.pdf> accessed 25 April 2024.
45 Law no 2004/26 (n 1) art 133.
46 *Case CT* 2023:046090 (Basic court of Ferizaj, 15 January 2024) <https://ferizaj.gjyqesori-rks.org/wp-content/uploads/verdicts/FE_KA_CT_2023-046091_SQ.pdf> accessed 25 April 2024.
47 *Case CT 2021:208069* (Basic court of Ferizaj, 25 October 2022) <https://ferizaj.gjyqesori-rks.org/wp-content/uploads/verdicts/FE_KA_CT_2021-208070_SQ.pdf> accessed 25 April 2024.

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brother.[48] The same action was taken by five daughters in case CT 2022:139035, who renounced their inheritance in favour of their brother as the sole heir.[49] Likewise, in decision No. 30/11, female heirs waived their inheritance, ceding their right to the five brothers.[50]

Similar situations have also been identified in the Basic Court of Gjilan, where women, through the declaration, renounce their inheritance. One notable case involved an heir leaving behind a son and a daughter, with only the son inheriting the entire property because the daughter, even though she asked for the division of the property, renounced the inheritance in favour of her brother.[51]

Upon analysing all the legal cases published by courts in Kosovo, it became evident that women are predominantly the ones who renounce their inheritance rights. In contrast, very few cases involved men renouncing their inheritance. These cases typically involve smaller assets, with brothers often renouncing their inheritance in favour of one other brother. Notably, no cases have been found where a man waives the right of inheritance in favour of his sister or another woman.

Through these judgments, it was consistently observed that the renouncing parties did not disclose the reasons for renouncing the inheritance. This lack of transparency is considered a legal flaw that warrants prompt attention. Introducing a legal requirement for heirs to provide reasons for renouncing inheritance could potentially reduce the incidence of renunciations, especially among women.

Recognising the high number of women in Kosovo who give up inheritance, the authors conducted direct interviews with 100 women aged 30-65 who have gone through inheritance procedures in order to identify women's attitudes regarding inheritance practices. It must be noted that the interviewed women had completed secondary education.

A notable finding was that 41% of women cited the customary right as their reason for renouncing their inheritance. According to these women, a woman who receives property from her biological family could strain relations with parents and siblings, as traditional norms dictate that women have no right to go to their family or siblings. Declining inheritance or taking inherited wealth from their family means good relations with parents and siblings.

Additionally, 19% of women interviewed renounced inheritance because they were married and financially stable in their married life and felt they did not need parental inheritance.

48 *Case CT 2021:194720* (Basic court of Ferizaj, 02 July 2023) <https://ferizaj.gjyqesori-rks.org/wp-content/uploads/verdicts/FE_KA_CT_2021-194721_SQ.pdf> accessed 25 April 2024.

49 *Case CT 2022:139035* (Basic court of Ferizaj, 14 October 2022) <https://ferizaj.gjyqesori-rks.org/wp-content/uploads/verdicts/FE_KA_CT_2022-139035_SQ.pdf> accessed 25 April 2024.

50 *Case CT nr 30/11* (Basic court of Ferizaj, 9 March 2018) <https://ferizaj.gjyqesori-rks.org/wp-content/uploads/verdicts/FE_CT_30_11_SQ.pdf> accessed 25 April 2024

51 *Case 2022:039607 CT nr 1/22* (Basic court of Gjilan, 08 February 2023) <https://gjilan.gjyqesori-rks.org/wp-content/uploads/verdicts/GJ_NO_CT_2022-039607_SQ.pdf> accessed 25 April 2024.

Another 13% of women declared that they gave up the inheritance because their parents' wealth was minimal, believing it would not be worth it to be divided among all the children, believing it more practical for their brother who lived with their parents to inherit. Moreover, 15% of women cited adherence to Islamic law as their reason. The remaining respondents chose not to disclose their reasons for giving up the inheritance.[52]

Another important legal address is improving the right of representation, including allowing spouses of deceased heirs to be legal heirs.

Although the right to renounce inheritance is considered a fundamental human right, in Kosovo, it has taken a different direction due to its application influenced by mentality or customary law. Unlike many other countries where renunciation is less common, in Kosovo, it is frequently used by women to renounce the inheritance that belongs to them in favour of brothers or sons, making this issue problematic.[53] Despite awareness campaigns advocating for equal division of inherited property among heirs regardless of gender, it is believed that recommended legal changes are necessary to address the situation.

5 THE INSTITUTE OF RENUNCIATION OF INHERITANCE ACCORDING TO THE LEGISLATION OF THE COUNTRIES IN THE REGION

The low number of women inheriting property in Kosovo is estimated to be due to the influence of customary law. Legally, women are not discriminated against as the law does not exclude them from inheritance rights. However, it has also been established by the US Department of State in the Country Reports on Human Rights for 2023 that even though all heirs in Kosovo enjoy equal rights in the legal sense, men typically inherit property.[54]

To better assess this situation, it is informative to see how other countries in the region have regulated the institution of renunciation of inheritance. For example, the waiver of inheritance is an institution that is also foreseen in the Civil Code of Albania. Based on Article 333 of this code, the declaration of renunciation of inheritance must be made in written form and registered with a notary.[55] Following registration, the notary issues a certificate for changing the order of inheritance. It should be noted that the declaration can only be declared within three months of the opening of the inheritance.[56] A notable feature

52 Source: author interviews (January 2024).
53 Joireman (n 38).
54 Bureau of Democracy, Human Rights and Labor, and Bureau of European and Eurasian Affairs, '2023 country Report on Human Rights Practices: Kosovo' (*US Department of state*, 22 April 2024) <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/kosovo/> accessed 25 April 2024.
55 Law no 7850 of 29 July 1994 'On the Civil Code of the Republic of Albania' (amended 3 November 2016) art 333 <https://www.wipo.int/wipolex/en/legislation/details/20976> accessed 25 April 2024.
56 ibid, art 335.

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of this institute in Albania is that an heir designated as such cannot renounce inheritance after the process has begun.

According to Albanian legislation, notaries, as public officials, have competence in examining inherited property and keeping registers of persons who renounce inheritance. Kosovo lacks such a register, making it challenging to track how many individuals have given up their inheritance. Compounding this issue is the dual competence of both notaries and courts in reviewing inheritance, further complicating data management and record-keeping.

The Inheritance Law of the Republic of North Macedonia has regulated the institute for renunciation of inheritance in almost the same way as in the Republic of Kosovo, outlined in Articles 128-133. Despite this legal similarity, both countries face a challenge with low rates of property inheritance by women.[57] In North Macedonia, approximately 27% of properties are registered under women's names, with the majority owned by men.[58] These figures highlight that women in North Macedonia, like in Kosovo, experience disproportionately lower rates of inheriting property than men.

In the Republic of Croatia, the institution of renunciation of inheritance is also well-regulated under inheritance law. Heirs can renounce the inheritance through a publicly verified statement or recorded declaration.[59] If the inheritance has not yet been opened, renunciation can be done through a written contract with the ancestor, which is only valid if it is certified by the court or notarised.[60]

Croatia differs from Kosovo in its approach to the relinquishment of inheritance. It is done through a publicly verified statement, and a database is maintained for persons who have renounced their inheritance rights. Additionally, there is a provision for heirs to conclude a contract between heirs and ancestors for inheritance that has not yet been opened.

In contrast to the regulations in Kosovo, Bulgaria has specific procedures regarding the renunciation of inheritance under its inheritance law. In Bulgaria, an heir wishing to renounce their inheritance must execute a declaration before a notary public. This declaration must be registered in court, resulting in a dual registration process.[61] This

57 Law of the Republic of North Macedonia 'Law on Inheritance' [1996] Official Gazette of the Republic of North Macedonia 47, art 128.

58 *KATACTAP: Agency for real estate in Republic of North Macedonia* <https://www.katastar.gov.mk/en/?s=statistik&submit=Search> accessed 25 April 2024.

59 Law of the Republic of Croatia of 15 February 2019 'Law on Inheritance' art 130 <https://www-zakon-hr.translate.goog/z/87/Zakon-o-naslje%C4%91ivanju?_x_tr_sl=hr&_x_tr_tl=en&_x_tr_hl=hr&_x_tr_pto=wapp> accessed 25 April 2024.

60 ibid, art 134.

61 Law of the Republic of Bulgaria of 30 April 1949 'Inheritance Act' (amended 23 June 2009) art 52 <https://www.bulgaria-inheritance-law.bg/law.html > accessed 25 April 2024.

method of double registration of declarations for renunciation of inheritance[62] makes storing data and declarations for disinheritance even more secure and reliable.

Considering that neighbouring countries in the region, such as Albania, Bulgaria and Croatia, have similar legal frameworks, it is recommended that Kosovo adopt a similar approach. This would involve requiring renunciations of inheritance to be done in writing, signed before a notary public, and entered in a special database.

6 CONCLUSIONS

The right to inherit is a right guaranteed by the Constitution and law. This right is considered a fundamental human right based on the principle of equality. In Kosovo, the Law on Inheritance governs inheritance rights and ensures the division of inherited property equally, irrespective of gender or other differences between heirs. Still, in practice, the result is different, with a large percentage of Kosovo women not inheriting property from either their biological family or their husband's family. This disparity has prompted many organisations and researchers to analyse the reasons why women in Kosovo do not inherit property.

The primary reason is adherence to customary law, which traditionally excludes women from inheriting property because they marry and live in their husband's homes. Under customary law, women do not have the right to inherit their parents' house as their husbands are the ones responsible for the family's well-being. Since men have an obligation to take care of the family, only they have the right to inherit to be able to take care of their families. Women are relieved of this obligation because they are only obliged to bear children and take care of the home. Consequently, women often renounce their inheritance rights to maintain good relations with their relatives, transferring their share to their brothers.

Despite the Inheritance Law not differentiating between the sexes and treating all heirs equally, many women voluntarily use the institution of renunciation of inheritance to give up their right to inherit in favour of their male heirs. This renunciation is deeply influenced by customary norms that instil the belief that women should not inherit. In cases where inheritance is divided between the heirs, women, in most cases, give up the inheritance in favour of their brothers, justifying it by the fact that the brothers live with their parents and have to take care of them.

62 Lucia Ruggeri, Ivana Kunda and Sandra Winkler (eds), *Family Property and Succession in EU Member States: National Reports on the Collected Data* (Faculty of Law of University of Rijeka 2019) 62.

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Another factor contributing to women's renunciation of inheritance is their desire to maintain good relationships with their brothers and parents.[63]

Additionally, the right to representation, as regulated by law, exacerbates the issue. Under this provision, the spouse is not foreseen as an heir in cases when the heir has died before the testator. As a result, the deceased heir before the testator is inherited only by his children and not by his spouse. This legal regulation has denied many women whose husbands predeceased their fathers. With the death of the father-in-law, the property that would have belonged to the husband is distributed only to their children and not to the wife. Despite the problems this regulation has caused in the judiciary in Kosovo, there have been no initiatives to address and correct this shortcoming.

After analysing the legal regulation of the Institute of Renunciation of Inheritance in Kosovo and comparing it with other regional countries, it is recommended that:

- Raise awareness: Conduct awareness campaigns to educate women that renunciation of inheritance should not be influenced by customary law. According to the law, each woman must receive an inheritance that belongs to her.
- Written declarations: Require that renunciation of inheritance be made in written form before a notary and registered in a database managed by basic courts.
- Legal deadlines: Implement deadlines for renunciation declarations, for example, within three months from the examination of the inheritance, as the civil code of Albania states.[64] The determination of this deadline means that if the waiver is not made within this deadline, women will no longer have the right to waive the inheritance and will become the owner of the shared property. If they really want their property to pass to others, they can do this through the gift contract. Therefore, this determination of the legal terms will not reduce the rights of the heirs.
- Mandatory reason disclosure: Make it mandatory to declare the reasons for renunciation. In this situation, the real reasons for relinquishing inheritance will be officially collected, and in this way, the state will have an easier time addressing this issue through legal changes, thereby promoting gender equality. The heirs will be respected for their free will to renounce the inheritance, but they must show the reason why they act in this way. Through this solution, cases can also be discovered when the heir has been forced to do such an action.
- Removal of renunciation temporarily: Consider temporarily removing the renunciation option from the law to ensure all heirs receive the wealth that belongs to them through the law. If the heir desires to pass the property acquired through

63 ATRC, 'What do we really know about property rights?: An analysis of the knowledge and attitudes of women and men in the Municipalities of Kaçanik/Kačanik, Viti/Vitina and Shtërpcë/Štrpce about property and inheritance rights' (*Kosova - Women for Women (K-W4W)*, 2018) <https://www.k-w4w.org/hulumtime-dhe-raporte/> accessed 25 April 2024.

64 Law no 7850 (n 55) art 335.

inheritance to another heir, they can do so through gift contracts. The only goal is to increase the number of women who inherit by not giving the opportunity to give up the inheritance.

- Include spouses in representation rights: Amend the law to include spouses as heirs under the right of representation.

Despite the shortcomings identified in the law, women must be treated equally with men according to inheritance law. However, influenced by customary law and their often weak economic position, women frequently use the institution of renunciation of inheritance. Therefore, it is very important to ensure that renunciation of inheritance should only be used for strong reasons. Only in this way will the economic and social position of women in society be strengthened.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ВІДМОВА ЖІНОК ІЗ КОСОВА ВІД СПАДКУ: БАЖАННЯ ЧИ НЕСПРАВЕДЛИВІСТЬ? ПЕРСПЕКТИВА З ПОГЛЯДУ СУДОВОЇ ПРАКТИКИ

Детріна Алішані Сопі*

АНОТАЦІЯ

Вступ. *Право на спадщину є одним із прав, гарантованих Конституцією та законами. Ним може скористатись кожен громадянин без винятку. Незважаючи на те, що це право захищене Конституцією, лише 23% жінок у Косові офіційно зареєстровані як спадкоємиці. Коли жінки користуються своїм правом відмовитися від спадку, вони здебільшого відмовляються від нього на користь спадкоємців чоловічої статі. Безсумнівно, звичаєве право впливає на цей вибір.*

Під впливом релігійних і звичаєвих прав, які передбачають, що спадкоємцями повинні бути чоловіки, жінки вважають за краще відмовитися від права на спадщину. Це пояснює низький відсоток спадкоємців жіночої статі. Незважаючи на те, що право на спадкування регулюється законом за принципом рівності, реальна ситуація свідчить про інше.

У цій статті буде проаналізовано спадкове право та вплив на нього звичаєвого права, що призвело до відмови багатьох жінок від спадку. Це питання дискримінує жінок Косова, адже позбавляє їх законної спадщини. Цей аналіз дозволить визначити, чи звичаєве право, чи інші фактори вплинули на нерівні права на спадкування жінок порівняно з чоловіками у Косові. Зрештою, виникає питання: чи є ці жінки жертвами несправедливості, чи вони добровільно вирішили відмовитися від своєї спадщини?

Методи. *У цьому дослідженні, щоб зробити висновок, було застосовано кілька методів, включно з аналітичним, компаративним, історичним та нормативним підходами. Аналітичний метод застосовувався для вивчення явища відмови жінок від своїх прав на спадщину та судових рішень щодо цієї проблеми. Нормативний метод використовувався для дослідження правових норм, які безпосередньо регулювали право на відмову від спадщини. Історичний метод відіграв вирішальну роль в ілюстрації еволюції прав на спадкування та його впливу на сучасні погляди жінок. Нарешті, за допомогою компаративного методу було здійснено порівняння правового регулювання спадкових прав у Косові з іншими країнами регіону.*

Результати та висновки. *З юридичної точки зору, право на спадкування передбачає рівність усіх спадкоємців, незалежно від статі, але на практиці дуже низький відсоток жінок отримує спадок, здебільшого це право надається спадкоємцям чоловічої статі. На цей результат вплинуло багато факторів, наприклад вплив звичаєвого та релігійного права, а також низька кількість працевлаштованих жінок. Після аналізу цього питання*

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стало зрозуміло, що основним рішенням є підвищити обізнаність жінок у тому, що всі спадкоємці є рівними, незалежно від статі, та забезпечити справедливе застосування закону до всіх спадкоємців. Щоб зменшити кількість жінок, які відмовляються від спадщини, рекомендовано кілька законодавчих змін. Однією з таких змін є вимога подати заяву про відмову від спадку, засвідчену нотаріусом, та реєстрації цієї заяви в суді з визначенням законних строків. Крім того, у встановлений строк мають бути чітко викладені причини відмови від спадщини.

Більш радикальним заходом, який гарантував би жінкам право на законну спадщину і таким чином позбавив їх від впливу суспільства, є зміна закону, що скасовує право на відмову від спадку. Таким чином, усі законні спадкоємці були б змушені прийняти належну їм за законом спадщину.

Ключові слова: *права на спадкування, звичаєве право, жінки, відмова від спадщини.*

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Research Article

COMBATTING SEXUAL VIOLENCE IN KOSOVO: GLOBAL PERSPECTIVES AND LOCAL SOLUTIONS

Berat Dërmaku*, Kosovare Sopi and Liza Rexhepi

ABSTRACT

Background: *Addressing sexual violence is a pressing social issue that requires comprehensive action and attention. In Kosovo, sexual assault remains a significant concern, necessitating a multidimensional approach to combat this pervasive problem. This paper delves into various facets of sexual assault in Kosovo, exploring its historical context, cultural factors, legal framework, and societal attitudes.*

Methods: *The paper synthesises information from diverse sources, including empirical data from a survey conducted in Gjilan city in 2022, which engaged 675 participants. Statistical analysis techniques were employed to analyse the survey findings and draw meaningful conclusions regarding public perceptions, attitudes, and responses to sexual violence.*

Results and Conclusions: *The findings underscore the urgency of addressing sexual violence in Kosovo through legal reforms, public awareness campaigns, support services for survivors, educational initiatives, and collaborative efforts among stakeholders. Recommendations are provided to strengthen the legal framework, enhance support services, promote awareness, and foster cooperation among governmental, non-governmental, and community organisations.*

Implementing these recommendations can contribute to creating a society free from sexual violence and prioritising the safety, well-being, and empowerment of survivors. By addressing sexual violence comprehensively, Kosovo can promote social cohesion, gender equality, justice, and economic development while also enhancing its international reputation and cooperation amidst European integration processes and post-war recovery efforts.

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1 INTRODUCTION

Violence is one of the numerous problems afflicting modern societies. Contemporary criminal law in recent decades has undergone significant changes regarding the perception of what is considered normal and prohibited in the realm of sexual life. Early criminal legislation criminalised and sanctioned various behaviours in this sphere, regardless of whether they were consensual or not. Over time, attitudes and sanctions related to specific behaviours in this realm of intimate life have evolved.[1] The use of violence has never proven to be a solution to human interpersonal issues. Violence is a means that directly violates human rights and freedoms. In the Republic of Kosovo, several taboo topics usually spark numerous debates. One such issue is sexual violence, especially in a more conservative country like Kosovo, where such cases are often not reported due to the prevailing notions of "morality" and "shame."[2]

Sexual assault is a severe and widespread issue that affects individuals in various societies and can have long-term physical, psychological, and emotional consequences. It refers to any non-consensual sexual act or behaviour forced upon an individual without their clear consent. Sexual assault includes various acts such as rape, harassment, molestation, and coercion, occurring in different settings such as intimate relationships, workplaces, educational institutions, and public spaces.[3]

This paper aims to explore the complex nature of sexual assault, its impact on victims, and society's response to this urgent issue. By examining the causes, consequences, and preventive measures, we can better understand the challenges survivors face and work towards creating a safer and more supportive environment for all individuals.

2 PREVIOUS ACHIEVEMENTS – INTERNATIONAL LEGAL FRAMEWORK OF SEXUAL VIOLENCE

Two decades of research have consistently shown that approximately 15% to 30% of women experience attempted or completed sexual assault in adulthood. Sexual assault is most common among younger women and adolescent girls, with over half of all first rapes of

1 Ejup Salihu, Rexhep Zhitija dhe Xhevdet Hasani, *Komentari I Kodit Penal të Republikës së Kosovë* (GIZ 2014) 605.

2 'Dhuna në familje, temë (jo) tabu në shoqërinë Kosovare' (*Telegrafi*, 18 December 2020) <https://telegrafi.com/dhuna-ne-familje-teme-jo-tabu-ne-shoqerine-kosovare/> accessed 15 February 2024.

3 Sigrun Sigurdardottir and Sigridur Halldorsdottir, 'Persistent Suffering: The Serious Consequences of Sexual Violence against Women and Girls, Their Search for Inner Healing and the Significance of the #MeToo Movemen' (2021) 18(4) International Journal of Environmental Research and Public Health 1849, doi:10.3390/ijerph18041849.

women occurring before age 18.[4] Women assaulted either in childhood or adolescence also have a significantly greater risk of sexual re-victimisation in adulthood.

In recent years, there has been increased public awareness of and societal responses to issues of violence against women and children. However, since the 1980s, we have experienced a political and social backlash of sorts in response to the gains won by the second wave of the women's movement in the 1960s and 1970s regarding various social issues, including sexual assault. It is important to be aware of this because what is considered rape is still hotly contested in US society.

In addition, rape stereotypes are quite prevalent and affect survivors' decisions of whether to disclose rape, as well as how people react to survivors' disclosures. Therefore, one cannot truly understand the topic of sexual assault without first grasping the broader societal context of rape.

In this chapter, we review the social phenomena that maintain a rape-supportive environment, including simultaneous acknowledgement and denial of rape in society, the "real rape" stereotype, and rape myths; the silencing effect of these phenomena; the variables that influence individual attitudes and beliefs about rape; and the question of whether disclosure really empowers women.[5]

There are five Special Procedures related to gender rights under the United Nations Human Rights (OHCHR):

(a) The Special Rapporteur on Trafficking in Persons, especially Women and Children, focuses on human trafficking for labour and involuntary sex work.
(b) The Special Rapporteur on Violence against Women and Girls, its Causes and Consequences.
(c) The Working Group on Discrimination against Women and Girls.
(d) The Independent Expert on Sexual Orientation and Gender Identity.
(e) The Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography, and other child sexual abuse.

When the Human Rights Council replaced the UN Human Rights Commission of the Secretariate in 2006, the HRC continued three individual Special Procedures. The Working Group only came into existence in 2010, and the Special Rapporteur on Sexual Orientation and Gender Identity in 2016.[6]

The persistent inequality faced by women is evidenced in the realm of violence. A brief examination of early political ideologies and subsequent anthropological research reveals a

4 Sarah E Ullman, *Talking about Sexual Assault: Society's Response to Survivors* (American Psychological Associations 2010) 13.

5 ibid 13-4.

6 Henry (Chip) Carey and Stacey M Mitchell, *Legalization of International Law and Politics: Multi-Level Governance of Human Rights and Aggression* (Palgrave Macmillan 2023) 171.

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historical distribution of power in society, where men traditionally wielded authority while women were relegated to domestic roles. This structure is commonly referred to as "patriarchal." While it is important to heed Rosaldo's caution against oversimplifying patriarchy, it is worthwhile to explore its varied manifestations across different societies and eras, as elaborated in the ensuing discussion.

Patriarchy takes on multifaceted forms, each with its distinguishing characteristics. A striking illustration of this is the violent treatment of women, which includes instances of sexual violence beyond the domestic sphere, workplace harassment, domestic abuse, and the portrayal of women in art or literature with a pornographic lens. Furthermore, patriarchy is evidenced in the historical exclusion of women from full participation in public life, whether through unequal opportunities in employment or underrepresentation in democratically elected legislative bodies.[7]

The majority of international organisations have condemned sexual violence and have also enacted measures against it. Among the initial acts prohibiting sexual violence are:

a) Lieber Codes (1863) – General Order 100 signed by President Abraham Lincoln.[8]
b) Hague Convention (1907) – Article 46.[9]
c) Nuremberg and Tokyo Tribunals (1945/6).[10]
d) Geneva Conventions (1949) and Additional Protocols (1977) – Articles 3, 27, 75, Article 4, Part II.[11]
e) International Criminal Tribunals for the former Yugoslavia and Rwanda (1993 & 1995) - Statutes of ICTY and ICTR.[12]
f) Statute of the International Criminal Court (1998) – Articles 7 and 8.[13]

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7 Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Routledge-Cavendish 2016) 7.

8 Instructions for the Government of the Armies of the United States in the Field (Lieber Code) (24 April 1863) <https://ihl-databases.icrc.org/en/ihl-treaties/liebercode-1863?activeTab=historical> accessed 31 January 2024.

9 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague, 18 October 1907) <https://www.refworld.org/legal/agreements/hague/1907/en/31788> accessed 31 January 2024.

10 Nuremberg and Tokyo Tribunals (1945/6) - War Crimes on Trial: The Nuremberg and Tokyo Trials. See: 'The International Military Tribunal for Germany: Contents of The Nuremberg Trials Collection' <https://avalon.law.yale.edu/subject_menus/imt.asp> accessed 31 January 2024; 'The International Military Tribunal for the Far East' <http://imtfe.law.virginia.edu/> accessed 31 January 2024.

11 'Geneva Conventions of 1949, Additional Protocols and their Commentaries' <https://ihl-databases.icrc.org/en/ihl-treaties/geneva-conventions-1949additional-protocols-and-their-commentaries> accessed 31 January 2024.

12 International Criminal Tribunals for the former Yugoslavia and Rwanda (1993 & 1994): Updated Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993) <https://www.icty.org/en/documents/statute-tribunal> accessed 31 January 2024; Statute of the International Criminal Tribunal for Rwanda (8 November 1994) <https://unictr.irmct.org/en/documents> accessed 31 January 2024.

13 Rome Statute of the International Criminal Court (17 July 1998) <https://ihl-databases.icrc.org/en/ihl-treaties/icc-statute-1998> accessed 31 January 2024.

Below is a table presenting international legal acts that envisage the prohibition of sexual violence (Table A).[14]

Table **A. International conventions and declarations**

Short Name	Full Name	Organisation	Adopted
DEDAW	Declaration on the Elimination of Discrimination Against Women	United Nations	1997
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women	United Nations	1979
VDPA	Vienna Declaration and Programme of Action	United Nations	1993
DEVAW	Declaration on the Elimination of Violence Against Women	United Nations	1993
Belém do Pará Convention	Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women	Organisation of American State	1994
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	African Union	2003
Istanbul Convention	Convention on preventing and combating violence against women and domestic violence	Council of Europe	2011

Most of the acts mentioned above have been directly incorporated by the Republic of Kosovo into its Constitution and subsequently into its legal framework.[15] This is specifically addressed in Article 22, which discusses the direct implementation of international agreements and instruments.

14 ICRC, 'Academic Workshop on Sexual Violence: International legal framework affording protection against sexual violence in armed conflicts and other situations of violence' (*ICRC International Humanitarian Law Databases*, 2014) <https://www.icrc.org/en/doc/assets/files/2014/sexual-violence-workshop-legal-provisions.pdf> accessed 31 January 2024.

15 Constitution of Republik of the Kosovo (adopted 9 April 2008) arts 17-22 <http://old.kuvendikosoves.org/?cid=2,1058> accessed 31 January 2024.

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The European Court of Human Rights also plays a crucial role, as demonstrated in the case of *M. C. v. Bulgaria* (4.12.2003, Application No. 39272/98).[16] In this case, the Court emphasised that the member states of the Convention[17] have an obligation under Articles 3 and 8 of the Convention for the Protection of Human Rights to criminalise and prosecute all forms of non-consensual sexual relations, including cases where the victim does not resist. In this instance, the Court found that Bulgaria had violated the provisions of Articles 3 and 8 of the Convention because the criminal prosecution in the case of the complainant's assault had been ineffective (the prosecutor had dropped the case) within the context of prosecutorial and judicial practices that generally pursued only those cases of assault where the victim actively resisted.[18]

3 PREVALENCE AND SPREAD OF SEXUAL VIOLENCE

Today, with the rapid development of technology and other factors, besides positive aspects, there are also negative influences affecting various aspects, including homicides, violence, and other illegal actions. Globally, alarming figures are observed in various countries. For example, one in every six American women has been a victim of an attempted or completed rape during her lifetime. Since 1998, around 17.7 million American women have been victims of attempted or completed rape, while 2.78 million men in the USA have been victims of attempted or completed rape.[19]

Despite being taboo topics in some societies, these issues are not unrecognised. It is crucial to understand what sexual violence is and consider it a significant crime that deserves special attention. Sexual assault occurs when someone touches another person sexually without their consent or involves them in a sexual activity without their agreement. This includes unwanted kissing and sexual touching.[20] Every sexual assault is a serious crime that can have lasting effects on the victim or survivor. No one deserves or seeks to experience it, and 100% of the blame lies with the perpetrator or perpetrators.[21]

Kosovo, despite numerous political and ongoing issues with neighbouring countries (such as the Republic of Serbia), has experienced a rising trend in crime in recent years, including

16 *MC v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003) <https://hudoc.echr.coe.int/eng?i=001-61521> accessed 31 January 2024.

17 Council of Europe, *European Convention on Human Rights (as amended)* (ECtHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 31 January 2024.

18 Salihu, Zhitija and Hasani (n 1) 510.

19 'Victims of Sexual Violence: Statistics' (*RAINN*, 2019) <https://rainn.org/statistics/victims-sexual-violence> accessed 31 January 2024.

20 'What is Sexual Assault?' (*Rape Crisis England & Wales*, nd) <https://rapecrisis.org.uk/get-informed/types-of-sexual-violence/what-is-sexual-assault/> Accessed 31 January 2024.

21 ibid.

more sensitive problems like domestic violence, sexual violence, and murder.[22] Despite being known as a relatively calm country with statistically low crime rates in the region, this issue has escalated due to various factors year by year.[23]

Crimes against "Sexual Integrity" were previously covered in the Penal Code of the former-Socialist Federal Republic of Yugoslavia (SFRY),[24] categorised as offences against the dignity and morality of an individual. In their book "Criminal Law," authors Nicola Serzentič and Aleksander Stajič referred to these acts as offences against sexual morality. They further emphasised that criminal law, in regulating sexual relations, has the duty to prevent, through punishment, only those activities that are inconsistent with human freedoms to decide during their pursuits to satisfy their sexual desires. Such acts primarily presented themselves as offences related to violence against a person, forcing them into physical contact with another person and, subsequently, actions directed against the freedom to decide in sexual matters.

The authors categorise these acts into two directions: offences directed against the freedom of a person's personality and criminal acts directed against their honour. The authors mentioned earlier highlight the significance of sexual offences for two main reasons. Firstly, intervention is necessary because while a minority of perpetrators may be deemed responsible individuals, the majority exhibit abnormal sexual tendencies, which may be either inherent or acquired. Secondly, there is the troubling aspect of exploiting individuals' vulnerabilities to fulfil sexual desires in such cases.[25]

Even the latest Constitution of the Socialist Autonomous Province of Kosovo[26] within the framework of the former SFRY, in its chapter on Freedoms and Rights, also foresaw personal integrity and human rights. Article 192 states, "The inviolability of the integrity of the individual's personality, personal life, and his other personal rights is guaranteed."[27]

On the other hand, Author Milan Millutinović characterises criminal acts with a sexual nature as offences with an influence of socio-pathological phenomena within the framework of criminality.[28] Similarly, author Ragip Halili explains why this category falls under socio-pathological factors, emphasising that it is related to a social disease that

22 'A ka shpjegim rritja e kriminalitetit?' (*TV Malisheva*, 23 November 2023) <https://www.malisheva.tv/a-ka-shpjegim-rritja-e-kriminalitetit/> accessed 14 March 2024.

23 Luljeta Krasniqi-Veseli, 'Papunësia, faktor i rritjes së kriminalitetit në Kosovë' (*Radio Evropa e Lirë*, 02 nëntor 2016) <https://www.evropaelire.org/a/28090352.html> accessed 14 March 2024.

24 Criminal Code of the Socialist Federal Republic of Yugoslavia (1 July 1977) <https://www.refworld.org/legal/legislation/natlegbod/1977/en/13685 > accessed 31 January 2024.

25 N Serzentič dhe A Stajič, *E Drejta Penale* (Enti i Teksteve Dhe Mjeteve Mësimore Të Krahinës Socialiste Autonome Të Kosovës, Universiteti i Prishtinës 1972) 369-70.

26 Kushtetuta e Krahinës Socialiste Autonome të Kosovës datë 27 shkurt 1974 [1974] Gazetën zyrtare e KSAK 4.

27 ibid, art 192.

28 M Millutinovič, *Kriminologjia* (Enti i Teksteve Dhe Mjeteve Mësimore Të Krahinës Socialiste Autonome Të Kosovës, Universiteti i Prishtinës 1970) 352.

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affects certain relationships on a broader scale. These phenomena involve undermining and attacking moral, human, and social values that contribute to the manifestation of crime in the country.[29]

Sexual violence is a global problem, not exclusive to Kosovo. Although Kosovo is a relatively young country with only 15 years of statehood, it has begun to face such issues. Sexual violence is a serious issue in Kosovo, as it is in many other countries worldwide. While accurate and comprehensive data is challenging to obtain due to underreporting and the stigma surrounding sexual violence, there is evidence that this phenomenon exists in Kosovar society.[30]

Sexual assault can occur in various contexts, including intimate relationships, workplaces, educational institutions, and many other public and private spaces. Victims of sexual assault are usually women and girls, but men and boys can also be victims. It is essential to emphasise that any act of sexual assault is unacceptable and unjust, and no one should suffer from this kind of abuse. From research conducted on the treatment of criminal acts, particularly sexual violence, it emerges that in the majority of cases, victims are presented as female. There are indeed several factors influencing the victimisation of the female gender, including educational, economic, and status-related factors.[31]

A particular problem in cases of sexual assault in Kosovo is underreporting,[32] which can result from various factors, including fear of retaliation, stigma, and deficiencies in the legal system. Victims often feel isolated and fear reporting their experiences due to the fear of public disclosure of their stories and the consequences it may create. In efforts to combat and prevent sexual violence in Kosovo, positive steps have been taken in raising awareness among society and institutions. There are organisations and specialised helplines providing support, counselling, and assistance to victims of sexual violence.[33]

The legal system has attempted to increase awareness of this issue and ensure proper procedures for reporting and prosecuting sexual violence perpetrators. However, there are still significant challenges in addressing the phenomenon of sexual violence in Kosovo. It is necessary to deepen public awareness to recognise the signs and consequences of sexual violence, as well as establish proper mechanisms for support, treatment, and justice for victims.[34]

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29 Ragip Halili, *Kriminologjia me penologjinës* (Universiteti i Prishtines 1995) 145.

30 'Viti 2022 në Kosovë, vit me raportime të shpeshta të ngacmimeve seksuale dhe dhunimeve' (*Dukagjini*, 3 January 2023) <https://www.dukagjini.com/viti-2022-ne-kosove-vit-me-raportime-te-shpeshta-te-ngacmimeve-seksuale-dhe-dhunimeve/> accessed 14 March 2024.

31 Ragip Halili, *Kriminologjia* (Universiteti i Prishtinës "Hasan Prishtina" 2016).

32 Annamorea Tiara Nixha, 'Dhuna "e heshtur" seksuale në Kosovë' (*Albanian Post*, 17 August 2021) <https://albanianpost.com/dhuna-e-heshtur-seksuale-ne-kosove/> accessed 14 March 2024.

33 Nadije Ahmeti, 'Dhuna seksuale në rritje, viktimat kryesisht të miturat' (*Radio Evropa e Lirë*, 19 January 2021) <https://www.evropaelire.org/a/dhuna-seksuale-/31051521.html> accessed 31 January 2024.

34 Salihu, Zhitija and Hasani (n 1) 609.

Family violence and the killing of women continue to be persistent problems in our society. Also, this year, cases of sexual violence against minors were particularly concerning. Authorities have failed to take all necessary measures to protect the lives of female victims of family violence, even though we continuously draw attention to their responsibility and obligation to take all necessary measures to protect lives, safeguarding against family violence and gender-based violence.[35]

In her book "Introduction to feminist jurisprudence", Hilaire Barnett delves into the pervasive issue of gender-based violence against women in contemporary society. The narrative underscores that acts such as sexual harassment, assault, sexual offences, or murder are universal concerns transcending geographical and political boundaries. Barnett acknowledges the inherent difficulty in accurately measuring the incidence of violence due to under-reporting. Still, she emphasises that research data unequivocally establishes the widespread nature of gender-based violence.

Furthermore, Barnett observes that gender-based violence introduces complexities for analysis, with explanations spanning psychological, economic, socio-structural, and political factors. The deeply rooted nature of such violence within society, coupled with a lack of consensus among researchers regarding its causes, poses challenges for legal frameworks. She notes the potential ineffectiveness of attempting to regulate deeply ingrained social attitudes through the law, particularly within private spheres.

Barnett asserts that feminist analysis and advocacy have played a significant role in elevating awareness about gender-based violence against women. However, despite these concerted efforts, the issue persists as a universal and widespread challenge across all societies.[36]

The case of *X and Y v. The Netherlands* (1985)[37] illuminates the intersection of international human rights law and state responsibility in addressing the rights of vulnerable individuals. In this instance, a legal loophole in Dutch criminal procedure left a mentally disabled rape victim without the means to initiate criminal proceedings. The European Court of Human Rights ruled in favour of the applicant, emphasising that the state, under the European Convention, holds positive obligations to safeguard individuals against rights violations. The decision challenges the conventional understanding that international law only attributes responsibility to states for violations by public officials. Instead, it recognises a state's duty to enact and enforce legislation protecting citizens, particularly women, from abuse within private spheres. The court's stance underscores the importance of holding states accountable for failures to protect vulnerable groups, reinforcing a Kantian perspective on international law that demands respect and dignity for all citizens. This

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35 International Ombudsperson Institution, *Annual Report 2022,* no 22 (IOI 2022).

36 Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Routledge-Cavendish 1998) 35-6, doi:10.4324/9781843142720.

37 *X and Y v The Netherlands* App no 8978/80 (ECtHR, 26 March 1985) <https://hudoc.echr.coe.int/eng?i=001-57603> accessed 31 January 2024.

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landmark decision highlights the broader scope of international human rights law beyond direct state actions, emphasising the imperative to address systemic shortcomings that place individuals, especially women, at an unjust risk within their homes.[38]

Regarding EU member states, Article 22[39] mandates that individual assessments be conducted to identify unique protection needs for victims during criminal proceedings. These assessments consider personal characteristics, the nature of the crime, and related circumstances from the victim's perspective. Special attention is given to victims who have suffered considerable harm, experienced bias or discrimination, or have a vulnerable relationship with the offender. Notably, victims of terrorism, organised crime, human trafficking, gender-based violence, sexual violence, exploitation, and hate crime, as well as those with disabilities, are highlighted explicitly for due consideration.

This flexible approach allows for comprehensive protection while avoiding abstract discrimination based on individual conditions.[40] Violence against women is endemic in all states; indeed, international lawyers could observe that this is one of those rare areas where there is genuinely consistent and uniform state practice.[41]

On 8 March 2022, the European Commission proposed a new directive on combatting violence against women and domestic violence. The proposal aims to ensure a minimum level of protection against such violence across the EU.[42] The new rules will criminalise a range of offences, including female genital mutilation and cyber violence. Cyber violence refers to non-consensual sharing of intimate images, cyberstalking, cyber harassment and cyber incitement to violence or hatred. The directive will also ensure that victims have:

1. access to justice,
2. the right to claim compensation,
3. access to free-of-charge helplines and rape crisis centres.[43]

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38 Fernando R Teson, *A Philosophy of International Law* (Routledge 2019) 165.

39 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57 <http://data.europa.eu/eli/dir/2012/29/oj> accessed 31 January 2024.

40 Tommaso Rafaraci, 'New Developments in European Legislation and Case Law after the Lisbon Treaty' in S Ruggeri (ed), *Human Rights in European Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty* (Springer Cham 2015) 222-3.

41 Henry J Steiner, Philip Alston and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2007) 171.

42 'EU Measures to end Violence against Women' (*European Council and Council of the European Union*, 8 May 2024) <https://www.consilium.europa.eu/en/policies/eu-measures-end-violence-against-women/> accessed 10 May 2024.

43 ibid.

The proposal from the European Commission to combat violence against women and domestic violence is driven by several critical reasons and objectives:

1. *Magnitude of the Problem:* The proposal recognises that violence against women and domestic violence are prevalent issues affecting a significant proportion of the population in the EU. Statistics indicate alarming rates, with 1 in 3 women estimated to have experienced some form of violence and 1 in 5 women suffering from domestic violence.
2. *Human Rights and Gender Equality:* The proposal underscores that violence against women is a violation of human rights and a manifestation of gender inequality and discrimination. It directly impacts fundamental rights such as human dignity, life, freedom from discrimination, and access to justice, as enshrined in the EU Charter of Fundamental Rights.
3. *Need for Comprehensive Legislation:* The proposal highlights the absence of specific EU legislation comprehensively addressing violence against women and domestic violence. While existing legal instruments provide some level of protection, they do not adequately address the unique needs and challenges faced by victims of such violence.[44]

Furthermore, within this directive proposal, we encounter various objectives, including:

Firstly, the proposal addresses criminality and sanctions, aiming to criminalise specific acts of violence that disproportionately affect women and are inadequately addressed at the national level. This includes rape based on lack of consent, female genital mutilation, and certain forms of cyber violence. Secondly, it focuses on protection and support for victims, emphasising strengthening victims' access to justice and ensuring gender-sensitive treatment by authorities. Central aspects include tailored protection and support, emergency barring and protection orders, and compensation mechanisms for victims. Thirdly, the proposal talks about prevention and awareness, advocating for measures for prevention, including raising awareness and training professionals likely to encounter victims, are proposed. Fourthly, it highlights the importance of enhancing coordination and cooperation at national and EU levels to facilitate a multi-agency approach and improve data collection on violence against women and domestic violence. Fifthly, it underscores alignment with international standards, particularly referencing the 2014 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). Additionally, it complements existing EU legislation on victims' rights, European protection orders, tackling child sexual abuse, anti-trafficking measures, and gender equality directives to address gaps and strengthen protections for victims of gender-based violence. Finally, it acknowledges

44 Proposal for a Directive of the European Parliament and of the Council 'On Combating Violence against Women and Domestic Violence' COM(2022) 105 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0105> accessed 10 April 2024.

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evolving modern challenges, such as cyber violence against women, which are not adequately addressed by existing legal frameworks and aims to fill these gaps, ensuring coherence in addressing online violence against women.[45]

The proposal seeks to provide a robust legal framework to combat violence against women and domestic violence in the EU, aligning with fundamental rights principles, international standards, and the need for comprehensive and coordinated action across Member States. By criminalising specific offences, enhancing victim protection, promoting prevention, and improving cooperation, the proposal aims to tackle these pervasive and deeply rooted societal challenges.

4 LEGAL REGULATION REGARDING SEXUAL VIOLENCE IN KOSOVO

There are several types of sexual violence happening today, such as rape, penetration assault (where someone penetrates another person's vagina or anus with an object or body part that is not a penis without their consent), and forms of child sexual abuse involving contact.[46]

Personal integrity is a concept related to an individual's ethical values and actions, focusing on their interaction with others and building an honest and sincere character. It includes the internal influences of personal values, morality, and norms that a person holds and applies in their daily behaviour.[47] The Constitution of the Republic of Kosovo, in its second chapter, also addresses personal integrity in Article 26, emphasising that:

"Every person enjoys the right to the respect of their physical and mental integrity, including:

1. The right to make decisions regarding reproduction, according to the rules and procedures specified by law;
2. The right to have control over their body in accordance with the law;
3. The right not to be subjected to medical treatment against their will in accordance with the law;
4. The right not to participate in medical or scientific experiments without their prior consent."[48]

What is crucial to note regarding the right to personal integrity and the inviolability of human integrity is that this right must be defined with precise constitutional provisions. The Constitution of the Republic of Kosovo guarantees the respect of personality and human

45 ibid.

46 Ministrinë e Shëndetësisë dhe Mbrojtjes Sociale, *Protokoll i menaxhimit të rasteve të dhunës seksuale tek të rriturat/rriturit, në nivel vendor: përmes qasjes shumësektoriale të koordinuar* (UNDP 2021) <https://www.undp.org/albania/publications/protokoll-i-menaxhimit-te-rasteve-te-dhunes-seksuale-ne-nivel-vendor-permes-qasjes-shume-sektoriale-te-koordinuar> accessed 15 March 2024.

47 ibid.

48 Constitution of Republik of the Kosovo (n 15) art 26.

dignity in criminal procedures and any other procedure involving the deprivation or limitation of freedom, as well as during the execution of the penalty.[49] Also, Article 27 of the Constitution speaks about the Prohibition of Torture, Inhuman or Degrading Treatment, stating, "No one shall be subjected to torture, inhuman or degrading treatment or punishment."[50] The Constitution takes the provision of the European Convention and accepts the provision of the Universal Declaration of Human Rights from 1948,[51] proclaiming that no individual should be subjected to torture or inhuman or degrading treatment, and emphasises the importance of disclaimers.

The criminal act of rape (Article 227) is part of the chapter on Criminal Offenses against Sexual Integrity, the twentieth chapter of the Penal Code of the Republic of Kosovo.[52] It states:

> "Anyone who forces another person to engage in a sexual act without the consent of that person shall be punished by imprisonment for a term of two (2) to ten (10) years."

The naming of this criminal act inherently suggests an obligation towards another person to engage in a sexual act. Rape is one of the most serious offences against sexual integrity.[53] The fundamental form of this criminal offence consists of obliging another person to engage in a sexual act without their consent. According to Article 228 of the Penal Code, the legislator categorises a primary criminal offence as a compound offence, which is characterised by both an obligation and a sexual act being deemed unlawful.[54] The second paragraph of Article 227 in the criminal code states:

> "Anyone who forces another person to engage in a sexual act by exposing them to the disclosure of a fact that would seriously damage the honor or reputation of that person or a person closely connected to them shall be punished by imprisonment for a term of three (3) to ten (10) years."[55]

5 SEXUAL VIOLENCE IN KOSOVO OVER THE YEARS

Sexual violence is a serious issue in Kosovo, with numerous reported and unreported cases throughout the years. However, obtaining accurate and comprehensive data is challenging due to underreporting and the stigmatisation of sexual violence.[56]

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49 Enver Hasani dhe Ivan Čukalović (eds), *Komentar: Kushtetuta e Republikës së Kosovës*, bot 1 (Deutsche Gesellschaft Für Internationale Zusammenarbeit (GIZ) GmbH 2013) 120.

50 Constitution of Republik of the Kosovo (n 15) art 27.

51 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 31 January 2024.

52 Code no 06/L-074 of 23 November 2018 'Criminal Code of the Republic of Kosovo' <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18413> accessed 31 January 2024.

53 Salihu, Zhitija and Hasani (n 1) 609.

54 ibid 510.

55 Code no 06/L-074 (n 52) art 227, para 2.

56 Ahmeti (n 33).

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In the table below, we can observe some data from criminal acts in Kosovo, including sexual violence by adult individuals from 2016 to 2019. The table shows an increase in the number of individuals accused of criminal offences each year, along with a continuous rise in reported sexual assault cases. Additionally, in the table below, we find data concerning minors involved in committing criminal offences, including sexual violence (Table B).[57]

***Table* B. Statistics of criminal offences in Kosovo (including sexual assaults) 2016-2019 by adults**

Years	Total criminal offences	Convicted persons	Criminal acts of rape	Complicity and violence	Violence and Slight Bodily Injury
2019	29,405	17,315	**18**	**6**	**1**
2018	28,696	19,721	**4**	/	/
2017	26,706	18,753	**2**	**7**	**1**
2016	27,631	17,859	**5**	**1**	**1**

Additionally, the subsequent table contains data related to minors involved in the commission of criminal offences, including sexual violence (Table C).[58]

***Table* C. Statistics of criminal offences in Kosovo (including sexual assaults) 2016-2019 by minors**

Years	Total criminal offences	Convicted persons	Criminal acts of rape	Complicity and violence	Violence and Slight Bodily Injury
2019	1,013	686	**1**	**0**	**0**
2018	1,179	713	**0**	**0**	**0**
2017	1,152	766	**1**	**3**	
2016	995	692	**7**	**0**	**0**

57 Agjencia e Statistikave të Kosovës, *Statistikat e Jurisprudencës Për Persona Madhor 2019* (Seria 5: Statistikat Sociale, ASK 2020) <https://askapi.rks-gov.net/Custom/02d4d612-1d43-4755-90c9-0e1d6f44c977.pdf> accessed 31 January 2024.

58 Agjencia e Statistikave të Kosovës, *Statistikat e Jurisprudencës për Persona të Mitur 2019* (Seria 5: Statistikat Sociale, ASK 2020) <https://askapi.rks-gov.net/Custom/1bc66ae7-593d-4d30-973e-c1f1b49051cb.pdf> accessed 31 January 2024.

From the table above, we can see some statistics from two categories of perpetrators of criminal offences, including those related to assault: adult individuals and minors. Notably, all perpetrators of the criminal offence of assault are Albanian males, with the exception of one perpetrator in 2019 from the non-majority Serbian community.[59]

When we consider the population size in proportion to the number of perpetrators of criminal offences, we observe that the number is not excessively high, especially for sexual assault offences. It must be noted that the above statistics only represent cases that have reached the courts. Yet, the number of cases reported to the police for sexual assault, sexual harassment, and domestic violence is higher.

For instance, in the first six months of 2022, around 41 cases were reported to the police, marking an increase from 102 cases reported in 2021. Moreover, in the first six months of 2021, there was a record of approximately 59 cases reported.[60]

If we turn to retrospective analysis within the framework of the former SFRY, author Vesel Latifi, in his book on "Youth Crime in Kosovo",[61] made a distinct classification in the divisions of criminal acts, labelling them as other criminal acts. These acts include Damage to Foreign Property (Article 257), Sexual Assault (Articles 74-81), Endangerment of Safety (Article 153), Infanticide (Article 138), Hostile Propaganda (Article 118), Fraud (Article 258), Endangerment of Public Communication (Article 271), and Indecent Sexual Acts (Article 186) (Articles in the Penal Code of the Autonomous Province of Kosovo from 1977).[62]

Latifi's research observes a trend between 1964 and 1975 in Kosovo, where these criminal acts accounted for approximately 11% of the total criminal acts, consistently involving juvenile perpetrators. However, this percentage dropped from 11% in the 1960s to 4.2% in 1975. This indicates that during this period, young people had started to become more restrained, leading to a decrease in criminal activity. The author presents the below-table with the scheme of such criminal acts.[63]

59 Jehona Hulaj, 'Dhunimet Seksuale Në Kosovë, Për Shtatë Muaj Në Policinë e Kosovës Janë Raportuar 41 Raste' (*Telegrafi*, 31 August 2022) <https://telegrafi.com/dhunimet-seksuale-ne-kosove-per-shtate-muaj-ne-policine-e-kosoves-jane-raportuar-41-raste-te-tilla/> accessed 31 January 2024.

60 ibid.

61 Vesel Latifi, *Kriminaliteti i të rinjëve në Kosovë* (Enti I teksteve dhe mjeteve mësimore I Krahinës Socialiste Autonome të Kosovës, Universiteti i Prishtinës 1980) 71-2.

62 The Criminal Code of the Autonomous Province of Kosovo issued in 1977 by the Assembly of the Autonomous Province of Kosovo, as part of the SFRY.
Ligji Penal i Krahinës Socialiste Autonome të Kosovës datë 28 qershor 1977 [1977] Gazetën zyrtare e KSAK 25.

63 Latifi (n 61) 71-2.

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Table D. Statistics of criminal offences in Kosovo (including sexual assaults) 1964-1973 by minors

Year	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973
All juvenile offenses	1207	1485	1859	4008	3520	3561	3418	3766	2927	2426
Criminal offenses of other minors	135	362	193	1337	426	722	336	335	302	321
Percent %	11	24	10	33	12	20	10	9	10	10

These statistics from the 1960s and 1970s revealed that these criminal acts constituted a figure of one criminal act for every seven general criminal acts (Table D).[64]

In the last six years, Kosovo has witnessed 225 cases of sexual assault reported to the Kosovo Police. The highest number was reported last year, with 58 cases, while in 2016 and 2017, there were 28 cases each. These cases reported to the Kosovo Police are categorised as criminal offences under the Penal Code of the Republic of Kosovo, specifically in the chapter "Criminal Offenses Against Sexual Integrity."[65]

Following the armed conflict in Kosovo in 1998-1999, reports of sexual violence during and after the war gained special attention. Organisations for justice and human rights documented cases of sexual violence during this period, including rape, sexual torture, and sexual abuse used as a weapon to terrorise and suppress the population.[66]

Between 1997 and 1999, a considerable number of sexual violence cases were reported during the conflict of Serbian hegemony against the Albanian citizens of Kosovo. In February 2018, the Government of Kosovo began the process of registering the status of individuals who were victims of wartime sexual violence and verifying their cases.[67] "In total, 1,939 applications have been received so far, of which 1,881 have been processed, and we are waiting to process only 58 cases that have not yet received a response...". Out of the 1,939 applications, 1,473 cases have been confirmed, of which 1,402 are female and 71 are male.[68]

64 ibid.
65 Ahmeti (n 33).
66 'Kosovë, verifikohet statusi i mbi 1.400 grave të dhunuara në luftë' (*TRT Balkan*, 28 March 2023) <https://albanian.trtbalkan.com/region/kosove-verifikohet-statusi-i-mbi-1400-grave-te-dhunuara-ne-lufte-12520647> accessed 31 January 2024.
67 ibid.
68 ibid.

About 23 years after the war, in July 2022, the first verdict was issued where Serbia was convicted for sexual violence that occurred in the city of Vushtrri in 1999. The Basic Court of Prishtina sentenced former Serbian police officer Zoran Vukotic to ten years in prison for committing rape and participating in the deportations of ethnic Albanian civilians from the city of Vushtrri during the war in May 1999.[69] However, in reality, the number of reported cases of sexual violence during the war is higher, and unfortunately, the number of individuals convicted for sexual violence is minimal.

The Government of Kosovo has extended the mandate of the Government Commission for Recognizing the Status of Victims of Sexual Violence in War until February 2026. This commission evaluates claims that have been registered as victims of wartime rape and are entitled to social benefits. All women and men who have gained the status of victims of wartime rape in previous years are eligible to receive a monthly payment of 230 euros from the state.

But does this payment suffice, considering that the perpetrators roam freely in Serbia? Moreover, a more pressing dilemma arises from the fact that no one has been convicted of sexual violence, either in Serbian or international courts.[70]

However, sexual assault is not a phenomenon limited only to the time of conflict. Sexual assault in intimate relationships, families, and workplace environments has had a significant impact on Kosovar society. The majority of sexual assault cases go unreported due to fear, stigma, and deficiencies in the legal system.

The government and civil society organisations have taken several steps to address the issue of sexual violence in Kosovo. Efforts have been made to raise awareness and provide support and assistance to victims of sexual violence. Additionally, there have been attempts to strengthen the legal system and ensure criminal prosecution of perpetrators of sexual violence.

However, there are still significant challenges that need to be addressed. Underreporting and the fear of victims are major obstacles to identifying and pursuing cases of sexual violence. It is crucial to improve awareness and support for victims, as well as to ensure the sustainability and effectiveness of the legal system in handling these cases. Education and awareness of the population regarding respecting rights and preventing sexual violence are essential for creating a society where all individuals can live safely and with personal integrity.[71]

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69 Serbeze Haxhiaj, 'Kosovo: Special War Court Delivers First Convictions for Guerrillas' (*Balkan Transitional Justice*, 23 December 2022) <https://balkaninsight.com/2022/12/23/kosovo-special-war-court-delivers-first-convictions-for-guerrillas/> accessed 31 January 2024.

70 ibid.

71 Ahmeti (n 33); Nixha (n 32); Eileen Skinnider dhe Ariana Qosaj-Mustafa, *Parandalimi dhe luftimi i dhunës ndaj grave dhe dhunës në familje: Manual Trajnimi për Trajnerë për Prokurorë dhe Gjyqtarë* (Projekti ''Fuqizimi i luftës kundër dhunës kundër grave dhe dhunës në familje në Kosovë '' - Faza II, Këshilli i Evropës 2020) <https://rm.coe.int/tot-manual-for-prosecutors-and-judges-alb/1680a1ac53> accessed 14 March 2024.

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In 2022, the Government of Kosovo made a decision to approve the "State Protocol for the Treatment of Cases of Sexual Violence."[72] The primary objective of the Protocol is to standardise the necessary actions for a continuous, comprehensive, and responsible response in the identification, protection, treatment, documentation, referral, sustainable empowerment, and reintegration of victims/survivors of sexual violence through immediate and professional interventions by responsible institutions. Therefore, this protocol aims to ensure sustainable treatment for victims/survivors of sexual violence, regardless of nationality, affiliation with any community, social or national origin, race, ethnicity, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, nationality, religious belief and faith, political affiliation, political opinion or other thoughts, social or personal status, age, family or marital status, pregnancy, childbirth, disability, genetic heritage, or any other basis.

In a publication by the European Institute for Gender Equality titled "Gender Equality Index: Measuring Progress in the Western Balkans," authored by Marija Babovic, the issue of sexual violence in Western Balkan countries is discussed (including Kosovo).[73] The author highlights the status of violence against women in the Western Balkans based on data from various surveys and reports. According to the OSCE-led survey in 2018, prevalence rates of physical and/or sexual violence by an intimate partner or another person are generally lower in Western Balkan countries compared to the EU average. However, partner violence rates are higher than non-partner violence rates, with Albania having the highest rates of partner violence. Psychological violence, including economic violence, controlling behaviour, and abusive behaviour, is prevalent across all Western Balkan countries, with controlling behaviour being the most common form of psychological violence from partners.

Specifically:

a) Approximately one in ten women have reported experiencing stalking since the age of 15, with Albania showing the highest prevalence among surveyed countries.
b) Significant proportions of women in Serbia, Albania, Montenegro, North Macedonia, Kosovo, and Bosnia and Herzegovina have reported instances of sexual harassment, although rates are lower than the EU average.[74]

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72 The State Protocol for the Treatment of Cases of Sexual Violence has been approved by the Government of the Republic of Kosovo with Decision No. 11/109 dated 23.11.2022.
Vendimi i Qeverisë së Republikës së Kosovës nr 11/109 i datë 23 nëntor 2022 'Aprovohet Protokolli Shtetéror pér Trajtimin e Rasteve té Dhunés Seksuale Republika e Kosovës' <https://md.rks-gov.net/desk/inc/media/04F016B5-48F2-4DB3-A595-D320114AC25D.pdf> accessed 31 January 2024.

73 Marija Babovic, *Gender Equality Index: Measuring Progress in the Western Balkans (Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia)* (EIGE 2023) 25-6 <https://eige.europa.eu/publications-resources/publications/gender-equality-index-measuring-progress-western-balkans> accessed 14 March 2024.

74 ibid.

Efforts are underway to improve data collection and measure violence against women more comprehensively. Initiatives include conducting EU surveys on gender-based violence in the Western Balkans and updating the Gender Equality Index to reflect progress and challenges in addressing violence against women in the region.[75]

6 THE EMPIRICAL PART (QUANTITATIVE DATA)

In 2022, a thorough survey was carried out through physical interviews with residents of Gjilan city. The objective was to gain insights into public perceptions and attitudes regarding sexual violence. The study engaged 675 participants, comprising 331 males and 344 females, aged between 18 and 45, with diverse educational backgrounds spanning elementary, secondary, and university levels. The questionnaire consisted of ten questions probing various aspects of sexual violence awareness and response (see more in the Annex).[76]

The findings shed light on several critical aspects of the issue. Firstly, a considerable portion of the respondents, 372 individuals, acknowledged awareness of the increasing prevalence of sexual violence in Gjilan. Furthermore, 316 participants reported specific knowledge of sexual assault incidents in the city. Notably, a majority of respondents, 602 individuals, expressed willingness to report such incidents to the police, suggesting faith in law enforcement's role in prevention.

Regarding preventive measures, opinions varied. While a significant number advocated for the inclusion of sexual education in school curricula (217 individuals), others emphasised the importance of family discussions (233 individuals) or higher penalties for offenders (200 individuals). Interestingly, a vast majority (582 individuals) believed that increasing penalties could deter sexual assault.

The survey also probed social attitudes and responses to sexual violence. A substantial portion of respondents (342 individuals) admitted they might withhold information about sexual assault if they knew a victim. However, a considerable majority (597 individuals) expressed willingness to support initiatives aimed at preventing sexual violence, indicating a proactive stance towards addressing the issue.

Finally, concerning personal involvement, a majority (465 individuals) affirmed their intention to report a family member's sexual assault to the police, underscoring a commitment to seeking legal justice rather than resorting to revengeful actions.

In conclusion, the research highlights the importance of awareness, prevention, and societal response mechanisms in tackling sexual violence in Gjilan. The findings underscore the significance of education, legal measures, and community support in addressing this pressing social issue.

75 ibid.

76 The questionnaire, together with the reports for all groups, is archived at the University "Kadri Zeka" Gjilan in 2022.

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Based on the findings, it is evident that the majority are willing to respond to the questionnaire. Most of them express interest in combating this phenomenon in various forms, including extreme ones, as indicated by the answers to the tenth question, where 18% of respondents emphasise that they would seek revenge if it happened to their close relatives.

Responses to the third question highlight the perceived importance of family discussion (33%) and inclusion of sex education (36%) in schools, as well as the necessity for higher penalties (31%) as a key element of prevention.

The eighth question is particularly significant as it highlights two major issues related to this topic: the lack of courage to report (50%) and prejudices against victims (30%).

Some of the findings for preventing sexual assault that we have encountered in this research are:

1. Awareness and education;
2. Increased awareness in institutions;
3. Promotion of a culture of consent;
4. Strengthening the law and criminal prosecution;
5. Establishment of helplines and specialised centres;
6. Involvement of the community.

Also, from the practice, we see that individuals who have been sexually assaulted may bear several negative effects, such as physical injuries, psychological trauma, emotional distress, social consequences (rejection), daily challenges, and even substance abuse, aiming for self-destruction.[77]

7 CONCLUSIONS

In conclusion, the issue of sexual assault in Kosovo is a major concern that requires urgent attention and comprehensive action. This paper has aimed to shed light on the complexity surrounding this widespread problem and provide knowledge about the factors contributing to its prevalence. Throughout the paper, we have explored various aspects related to sexual assault in Kosovo, including its historical context, cultural factors, legal framework, and societal attitudes. The evidence presented highlights the urgent need for a multidimensional approach to effectively combat this issue.

It is crucial to acknowledge that sexual assault is a violation of human rights that causes severe physical, psychological, and emotional harm to survivors. The experiences of survivors need to be validated, and they must be provided access to appropriate support services, such as counselling, medical care, and legal assistance.

77 Skinnider and Qosaj-Mustafa (n 71).

The legal framework surrounding sexual assault in Kosovo requires considerable improvements. While noticeable progress has been made in recent years, more efforts are needed to strengthen legislation, ensure its effective implementation, and enhance the judicial process. This includes addressing the underreporting of sexual assault cases, reducing stigma and fear of punishment, and promoting a supportive environment for survivors.

Educational initiatives play a crucial role in preventing sexual assaults and promoting a culture of consent. Inclusive awareness campaigns targeting both men and women should focus on challenging gender stereotypes, promoting respect for boundaries, and encouraging healthy relationships. Schools, community centres, and other institutions should prioritise the implementation of age-appropriate sex education programs that cover topics related to consent, healthy relationships, and bystander intervention.

Furthermore, cooperation among stakeholders is essential for the effective combatting of sexual assault. Government units, civil society organisations, healthcare providers, and law enforcement agencies must work together to address this issue comprehensively. As for the impact of the state protocol on sexual assaults in Kosovo, it is still in its early stages, and the results, whether positive or negative, will soon be seen.

The final part, on sexual assault in Kosovo, calls for a comprehensive approach that includes legal reforms, support services for survivors, inclusive education, and collaborative efforts among stakeholders. By prioritising the safety, well-being, and empowerment of survivors, we can strive towards creating a society free from sexual violence, where everyone can live with dignity, respect, and equality.

8 RECOMMENDATIONS

Within the framework of recommendations concerning sexual violence, it can be observed that Kosovo has made significant strides in its legislative efforts to safeguard victims. Nevertheless, there remains a need for further enhancement, particularly in the realms of human rights, public health, social cohesion, gender equality, women's empowerment, the rule of law, international cooperation, reputation, and economic prosperity. Henceforth, we delineate some pertinent recommendations pertaining to sexual violence, including:

First, legal reforms aimed at strengthening the legal framework for combating sexual violence and addressing deficiencies in reporting, prosecution, and penalising punishment. *Secondly,* public awareness campaigns to implement comprehensive awareness campaigns targeting schools, communities, and institutions to challenge gender stereotypes, promote consent, and reduce stigma. *Thirdly,* support services focused on enhancing support services for survivors, including counselling, medical care, and legal assistance, with a focus on ensuring their sustainability and effectiveness. *Fourthly*, education programs to introduce

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age-appropriate sex education programs in schools and institutions to foster a culture of consent and healthy relationships. *Fifthly,* collaborative efforts to foster cooperation among government units, civil society organisations, healthcare providers, and law enforcement agencies to address sexual violence comprehensively. *Lastly*, a commitment to monitoring and evaluating the impact of implemented measures, including the State Protocol, and making necessary adjustments and improvements.

By addressing these recommendations, Kosovo can strive towards creating a society free from sexual violence, prioritising the safety, well-being, and empowerment of survivors. This comprehensive approach involves legal reforms, public awareness, education, and collaborative efforts among stakeholders.

Also, as part of this study, we have appended more than 600 citizen questionnaires to supplement the quantitative research. The quantitative research results are part of this paper's appendix.

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ANNEX

QUESTIONARY TO SECTION 6 "THE EMPIRICAL PART (QUANTITATIVE DATA)"

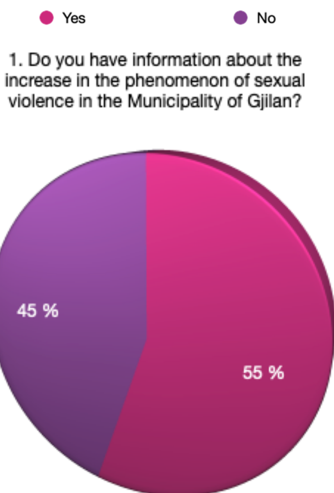
There are a total of 10 questions. Below are the graphs representing the questions and their corresponding findings:

1) Do you have information about the increase in the phenomenon of sexual violence in the Municipality of Gjilan?

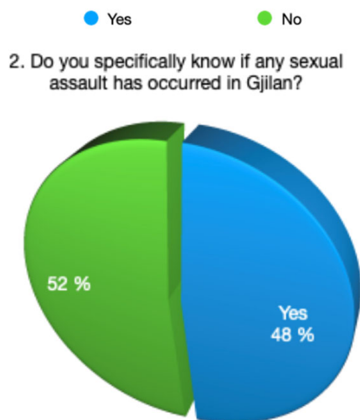
   A) Yes – 372 (165 Men – 207 Women);
   B) No – 301 (165 Men – 136 Women).

2) Do you specifically know if any sexual assault has occurred in Gjilan?

   A) Yes – 316 (157 Men – 159 Women);
   B) No – 341 (181 Men – 171 Women).



a) Yes 372 (165 Men- 207 Women)
b) No 301 (165 Men- 136 Women)



A) Yes 316 (157Men-159Women)

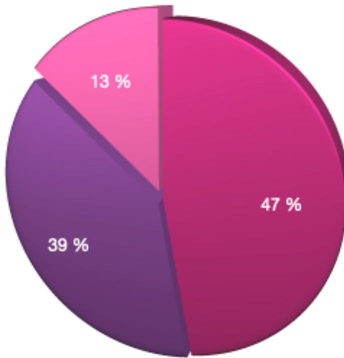
B) No 341 (181Men-171Women)

3) Who plays the most significant role in preventing sexual assault?

   A) Inclusion in the school curriculum - Sexual education – 217 (107 Men – 110 Women);
   B) Family discussion with children – 233 (102 Men – 131 Women);
   C) Higher penalties for violators – 200 (112 Men – 88 Women).

4) Would reporting to the Police influence the prevention of sexual assault?

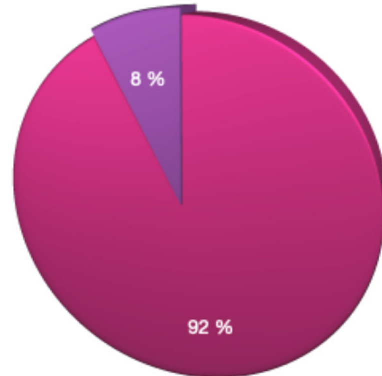
A) Yes – 598 (287 Men – 311 Women);
B) No – 50 (25 Men – 25 Women).



A) Inclusion in the school curriculum - Sexual education 217 (107Men-110 Women)

B) Family discussion with children 233 (102Men-131Women)

C) Higher penalties for violators 200 (112Men-88Women)



A) Yes 598 (287Men-311Women)

B) No 50 (25Men-25Women)

5) In case you have information about a sexual offender, would you report it to the Police?

A) Yes – 602 (280 Men – 322 Women);
B) No – 12 (10 Men – 2 Women);
C) I have no answer – 55 (29 Men – 26 Women).

6) Do you believe that increasing penalties for sexual offenders would prevent sexual assault?

A) Yes – 582 (261 Men – 321 Women);
B) No – 88 (50 Men – 38 Women).

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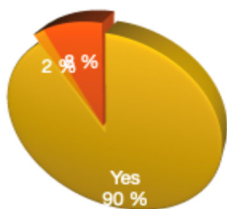
Yes No I have no answer

5. 1) In case you have information about a sexual offender, would you report it to the Police?



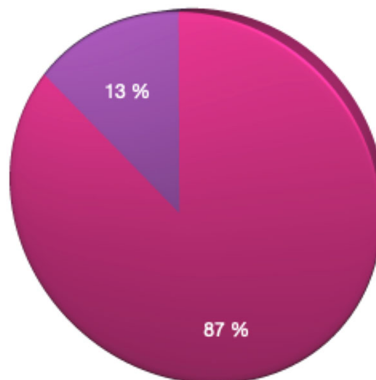
A) YES 602 (280Men-322Women)

B) NO 12 (10Men-2Women)

C) I have no answer 55 (29Men-26Women)

Yes No

6. Do you believe that increasing penalties for sexual offenders would prevent sexual assault?



A) Yes 598 (287Men-311Women)

B) No 50 (25Men-25Women)

7) If you knew that a girl had been sexually assaulted, would you be able to keep this information from others?

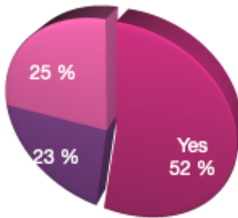
   A) Yes – 342 (161 Men – 181 Women);
   B) No – 154 (70 Men – 84 Women);
   C) I have no answer – 162 (70 Men – 92 Women).

8) The increase in the number of sexual assaults, is it a consequence of:

   A) Lack of courage to report by victims – 312 (149 Men – 163 Women);
   B) Low penalties – 130 (82 Men – 48 Women);
   C) Prejudices that can be done to the victim – 185 (84 Men – 101 Women).

Yes No I have no answer

7. If you knew that a girl had been sexually assaulted, would you be able to keep this information from others?



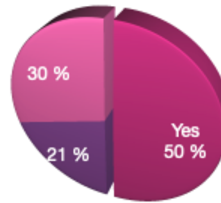
Yes 342 (161M-181W)

B) NO 154 (70M-84W)

C) I have no answer 162 (70M-92W)

Yes No I have no answer

8. The increase in the number of sexual assaults, is it a consequence of?



A) Not daring to report by the victims 312 (149Men-163Women)

B) Low penalties 130 (82Men-48Women)

C) Prejudices that can be done to the victim 185 (84Men-101Women)

9) If you were asked to support any initiative to prevent sexual assault, would you be willing?

A) Yes – 597 (238 Men – 359 Women);
B) No – 16 (13 Men – 3 Women);
C) I have no answer – 48 (27 Men – 21 Women).

10) In case a family member of yours is sexually assaulted, how would you act?

A) You will report the case to the police... – 465 (189 Men – 276 Women);
B) I would take revengeful actions – 122 (78 Men – 44 Women);
C) I have no answer – 80 (38 Men – 42 Women).

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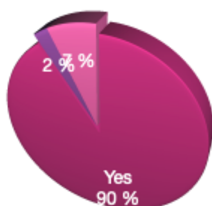
Yes No I have no answer

9. If you were asked to support any initiative to prevent sexual assault, would you be willing?



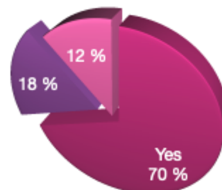
A) YES 597 (238Men-359Women)

B) NO 16 (13 Men-3Women)

C) I have no answer 48 (27Men-21Women)

Yes No I have no answer

10. In case a family member of yours is sexually assaulted, how would you act?



A) You will report the case to the police... 465 (189M-276W)

B) I would take revengeful actions 122 (78M-44W)

C) I have no answer 80 (38M-42W)

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RIGHTS AND PERMISSIONS

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

БОРОТЬБА З СЕКСУАЛЬНИМ НАСИЛЬСТВОМ В КОСОВІ: ГЛОБАЛЬНІ ПЕРСПЕКТИВИ ТА ЛОКАЛЬНІ РІШЕННЯ

Берат Дермаку*, Косоваре Сопі та Ліза Реджепі

АНОТАЦІЯ

Вступ. *Боротьба з сексуальним насильством є гострим соціальним питанням, яке потребує комплексних дій та уваги. У Косові сексуальне насильство залишається серйозною проблемою, що вимагає багатовимірного підходу. У цій статті розглядаються різні аспекти сексуального насильства в Косові, досліджується його історичний контекст, культурні фактори, нормативно-правова база та ставлення суспільства.*

Методи. *У роботі синтезовано інформацію з різних джерел, у тому числі емпіричні дані опитування, проведеного в місті Гїлан у 2022 році, у якому взяли участь 675 учасників. Методи статистичного аналізу було використано для того, щоб дослідити результати опитування та отримати важливі висновки щодо суспільного сприйняття, ставлення та реакції на сексуальне насильство.*

Результати та висновки. *Отримані результати підкреслюють нагальність вирішення проблеми сексуального насильства в Косові за допомогою правових реформ, кампаній з підвищення обізнаності громадськості, служб підтримки постраждалих, освітніх ініціатив і спільних зусиль між зацікавленими сторонами. Надаються рекомендації щодо зміцнення нормативно-правової бази, покращення послуг підтримки, підвищення обізнаності та сприяння співпраці між урядовими, неурядовими та громадськими організаціями.*

Виконання цих рекомендацій може допомогти створити вільне від сексуального насильства суспільство, і надавати пріоритет безпеці, благополуччю та розширенню можливостей постраждалих. Комплексно вирішивши проблему сексуального насильства, Косово може сприяти соціальній згуртованості, гендерній рівності, правосуддю та економічному розвитку, а також покращувати свою міжнародну репутацію та співпрацю в межах процесів європейської інтеграції та повоєнного відновлення.

Ключові слова: *Косово, сексуальне насильство, суспільне сприйняття, нормативно-правова база, гендерна рівність.*

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Research Article

RELIGIOUS SLAUGHTER AND ANIMAL WELFARE: A COMPARATIVE LEGAL STUDY OF KAZAKH AND EUROPEAN LEGISLATIONS

Anar Mukasheva, Alisher Ibrayev*,
Inkar Bolatbekova, Bakyt Zhussipova and Nursultan Ybyray

ABSTRACT

Background: *In Kazakhstan, until recently, issues regarding the responsible and humane treatment of animals were unregulated. The first law, "On Responsible Treatment of Animals," was adopted in 2021, defining the place of animals in the system of public relations and guaranteeing their protection. However, the law includes an exception regarding the slaughter of animals during religious ceremonies, which has caused discussions and disputes between public organisations for the protection of animals and religious communities. Impressive results of balancing animal welfare with religious freedom can be found in the EU. This article conducts a comparative legal study of Kazakh and some EU Member State legislations with regard to religious slaughter.*

Methods: *This study employed various methodologies, utilising both theoretical and empirical approaches. These methodologies encompassed the comparative legal method, which allowed the authors to analyse and research foreign experience in animal rights protection to pinpoint the most important features applicable to Kazakh legislation.*

Statistical data was also collected to identify patterns and trends. Based on this, a forecast was made indicating a growing population, thereby suggesting an increase in animal consumption and utilisation. Therefore, this article on the protection of animal rights is a timely and relevant study.

Moreover, the authors conducted an analysis of specific cases from foreign countries, aiding in the identification of the features and challenges of law enforcement practice.

The dialectical method was central to examining the research problem. It enabled the identification of contradictions and interrelationships between classical and religious methods of mortification.

Results and Conclusions: *Based on the study's results, several practical proposals are put forward to eliminate or regularise the existing legislative derogation in respect of religious slaughter. The present contribution concludes that the Kazakh legal framework on animal rights protection has shortcomings that require improvements by enshrining specific methods of animal slaughtering, which can be drawn on European experience.*

1 INTRODUCTION

> *"Anyone who shows mercy, even to an animal meant for slaughtering, will be shown mercy by Allah on the Day of Rising." - The Prophet Muhammad (Peace be upon him)* [1]

Over the past century, human-animal relationships have evolved into a major ethical issue. An organised animal rights movement has emerged, achieving significant results both in practice and in the legislative sphere for the benefit of animals worldwide. Animal rights were captured in the Universal Declaration of Animal Rights (Paris, 1978),[2] which proclaimed inter alia that if an animal must be killed, it should be done rapidly and without distress.[3]

The statutory requirement for stunning an animal before slaughter has been enshrined in numerous acts and international agreements, including the legislation of the European Union (hereinafter "EU"). EU law concerning animal welfare at the time of killing prohibits the slaughter of animals without prior stunning but includes an exemption allowing non-stunned slaughter for ritual rites.[4] This exemption exists because the dietary dogma of Jews and Muslims requires food animals to be alive and healthy until the very moment of physical death, which, according to the laws of the religion, comes from a single cut in the neck.[5]

Various scientific research justifies that non-stunned ritual slaughter through the neck incision inflicts pain, fear, distress, and suffering on animals. Member States that have taken actions towards banning non-stun slaughter, in accordance with EU values on animal welfare,[6] have faced formidable domestic challenges, as the prohibition is claimed to violate the right to the freedom of religion.

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1 Imam Al-Bukhari, *Al-Adab Al-Mufrad* (Dakwah Corner Publ 2014).

2 Universal Declaration of Animal Rights (15 October 1978) <https://www.esdaw.eu/unesco.html> accessed 4 December 2023.

3 Georges Chapouthier and Jean-Claude Nouët (eds), *The Universal Declaration of Animal Rights: Comments and Intentions* (LFDA 1998).

4 Council Regulation (EC) No 1099/2009 of 24 September 2009 'On the Protection of Animals at the Time of Killing' [2009] OJ L 303/9, art 4(4).

5 Stéphanie Wattier, 'Ritual Slaughter Case: The Court of Justice and the Belgian Constitutional Court Put Animal Welfare First' (2022) 18(2) European Constitutional Law Review 264, doi:10.1017/S1574019622000189.

6 Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/54, art 13.

The European halal meat market is expected to grow due to the increasing Muslim population in European countries. According to the Pew Research Center, the Muslim population is at the level of 4,9%, and even if migration were to permanently and immediately stop, this population is expected to rise to 7,9% by 2050.[7]

Animal welfare legislation of the Republic of Kazakhstan (hereinafter - "Kazakhstan") is at its origin and has introduced its first act defending the rights of vertebrates only in 2022. Unsurprisingly, the Law "On the Responsible Treatment of Animals"[8] (hereinafter - "LRTA") contains the same derogation as in the EU legislation with regards to religious slaughter. Despite being a secular state, Kazakhstan has a vast Muslim majority population, whose opinions it must strongly regard.

Taking into account the evident growth of the Muslim population in Europe, it becomes somewhat feasible to compare EU states and Kazakhstan in terms of trends in developing animal welfare legislation on religious slaughter.

In light of the above, the welfare of animals at the time of killing emerges as an issue that should encourage destructive dialogue between religious minorities, animal rights advocates, and states. This article ascertains how kosher and halal slaughter without prior stunning cause unnecessary suffering to food animals and proposes solutions to be implemented into Kazakh legislation, drawing from the experiences of EU states.

2 METHODOLOGY OF THE STUDY

The article uses empirical and theoretical research methods. The choice of the research topic is based on general scientific and philosophical approaches to the humane treatment of animals, the recognition of their rights and the need to protect them from any suffering. The article emphasises that animals are not just a thing but creatures capable of feeling pain and suffering. During the study, the authors conducted a comparative legal analysis based on the experience of some European countries such as England, Germany, and Belgium. This subsequently made it possible to identify the weaknesses of the Kazakh legislation and areas of further development and improvement.

Taking into account that the majority of the population of the Republic of Kazakhstan are Muslims, the focus was on respecting everyone's right to freedom of religion. The results of the study confirmed the fact that the slaughter of livestock by humane methods does not contradict the canons of religion. The primary needs of animals, especially the need to avoid

7 Pew Research Center, 'Europe's Growing Muslim Population' (*Pew Research Center*, 29 November 2017) <https://www.pewresearch.org/religion/2017/11/29/europes-growing-muslim-population/> accessed 4 December 2023.

8 Law of the Republic of Kazakhstan no 97-VII LRK of 30 December 2021 'On Responsible Treatment of Animals' <https://adilet.zan.kz/eng/docs/Z2100000097> accessed 14 February 2024.

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pain, should be considered no less valuable than similar needs of humans. It asserts the equality of suffering between beings, human or not, with no moral basis to believe that some of them are more important than others.[9]

As for empirical methods, the team conducted extensive research involving the search and collection of normative legal material from European Union countries and the United Kingdom regarding animal rights protection, namely in terms of their killing for religious purposes. In addition, statistical data on demographic processes on the European continent and their forecasts for further development were analysed by the research team. This comprehensive approach enabled them to assess the current situation and identify key trends and challenges that may affect the future demographic structure of Europe. As a result of the study, specific recommendations were proposed to improve legislation in the field of animal rights protection and mitigate possible negative consequences. The situation is similar in Kazakhstan; population growth will lead to greater consumption and use of animals. Therefore, the study is timely and relevant in identifying the contradictions and interrelationships between classical and religious methods of slaughter, which are directly related to the study of religious norms of law. The analysis of the revealed disagreements made it possible to determine the most acceptable method of killing as a reversible method of stunning. According to the authors, using this method will ensure the humane treatment of animals and not violate the religious canons of believers.

An analysis of specific cases was conducted, which helped to identify the features and problems of slaughter for religious purposes and the main answer was received that humane killing does not violate people's rights to freedom of religion.

The authors employed the dialectical method to study the basic patterns of development and functioning of the Institute for Animal Protection in the legislation of the European Union and the United Kingdom. This included an examination of the legal norms regulating animal slaughter, including for religious purposes. Additionally, using the descriptive legal method, the authors analysed international documents such as the Universal Declaration of Animal Rights and others.

In parallel, this article includes a study on the formation of legislation in the Republic of Kazakhstan on the responsible treatment of animals, beginning in 2021. This law is expected to lay the foundation for establishing and developing the Institute for the Protection of Animal Rights. As a result, the ongoing research should be the basis for further developing the Institute for the Protection of Animal Rights and bringing it in line with international standards. Legal norms analysed by the authors enabled them to draw certain conclusions and critical remarks regarding the need for further development of Kazakh legislation.

9 Act of the Parliament of the United Kingdom of 22 July 1822 'An Act to Prevent the Cruel and Improper Treatment of Cattle' (Martin's Act) <https://en.wikisource.org/wiki/Martin%27s_Act_1822> accessed 4 December 2023.

Moreover, by employing the dialectical method of scientific and research cognition and aligning with modern, generally recognised trends in the development of states, the authors obtained previously unexplored results regarding the procedure for recognising halal food products in Kazakhstan. This issue is most relevant because Islam is the predominant religion among the population in the country.

The article concludes that the best practices of European Union countries are acceptable for application in the protection, consolidation, protection, and enforcement of animal rights. The method of comparative legal analysis made it possible to identify existing gaps in the legislation of Kazakhstan that allow unnecessary suffering of food animals.

3 RELIGIOUS DOGMA AND SCIENTIFIC RATIONALE

Concretely ascertainable, it is necessary to provide factual background and evidence of animal suffering during non-stunned slaughter from the standpoint of religious rules and science to enforce arguments for the legitimate outlaw of the existing derogation.

The laws for kosher slaughter ("*shechita*") and halal slaughter ("*dhabihah*") are stipulated in the books of the Holy Scriptures for Jews and the Qur'an for Muslims. Both methods have specific instructions for killing religiously acceptable nonhuman animals but generally include a transverse incision of the neck using a smooth knife with further rapid exsanguination.[10] The process involves cutting the skin, muscles, trachea, oesophagus, carotid arteries, jugular veins, and the cervical plexus's major, superficial, and deep nerves. Death of a vertebrate comes from the rapid loss of blood volume after severing the major blood vessels of the neck.[11]

Many adherents of Islam and Judaism believe that *dhabihah* and *shechita* are humane ways of killing an animal. They are convinced that the requirement to perform a cut with a well-sharpened blade causes the least suffering and that the animal loses its senses when the throat is cut, after which death immediately occurs, i.e., there is no delay between stunning and death.[12]

It was extensively construed that religions promote anthropocentrism, place humans at the top of the hierarchy, and even require people to sacrifice animals for religious purposes, e.g., Qurbani.[13] However, both Jewish and Islamic injunctions guide believers to treat animals with kindness and compassion and forbid them to be cruel to animals.

10 Temple Grandin and Joe M Regenstein, 'Religious Slaughter and Animal Welfare: A discussion for Meat Scientists' [March 1994] Meat Focus International 115.

11 A Velarde and others, 'Religious Slaughter: Evaluation of Current Practices in Selected Countries' (2014) 96(1) Meat Science 278, doi:10.1016/j.meatsci.2013.07.013.

12 Rabbi Lord Jonathan Sacks, 'Animal Welfare and Shechita' (*The Rabbi Sacks Legacy*, 17 January 2014) <https://www.rabbisacks.org/archive/animal-welfare-shechita/> accessed 24 December 2023.

13 Sarra Tlili, *Animals in the Qur'an* (CUP 2012).

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The Jewish Torah mandates not to cause pain to any living creature (*tsa'ar ba'alei chayim*), whereas in Islamic teachings, any cruelty towards animals is considered a sin.[14] In view of this, it is of the essence to provide scientific evidence of the suffering of animals during non-stunned slaughter so that religious groups may consider such slaughter as cruelty towards creatures of God.

Rene Descartes was one of the first philosophers and scientists to consider the feelings of Animalia. A well-known "fan" of vivisection denied the ability of animals to feel joy or pain and described animals as "machines" or "automata".[15] However, over the past decades, various scientific studies justified that vertebrates can sense pain and suffer during slaughter, which led to a "science versus religion" debate.[16] The following groundbreaking works clearly show the implications inflicted on animals before and during slaughter without stunning.

The DIALREL, an international research project subsidised by the European Commission, was the largest project addressing issues of religious slaughter, collecting and disseminating information, and encouraging dialogue between religious and scientific communities. In one report, different views of scientists on animal feelings of pain, fear, distress, and stress during slaughter were discussed.[17]

It was outlined that farm livestock can experience two types of pain during neck incisions. Nociceptive pain occurs from the mechanical forces of cutting, whereas inflammatory pain results from chemical stimuli due to tissue damage. It was stated that the severity of the inflammatory pain can be reduced if a clean cut is performed using a sharp knife; however, it has no effect on nociceptive pain. Thus, numerous scientists concluded that "with the utmost probability, animals feel pain during the throat cut without stunning".

A groundbreaking study conducted by New Zealand scientists using an electroencephalogram (EEG) also proved that non-stunned slaughter of food animals by ventral-neck incision is "associated with noxious stimulation that would be likely to be perceived as painful". It was stated that cattle can feel pain and distress for 60 seconds or more between the incision andloss of consciousness.[18]

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14 Krista Kihlander, 'What Each Major Religion Says About Animal Rights' (*Sentient Media*, 15 November 2019) <https://sentientmedia.org/what-each-major-religion-says-about-animal-rights/> accessed 4 December 2023.

15 René Descartes, *Discourse on the Method* (Les prairies numériques 2020).

16 Mara Miele, 'Religious Slaughter: Promoting a Dialogue about the Welfare of Animals at Time of Killing'(2013) 21(5) Society & Animals 421, doi:10.1163/15685306-12341308.

17 Karen von Holleben and others, 'Report on Good and Adverse Practices – Animal Welfare Concerns in Relation to Slaughter Practices from the Viewpoint of Veterinary Sciences' (DIALREL 2010).

18 DJ Mellor, TJ Gibson and CB Johnson, 'A Re-Evaluation of the Need to Stun Calves Prior to Slaughter by Ventral-Neck Incision: An Introductory Review' (2009) 57(2) New Zealand Veterinary Journal 74, doi:10.1080/00480169.2009.36881.

In its report, the FAWC declared that non-stunned slaughter is unacceptable and outlined three main issues regarding the method: pre-slaughter handling, the potential for pain and distress during exsanguination, and the time to loss of brain responsiveness. It was stressed that the un-stunned slaughter process should involve greater restraint as smaller animals can be exposedto severe pain and injuries, e.g., the head could slip out of the restraining mechanism or leg injuries may occur. Despite the receipt of representations that neck incision is not painful, the organisation was persuaded that such major injuries lead to significant pain and distress. Further, it was reassured that the insensibility does not occur immediately after the cut. For instance, in case of occlusion (retraction of arteries after transverse incision), cattle can remain conscious for up to two minutes.[19]

The EFSA, in its Scientific Opinion, affirmed that there are no preventive measures available to mitigate the animal welfare consequences caused by cutting except for pre-cut stunning and reiterated that "slaughter without stunning should not be practiced".[20]

In light of the available evidence, it can be concluded that farm livestock is exposed to noxious stimulation (i.e. feels pain) in advance of and during non-stunned slaughter, and from an animal welfare standpoint, there is a need for outlawing. The legitimacy of such an outlaw from the legal viewpoint will be considered in the following section.

4 GROUNDS FOR THE LEGITIMATE OUTLAW OF NON-STUNNED RELIGIOUS SLAUGHTER

4.1. EU Law On Religious Slaughter

The legal regime on ritual slaughter differs among Member States. Despite the existing derogation in relation to ritual rites, some states prohibit non-stunned slaughter (Slovenia, Sweden, Denmark, etc.), require post-cut stunning (Austria, Estonia, Greece, Latvia), or concurrent sedation (Finland). In contrast, some countries do not require stunning for ritual slaughter (Germany, Italy, Hungary, France, etc.).[21] This dissimilarity exists due to the subsidiarity given to the Member States in Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (hereinafter -

19 Farm Animal Welfare Council, *Report on the Welfare of Farmed Animals at Slaughter or Killing*, pt 1: *Red Meat Animals* (FAWC 2003). It was renamed to Animal Welfare Committee (AWC) on 1 October 2019.

20 Søren Saxmose Nielsen and other, 'Welfare of Cattle at Slaughter' (2020) 18(11) EFSA Journal 107, doi:10.2903/j.efsa.2020.6275.

21 Zack Udin, 'Legislation Factsheet: Ritual Slaughter Laws in Europe' (*USCIRF United States Commission on International Religious Freedom*, 07 October 2020) <https://www.uscirf.gov/news-room/releases-statements/uscirf-releases-ritual-slaughter-factsheet-highlighting-range> accessed on 24 December 2023.

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"Regulation No. 1099/2009"), allowing them to implement national rules aimed at ensuring more extensive protection of animals at the time of killing in relation to ritual slaughter.[22] The same subsidiarity is enshrined in the Council of Europe's European Convention for the Protection of Animals for Slaughter.[23]

A great example of the examination of such rights took place in Belgium. Flemish and Walloon regions enacted decrees applicable to animal slaughter; however, the same attempt in Brussels, an area with the highest Jew and Muslim population in Belgium, is still pending.[24]

After the outlawing, a dispute concerning the Flemish and Walloon decrees was referred to the Court of Justice of the EU ("CJEU") by the Constitutional Court of Belgium.[25] The ban was claimed to infringe on the right to the freedom of religion protected under Article 9(1) of the European Convention on Human Rights ("ECHR"). However, in its endorsement, the CJEU held that the stunning requirement does not fundamentally violate the right to freedom of religion and meets the requirements for promoting the welfare of animals.

The court agreed that the freedom to manifest religious beliefs is under the scope of Article 9(1). Interestingly, the same outcome was derived from the European Court of Human Rights ("ECtHR") in *Eweida v United Kingdom*. It was stated that all religious acts that are "intimately linked to the religion or belief" are included within the scope of the article.[26] Thus, the act of ritual slaughter is indeed under the protection of the article and is considered a *forum externum*, the freedom to act according to the prescriptions of one's religion. However, if the *forum internum* is absolute and unconditional as it includes the freedom to have a religion, conscience, or belief, the *forum externum* may be subject to limitations.[27]

Article 9(2) of the ECHR requires limitations to the *forum externum* to be prescribed by law, necessary in a democratic society, and to pursue legitimate aims. Accordingly, any

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22 Council Regulation (EC) No 1099/2009 (n 4) art 26(2)(c).

23 European Convention for the Protection of Animals for Slaughter of 5 October 1979 [1988] OJ L 137/33, art 17.

24 Dylan Carter, 'Ritual Slaughter Ban Proposal Divides Brussels Lawmakers' *The Brussels Times* (Brussels, 9 June 2022) <https://www.brusselstimes.com/235556/ritual-slaughter-ban-proposal-splits-ruling-brussels-coalition> accessed 4 December 2023.

25 Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* (CJEU, 17 December 2020) ECLI:EU:C:2020:1031 <https://curia.europa.eu/juris/liste.jsf?num=C-336/19> accessed 4 December 2023.

26 *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) para 82 <https://hudoc.echr.coe.int/eng?i=001-115881> accessed 4 December 2023.

27 Carla M Zoethout, 'Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter' (2013) 35(3) Human Rights Quarterly 651.

ban on ritual slaughter must adhere to the prescribed criteria. The CJEU has held that the legitimate goal of general interest, namely animal welfare, can justify interference with religious freedom.[28]

It is important to note that the same conclusion has been drawn by the ECtHR previously, which iterated that in banning the hunting of mammals with dogs, the UK government pursued a legitimate aim of the protection of morals.[29] The same parallel argument can be made regarding ritual slaughter.[30]

It can be assumed that the choice to outlaw the un-stunned slaughter would result in privileging one fundamental right over the other. However, such a choice was considered a political choice that could be justified in reference to plenty of scientific evidence of suffering and pain inflicted on animals (please refer to the previous section).[31]

To balance the two sensitive values, decrees prescribed the reversible stunning method, which cannot result in the death of the animal.[32] The CJEU affirmed that reversible stunning allows "a fair balance to be struck between the importance attached to animal welfare and the freedom of Jewish and Muslim believers to manifest their religion".[33] It was stated that the Flemish authorities touched upon only one aspect of a specific ritual act and that the decree respects religious freedom since it does not prohibit ritual slaughter as such.[34]

The reversible stunning purports an electrical head-stunning, which does not result in the death of a vertebrate but a loss of consciousness. The position of religious communities on the permissibility of such a method is ambiguous.

In a fatwa, the Mufti of Delhi affirmed that stunning is acceptable under Islamic prescriptions, as reversible stunning does not kill the animal. As long as the animal is alive before the incision, the meat is considered halal. Similarly, the Rector of the Al-Azhar University of Cairo stated that stunning does not make the practice un-Islamic.[35]

The Jewish community is more sensitive to the stunning matter. However, Rabbi Jonathan Romain of Maidenhead Synagogue, head of the Assembly of Reform Rabbis, advocates for

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28 Wattier (n 5) 279.

29 *Friend and Others v United Kingdom* App nos 16072/06 and 27809/08 (ECtHR, 24 November 2009) para 22 <https://hudoc.echr.coe.int/eng?i=001-96372> accessed 4 December 2023.

30 Joe Wills, 'The Legal Regulation of Non-stun Slaughter: Balancing Religious Freedom, Non-Discrimination and Animal Welfare' (2020) 41 Liverpool Law Review 145, doi:10.1007/s10991-020-09247-y.

31 Wattier (n 5) 284.

32 Case C-336/19 (n 25) para 13.

33 ibid, para 80.

34 ibid, para 61.

35 Zoethout (n 27) 666.

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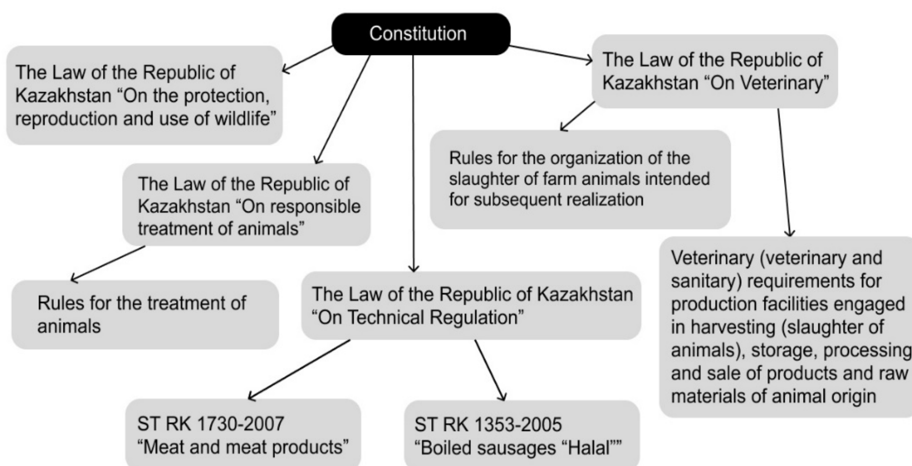
stunning animals before slaughter.[36] It is also compelling that conservative Rabbi Mayer Rabinowitz accepted post-cut stunning in his article "A Stunning Matter".[37] Thus, there is no certain consensus within religious groups on whether ritual slaughter involving reversible stunning is against Islamic and Jewish laws.

Considering the above, it can be concluded that EU legislation permits the ban of ritual slaughter without prior stunning, and Member States are in the process of application of this right, which is legitimate with respect to the right to the freedom of religion.

4.2. Shortcomings of the animal welfare law of Kazakhstan and proposals for the enhancement

To develop the system of Kazakhstan legislation in the field of regulating the treatment of animals the following active legal sources need to be analysed:



The authors analysed all the above-mentioned normative legal acts and concluded that none of them adequately provides for or meets the requirements of the humane killing of an animal.

36 Simon Rocker, 'Animals Should be Stunned before Shechita, Report to Reform Rabbis Says' (*The Jewish Chronicle*, 14 July 2022) <https://www.thejc.com/news/news/animals-should-be-stunned-before-shechita-report-to-reform-rabbis-says-4R2WYxFDRSKJVT1bIMl9Dw> accessed 24 December 2023.

37 Rabbi Mayer Rabinowitz, 'A Stunning Matter' (adopted CJLS 13 March 2001) <https://perma.cc/2D3F-MBT9> accessed 24 December 2023.

Article 4 of the LRTA bans the cruelty to animals and lists actions that comprise animal abuse, which inter alia include:

> *"1) beatings, torture of an animal, including hunger, thirst, and other violent acts by dismemberment, burning, drowning, strangulation, butchering of an animal, which have led or may lead to death, mutilation or other harm to the animal's health;"*[38]

However, the same article prescribes that "*slaughter of animals during religious ceremonies by followers of religious associations registered in the Republic of Kazakhstan, if this is provided for by their creed*"[39] is not considered an act of cruelty to animals. This constitutes an exemption, allowing the infliction of suffering on animals if the religion dictates as such.

Religious freedom is enshrined in the Constitution of Kazakhstan, having supreme juridical power, which states that "*No one may be subjected to any discrimination based on … attitude to religion, beliefs...*"[40] For its part, animal rights are not addressed in the Constitution, accordingly, not entitling them any fundamental rights. It is only stated that "animality" belongs to the nation of Kazakhstan.[41] Therefore, any attempts to outlaw the derogation will be considered an infringement of the fundamental right to the freedom of religion.

In light of the above, firstly, it is important to mention that the LRTA is silent on any other provision regarding killing animals for consumption. Therefore, it is ambiguous whether slaughter not in accordance with ritual rites constitutes animal abuse or not. In fact, slaughter using the stunning may be treated as a violation.

Further, there is no regulation governing the slaughter process. There are rules for the organisation of the slaughter of farm animals intended for subsequent sale. However, it mainly concerns requirements for veterinary examination and documentation to be obtained. In this regard, it can be assumed that the whole process of slaughter is regulated by religious rules due to the absence of an alternative.

Currently, the issues of compliance with the requirements of religious norms of the mechanism (procedure) of slaughter of food animals in Kazakhstan are handled by several organisations, including the republican enterprise KazStandart, the Association of Halal Industry of Kazakhstan (AHIK), Halal Damu LLP of the Spiritual Administration of Muslims of Kazakhstan, HALAL Quality Center LLP and others. These organisations receive permission from the National Accreditation Center to carry out Halal certification work.

38 Law of the Republic of Kazakhstan no 97-VII LRK (n 8) art 4, para 2(1).

39 ibid, art 4, para 4(5).

40 Constitution of the Republic of Kazakhstan of 30 August 1995 (amended 17 September 2022) art 14, para 2 <https://adilet.zan.kz/eng/docs/K950001000_> accessed 14 March 2024.

41 ibid, art 6, para 3.

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Regarding the classification of “Halal” products, Kazakhstan has adopted two national standards: ST RK 1353-2005 “Boiled sausages “Halal”. General technical conditions”[42] and ST RK 1632-2007 “Tourist and excursion service of the Halal hotel. Classification”.[43]

One standard, ST RK 1353-2005 "Boiled sausages "Halal". General technical conditions," is relevant to the research topic. The standard establishes requirements for technological instructions, recipes for the production of sausages (requirements for ready-made raw materials and auxiliary materials), organoleptic and physical-chemical parameters of sausage, weight of finished products, packaging (containers), rules for product acceptance, transportation and storage of products and more.[44]

At the same time, a careful study of this document allowed us to conclude that there are no requirements specifically for slaughtering livestock.

Due to the lack of legislation on Halal product certification in the country, any company can operate in the field of Halal certification based on its own knowledge and skills.

In general, the authors consider the situation to be unfavourable, requiring appropriate intervention by the state to avoid the cruel treatment of food animals for religious purposes. Organisations involved in the killing of animals formally prescribe religious norms for the slaughter of food animals but do not adhere to the procedure for conducting the sacrifice ceremony.

Given that the majority of the population of Kazakhstan adheres to the Muslim religion, the issues of animal slaughter are very relevant. Unfortunately, the level of humane treatment of animals is low. For example, during the mass slaughter of artiodactyls (Qurbani), animals are killed in front of each other, and knives are sharpened in their presence. This practice of sacrifice in Kazakhstan contradicts the established religious humane slaughter rules.

All of the above proves the need for state regulation through the adoption of appropriate regulations on the procedure for killing animals for religious purposes, on the certification of Halal products, as well as the implementation of appropriate control over these processes.

The experience of the EU countries will be valuable for Kazakhstan to improve the situation with responsible treatment of animals. In Kazakhstan, the branch of legislation in the field of fauna, namely non-wild fauna, is only at the stage of formation. It should be noted that at the legislative level, there are no acceptable, humane methods of killing food animals.

42 ST RK 1353-2005 ‘Boiled Sausages “Halal”: General Technical Conditions’ <https://online.zakon.kz/Document/?doc_id=30163009> accessed 4 December 2023.

43 ST RK 1632-2007 ‘Tourist and Excursion Service of the “Halal” Hotel: Classification’ <https://online.zakon.kz/Document/?doc_id=31554325> accessed 4 December 2023.

44 ST RK 1353-2005 (n 42).

Humane methods of killing food animals should be adopted at the legislative or subordinate level precisely for the religious purposes permitted by the above-mentioned law.

As such, the authors propose to develop a regulation that aims to minimise the pain and suffering of animals through properly approved stunning methods, including the reversible ones for ritual rites. It may be argued that the inclusion of such a requirement will infringe on the right of freedom of religion; however, as discussed in the previous section, the European experience shows that it is legitimate as the reversible stunning method does not violate this right and it is acceptable for halal slaughter. As the majority of the Kazakhstani population is Muslim, by means of proper dialogue from the state's side, it is expected that no complications should arise.

Thus, a similar procedure is provided for in European legislation in Council Regulation (EC) No. 1099/2009 on the protection of animals during slaughter.[45] Impressively, it contains rules for the killing of animals that are raised or kept not only for the production of food, but also for wool, leather, fur or other products, as well as the killing of animals for depopulation and related operations. It describes the methods for stunning, control of the stunning process, instructions for using the equipment for restraining and stunning, requirements for design, construction and equipping the slaughterhouses, appointment of the animal welfare officer, establishes responsibility for non-compliance in the form of fines, etc. Such requirements should be implemented in the Kazakh law to regulate the animal slaughter process.

5 CONCLUSION

The invisible ideology of carnism is dominant in our society. Whilst the increasing population of vegetarian and vegan people, the great majority consume meat and animal products daily. Although the community is still on its way toward advancing animal welfare and animal rights, there are possible solutions to mitigate pain and suffering during animal slaughter for food production. The imposition of the requirement to stun animals for religious groups can serve as a significant measure towards such an enhancement.

This article has discussed that animals are exposed to significant implications in the process of un-stunned slaughter and that the EU law authorises states to legitimately outlaw an existing derogation on religious slaughter without fundamentally infringing the right to the freedom of religion by invoking the reversible stunning method.

As part of the study, the authors propose amending paragraph 4 of the LRTA to reference similar European standards on humane animal killing methods, including preliminary stunning. Through such discussions, they offer practical solutions for enhancing

45 Council Regulation (EC) No 1099/2009 (n 4).

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Kazakhstani legislation on animal welfare at the time of killing for consumption purposes, which do not violate religious rights. This would represent a vital step in balancing animal welfare with religious freedom.

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Summary: 1. Introduction. – 2. Methodology of the Study. – 3. Religious Dogma and Scientific Rationale. – 4. Grounds for the Legitimate Outlaw of Non-Stunned Religious Slaughter. – *4.1. EU Law on Religious Slaughter*. – *4.2. Shortcomings of the Animal Welfare Law of Kazakhstan and Proposals for the Enhancement*. – 5. Conclusions.

Keywords: kosher and halal slaughter, religion, animals, food, ethical issue.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ВБИВСТВО З МЕТОЮ ЖЕРТВОПРИНОШЕННЯ І ДОБРОБУТ ТВАРИН: ПОРІВНЯЛЬНО-ПРАВОВЕ ДОСЛІДЖЕННЯ КАЗАХСТАНСЬКОГО ТА ЄВРОПЕЙСЬКОГО ЗАКОНОДАВСТВА

Анар Мукашева, Алішер Ібраєв*, Інкар Болатбекова, Бакит Жусіпова та Нурсултан Ибирай

АНОТАЦІЯ

Вступ. *Донедавна у Казахстані питання відповідального та гуманного ставлення до тварин були неврегульовані. Перший закон «Про відповідальне ставлення до тварин» ухвалили у 2021 році, у якому було визначено місце тварин у системі суспільних відносин та гарантовано їх захист. Однак закон містить виняток щодо забою тварин під час релігійних церемоній, що викликало дискусії та суперечки між громадськими організаціями із захисту тварин та релігійними громадами. Приголомшливі результати балансу між добробутом тварин і релігійною свободою можна знайти в ЄС. У цій статті проведено*

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порівняльно-правове дослідження законодавства Казахстану та деяких держав-членів ЄС щодо вбивства з метою жертвоприношення.

Методи. *У цьому дослідженні використовувалися різні методології, застосовувались як теоретичні, так і емпіричні підходи. До них належить порівняльно-правовий метод, завдяки якому автори проаналізували і дослідили зарубіжний досвід захисту прав тварин, що дозволило виявити найважливіші особливості, які можуть бути застосовані в законодавстві Казахстану.*

Статистичні дані були використані для виявлення закономірностей і тенденцій. З огляду на це зроблено прогноз, що оскільки кількість людей зростає, то зростатиме споживання та використання тварин. Тому ця стаття про захист прав тварин є своєчасним і актуальним дослідженням.

Крім того, авторами проведено аналіз конкретних випадків в іноземних державах, що допомогло виявити особливості та проблеми застосування права на практиці.

Центральним у розгляді досліджуваної проблеми був діалектичний метод, який дав змогу виявити протиріччя та взаємозв'язки між класичним і релігійним способами вбивства.

Результати та висновки. *На основі результатів дослідження було висунуто кілька практичних пропозицій щодо усунення або врегулювання існуючих законодавчих відступів щодо вбивства з метою жертвоприношення. Можна дійти висновку, що законодавча база Казахстану щодо захисту прав тварин має недоліки, які потрібно вдосконалити, закріпивши конкретні методи забою тварин, які можуть бути використані з європейського досвіду.*

Ключові слова: *кошерний і халяльний забій, релігія, тварини, їжа, етичні проблеми.*

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Research Article

THE ROLE OF ADMINISTRATIVE CONTRACTS IN THE FIELD OF PUBLIC ADMINISTRATION

Ahmet Imami* and Mirlinda Batalli

ABSTRACT

Background: *This scientific paper aims to delve deeply into the concept of administrative contracts and their importance in the field of public administration. Therefore, our goal is to provide a clear and detailed analysis and interpretation for readers, ensuring that all those interested have the opportunity to gain a foundational understanding of the importance and legal consequences of administrative contracts. By means of this paper, treating administrative contracts broadly regarding their development, meaning and importance in the theoretical aspect will positively influence and facilitate their application in practice by the public administration. These contracts, often similar to classical ones, with their content and purpose, are so differentiated that now it is no longer possible to speak of their belonging to one of the existing groups of contracts but of new, independent types of contracts.*

Methods: *This paper employs analytical, normative, historical and comparative methods. The analytical method will be used to analyse administrative contracts in the Republic of Kosovo and their application by state bodies. The normative method will treat the legal provisions that regulate administrative contracts, starting with those within administrative law and extending to provisions in other legal domains. The historical method will illustrate the history of the development of administrative contracts, detailing their past and how they work today. Lastly, the comparative method will compare the development and operation of administrative contracts in the Republic of Kosovo with those in other democratic states mentioned in the paper.*

Results and conclusions: *The administrative contract holds significant importance in public administration, as its primary objective is always to serve the general state interest. Despite being a bilateral legal act, an administrative contract typically involves a public or state administration body as the contracting party, which inherently holds greater power or authority in relation to the other legal entity involved. This power disparity means there is no equal footing between the contracting parties, contrary to the principle of equality observed in civil law and generally required for concluding private contracts.*

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1 INTRODUCTION

Administrative contracts, along with their characteristics, types, and importance, are universally known. These contracts are important for all democratic countries by enhancing the efficiency and effectiveness of public administration within the legal system of a given country.

In most democratic countries, administrative contracts are important since their primary purpose in public administration is the realisation of the general state interest by the public administration body as a contracting party in relation to any given legal subject. They represent modern legal creations of institutional and business practice, which have emerged from the need for economic development to be shaped or performed legally in national and international terms. The administrative, economic and legal elements are deeply intertwined, defining the essence of each administrative contracting work.

Despite being bilateral legal acts, administrative contracts often exhibit a power disparity, with the public or state administration body as the contracting party wielding greater authority over the other legal entity involved. This inequality contrasts with the equality principle upheld in civil law, which is a general condition for concluding civil-private contracts.

The institute of administrative contracts in administrative law, namely in regulating administrative activity, is of great importance. Therefore, through this topic, we aim to contribute initially to public administration bodies in addressing administrative issues of general state interest and then to all those interested in gaining knowledge about administrative contracts.

For the reasons mentioned above, we consider this topic related to the role of administrative contracts in public administration necessary. We hope that it will be treated scientifically and serve our society, researchers in the legal field, researchers in political sciences and public administration, scientific workers, judges, prosecutors, lawyers, and others in related fields.

2 THE HISTORY OF ADMINISTRATIVE CONTRACTS

Administrative contracts in their historical context were first introduced in the civil laws of states at the end of the 19th century and the beginning of the 20th century, notably starting in France. The theory of administrative law and its essential elements originated in France, making it a pivotal influence in this legal domain. In today's contemporary democratic systems, administrative contracts are widely recognised by most continental European systems, especially in those that have been under the influence of French law.[1] Consequently, many terms and notions in the field of administrative law derive from the French state.

1 Bajram Pollozhani and other, *Administrative Law: Comparative Aspects* (Skopje 2010) 75.

The appearance of administrative contracts at that time confirms their long history of development and implementation in public law. As the complexity of public administration increased in the 20th century, administrative contracts in public law gained even greater importance.

Historically, administrative contracts were considered simple because they clearly defined the rights and duties of the contracting parties. While the parties were responsible for providing services and goods, the state body was competent only for implementing the contract.

In the past, high state officials or persons close to the king were tasked with conducting concession procedures by means of administrative contracts, or they became concessionaires, covering the expenses personally. To realise the goals of the concessions, such as mining concessions, construction of new cities, urbanisation of rural areas, etc., the contracts were financed by a contractor related to the king or a high state official.

Concessionaires could also lease the concessioned assets to create assets for the state, fill the state treasury and develop their country's economy.[2] The privileging of state officials was a common practice of the governments of that time. Still, the importance of administrative contracts was special even in the time of the king, since the state developed the country's economy and filled the treasury precisely based on administrative contracts.

In the Republic of Kosovo, administrative contracts were recognised for the first time in 2017, respectively with the entry into force of the new law on general administrative procedure. In the legal system of the Republic of Kosovo, the institution of administrative contracts has yet to be regulated in detail because there are only a few articles, respectively only nine of them, which determine the regulation of the procedure for concluding administrative contracts.

3 THE MEANING OF THE ADMINISTRATIVE CONTRACT

An administrative contract is a mutual agreement between two or more parties or legal subjects, where at least one contracting party is a public body whose purpose is to create, change or end a concrete relationship of administrative law. As a contracting party, the public body has the right to enter into an administrative contract to realise any general public or state interest when such a thing is provided for in a tax manner by law, as well as on the condition that the public body, by concluding the administrative contract, does not violates the legal interests of third parties.[3] So the basic conditions for concluding an

2 François Lichère, 'L'évolution du Critère Organique du Contrat Administratif' (2002) 2 Revue Française de Droit Administratif 341.

3 Law no 05/L-031 of 25 May 2016 'On the General Administrative Procedura' [2016] Official Gazette of the Republic of Kosovo 20/1, art 60 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=12559&langid=2> accessed 12 December 2023.

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administrative contract are at least one contracting party must be a public or state body, not excluding the possibility that two or more contracting parties may be public bodies. The purpose of concluding the administrative contract must be to realise the general social interest, respecting the provisions of the laws that belong to the field of administrative law.

Also, the administrative contract is a two-way legal act concluded between the state or any other legal-public body and the natural or legal person under the conditions defined by the special legal provisions.[4] The character of the contract as a bilateral act means that its conclusion requires the expression of the will of both contracting parties, the state on one side and the natural or legal person on the other. Also, regulating the administrative contract with special provisions means that a special procedure is required for its conclusion, such as the announcement of public tenders by the state body, to conclude the administrative contract with any legal entity to realise the general social interest. Due to its importance, the administrative contract is usually concluded in written form, but provided that the law does not explicitly foresee any other form.

In administrative contracts, the signing of the contracting parties is done by the parties themselves or their representatives. The use of electronic signatures is subject to specific laws governing their validity. When a person signs on behalf of a public body, it must be based on some important certificate of the body on the basis of which it is known the identity of the public body[5] on whose behalf the administrative contract is signed.

It is worth noting that the Republic of Kosovo has undergone significant reforms over the years, resulting in the approval of several important laws related to electronic signatures, documents, and communications.[6]

Administrative contracts belong specifically to administrative law, as evidenced by numerous legal principles such as the ability of state bodies to unilaterally modify administrative contracts.[7] These contracts constitute a distinct aspect of administrative law due to their unique characteristics and the backing they receive from state entities. Unlike contracts under civil law, administrative contracts are always related to the realisation of some public interest specified by law, with the enduring involvement from public authorities.[8]

When concluding administrative contracts, state bodies must maintain state authority and sovereignty. Respecting sovereignty is important to ensure the effectiveness of administrative contracts in realising the general state interest.

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4 Pollozhani and other (n 1) 76.

5 Law no 05/L-031 (n 3) art 61, para 1.

6 Kastriot Dërmaku and Ardian Emini, 'Digisitation of Administration and Legal Basis in Kosovo' (2024) 7(1) Accsess to Justice in Estern Europe 245, doi:10.33327/AJEE-18-7.1-a000107.

7 Fabrice Melleray, 'L'exorbitance du Droit Administratif en Question(s)' (2003) 37 Actualité Juridique Droit Administratif 1961.

8 Sokol Sadushi, *E drejta administrative procedural* (Botimet Toena 2017) 352.

In general, an administrative contract is a bilateral legal act involving a public body and a private person (natural or legal) aimed at advancing specific public interests. Administrative contracts are governed by special norms of public law, somewhat different from those governing civil contracts under private law.[9] The special norms of public law aim to protect public interests and regulate the relations between the contracting parties, respectively, between the public body and the private person. By means of special laws of public law, the procedures for concluding the administrative contract, the mechanisms for its implementation, and the rights and duties of the contracting parties are regulated.

Regarding the name of the administrative contract, legal doctrine, English and American jurisprudence often use the term "government contracts" to encompass both central and local administration[10] as public bodies. This broader term helps fulfil the body's criterion so administrative contracts can be identified as efficiently as possible.

It is important to clarify that not only one of the contracting parties must always be a public body in administrative contracts. There are cases where both contracting parties are public bodies, such as administrative contracts between two ministries. To define the notion of administrative contracts, it is first necessary to distinguish them from other forms of administrative activity. Secondly, it is necessary to identify and define the criteria that give a contract an administrative character. This involves analysing the subjects of the contract, the object of the contract and the legal norms that regulate administrative contracts.

Additionally, it is important to conduct a legal analysis of new mechanisms in the law of administrative contracts, including how administrative contracts replace administrative-legal acts in the field of administrative law.[11]

4 CHARACTERISTICS OF ADMINISTRATIVE CONTRACTS

The administrative contract has these basic characteristics:

- the subjects of the contract - which means that one of the contracting parties must always be the state or public body;
- the purpose of the contract - the administrative contract always aims to realise the general public or state interest;
- the special conditions for the conclusion and realisation of the contract - which means that for the conclusion of the administrative contract, a special procedure

9 André de Laubadère, Franck Moderne et Pierre Delvolvé, *Traité des Contrats Administratifs*, vol 1: *La Notion de contrat administratif, la formation des contrats administratifs, l'exécution des contrats administratifs (principes généraux)* (2e éd, LGDJ 1983); Laurent Richer, *Les Contrats Administratifs* (DALLOZ 1991), et al.

10 Anne CL Davies, *The Public Law of Government Contracts* (OUP 2008) 200-20.

11 Erajd Dobjani, Kontratat administrative: traktat teorik dhe praktik i kontratave administrative në të drejtën shqiptare (Emal 2017) 140.

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must always be conducted, such as the opening of the public call or the call for certain offers;[12]
- the legal inequality of the parties, as a determining element for an administrative contract;
- contractual freedom of the public authority limited by law;
- the expanded interpretation of the contract, which always gives priority to the public interest of the administration, which appears in cases where the administration cancels the contract, provided that the damage to the other contracting party is compensated;
- suitability in execution of contract obligations by the private party, which in case of delay, may be charged with a penalty for delay;
- the specific character of the contract, where it can be terminated only when permitted by the public authority or the state;
- when it is in the public interest, the unilateral dissolution of the contract by the state;
- the capability of the state to unilaterally change the rules of the contract;
- that the two contracting parties have the same goal, which is the provision of public service;
- the administrative contract, according to its drafting, is a solemn contract with a standard written form, but not ignoring the complex form of the drafting.[13]

The aforementioned characteristics are considered fundamental elements for identifying an administrative contract since if one does not exist, then it cannot be an administrative contract. Based on the characteristics or elements of the administrative contract, a distinction is made between the administrative contract and the civil-private contract, which, unlike the administrative contract, is decisively regulated by the provisions of civil law.

It is important to emphasise that the third characteristic, related to the inequality of the contracting parties, applies only to those administrative contracts where one of the contracting parties is a private entity. In these contracts, the public body has the right to unilaterally cancel or change the contract if, after the conclusion of the contract, the circumstances determined by the legislation of the relevant state appear, which make it impossible to fulfil the contractual obligations. As for the other types of administrative contracts that will be elaborated below, where the contracting parties can only be public entities, then we have contracting parties with more equal rights and each party, at the time of presenting certain circumstances, has the right to unilaterally cancel or change the concluded contract.

12 Pollozhani and other (n 1) 76.
13 Sadushi (n 8) 355-6.

5 TYPES OF ADMINISTRATIVE CONTRACTS AND THEIR LEGAL FUNCTION

The administrative contract that replaces the administrative act (substitute contract) *refers to* a contract between a public body and another party, established when the public body, aiming to serve the general public interest, is obliged to issue an administrative act by which it obliges the party to undertake or not to undertake a certain action and deems it reasonable that to achieve the specific purpose it is better to enter into an administrative contract with the party herewith the administrative act will be replaced for which the body is obliged to issue to protect the general public interest.

In cases where an administrative contract substitutes for an administrative act, the public body is obliged to justify this decision within the contract, explaining why opting for a substitute administrative contract is preferable over issuing an administrative legal act.[14] The term *substitute contract* signifies that this contract replaces the administrative act when such a replacement is reasonable for achieving the goal set by the public body to advance the state's general interest.

An administrative contract of compromise *is a contractual arrangement where* a public body, uncertain about the content of an administrative act it must issue to a designated party, seeks to eliminate this uncertainty through agreement with the party. Both parties – the public body and the party – acknowledge that despite their efforts to evaluate the factual and legal circumstances, the situation remains uncertain and objectively unclarifiable.[15]

In the past, when an administrative body lacked sufficient evidence for any administrative matter, it was obliged to issue an administrative act. However, under the new LPA, the administrative body can now enter into an administrative contract by assigning the rules to the party within the contract. After concluding the contract, the administrative body is obliged to issue the administrative act. The conclusion of the administrative contract of compromise enables the public body to avoid uncertainty and empowers the administrative act addressed to the party for any specific administrative issue.

Administrative contracts between public bodies *are established* when these bodies share a common interest in carrying out certain activities and regulating their relationships. Examples of such contracts include public-private partnership contracts, concession contracts, public procurement contracts, and others that encompass elements similar to those found in contemporary administrative contracts. Nevertheless, we consider that the term "administrative contract" is more accurate and precise because its elements are more binding than memoranda or agreements with different designations, as administrative contracts between public bodies have their form and content defined expressly according to the law.

14 Law no 05/L-031 (n 3) art 62.
15 ibid, art 63.

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A coordinated administrative contract is concluded between two public bodies with common interests in regulating relations and carrying out activities to achieve their goals. An example of a coordinated administrative contract is when two or more administrative bodies enter into a partnership contract to build much-needed schools in municipalities.[16] This contract falls under the category of administrative contract between public bodies.

For example, a coordinated administrative contract can also be called a contract that can be concluded between the Ministry of Culture, Youth and Sports in Kosovo on one side and the Football Federation of Kosovo on the other side to announce their partnership for financing of building a football stadium with European standards.

A dependent administrative contract is a specific type of administrative contract concluded between contracting parties where one party holds a superior position over the other, who is considered dependent. An example of such a contract is when an administration body concludes a contract with a citizen or any other legal entity that is a dependent, and such contract is made under the exercise of a judgment of an official authority. For example, the contract that is given to the enterprise for construction.[17] A dependent contract can also be any contract of the other type mentioned above, such as the contract for the licensing of games of chance, where with the licensing of those games the public body enters into an administrative contract by exercising unilateral authority towards the entity that requests the licensing of any games of chance by determining in the contract decisively the criteria that must be met for obtaining a license for the exercise of the activity of games of chance. With such a contract, we always understand the priority of the superior as a contracting party (administrative body) on one side to the dependent -entity (physical or legal person) on the other.

Active and passive administrative contracts *refer to two distinct* categories based on their impact on the state benefits and financial resources. An active administrative contract is one that benefits the state by generating revenue or positive economic outcomes. In these contracts, all rights specified in the agreement belong to the state, while the other party bears the obligations. For example, an active administrative contract is considered when the state signs a contract with a private contractor to construct a highway. With the execution of the project, namely with the construction of the highway, the state develops the country's economy. In this case, it is considered that the state is the beneficiary.

Conversely, a passive administrative contract is one that results in a cost or financial burden for the state without generating direct economic benefits. [18] In these contracts, the rights belong to the other contracting party, while the obligations belong to the state. For instance, when the state engages in contracts that require payment for services, it fails to bring direct economic benefits to the country and even causes a loss of its resources.

16 Esat Stavileci, Mirlinda Batalli dhe Islam Pepaj, *Pjesa e posaçme e drejtës administrative* (Universiteti i Prishtinës "Hasan Prishtina" 2017) 30.

17 ibid.

18 ibid.

Active and passive administrative contracts are identified based on their impact on the state budget. Active contracts positively affect state financial revenues, while passive ones negatively affect them.

Administrative contracts can be concluded by three or more contracting parties to achieve their interests. However, it should be noted that in these contracts, where there are many contracting parties, their rights are equal, except for the parties that are private entities. Giving more rights to public entities, in relation to private ones, means that public entities always aim to achieve the general state interest, whereas the purpose of private entities is to achieve their private interests.

The classification of the types of administrative contracts varies depending on the legislation of the specific country. Still, their classification elaborated above is made in a general category based on their characteristics.

6 THE DIFFERENCE BETWEEN ADMINISTRATIVE CONTRACTS AND CIVIL-PRIVATE CONTRACTS

While significant differences exist between administrative and civil-private contracts,[19] their commonalities must not be overlooked.

Understanding the concept and significance of administrative contracts within the field of administrative law necessitates a detailed classification that distinguishes them from other types of contracts falling under different branches of law. According to international literature, administrative contracts involve at least one contracting party, which is a public body. Disputes arising from administrative contracts are typically resolved by administrative courts – either specialised courts or regular courts – depending on the state as which system is recognised by their legislation. The unique setting of these contracts results from their regulation by specific laws or provisions of public law.

In contrast, private law contracts are fully subject to the norms of private law and, therefore, disputes concerning them are adjudicated by judicial bodies operating under civil jurisdiction. On the other hand, administrative contracts are fully subject to the norms of administrative law, and their legal oversight occurs within the administrative jurisdiction.

It is generally accepted that administrative contracts are one of the most problematic areas of administrative law,[20] particularly due to difficulties distinguishing them from private contracts. The criteria to differentiate between administrative and private

19 Marcel Waline, 'İdari Mukaveleler' (1944) 1(4) Ankara Üniversitesi Hukuk Fakültesi Dergisi 566, doi:10.1501/Hukfak_0000000034.

20 M Ayhan Tekinsoy, 'İdari Sözleşmelerde Ölçüt Sorunu' (2006) 55(2) Ankara Üniversitesi Hukuk Fakültesi Dergisi 183, doi:10.1501/Hukfak_0000000351.

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contracts often prove insufficient, especially when one of the contracting parties is a public administration body. [21]

Despite their differences, administrative contracts and private contracts are also related to each other. An administrative body has the authority to conclude an administrative contract as well as a private contract. Private contracts in which one of the contracting parties is the administration body have the same legal basis as private contracts, which are concluded between private entities. With the conclusion of the private contract, the administration body only administers its property; that is, it creates, changes or terminates a civil legal relationship.

In private contracts, the rights and duties of the contracting parties – whether the administration body or a private entity – are generally equal. Unlike administrative contracts, private contracts lack the exercise of state power by the public or state body over the designated private entity. Instead, private contracts emphasise the principle of coordination between contracting parties. Although, in principle, there are cases where the nature of the administrative contract is determined by law, in most cases, the administration is authorised by law to enter into a contract for a certain issue, but it is not specified that the concluded contract is an administrative contract or a contract of civil-private law. In these cases, two criteria (organic and material) determine whether the concluded contract is an administrative or civil-private contract.[22] The organic criterion is related to the parties in the contract, whether one of the parties to the administrative contract is a public body, while the material criterion is related to the content and provisions of the contract, which means that the object of this contract must be the general public interest or the contract shall contain provisions that go beyond the provisions that regulate civil - private contracts.[23] Based on these two criteria, it is determined whether a contract is administrative or a civil-private contract. The organic criterion is related to the parties participating in the contract (the public body is inalienable). In contrast, the material criterion is related to the content and purpose of the contract (realisation of the general state interest). The rules for the conclusion of private contracts between the administration body and the private entity are determined by the field of civil law, where even in the event of a dispute between the contracting parties, the competent courts to resolve the case are the regular courts[24] which adjudicate cases related to civil matters.

Administrative or public contracts and private ones also differ in terms of the procedure for concluding them, since a more complicated and special procedure is required for the conclusion of administrative contracts, such as: the announcement of a tender by the public body for a specific issue, recruiting applicants, announcing the winner of the tender, and many other conditions. For private contracts, an easier procedure is required because the

21 Vedat Buz, *Kamu Ġhale SözleÇmelerinin KuruluÇu ve Geçerlilik ġartları* (Yetkin Yayınları 2007) 51.
22 Kemal Gözler, *İdare Hukuku*, C 2 (Ekin Kitabevi 2003) 18.
23 ibid 24.
24 Sokol Sadushi, *E Drejta Administrative*, 2 (BOTIMEX 2008) 348.

purpose of concluding the contract is not the general public or state interest but the private interest between the contracting parties. Of course, even with the conclusion of private contracts, the contracting parties are obliged to adhere to general legal rules, but not in a complicated procedure such as in the case of the conclusion of administrative contracts.

Therefore, in the end, administrative contracts belong to public law, whereas civil contracts belong to private law.

7 ADMINISTRATIVE CONTRACTS AT INTERNATIONAL ASPECT

One of the elements that distinguishes administrative contracts from those of an international character is their connection with public-state institutions in which the general public interest prevails concerning private interest. For this reason, international administrative contracts have some special features that distinguish them from administrative contracts with a national character because the foreign contracting party is obliged to draw up some documents related to the legislation on what an international administrative contract means. After the conclusion of the contract, the parties are obliged to implement the same in accordance with international norms.[25] It is important to emphasise that the public interest should not prevail only in administrative contracts with an international character but also in those with a national character because the subject of the contract itself has to do with the execution of the general state-public interest.

The international element of administrative contracts is also important considering the legislation it regulates them, including which body is competent to resolve the conflicts of the contracting parties in case of any eventual dispute. For any disputes between the parties in international administrative contracts, international arbitration is competent for their resolution, which develops dispute resolution procedures based on international norms. Within the European legal systems, in addition to the differences in their concepts, there are also common features and interests between them in relation to administrative contracts. In principle, the legislation must always find a proper balance between public and private interest, in the case of presenting a circumstance where by applying any private law, the general public interest will be violated.[26] In the absence of legislation to give priority to the public interest, it should be left to the discretion of the judges to give priority to the public interest when adjudicating such disputes, but being conscious of finding a balance between the freedoms and rights of the other contracting party should not be violated. It is important to create legal systems with relevant legislation so that administrative contracts have legal certainty, to protect the public

25 Munir Abbasi, 'Arbitration in International Administrative Contracts' (Memorandum Master's Law, Khamis Miliana University 2013-2014) 22.

26 Márta Várhomoki-Molnár, 'A közigazgatás szerződései és a koncessziók Európában' (doktori értekezés, Eötvös Loránd Tudományegyetem 2020) 5.

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interest and guarantee the realisation of the rights and legal interests of the parties included in the contract, because due to the nature of complexity in administrative contracts with an international element, various challenges related to their implementation and management have been presented, including cultural differences and legal systems between the entities that have concluded administrative contracts. For this reason, negotiations for the conclusion of these contracts require a high level of specialisation and expertise in the field of international legislation, diplomacy and public administration.

In the Republic of France, considered the cradle of administrative law, several norms go beyond French legislation, respectively the French Civil Code, by which administrative contracts are regulated. The main characteristic of administrative contracts in the French system is that the contracting parties are not equal, and the law recognises certain privileges for public bodies as contracting parties.[27]

In addition to France, most European legal systems related to administrative contracts have foreseen the need for the legislation of their states to provide public bodies as administrative contracting parties greater freedom of action in relation to the private contractor. The largest space given to the public entity is related to the unilateral resolution and modification of the contract.[28]

This phenomenon has also been confirmed by the European Court of Human Rights (ECHR) in its decision no. 13427/87, dated 9 December 1994, concerning the Stran Greek Refineries and Stratis Andreadis v Greece. The court assessed that the change of the contract by the public body unilaterally as a contracting party of the administrative contract, in principle does not violate the property right as defined by Article 1, Protocol 1, of the European Convention on Human Rights (ECHR), reasoning that: "International jurisprudence and arbitration courts recognise that each state has the sovereign power to change a contract entered with the private individuals, provided that a compensation is made." This solution reflects the idea that the highest interests of the state prevail over contractual obligations and considers the need to maintain a fair and reasonable balance of the contract.[29]

This decision underscores the extraordinary importance of the general public interest within a state against the interests of the private contracting party. Moreover, the public entity, even based on this international practice to realise the general state interest, has the right to unilaterally terminate the administrative contract in relation to the other private contracting party but is obliged to pay the full compensation to the private party for the damage caused.

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27 ibid 5.

28 ibid 9.

29 *Stran Greek Refineries and Stratis Andreadis v Greece*, App no 13427/87 (ECtHR, 9 December 1994) <https://hudoc.echr.coe.int/eng?i=001-57913> accessed 12 December 2023.

Judicial practice concerning administrative contracts varies based on each country's legal system and context. However, as discussed earlier, it is more important to point out some common topics and practices observed in many European legal systems. These include assessing the legality of administrative contracts, overseeing contract implementation and interpretation, managing complaints of contracting parties, and addressing arbitration in international administrative contracts.

Administrative courts play a crucial role in resolving administrative conflicts by increasing judicial control over administrative bodies and expanding and strengthening specialised models of judicial control. This increased control not only ensures administrative activities comply with relevant laws but also impacts the division of powers within a democratic society, contributing to the democratisation process. Furthermore, guaranteeing the independence and impartiality of judges within these courts is essential to strengthen the principle of legality in judicial bodies and uphold constitutional standards in resolving administrative disputes.[30] Increasing judicial control over administrative bodies is important because it ensures that the administrative activity and decisions of administrative bodies are compatible with the relevant laws.

Whereas the expansion and strengthening of specialised mechanisms of judicial control foster expertise that enables efficient and effective handling of administrative cases. This increased judicial oversight is significant in maintaining the balance of powers, as administrative conflicts are adjudicated independently by courts, ensuring adherence to constitutional principles and legality. Likewise, guaranteeing the independence and impartiality of judges ensures that the decisions or verdicts taken in the conflict procedure of the administrative contracting parties are based on the law and not on external political or nepotistic influences.

8 CONCLUSIONS

In conclusion, we consider that the administrative contract is extremely important in the field of public administration, where their primary purpose is to serve the execution of the general state interest. Unlike private contracts governed by principles of equality between parties, administrative contracts are bilateral legal acts involving a public or state administration body that typically holds greater authority or power compared to the other contracting party. This power disparity means that there is no equal footing between the contracting parties, contrary to the principle of equality observed in civil law and generally required for concluding private contracts.

30 Fejzulla Berisha dhe Jusuf Zejneli, *E Drejta Administrative* (Universiteti "Haxhi Zeka" 2015) 169.

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Administrative contracts were first introduced in the law of civil states at the end of the 19th century and the beginning of the 20th century, notably in France, and then distributed to other democratic states.

The specifics that distinguish administrative contracts from other contracts include the requirement that at least one contracting party must be a public body, the overarching purpose of serving the general state interest, the special conditions for their conclusion that differ from the conditions for the conclusion of ordinary contracts and the inherent inequality between the contracting parties. When entering into an administrative contract, not only must special conditions pertinent to administrative contracts be met, but general conditions prescribed by civil law for private contracts must also be satisfied.

Given these complexities, further scientific research is essential to better understand the implementation and implications of administrative contracts. This research will provide professionals in the field with exactly what administrative contracts are and how they are developed and implemented in the field of public administration.

We remain hopeful that this scientific research will enrich the legal literature on administrative contracts in the field of public administration and, more broadly, as a matter that needs research and scientific studies for the current and subsequent generations.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЛЬ АДМІНІСТРАТИВНИХ ДОГОВОРІВ У СФЕРІ ДЕРЖАВНОГО УПРАВЛІННЯ

Ахмет Імамі* та Мірлінда Баталлі

АНОТАЦІЯ

Вступ. *Пропонована наукова стаття має на меті глибше зануритися в концепцію адміністративних контрактів та розкрити їхнє значення у сфері державного управління. Іншими словами, наше завдання полягає в тому, щоб надати читачам чіткий і детальний*

аналіз і тлумачення щодо зазначених питань, щоб усі зацікавлені особи мали можливість отримати базове розуміння важливості та правових наслідків адміністративних контрактів. За допомогою цього дослідження широке трактування адміністративних договорів щодо їхнього розвитку, значення та важливості в теоретичному аспекті матиме позитивний вплив та полегшить їхнє застосування на практиці державними адміністраціями. Ці договори, часто подібні до класичних, за своїм змістом і метою набули такого рівня диференціації, що зараз уже можна вести мову не про їхню належність до однієї з наявних груп договорів, а про новий, самостійний вид договорів.

Методи. *Дослідження виконано за допомогою аналітичних, нормативних, історичних та порівняльних методів. Аналітичний метод застосовано для аналізу адміністративних контрактів у Республіці Косово та їхнього використання державними органами. За допомогою нормативного методу розглянуто правові положення, що регулюють адміністративні договори, починаючи з адміністративного права та поширюючись на положення в інших правових сферах. Історичний метод проілюструє історію розвитку адміністративних договорів, деталізує їхнє минуле та те, як вони діють нині. Нарешті, порівняльний метод дасть змогу порівняти розроблення та дію адміністративних контрактів у Республіці Косово з аналогічними в інших демократичних державах, згаданих у статті.*

Результати та висновки. *Адміністративний договір має важливе значення в державному управлінні, оскільки його основною метою завжди є служіння загальним інтересам держави. Незважаючи на те, що адміністративний договір є двостороннім правовим актом, він зазвичай передбачає державний або державний адміністративний орган як договірну сторону, яка за своєю суттю має більші повноваження чи повноваження щодо іншої залученої юридичної особи. Ця розбіжність у повноваженнях свідчить про відсутність рівності між договірними сторонами, що суперечить принципу рівності, якого дотримуються у цивільному праві та який зазвичай необхідний для укладання приватних контрактів.*

***Ключові слова**: адміністративний договір, державне управління, розвиток та мета.*

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Research Article

LEGAL LIABILITY OF A PHYSICIAN FOR PROVIDING INADEQUATE MEDICAL CARE TO A PATIENT: ANALYSIS OF APPROACHES BASED ON THE EXAMPLES OF KAZAKHSTAN AND THE UNITED STATES

Aibek Seidanov, Arstan Akhpanov, Lyazzat Nurlumbayeva* and Maya Kulbaeva

ABSTRACT

Background: *This research focuses on the determination of liability for medical professionals causing harm to patients, using the criminal legislation of the Republic of Kazakhstan as a foundation. Criminal liability for medical offences is stipulated in Chapter 12 of the Criminal Code. By identifying the mandatory characteristics or elements of a medical criminal offence according to the criminal legislation of Kazakhstan, parallels are drawn with the types of culpability provided for in developed countries worldwide. The authors reviewed scholarly works examining the effectiveness of handling cases involving harm to patients and decisions regarding the satisfaction or dismissal of the patient's claims in Kazakhstan. Attention has been given to empirical data collected within the territory of the Republic of Kazakhstan. The results of sociological research conducted by the authors over a period of 3 months among healthcare professionals from different regions of the country have been utilised. Special attention has been devoted to international experiences in implementing measures to improve patient safety, reducing citizen complaints regarding the quality of healthcare services, and enhancing the legal protection of medical personnel. The research selects provisions from scholarly works that reduce the risk of harm to patients and thereby contribute to reducing medical crime levels.*

Methods: *In this research, the authors employed a number of methods of scientific research to achieve their goals and solve their tasks, in particular legal analysis, comparative legal analysis, survey, questionnaire, and interviewing. Legal analysis of the Criminal Legislation of the Republic of Kazakhstan, including Chapter 12 of the Criminal Code, was conducted to identify the specifics of criminal liability for medical offences, exemplified by Article 317. This analysis highlighted the nuances of criminal liability for medical offences in Kazakhstan.*

Comparative legal analysis made it possible to compare the responsibilities of doctors in the USA and Kazakhstan. Attention was drawn to the similarity of the concepts of guilt in the form of negligence, with a specific emphasis on the American approach, which offers valuable insights for Kazakhstan. These aspects could be adapted to improve Kazakhstan's legal system. The specific cases of harm to patients considered by the courts of the Republic of Kazakhstan were studied, and court decisions concerning the satisfaction of patients' claims and their rejection were analysed, which allowed the authors to identify the main arguments and trends in judicial practice.

Surveys and questionnaires were conducted among medical workers from various regions of Kazakhstan to gather empirical data on their perceptions of duties and responsibilities. Additionally, in-depth interviews were also conducted with experts in the field of medicine and law, as well as patients, and representatives of health authorities, providing high-quality data on the problems and challenges faced by medical workers.

Statistical data collected during sociological research were processed and analysed. This included data on citizen complaints about the quality of medical care, cases of harm to patients and other relevant statistical indicators. The study of the problem at various levels revealed the level of patient safety and legal protection of medical personnel.

Results and Conclusion: *Creating conditions for medicine and ensuring effective social and professional medical insurance are some factors that provide opportunities for medical practice as a whole and the healthcare system. These facts also facilitate a proper legal assessment of a doctor's performance.*

1 INTRODUCTION

The issue of holding healthcare professionals accountable for the harm caused to patients during medical care always sparks debate across society, particularly among the medical community and affected patients. Since ancient times, society has consistently expressed its stance on the harm caused by a physician while treating patients. Historical monuments vividly depict these occurrences, spanning millennia. It is evident to us now that society has never overlooked the medical profession. Various cultures have referred to those providing medical assistance by diverse titles such as healers, shamans, physicians, healers, infirmaries, priests, clerics, asclepiads, wise men, philosophers, and others.

The concepts of medical care and treatment practices in antiquity differed from modern standards and methods of medical science. Medicine in ancient times was largely based on religious, philosophical, and magical beliefs and did not always correspond to contemporary medical standards and the scientific approach to treatment. Medical practices and methods could vary across different societies and cultures, incorporating techniques such as herbs, amulets, prayers, rituals, magical remedies, and other means.

Despite limited knowledge and resources available in antiquity, many civilizations developed systems of medical care that played crucial roles in the health and well-being of

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their populations. Ancient healers and physicians gathered and transmitted experience and knowledge about treating various illnesses. These practices laid the foundation for future medical science and practice.

It is worth noting that modern medicine has made significant advancements in scientific and technical aspects. Today, medical care is provided by highly skilled medical professionals based on scientific research, clinical trials, and evidence-based medicine. The high achievements of medical science, evidence-based research, practical experience, and innovations improve the outcomes of medical care, enabling people to recover from diseases and ailments previously considered incurable.

Medical activity as a profession is marked in history not only by positive achievements but also by unfavourable outcomes of the diagnosis and treatment process.

In the Republic of Kazakhstan, the number of complaints from healthcare service recipients regarding quality is increasing. The global trend of increasing scrutiny towards the activities of healthcare professionals aligns with the time frame observed in Kazakhstan, which is approximately since 2005. However, the number of complaints from citizens regarding healthcare workers continues to rise year by year. Among the citizen complaints, a significant portion is related to professional ethics, but concerns are raised regarding the quality of healthcare services.

In 2019, the World Health Organization (WHO) adopted Resolution WHA72.6, "Global Action on Patient Safety," at its seventy-second session,[1] highlighting the urgent need for global attention to patient safety. This call to action is driven by industries associated with high-risk levels, such as aviation and the nuclear industry, which have much higher safety records than the healthcare sector. For instance, the probability of a person dying in a car accident is one in 3 million, whereas the likelihood of a patient dying as a result of an adverse event in medical practice is one in 300.[2]

Annually, low and middle-income countries report approximately 134 million cases of medical errors or negligence by healthcare providers, resulting in an estimated 2.6 million deaths. In high-income countries, it is estimated that one in every ten patients experiences harm while receiving hospital care. Harm can be caused by a range of adverse events, and nearly 50% of them are preventable. According to the World Health Organization (WHO), the occurrence of adverse outcomes due to healthcare is likely one of the top 10 causes of death and disability worldwide.

1 Resolution WHA72.6 of 28 May 2019 'Global Action on Patient Safety' <https://www.who.int/teams/integrated-health-services/patient-safety/policy/resolutions> accessed 10 April 2024.

2 WHO, '10 Facts on Patient Safety' (*World Health Organization (WHO)*, 26 August 2019) <https://www.who.int/news-room/photo-story/photo-story-detail/10-facts-on-patient-safety> accessed 10 April 2024.

In primary and ambulatory healthcare settings, up to 4 out of 10 patients worldwide experience harm, with as much as 80% of these incidents being preventable. The most detrimental errors are related to diagnosis, prescribing, and medication use.[3]

Recognised on 17 September annually, World Patient Safety Day highlights patient safety as a global health priority. In 2020, the WHO called upon governments and healthcare leaders to take action to eliminate factors that systematically threaten the health and safety of healthcare workers and patients.[4] They introduced the Charter for Patient Safety.[5]

The importance of addressing patient and healthcare worker safety issues is indicative of a society's cultural development. Ensuring patients' rights while receiving medical care or services is guaranteed by laws in each country's fundamental legislation and international regulatory acts. Regulating the legal relationship between patients and healthcare workers in cases of harm to the patient's health requires a meticulous and fair approach that ensures the rights and freedoms of both parties.

On one side, patients are seeking medical care or services from a doctor or healthcare institution. On the other side, healthcare professionals are morally and professionally bound to provide diligent care.

If there is a negative outcome resulting in harm to the patient in the context of the provision of medical care, there is a need for a qualified investigation. In such cases, it is necessary to conduct an examination, investigate the circumstances, analyse the actions or inactions of the doctor, study the behaviour of the patient, and determine whether the doctor's negligence in fulfilling their professional duties played a role in causing the harm.

This study attempts to determine the type of responsibility for a medical doctor based on the nature of the harm caused and the extent of their actions or inactions.

2 GOALS AND OBJECTIVES OF RESEARCH

The objectives of the research are to study the criminal liability of a medical worker under the legislation of the Republic of Kazakhstan for medical criminal offences and to compare the responsibility of foreign countries using the example of the United States. The article aims to define the direction of the search for effective legal instruments to reduce the level of medical crime. Central to this study is Article 317 of the Criminal Code of the Republic

3 ibid.

4 WHO, 'Keep Health Workers Safe to Keep Patients Safe' (*World Health Organization (WHO)*, 17 September 2020) <https://www.who.int/news/item/17-09-2020-keep-health-workers-safe-to-keep-patients-safe-who> accessed 20 April 2024.

5 WHO, 'Patient Safety Rights Charter' (*World Health Organization (WHO)*, 16 April 2024) <https://www.who.int/publications/i/item/9789240093249> accessed 20 April 2024.

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of Kazakhstan,[6] which will undergo doctrinal analysis and be juxtaposed with the experience of the United States.

To study foreign experience in improving the level of patient safety and legal protection of medical personnel. Ultimately, this research aims to develop recommendations for reducing the level of medical crime and improving the quality of medical care in Kazakhstan.

The research objectives include the analysis of the criminal liability of a medical worker in the Republic of Kazakhstan under Article 317 of the Criminal Code, comparing it with events that entail similar negative consequences for patients abroad and the legal instruments used to combat them. An attempt is made to compare these approaches to determine trends in the legal responsibility of a medical professional and adopt positive experience.

Studying the US experience of pre-trial consideration of claims for harm gives grounds for the development of professional medical insurance and legislation on patient safety, which is a global trend. Collecting empirical data through a sociological survey of medical workers, patients and employees of investigative units will highlight the inefficiency of the tools of the criminal legislation of Kazakhstan and confirm the need to develop more effective methods to combat the facts of providing substandard medical care and services. Development of recommendations on improving legislation regarding medical criminal offences and alternative types of liability to improve the quality of medical care. One of the core tasks is a practically applicable scientific search to improve the quality of medical care and legal protection for both patients and medical workers.

3 CRIMINAL LEGISLATION ON MEDICAL CRIMINAL OFFENSES IN KAZAKHSTAN: A COMPARATIVE ANALYSIS OF THE ELEMENTS OF MEDICAL CRIMINAL OFFENSES USING THE EXAMPLE OF KAZAKHSTAN AND THE USA

Analysing the features and elements of medical criminal offences allows for their classification within the framework of criminal law in Kazakhstan.[7]

The general theory of criminal law in the Republic of Kazakhstan identifies the following characteristics of a criminal offence in accordance with the codified legislation: social danger, unlawfulness, culpability, and punishability.

Unlawfulness is a characteristic that establishes the prohibition by a specific criminal law norm. Social danger is a material characteristic that reveals its social essence. Culpability is

6 Code of the Republic of Kazakhstan no 226-V of 3 July 2014 ‘Criminal Code of the Republic of Kazakhstan’ <https://adilet.zan.kz/eng/docs/K1400000226> accessed 20 April 2024.

7 EV Espergenova, ‘Problems of the Theory and Practice of Applying the Legislation of the Republic of Kazakhstan in Countering Medical Criminal Offenses Committed by a Special Subject’ (PhD (Law) thesis, Karaganda Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan 2019).

characterised by a person's internal mental attitude towards the committed act, which can be expressed in the form of intent or negligence. Punishability refers to establishing by law the possibility of imposing punishment for the committed act.

The composition of a criminal offence is a scientific category in criminal law that is necessary for the accurate determination of the presence or absence of the elements of a criminal offence in a person's actions. It includes four essential elements (object, objective side, subject, and subjective side), and if any of these elements are missing, the composition of the criminal offence is disrupted.

In the present study, we rely on the criminal offence provided for in Article 317 of the Criminal Code of the Republic of Kazakhstan. This article defines various scenarios and corresponding penalties for medical professionals:

> "1. Non-performance, improper performance of professional duties by a medical or pharmaceutical employee due to negligent or unconscientious attitude to them, if these actions entailed infliction of harm of average gravity to human health by negligence, – shall be punished by a fine in the amount of up to two hundred monthly calculation indices or corrective labours in the same amount, or community services for a term of up to one hundred eighty hours, or arrest for a term of up to fifty days.
> 2. The actions, provided by the first part of this Article, entailed the infliction of grievous harm to the health by negligence – shall be punished by a fine in the amount of up to three thousand monthly calculation indices or corrective labours in the same amount, or restriction of liberty for a term of up to three years, or deprivation of liberty for the same term, with deprivation of the right to hold certain positions or engage in certain activity for a term of up to one year or without it.
> 3. The actions, provided by the first part of this Article, entailed the death of a person by negligence– shall be punished by imprisonment for a term of up to five years with deprivation of the right to occupy determined posts or to engage in a determined activity for a term of up to three years.
> 4. The actions, provided by the first part of this Article, entailed the death of two or more persons by negligence – shall be punished by imprisonment for the term of three to seven years with deprivation of the right to occupy determined posts or to engage in a determined activity for the term of three years.
> 5. Improper performance of professional obligations by medical employees, as well as employees of organisation of domestic or other service to the population due to negligent or unconscientious attitude to them, if this action entails infection of another person with HIV / AIDS – shall be punished by imprisonment for the term of up to five years with deprivation of the right to occupy determined posts or to engage in a determined activity for the term of up to three years."[8]

8 ibid, art 317.

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This article aims to determine the characteristics of medical criminal offences provided for in Article 317 of the Criminal Code of the Republic of Kazakhstan through systematic analysis, comparing them with international approaches and examining the legal measures to combat such offences.

The systematic approach allows us to position the phenomena under study in a structured manner, thereby identifying their internal logical connections, understanding them as parts of a whole, and predicting the existence of missing links. It enables us to diagnose and predict new phenomena. This approach is achieved by determining the phenomenon being studied, which necessitates defining the concept of criminal offences committed by medical personnel.[9]

First, it is necessary to provide a clear definition of the object of medical criminal offences envisaged in Article 317 of the Criminal Code of the Republic of Kazakhstan. According to E.I. Kairzhanov:

> "The object of a crime is an element of the composition whose presence to a significant extent determines the possibility of criminal encroachment upon it: the purpose, content of the subjective side, the nature of specific actions by the guilty party, harmful consequences, and even the danger to the personality of the crime's subject."[10]

G.R. Rustemova generally relates the objects of medical criminal offences to the sphere of medical services, the understanding of which should be approached from the concept of serving the population while distinguishing it from the concept of the sphere of services, which implies the production of consumer value. In medical contexts, services are delivered to benefit patients' health, distinguishing them from typical consumers services.

Central to medical activity is the provision of medical services, encompassing professional activities aimed at promoting patient health, whether carried out on a paid or gratuitous basis.[11] It is precisely in relation to the provision of medical services and assistance to the patient that legal relations are formed, regulated by Chapter 12 of the Criminal Code of the Republic of Kazakhstan.

A medical service must be useful and safe, which determines its quality. The quality of the service is assessed based on two indicators: execution and compliance.[12]

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9 MA Ibrayev, 'Methodology of Investigation of Improper Fulfilment of Professional Duties by a Medical Worker' (PhD (Law) thesis, Kazakh Humanitarian Law University 2010).

10 EI Kairzhanov, 'On the Methodology of Cognition of the Object of Crime' in AE Mizanbaeva (ed), *Criminal Law Understanding at the Present Stage: Methodological Aspects of Law Enforcement* (Globus 2009).

11 GR Rustemova, *Medical Criminal Offenses* (KazAtiso 2016).

12 Wilm Quentin and others, 'Measuring Healthcare Quality' in Reinhard Busse and others (eds), *Improving Healthcare Quality in Europe: Characteristics, Effectiveness and Implementation of Different Strategies* (Health Policy Series no 53, European Observatory on Health Systems and Policies 2019) ch 3 <https://www.ncbi.nlm.nih.gov/books/NBK549260> accessed 10 April 2024.

Referring to the concept of medical services as stated in the Code of the Republic of Kazakhstan on People's Health and the Healthcare System dated 7 July 2020 (in paragraph 181, Article 1), healthcare services are defined as "actions of healthcare entities with a preventive, diagnostic, therapeutic, rehabilitation and palliative orientation in relation to a specific person". In other words, all legal relationships arising from the provision of medical services can be represented by the formula "medical or pharmaceutical worker – medical service – service recipient, i.e. the patient".

Additionally, the law also includes the definition of medical care, which is expressed as follows: "medical care – a complex of healthcare services aimed at maintaining and restoring the health of the population, including drug provision".[13] In other words, the concept of medical assistance is broader than the concept of medical service, as the latter is used to define medical assistance.

Thus, under Article 317 of the Criminal Code of the Republic of Kazakhstan, a criminal offence arises at the moment when harmful consequences occur for the patient as a result of non-performance or improper performance of professional duties in providing medical assistance and violating standards. In other words, the quality of medical care has an inverse relationship with the formation of harm. The higher the quality of medical assistance, the lesser the harmful consequences.

Thus, the primary object of this criminal offence is the life and health of a person as the patient, while the proper provision of medical assistance and compliance with medical standards serve as additional objects. The criminal legal relationship arises in the case of gross violations of the proper provision of medical assistance and the violation of medical standards resulting from relationships formed according to the general formula for Article 317: medical or pharmaceutical worker, worker of an organisation providing household or other services to the population – provision of medical assistance, provision of services – patient, client. Another condition is the occurrence of socially dangerous consequences for the patient or client.

The moment when the consequences occur as a result of negligence in the form of moderate harm marks the completion of the act specified in Part 1 of Article 317 of the Criminal Code. Causing serious harm to health due to negligence corresponds to Part 2, while the occurrence of a patient's death due to negligence is covered by Part 3. Part 4 deals with the death of two or more persons due to negligence.

Part 5 of Article 317 establishes criminal liability for negligent actions that result in the infection of a person with HIV. In this part, the legislator distinguishes a specific subject, in addition to the medical worker, namely the worker of an organisation providing household or other services to the population.

13 Code of the Republic of Kazakhstan no 360-VI of 7 July 2020 'On Public Health and Healthcare System' <https://online.zakon.kz/Document/?doc_id=39793804#activate_doc=2> accessed 10 April 2024.

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The objective aspect of the criminal offence entails several types of criminal conduct as outlined in parts 1-4:

- failure by medical and pharmaceutical workers to fulfil their professional duties.
- improper fulfilment of professional duties by medical and pharmaceutical workers, which involves non-compliance with the procedures or standards of providing medical care.

The objective aspect of the criminal offence under Part 5, Article 317 involves the improper fulfilment of professional duties by a medical worker or a worker of an organisation providing household or other services, resulting in the transmission of HIV through negligence.

Understanding such criminal conduct starts with recognising what constitutes a failure to fulfil professional duties. It refers to situations where a medical worker, such as a doctor, fails to adhere to legal obligations or regulations or refuses to perform them.

Conversely, understanding improper performance can be achieved by reasoning from the opposite. Proper performance of duties is defined in the dictionary as "such as follows; due, appropriate".[14] The very concept of conformity in medicine is reduced to consistency, the correctness of the use of scientific medical knowledge based on modern scientific data, new technologies and discoveries in medicine that have proven their effectiveness in practice.[15] Accordingly, they are used in the process of diagnosis, treatment and rehabilitation. This means that such an activity will be inappropriate, inconsistent with certain rules, and not bring a positive result in providing medical care.

In Kazakhstan, like in many countries, adherence to medical standards is crucial. To meet the standards in medicine, work is underway to create clinical protocols for diagnosis and treatment; about 800 types of clinical protocols are used in Kazakhstan; since medicine is developing rapidly, clinical protocols are usually updated every three years. When developing protocols, the main principle is to adhere to the approach of scientific evidence.

The requirement for a physician's actions to comply with the provisions of a treatment protocol is an ambiguous issue, as adherence to the treatment protocol in Kazakhstan is not mandatory and is recommendatory. The treatment protocol provides recommendations on a physician's order of treatment procedure. However, the physician may deviate from the rules to achieve better results in the course of treatment, selectively choosing certain

14 SI Ozhegov, *Explanatory online dictionary* (AS USSR 1989) <https://lexicography.online/explanatory/ozhegov/search?s=%D0%BD%D0%B0%D0%B4%D0%BB%D0%B5%D0%B6%D0%B0%D1%89%D0%B8%D0%B9> accessed 10 April 2024.

15 Ministry of Labour and Social Protection of the Population of the Republic of Kazakhstan, 'Professional Medical Associations will be Involved in the Development of Clinical Protocols' (*Paragraph Zakon.kz*, 22 February 2016) <https://online.zakon.kz/Document/?doc_id=37233852> accessed 10 April 2024.

recommendations while disregarding others. In other words, a physician should approach diagnosing, treating, and rehabilitating a patient creatively.

According to the results of a survey among physicians in Kazakhstan, a paradox arises. Despite the recommendatory nature of the treatment protocol, penalties and sanctions from management and regulatory bodies may be imposed on a physician who deviates from certain protocol provisions. This represents a clear and dangerous contradiction because it undermines the ability of protocols to ensure the proper performance of a healthcare professional's duties. It means that the issues related to defining the proper performance of a physician's duties remain unresolved and open.

Establishing proper performance of professional duties based on the principles of compliance with international standards is crucial. Treatment protocols should align with these standards while maintaining their recommendatory nature. Furthermore, it is worth noting that Western medicine is based on the principles of evidence-based medicine, which means that every general practitioner and specialist knows precisely which treatment methodology should be applied. We consider this to be a valid approach.

In Kazakhstan, however, delays in updating treatment protocols to incorporate the latest global scientific advancements are evident due to bureaucratic hurdles. This delay impacts the effectiveness of medical care provided to patients. Unlike in developed countries where healthcare systems utilise a worldwide database of scientific publications as a platform accessible to healthcare professionals, access to such resources in Kazakhstan is hindered, often requiring proficiency in English for healthcare professionals to benefit fully.

For example, in developing treatment protocols for COVID-19, foreign specialists adopted various approaches, including the treatment methodology for atypical pneumonia. Certain foundational principles were initially built upon the treatment methodology for atypical pneumonia. Subsequently, the treatment methodology for COVID-19 started to acquire its uniqueness based on the experience gained from treating this disease in different parts of the world.

According to Article 317 of the Criminal Code of the Republic of Kazakhstan, the subject of the criminal offence is a specific individual who is a medical or pharmaceutical worker or an employee of an organisation providing household or other services to the population. The subject refers to individuals who have reached the age of sixteen at the time of committing the socially dangerous act (Article 15 of the Criminal Code of the Republic of Kazakhstan). Still, it should be noted that the subject must be related to medical or pharmaceutical personnel.

According to the definition provided in the Law of the Republic of Kazakhstan, "On Public Health and Healthcare System", a medical worker is an individual who possesses professional medical education and engages in medical activities. Therefore, pharmaceutical workers have pharmaceutical education and engage in pharmaceutical activities. The mandatory requirement for these categories of individuals is the possession

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of medical and pharmaceutical education, the definitions of which are provided in the same law. Thus, this matter does not pose difficulties during the investigation and qualification of criminal cases.

Besides the mentioned individuals, the legislator, in the capacity of a special subject under Part 5 of Article 317, identified a worker of household or other population servicing who, as a result of providing a household service, caused harm to a client by infecting them with HIV.

Including this category of individuals in the aforementioned article of the criminal code is controversial because workers of households or other population servicing do not provide medical assistance but use medical instruments. For this reason, they are not considered within the scope of this article since this category of individuals is not comprised of doctors or medical workers. Moreover, there is no recorded practice of implementing Part 5 of Article 317 in the Republic of Kazakhstan.

The subjective aspect of a criminal offence is the fourth element, and establishing it for this type of offence is an important and challenging task. Guilt in criminal law is considered as the mental attitude of a person towards the socially dangerous act they commit, as provided by criminal law and its consequences.

By establishing criminal liability for intentional encroachment on legally protected goods and values, the state and society express their official legal assessment regarding the demonstrated negative attitude of the subject towards the interests of others. [16]

Determining the guilt of the subject of a criminal offence as a subject of proof requires a clear definition of the actions or omissions of the medical worker and establishing the link with the resulting consequences.

For this reason, in both scientific and practical contexts, the burden of proving guilt is assigned to a subsequent stage after the previous elements – the object, the objective aspect, and the subject – have already been established and identified:

In other words, establishing guilt is a process in which the law enforcement agency, having information about the object, the objective side of the criminal offence, and the subject, establishes a cause-and-effect relationship between the socially dangerous act and the resulting consequences. It involves assessing the behaviour of the subject in relation to the events that led to the harm.

A study and survey of healthcare professionals have revealed that the perception of guilt by the healthcare workers themselves is often distorted. As a result, many doctors who are subject to criminal prosecution simplify their understanding to the notion that "if they didn't do anything, they are not guilty." According to doctors' opinion, inaction does not lead to criminal liability. This misconception leads to the traditional mindset within the

16 II Rogov and KJ Baltabaev (eds), *Criminal Law of the Republic of Kazakhstan: General Part* (LN Gumilyov Eurasian National University 2015).

medical community that excludes the possibility of criminal liability for doctors by using the term "medical error", which is not a legal concept.

In response, the legislator has explicitly identified a form of guilt for medical criminal offences under Article 317 in the form of negligence, manifested as reckless imprudence and criminal negligence. Negligence occurs when healthcare workers fail to anticipate the potential occurrence of socially dangerous harmful consequences or improperly rely on preventive measures, leading to reckless imprudence.

The survey results indicate that 54.7% of healthcare workers are not familiar with the provisions of criminal legislation under Chapter 12 of the Criminal Code of the Republic of Kazakhstan, which means they cannot provide a legal assessment of their actions in case of negative consequences for the patient.

For example, 45.3% of respondents stated they had not encountered criminal legislation regarding medical criminal offences. In our opinion, this is a subjective assessment because when asked if they have been taught the basics of criminal legislation that provides for criminal liability for medical criminal offences, 73.3% of the respondents indicated that they had not.

Of the total respondents, 40% of healthcare workers indicated that criminal liability for these types of criminal offences is unquestionably necessary. In comparison, 47.7% stated that there is no need for criminal liability.

The data from the sociological survey demonstrates that most healthcare workers are unwilling to bear criminal responsibility for inadequate performance of professional duties. This is attributed to low legal awareness and a lack of knowledge in the field of medical criminal relations.[17]

Statistics from the past three years show that an average of 300 to 320 criminal cases under Article 317 of the Criminal Code of the Republic of Kazakhstan are initiated per calendar year across the country. Only 1% of the total criminal cases receive a legal assessment with charges filed. In these cases, medical workers are accused under Article 317 of the Criminal Code of the Republic of Kazakhstan, resulting in a court verdict and the imposition of criminal punishment. Notably, 10% of the 300-320 criminal cases are terminated due to the absence of guilt on the part of the healthcare worker, meaning there was no violation of medical care standards.

A significant majority, 89% of criminal cases are suspended because forensic medical experts cannot determine the presence or absence of guilt on the part of the doctor. Consequently, the law enforcement agency cannot provide a legal assessment.[18] However,

17 'Questionnaire for Doctors: Electronic Questionnaire, misteraibek@gmail.com' <https://docs.google.com/forms/d/19Q5l5-fSjkRLGJxDdJXI4ox8bzKeBdD9Pfu0-PtXsmQ/viewanalytics> accessed 10 April 2024.

18 'Statistical Reports' (*Portal of Legal Statistics,* 2024) <https://www.qamqor.gov.kz/crimestat/statistics> accessed 10 April 2024.

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in such cases, a forensic medical expert's opinion indicates the percentage of doctor and patient guilt, for example, 70/30, 60/40, 50/50. This implies that there are violations on the part of the doctor.[19]

The legislation of the Republic of Kazakhstan also provides for the responsibility of healthcare workers in an administrative procedure for causing minor harm to health. Over the past three years, there have been two cases of healthcare workers being held accountable under Article 80 of the Code of Administrative Offenses,[20] resulting in fines and the revocation of their medical licenses. Administrative proceedings are carried out by the authorised body, the Medical and Pharmaceutical Control Committee of the Ministry of Health of the Republic of Kazakhstan.

In cases of civil liability, six lawsuits have been filed for compensation for health damage and wrongful death resulting from inadequate medical care. Only in one case did the court reject the patient's claim. In the remaining five cases, the claims were partially granted. In these decisions, the court recognised the guilt of the medical practitioners and obliged the responsible parties to fully compensate for the material damages. The claims for moral damages in these civil cases were partially satisfied, with the court reducing the amount of moral damages.

There are disparities in the number of complaints made by citizens seeking to restore their rights due to health damage, material losses, and moral harm. It seems that patients who have suffered at the hands of medical professionals have more trust in the authorities responsible for criminal prosecution. However, on the other hand, we see that the investigation of criminal cases is ineffective.

This situation clearly highlights the need for effective legal instruments to achieve the principle of justice. In reality, there is a need for a tool that would ensure the result described in the proverb "sheep are safe, and wolves are fed". Without drawing final conclusions, it is worth noting that we have experience in investigating medical criminal offences under Article 317 of the Criminal Code of the Republic of Kazakhstan. The main problem with investigating such criminal cases lies in the inability and unwillingness of the law enforcement agency to thoroughly understand the situation that led to harm to the patient. An objective factor is the lack of medical knowledge among the law enforcement agency, the problematic procedure for involving medical professionals as experts, and the perception of the medical community that the law enforcement agency is a punisher, which results in a reluctance to cooperate in establishing the objective truth in the case.

19 AB Seidanov, 'Investigation of Medical Criminal Offences (On the Example of Art 317 of the Criminal Code of the Republic of Kazakhstan)' (PhD (Law) thesis, Alikhan Bokeikhan University 2023) 121.

20 Code of the Republic of Kazakhstan no 235-V of 5 July 2014 'On Administrative Infractions' <https://adilet.zan.kz/eng/docs/K1400000235> accessed 10 April 2024.

The mentioned problems, in their format, are global. It is believed that at this stage of the development of Kazakhstani legislation, a new approach is needed to regulate the relationship between doctors and patients that cause harm to the latter.

We propose considering the experience of the United States as an example. As one of the largest and most developed countries with a well-established legal system, the United States attractiveness lies in the diversity of legal frameworks across states. Therefore, it can serve as a platform for Kazakhstan.

To begin with, let us consider those legal relations that can be recognised as medical crimes in the United States. Like in some other countries, medical crime in the United States can take various forms. Some common types of medical crimes in the United States include:

1. Healthcare fraud: This may involve falsification of medical records, billing fraud, unlawful billing practices, illegal insurance payouts, and other types of fraud committed by healthcare professionals, patients, or third parties.
2. Improper prescribing and dispensing of medications: This may include prescribing unnecessary medications, incorrect dosages, prescription forgery, or illegal sale of controlled substances, such as narcotics.
3. Misconduct by healthcare personnel: This may involve violations of medical ethics and professional standards, such as incompetence, improper treatment, breach of patient confidentiality, sexual harassment, physical or emotional abuse, and other forms of misconduct.
4. Theft of medical equipment and supplies: This may include the theft of medical equipment, instruments, medications, and other materials.
5. Non-compliance with safety rules and quality standards: This may involve violations of hygiene rules, infection control measures, and failure to meet treatment and diagnostic standards, which can lead to adverse outcomes for patients.
6. Falsification of medical documents: This may include falsifying medical records, examination reports, laboratory test results, and other documents with the intention to deceive or conceal errors or unlawful actions.
7. Crimes related to scientific research: This may involve violations of ethical principles and rules governing clinical trials, data falsification, unlawful use of research funding, and other crimes related to scientific activities.
8. Abuse of power and authority: This may include the abuse of power and authority by healthcare professionals, such as coercing patients into unnecessary procedures, sexual harassment, discrimination, or other forms of abuse of power.
9. Financial crimes or manipulations: Some cases of medical crime may be linked to financial motives, such as obtaining unlawful financial benefits, bribes, kickbacks, or other financial manipulations within the healthcare system.

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10. Personal factors: Some cases of medical crime may be associated with personal factors of healthcare professionals, such as substance abuse, alcoholism, mental disorders, or other personal problems that can influence their professional behaviour and decisions.[21]

Indeed, one of the main differences in understanding medical criminal offences in the United States is the legal system based on precedent. Kazakhstan, on the other hand, has codified criminal legislation that limits all medical criminal offences to a few articles of the Criminal Code of the Republic of Kazakhstan.

The aforementioned crimes and criminal offences, according to Kazakhstan's criminal legislation, can be grouped based on the criterion of identifying a specific subject, namely a medical worker or physician. However, the socially dangerous acts designated as medical crimes in the United States are covered in different chapters of Kazakhstan's Special Part of the Criminal Code. One of the mandatory criteria in Chapter 12 of the Criminal Code of the Republic of Kazakhstan is medical practice, the procedure for providing medical care, conducting examinations, disclosing medical confidentiality, and other actions and omissions directly related to medical responsibilities towards patients, clients, and similar individuals.

Performing a more detailed comparison, the following elements of criminal offences can be identified that correspond to the criminal legislation of the United States regarding medical crimes in Kazakhstan:

Article 190 of the Criminal Code - Fraud;

Article 116 - Coercion to extract or unlawful extraction of human organs and tissues;

Article 131 - Insult;

Article 189 - Embezzlement or misappropriation of entrusted property;

Article 188 - Theft;

Article 247 - Receipt of illegal remuneration;

Article 296 - Unlawful handling of narcotics, psychotropic substances, their analogues, or precursors without the intent of distribution;

Article 298 - Theft or extortion of narcotics, psychotropic substances, and their analogues;

Article 303 - Violation of rules for handling narcotics, psychotropic or poisonous substances;

21 Paul Jung, Peter Lurie and Sidney M Wolfe, 'US Physicians Disciplined for Criminal Activity' (2006) 16(2) Health Matrix 335.

Article 305 - Concealment of information about circumstances that pose a danger to the life or health of individuals;

Article 361 - Abuse of official powers;

Article 369 - Official forgery.

According to the criminal legislation system in the United States, the key criterion for classifying crimes as medical crimes is the involvement of a specialised professional, namely a doctor. A doctor can commit a socially dangerous act that qualifies as a crime. In the United States, a doctor can engage in criminal misconduct directly or indirectly related to providing medical care or services, and such socially dangerous acts would be categorised as medical crimes. Therefore, the understanding and approach to medical criminal offences in the United States and Kazakhstan exhibit significant differences.

4 THE EXAMINATION AND INVESTIGATION OF CASES INVOLVING HARM TO A PATIENT AS A RESULT OF MEDICAL TREATMENT

In many jurisdictions, civil tort law allows patients to file lawsuits regarding medical negligence. A civil lawsuit may involve financial compensation to the injured patient for damages and losses such as medical expenses, loss of income, physical pain and suffering, as well as psychological and emotional harm.

Additionally, in some cases, medical negligence can be considered an administrative or professional violation, and a physician may face disciplinary proceedings or have their license revoked based on the decision of the medical regulatory body.

A significant and main difference in the US legal system is that patient claims and lawsuits do not go unanswered. In our view, this is a positive factor that influences the realisation of patient rights and indicates their priority. It means that a court decision is reached in each case, or the parties reach a mutual agreement, thereby implementing the provisions of patient safety laws. This directly impacts the accountability of the physician who caused harm.

In criminal cases involving medical offences in the United States, there are prosecutors on one side and the physician as the defendant on the other side. Compensation for damages is typically covered by insurance premiums paid by insurance companies that have undertaken the responsibility of insuring medical practice. However, the physician is personally responsible for the criminal punishment.

A significant problem in Kazakhstan is that out of 300 criminal cases related to medical offences, only 1% result in criminal liability. 10% of the cases are dismissed due to the absence of guilt from the healthcare worker. This means that the actions of the physician and healthcare worker are deemed by the court or law enforcement agency as not meeting the criteria for criminal offence or wrongdoing. The remaining 89% of the criminal cases remain unresolved, with legal authorities unable to decide objectively. In other words, the

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law enforcement agency does not decide the guilt or innocence of the healthcare worker and physician. The reason for this is that medical experts cannot provide clear conclusions regarding the guilt or innocence of the physician or healthcare worker.

At this stage of the development of criminal and criminal procedural legislation, it is necessary to acknowledge the fact that the procedure for examining and investigating criminal cases related to medical offenses in Kazakhstan, during the pretrial stage, is ineffective.

For this reason, we have turned to the experience of the United States in an attempt to develop effective tools and models that can be applied in Kazakhstan to address and rectify the negative practices in handling this category of criminal offences.

In Kazakhstan, many physicians are involved in the remaining percentage (89%) of criminal cases and are under constant suspicion. This factor leads to phenomena such as "burnout syndrome", a reluctance to enhance their professionalism, degradation of professional qualities, the development of a "cold" attitude towards their profession, and indifference towards patients.

Combined with such negative phenomena, the level of healthcare decreases, leading to citizens' mistrust towards physicians and healthcare workers. Often, many patients resort to alternative methods of treatment (shamanism, healers, etc.), and in many cases, worsen their health conditions.

The study of healthcare issues has led to the conclusion that the medical community comprises highly educated individuals dedicated to delivering healthcare and medical assistance services to citizens. While striving to improve healthcare quality, the community also seeks to protect healthcare workers and physicians. For example, professional unions of healthcare workers have been established in Kazakhstan. However, a problem in the Kazakhstani healthcare system is that these professional unions rarely include legal experts. There is a lack of specialists who can provide legal assistance and support in addressing patient complaints regarding the quality of medical care.

Sociological research has shown that the majority of doctors and healthcare workers are members of professional unions and pay membership fees. However, these unions primarily focus on labour relations, which involve the relationship between healthcare workers and employers. When questioned about how patient complaint issues are regulated, a significant number of doctors responded that such problems are resolved directly between the healthcare worker and the patient. In other words, the mechanism for regulating conflicts in these situations is informal, and the healthcare worker and patient may not come to a mutual agreement. Consequently, patient satisfaction with filed complaints may be lacking, indicating a lack of patient safety. This means that the role of professional unions of healthcare workers has a limited impact on the quality of medical care and does not address the existing problems.

A fundamental issue contributing to these challenges is the lack of a professional liability insurance system, exacerbated by a lack of understanding among healthcare professionals about its purpose and benefits. The topic of professional medical liability insurance is actively discussed on social media platforms, but healthcare professionals themselves do not believe in the effectiveness of this mechanism. This scepticism is due to the fact that the previously established Mandatory Medical Insurance Fund did not live up to the expectations of doctors as a whole. The allocation of financial resources for ensuring quality healthcare has imbalances that affect the opinions of both doctors and patients. State hospitals and their doctors lack the means to provide quality medical care. Patients are forced to spend their own additional funds to receive medical assistance and services.

Moreover, in Kazakhstan, medical administrators are frequently prosecuted criminally for committing official and other crimes unrelated to the provision of medical care.

It is important to note that insurance of professional medical activities as a means of ensuring patient safety and physician protection requires careful study and development at the legislative level, drawing on the experience of leading countries.

There are also downsides to such cases. The U.S. government considers medical malpractice and all related legal proceedings as a "black hole" into which enormous sums of money from filed lawsuits endlessly disappear. The insurance business suffers, and some participants go bankrupt and exit the insurance market because they cannot fulfil their obligations to provide insurance payouts. As a result, there is a drain of medical professionals, leading to a shortage of personnel. All these factors contribute to a decline in the level of healthcare in different regions of the country. Therefore, the situation varies in different states. For example, the state of Arizona is experiencing a shortage of medical personnel in certain areas.

The solution in such cases is to establish upper limits for compensation claims for moral damages, which helps to balance the situation. However, doctors often fear patients, considering them potential plaintiffs.

In the United States, in addition to criminal and civil liability measures, another legal tool is used to address the largest number of complaints and patient grievances regarding the quality of medical care. Most disputes are resolved outside of court through the direct involvement of the patient, the doctor, and professional lawyers. This process is called case closure. A similar method of conflict resolution between doctors and patients, mediation, can be applied in our country.

The American practice of litigation and case closure has extensive experience. It is noteworthy that the American public and political representatives pay significant and due attention to these issues. An important consequence is that in the United States when the fact of harm caused by a doctor's actions is proven, the patient receives compensation for

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damages and moral harm from the insurance company. Medical malpractice insurance assumes the risks of insurance claims.

However, the aim of this article is to compare the American model of criminal investigation with the Kazakhstani one. First, it is important to establish that criminal responsibility for medical criminal offences in both countries shares the same objectives.

Criminal responsibility for medical criminal offences serves several purposes:

1. Justice: It provides the opportunity to punish violations of the law and compensate victims of medical negligence or other medical crimes.
2. Deterrence: Criminal responsibility acts as a deterrent and can prevent potential medical offences by instilling fear of punishment.
3. Protection of society: Criminal responsibility for medical crimes protects society from wrongful behaviour by healthcare professionals and others associated with medical institutions, contributing to maintaining trust in the healthcare system.
4. Regulation of medical practice: Criminal legislation can also serve as a tool for regulating medical practice by establishing standards of conduct and professional duties for healthcare professionals.

If a doctor causes harm to a patient due to negligence, the question of whether they should be brought to trial depends on various factors, such as the nature and severity of the harm, the degree of negligence, the actions of the doctor, the actions of the patient, and other circumstances specific to the case.

It should be emphasised that the decision to pursue criminal responsibility should be based on a careful examination of each individual case, taking into account all circumstances and factors, including medical standards and professional duties of the doctor, evidence of negligence or violation of medical practice standards, as well as the degree of culpability, motives, consequences, and other aspects. It is also important to ensure fairness and protect the rights of healthcare professionals to avoid unjust prosecution or fear thereof.

Previously in the article, the criminal-legal characteristics of Article 317 of the Criminal Code of the Republic of Kazakhstan were provided. Now, we will discuss the American approach to understanding the indicators of medical criminal offences and crimes.

American researchers identify five factors that determine medical negligence or malpractice:

1. Duty of care towards the patient.
2. Breach of the standard of care (duty).
3. Injury or harm.

4. Causal relationship (the breach caused the injury).
5. Damages (the injury is significant enough to warrant compensation).[22]

In cases of medical negligence, duty is usually the simplest component of responsibility. However, it is not necessarily the least concerning component. In fact, establishing an unconscious duty is one of the most insidious traps that a doctor can fall into, unaware of the dangers hidden in seemingly casual and innocent conversations and encounters. As noted in the report, "Key Elements of Medical Negligence – Duty", casual conversations (or "curbside consultations") with another doctor about a specific patient, calls from an emergency department physician, and so on, as well as situations where a doctor is unsure about what to do with a patient, calls from an emergency department physician seeking only advice about a patient, and even personal and private discussions about someone's health problems, can all expose doctors to potential legal consequences if adverse events occur that can be linked to their decisions or omissions based on trust in their professional knowledge and experience.

A doctor is never completely "off duty". A medical practice license is a privilege that carries constant responsibility, which cannot be left behind at the hospital or office. This report serves as a reminder of the need to always exercise caution when expressing professional opinions or advice, even inadvertently and outside the professional environment. [23]

Laws vary in different states of the United States, but five main factors constitute the "risk of harm to the patient". These factors include the following:

1. All foreseeable types of harm.
2. The frequency or probability of harm.
3. The severity of harm.
4. The public interest in preventing future harm.
5. Any moral blameworthiness attributed to the doctor. [24]

One of the authors who studied this issue noted that "it is best to avoid damages from negligent practice by reducing adverse outcomes and developing unambiguous practical recommendations, rather than attempting to make unusual care more justifiable through the use of vague recommendations."[25]

22 B Sonny Bal, 'An Introduction to Medical Malpractice in the United States' (2009) 467(2) Clin Orthop Relat Res 339, doi:10.1007/s11999-008-0636-2.

23 Dr. James R. Bean is a neurosurgeon in Lexington, Kentucky. He received his medical degree from Tulane University School of Medicine and has been in practice for more than 20 years.

24 Gregg W Luther, 'The Key Elements of Medical Negligence-Duty' (2021) 88(6) Neurosurgery 1051, doi:10.1093/neuros/nyab077.

25 Steven L Clark and others, 'Improvement Outcomes, Fewer Caesarean Deliveries, and Reduced Litigation: Results of a New Paradigm in Patient Safety' (2008) 199(2) Am J Obstet Gynecol 105.e1-7, doi:10.1016/j.ajog.2008.02.031.

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In defining negligence as a form of fault in the United States, physicians are advised to exercise caution when providing medical care to patients to minimise risks and ensure the safety and effectiveness of treatment. Here are several key aspects of caution that physicians should consider:

1. Caution in adhering to standards of medical care: Physicians must act in accordance with accepted medical practice and professional standards of care. This includes knowledge and application of current clinical protocols, procedures, and recommendations.
2. Caution in diagnosis: Physicians must exercise caution in the diagnostic process to avoid errors or omissions. This may involve a thorough examination of the patient's medical history, conducting necessary investigations, and interpreting results with caution and accuracy.
3. Caution in choosing treatment tactics: Physicians must exercise caution in prescribing and conducting treatment to avoid errors in medication dosage, selection of procedures, and other medical interventions. This also includes considering potential side effects and drug interactions.
4. Caution in timeliness and coordination: Physicians must ensure timeliness and coordination of medical care to avoid delays, omissions, and improper handling of patients. This may involve proper prescription and monitoring of treatment, ensuring the availability of necessary resources, and timely communication with other members of the medical team.
5. Caution in communication: Physicians must exercise caution and clarity in communicating with the patient, explaining diagnoses, treatment decisions, and potential risks or side effects. This helps the patient make informed decisions and collaborate in their treatment.

General caution and adherence to professional standards help physicians ensure the safety and quality of medical care for their patients.

Failure to comply with these factors can lead to the development of professional ignorance, which may result in criminal consequences, such as a physician committing medical malpractice.

Professional incompetence of a medical worker can be caused by various factors, including:

1. Lack of up-to-date knowledge and skills: Medical practices are constantly evolving, and healthcare professionals need to update their knowledge and skills to stay informed about the latest medical advancements, technologies, and procedures. If a medical worker fails to keep up with updates in their field and does not enhance their professional knowledge and skills, it can lead to professional incompetence.
2. Errors in education and training: Insufficient or poor-quality education, lack of systematic training, or absence of appropriate certifications and accreditations can also contribute to professional incompetence in a medical worker. Improper or

incomplete training can limit a medical worker's knowledge and skills, impacting their professional practice.

3. Lack of experience and practical exposure: Experience plays a crucial role in the development of a medical professional. Insufficient experience or lack of practical exposure can restrict a medical worker's ability to make correct decisions and perform complex medical procedures. Lack of experience can also be associated with low confidence levels in a medical worker's professional knowledge and skills, leading to the manifestation of professional incompetence.
4. High workload and stress: Medical practice often involves high workloads, emotional stress, and time constraints. Under stressful and overwhelming conditions, a medical worker may struggle with decision-making, coping with challenging situations, and displaying optimal professionalism.
5. Cultural and organisational factors: Cultural and organisational factors can also influence the manifestation of professional incompetence in a medical worker. Poorly organised work processes, lack of resources, a challenging work environment, ineffective communication, and interaction within the team can all diminish professionalism, leading to displays of professional incompetence.
6. Personal factors: Sometimes, a medical worker's professional incompetence can be associated with personal characteristics such as lack of motivation, inadequate self-assessment, incorrect beliefs, or a lack of professional responsibility.

Professional incompetence in medical workers can stem from multiple causes, necessitating a comprehensive approach to address this issue. Ensuring high-quality education and training, gaining experience and practical exposure, managing stress and workload, organising work processes effectively, supporting communication and teamwork, as well as promoting personal and professional development and motivation are all critical elements in enhancing competence.

The medical profession is one of the world's oldest and most humanitarian professions. There is no greater service than serving the suffering, wounded, and sick. An integral concept of any profession is a code of conduct containing fundamental ethical norms emphasising moral values, regulating professional activities, and maintaining dignity. Medical ethics highlights the values that underlie the relationship between a practising physician and the patient.

Recently, there has been a tendency among professionals to forget that self-regulation, which is at the core of their profession, is a privilege, not a right. This privilege is granted in exchange for an implicit contract with society to provide goods and services competently and to be accountable to the community. It is always important to remember that being a

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doctor is a noble profession, and the goal should be to serve humanity. Otherwise, the profession will lose its true value. [26]

The criminal incompetence of a doctor refers to a situation where a physician or another medical worker engages in criminal actions or omissions, displaying a lack of knowledge, experience, or competence, resulting in harm to patients or other individuals. The criminal incompetence of a doctor can take various forms and manifest in different situations, such as diagnostic errors, errors in choosing treatment methods, incorrect prescription of medications, improper performance of medical procedures, violation of medical ethics, and more.

Criminal incompetence of a doctor can have serious consequences for patient health and safety, leading to injuries, worsening conditions, disability, or even death. Legal implications are also significant, as doctors can be held legally accountable for causing harm to patients or violating healthcare legislation.

The causes of a doctor's criminal incompetence are diverse, including inadequate education and training, incorrect interpretation of clinical data, lack of experience, subjective preferences or biases, misperception of risks and benefits, pressure from the environment, violation of medical ethics, fatigue or stress, among others.

To prevent criminal incompetence of doctors, it is important to ensure a high level of medical education and training, adherence to medical standards and protocols, continuous professional development, compliance with medical ethics and professional conduct, as well as the implementation of quality control in medical practice and feedback from colleagues, patients, and other stakeholders. In case of identifying criminal incompetence of a doctor, appropriate measures, including legal accountability, should be taken to protect patients' rights and ensure the safety of medical practice. It is also important to educate healthcare workers on the fundamentals of medical law, ethics, and professional conduct to prevent instances of criminal incompetence by doctors.

Other measures to prevent criminal incompetence of doctors may include:

1. Improving the system of education and training for healthcare professionals, including modern teaching methods, practical training, and internships.
2. Establishing and supporting continuous professional development, including on-the-job training, scientific conferences, seminars, and other events.
3. Developing and implementing medical standards and protocols based on current scientific evidence and recommendations and strictly adhering to them.

26 MS Pandit and Shobha Pandit, 'Medical Negligence: Coverage of the Profession, Duties, Ethics, Case Law, and Enlightened Defense - A Legal Perspective' (2009) 25(3) Indian J Urol 372, doi:10.4103/0970-1591.56206.

4. Increasing awareness among healthcare workers about patients' rights and responsibilities, as well as medical law and ethics, through training and informational materials.
5. Establishing feedback mechanisms from patients, colleagues, and other stakeholders to identify potential cases of criminal incompetence by doctors and take measures to address them.
6. Implementing clear procedures and mechanisms for quality control in medical practice, including audits, reviews, and monitoring.
7. Promoting a healthy organisational culture based on professional ethics, fairness, transparency, and accountability to patients and society.

It is important to note that preventing criminal incompetence of doctors is a complex process that requires collaboration among various stakeholders, including healthcare professionals, healthcare organisations, law enforcement agencies, patients, and the public.

5 CONCLUSIONS

The comparison of approaches to understanding legal responsibility in the United States and Kazakhstan has many similarities but also several differences. The conceptual differences stem from the legal systems, which explain the approach to defining and understanding medical criminal offences. The United States, as a representative of common law, has its own distinctiveness in that each state has its own legislation, which can differ from others. The functioning of such a complex legal system ensures a meticulous approach to examining and investigating criminal cases related to medical crimes.

Kazakhstan belongs to the civil law system, influenced by the Soviet period. The country has the opportunity to learn from the proven experience of the United States in investigating criminal cases, particularly in pretrial investigations and court proceedings. However, adopting the US judicial procedure may not be feasible.

The Criminal Code of Kazakhstan defines an exhaustive list of medical criminal offences, which are outlined in Chapter 12 and consist of seven components of criminal offences. All other acts that do not meet the criteria for criminal offences in Chapter 12 are not considered as such. Modernising the investigation structure and evidence collection for medical criminal offences requires a systematic approach.

In Kazakhstan, it is necessary to review the procedure for involving experts, establish selection criteria for such specialists, and possibly utilise a "blind" expert examination system similar to the one used in the United States. This would enhance the objectivity of the examination and, as a result, could be used to develop clear recommendations for physicians in their medical practices. Such a solution could reduce the number of citizen complaints by improving patient safety and increasing the legal protection of healthcare professionals.

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There is also a need to revise the understanding of criminal responsibility for healthcare workers. Kazakhstan's legislation should develop the concept of harm caused by healthcare workers as a result of providing medical assistance and clearly distinguish elements of negligence, following the example of the United States. Understanding negligence will guide scientists and practitioners toward defining this form of guilt.

Current forms of negligence, such as overconfidence and carelessness, do not provide a precise understanding of this form of guilt and cannot be correctly applied in practice during qualification and proof of guilt. These definitions act as a prism, dispersing negligence into the types of care applied in the United States. Through these changes, it will be easier to combat the ignorance of healthcare workers and enhance their legal literacy and awareness.

In conclusion, we maintain that being a doctor is an important profession that ensures people's quality of life. Caring for doctors as a socially and culturally significant group is a way of taking care of ourselves. Patients must understand that a doctor cannot instantly correct the mistakes of a lifetime that the patient knowingly made, such as an unhealthy lifestyle, harmful habits, or improper nutrition. Taking care of one's personal health is an individual responsibility, and blaming doctors for everything is not fair. A doctor is the person one turns to when facing health problems. However, it is important to remember that a doctor should meet the requirements of their profession. Honest, noble, and highly intellectual individuals should be part of this profession.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЮРИДИЧНА ВІДПОВІДАЛЬНІСТЬ ЛІКАРЯ ЗА НАДАННЯ НЕНАЛЕЖНОЇ МЕДИЧНОЇ ДОПОМОГИ ПАЦІЄНТУ: АНАЛІЗ ПІДХОДІВ НА ПРИКЛАДІ КАЗАХСТАНУ ТА США

Айбек Сейданов, Арстан Ахпанов, Ляззат Нурлумбаєва* та Мая Кульбаєва

АНОТАЦІЯ

Вступ. *Це дослідження спрямоване на визначення відповідальності медичних працівників за заподіяння шкоди пацієнтам на підставі кримінального законодавства Республіки Казахстан. Кримінальна відповідальність за медичні злочини передбачена главою 12 Кримінального кодексу. Визначивши обов'язкові ознаки або елементи складу медичного кримінального правопорушення згідно з кримінальним законодавством Казахстану, було проведено паралелі з видами вини, передбаченими в розвинених країнах світу. Автори проаналізували наукові праці з вивчення ефективності розгляду справ про заподіяння шкоди пацієнтам та рішень щодо задоволення або відхилення позовів пацієнтів у Казахстані. Приділено увагу емпіричним даним, зібраним на території Республіки Казахстан. Використано результати соціологічного дослідження, проведеного авторами протягом 3 місяців серед медичних працівників різних регіонів країни. Особливу увагу було приділено міжнародному досвіду впровадження заходів щодо підвищення безпеки пацієнтів, зменшення скарг громадян на якість медичних послуг та посилення правового захисту медичного персоналу. У дослідженні відібрано положення з наукових праць, які зменшують ризик заподіяння шкоди пацієнтам і тим самим сприяють зниженню рівня медичної злочинності.*

Методи. *У цьому дослідженні для досягнення поставленої мети та вирішення зазначених завдань було використано низку методів наукового дослідження, зокрема правовий аналіз, порівняльно-правовий аналіз, опитування, анкетування, інтерв'ювання. Правовий аналіз кримінального законодавства Республіки Казахстан, зокрема глави 12 Кримінального кодексу, був проведений з метою виявлення особливостей кримінальної відповідальності*

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за медичні злочини, на прикладі статті 317. Цей аналіз висвітлив нюанси кримінальної відповідальності за медичні злочини в Казахстані.

Порівняльно-правовий аналіз дав змогу порівняти відповідальність лікарів у США та Казахстані. Також увага звертається на подібність поняття вини у формі недбалості, з особливим акцентом на американському підході, який пропонує цінні ідеї для Казахстану. Ці аспекти можуть бути адаптовані для вдосконалення казахстанської правової системи.

Досліджено конкретні справи, які розглядаються судами Республіки Казахстан, про заподіяння шкоди пацієнтам, а також проаналізовано судові рішення щодо задоволення позовних вимог пацієнтів та їх відхилення, що дозволило авторам визначити основні аргументи та тенденції судової практики.

Були проведені опитування та анкетування медичних працівників із різних регіонів Казахстану для збору емпіричних даних про їхнє сприйняття обов'язків і відповідальності. Крім того, також були проведені докладні інтерв'ю з експертами в галузі медицини та права, а також пацієнтами та представниками органів охорони здоров'я, які надали якісні дані про проблеми та виклики, з якими стикаються медичні працівники.

Опрацьовано та проаналізовано статистичні дані, зібрані під час соціологічного дослідження. Сюди увійшли відомості про скарги громадян на якість медичного обслуговування, випадки заподіяння шкоди пацієнтам та інші відповідні статистичні показники. Дослідження проблеми на різних рівнях виявило рівень безпеки пацієнтів та правової захищеності медичного персоналу.

Результати та висновки. *Створення умов для медицини та забезпечення ефективного соціального та професійного медичного страхування є одними з факторів, які створюють можливості для медичної практики в цілому та для системи охорони здоров'я. Ці факти також сприяють належній правовій оцінці діяльності лікаря.*

Ключові слова: *юридична відповідальність, медичні правопорушення, неналежне надання медичної допомоги, Казахстан, США.*

CASE NOTE

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Case Note

THE LEGAL CONCERNS OF THE SETTLEMENT DISPUTES BY THE COUNCIL ON THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

Khalid Alshamsi and Attila Sipos*

ABSTRACT

Background: *The International Civil Aviation Organization (ICAO) is a "Club" of sovereign States. ICAO is a specialised United Nations agency (UN) with 193 Member States. If a dispute between these States and the diplomatic channels does not find a mutual solution, disagreement arises; however, the ICAO Council has an essential function in settling disputes. This settlement procedure is structured under the Chicago Convention (1944), the Rules for the Settlement of Differences (1957) and the Rules of Procedure for the Council (1969). However, Member States do not welcome these provisions, demonstrated by the scarcity of dispute settlement procedures before the ICAO Council in the last 80 years. This article introduces these legal disputes and looks for justifications based on the nature of the cases. The Council is a unique permanent body within ICAO. Although ICAO in the former century became rather a political (diplomatic) body upon its foundation, that is why the absence of successfully concluded dispute resolutions is a legal viewpoint that is more than interesting. This research paper reveals examples of the lack of effectiveness of the ICAO Council's dispute settlement, focusing on the nature of the State's interests and the outcomes of the procedure, furthermore, the role in these disputes in front of the International Court of Justice (ICJ) or arbitration.*

Methods: *This article focuses on understanding and analysing the historical context, international cooperation and diplomacy, and the regulatory landscape of dispute resolutions and settlements. The search was based on databases, academic journals, and official publications from aviation authorities and organisations such as ICAO. The research utilised qualitative and quantitative methods based on empirical observations and examinations (document analysis and case studies).*

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Results and conclusions: *The ICAO Council has rule-making, judicial and administrative functions. It is a quasi-judicial body, and its President has the authority to settle disputes among the contracting States. However, if we look at the history, in the last 80 years, only 10 cases were handled by the ICAO Council. The main reason for the lack of ICAO Council dispute settlement decisions is the growing diplomatic (political) function of the ICAO Council. Aviation is a crucial commercial activity for every State, meaning the aviation industry is determined by political interests and decisions. Such political interests and subtle international relations often prevent States from submitting themselves to binding legal procedures.*
Another reason for fewer disputes before the ICAO Council is the need for more provisions and rules to support transparent and legally binding decisions. The current rules are neither appropriate nor comprehensive enough and cannot be executed in the same manner as court decisions. In addition, the ICAO Council's decision can be appealed to non-ICAO bodies such as the International Court of Justice.
Therefore, it is highly recommended that the whole processual mechanism be revised or that a new, dedicated judicial body with clear legal status, jurisdiction, and competence for dispute resolutions be created.

1 INTRODUCTION

The main goals of international law are preserving peace, finding peaceful solutions, and evading conflict between sovereign states as much as possible. Looking back over the last century, these goals are valid and desirable. It is not inadvertent that the significance of international law has grown, and its role as a separate branch of law is paramount in our modern world.

Of the primary fundamental principles of international law, peaceful solutions and the peaceful settlement of disputes may be the most important objective and definitive system of aspects. The International Civil Aviation Organization (hereinafter ICAO) plays a significant role in fostering and maintaining peace in international civil aviation through its various instruments. A clear statement can be found in the Preamble of the Convention on International Civil Aviation (the so-called Chicago Convention): "Whereas, it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends."[1]

ICAO is a specialised agency of the United Nations (UN).[2] The Chicago Convention empowered ICAO to pronounce that "the Organization may, concerning air matters within its competence directly affecting world security – by a vote of the Assembly – enter into

1 Convention on International Civil Aviation (Chicago Convention) ICAO Doc 7300/9 (signed 7 December 1944, amended 2006) <https://www.icao.int/publications/pages/doc7300.aspx> accessed 18 February 2024.

2 United Nations Charter (signed 26 June 1945) chs IX-X <https://www.un.org/en/about-us/un-charter/full-text> accessed 18 February 2024.

appropriate arrangements with any general organisation set up by the nations of the world to preserve peace."[3] For these arrangements to take effect, decisions of approval from both the General Assemblies of the UN and ICAO are necessary. After its administrative signing in 1947, ICAO became a member of the UN 'family,' assuming many obligations. As part of this system, ICAO establishes the conditions of friendship and peaceful alliance among the peoples and nations of the world.

2 THE CHICAGO CONVENTION AND GENERAL PRINCIPLES OF LAW

The Charter of the United Nations (1945) encompasses the general principles of international law, including respect for state sovereignty and equality and rights inherent in sovereignty, the prohibition of the threat or use of force, the peaceful settlement of disputes, cooperation among States, fulfilment in good faith of obligations under international law, and the equal rights and self-determination of peoples and nations.[4] Similarly, the Chicago Convention (1944), the primary and most important source of public international aviation law,[5] enshrines these general principles of international law. These principles, enumerated first and foremost in Article 38 of the Statue of the International Court of Justice (ICJ), are recognised by "civilised" nations as foundational to international law.[6] The Chicago Convention's text reflects these universal requirements, which are essential for peaceful and cooperative existence in the world: e.g., respect for State sovereignty (Article 1), equality of States (Article 48 *b*), the prohibition of discrimination (Articles 4, 9, 11, 15), and the principle of the peaceful settlement of international disputes (Article 84).[7]

As highlighted, peace and peaceful solutions constituting a general principle and objective of international law are top priorities. Implementing this objective requires serious diplomatic and human efforts. The history of the 20th century, or even contemporary wars, demonstrates what terrors humankind can occasion if international norms and fundamental principles are not observed.

Each politician, nation, and community must work to ensure peace prevails under all circumstances. ICAO has always had an important role despite lacking the authority to impose substantive sanctions. As a community of Member States, ICAO cannot pressurise the coercion of specific political steps. However, as an international intergovernmental

3 Chicago Convention (n 1) art 64.
4 United Nations Charter (n 2) ch I, art 2.
5 Assad KOTAITE, *My Memoirs: 50 Years of International Diplomacy and Conciliation in Aviation* (ICAO 2013) 43; Paul S DEMPSEY, 'The Future of International Air Law in the 21st Century' (2015) 64 ZLW German Journal of Air and Space Law 215.
6 Statute of the International Court of Justice (signed 26 June 1945) art 38 <https://www.icj-cij.org/statute> accessed 18 February 2024.
7 Chicago Convention (n 1).

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organisation, it can take steps to make decisions on controversial international issues emerging between the Member States and enforce its decisions.

3 ICAO COUNCIL SETTLEMENT OF DISPUTES FUNCTION

The ICAO institutional system is similar to that of other specialised UN Agencies. As the Chicago Convention stipulates, ICAO is "made up of an Assembly, a Council, and other bodies as may be necessary".[8] Therefore, the main representative organ of ICAO is the Assembly. The permanent body of the ICAO Council is accountable to the Assembly. Besides the ICAO Council, the Secretariat manages and arranges the administrative and official matters of the ICAO's organisation.

The Council shall exercise its dispute settlement functions indirectly under the Chicago Convention when the Council "reports to contracting States any infraction of the Convention, as well as any failure to carry out recommendations or determinations of the Council" (Article 54 *j*) or when it considers "any matter relating to the Convention which any contracting State refers to it" (Article 54 *n*).[9] Thus, the Chicago Convention is apparent regarding the duty of the ICAO Council. The reporting system can serve as a form of sanction. As civil aviation has become international, the fact that a contracting State does not adhere to the recommendations and determinations of the ICAO Council means that the ICAO Council shall resort to the quasi-sanctioning instrument inherent in publicity. This is the case following safety and security audits; when a Member State does not comply with the Standards and Recommended Practices (SARPs) adopted by the ICAO Council, it communicates the audit results to other Member States in table form. This does not qualify as a dispute settlement. However, it manages the dispute between ICAO and its Member States.

The Chicago Convention is dedicated to settling disputes in Chapter XVIII (under Articles 84-88). It will be noted that the Convention gives the ICAO Council the mandatory power to decide on disputes. The Convention does not make any difference between the interpretation of the Convention and the interpretation of the Annexes. The ICAO Council is a quasi-judicial body. Only an appeal from the Council's decision would be referred to the International Court of Justice, thus vested with obligatory jurisdiction.[10]

At the same time, the treaty-maker settles disputes separately under the Chapter "Disputes and Default" (not in part "Mandatory Functions of Council").[11] Thus, an essential duty of the ICAO Council is to exercise its dispute settlement function directly when it decides on

8 ibid, art 43.
9 ibid, art 54.
10 Note that the Chicago Convention (1944) was signed prior to the acceptance of the UN Charter (1945), therefore, it refers to the Permanent Court of International Justice in the text.
11 Chicago Convention (n 1) ch XVIII.

controversial matters relating to interpreting or applying the Convention and its Annexes among the contracting States. "If any disagreement between two or more contracting States relating to the interpretation or application of the Chicago Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council."[12] The procedure is briefly summarised in the Chicago Convention (1944) and more detail under the Rules for the Settlement of Differences (1957) and the Rules of Procedure for the Council (1969).[13]

In brief, during Council Settlement disputes, "no member of the Council shall vote in the consideration by the Council of any dispute to which it is a Party."[14] The Council, consisting of elected Member States,[15] primarily serves political functions, which complicates the ability to make decisions purely on a professional basis in disputes among Member States. To mitigate this issue and ensure the objective consideration of cases, the Council often employs internationally recognised experts.

3.1. Legal Dispute with the Involvement of the ICAO Council

The ICAO Council is composed of contracting States. Currently, 36 seats are occupied by Member States (in the future, the number of representatives will be 40).[16] The ICAO Council is a quasi-judicial body, unlike the governing body of other specialised agencies.[17] In nature, the ICAO Council is mainly a political body that has to decide on a legal matter. This function is "based on policy and equity considerations rather than purely legal grounds…, truly legal disputes…, can be settled only by a true judicial body…".[18] Moreover, the 36 ICAO Council Member States, indirectly but factually, create a conflict of interests as the 36 States represent the other contracting States (altogether 193). This means that 18,65% of Member States make decisions on behalf of the others. The problem arises mainly if the contracting State is not a Member of the ICAO Council. This State (or States) lacks the power to validate its interest or must seek support from some ICAO Council

12 ibid, art 84.

13 Rules for the Settlement of Differences, ICAO Doc 7782/2 (approved 9 April 1957, amended 10 November 1975) <https://standart.aero/en/icao/book/doc-7782-rules-for-the-settlement-of-differences-en-cons> accessed 18 February 2024; Rules of Procedure of the Council, ICAO Doc 7559 (revised 28 November 1969, entered 27 April 1970) <https://standart.aero/en/icao/book/doc-7559-rules-of-procedure-for-the-council-ed-4-en-8811> accessed 18 February 2024.

14 Chicago Convention (n 1) art 53.

15 ibid, art 50.

16 Proposal to Amend Article 50 a) of the Convention on International Civil Aviation so as to Increase the Membership of the Council (ICAO Assembly 39th Sess, A39-WP/18 EX/6 31/05/2016) <https://www.icao.int/Meetings/a39/Pages/wp_num.aspx> accessed 18 February 2024.

17 Attila Sipos (rev), *Milde's International Air Law and ICAO* (4th edn, Eleven 2023) 205.

18 Stated by Prof. Michael Milde, the Former Legal Director of ICAO. Ruwantissa Abeyratne, 'Law Making and Decision-Making Powers of ICAO Council: A Critical Analysis' (1992) 41 ZLW German Journal of Air and Space Law 394.

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Member States. This situation also admits the lack of judicial transparency and detachment in decision-making.

The ICAO Council was adopted under the Rules for the Settlement of Differences (1957), which contains an option to request an "expert opinion". When a case is brought to the attention of the ICAO Council, it may at any time, during the procedure, "entrust any individual, body, bureau, commission or other organisation that it may select, with the task of carrying out an enquiry or giving an "expert opinion".[19] According to the rules, whether legal or not, an expert opinion can only be requested by the ICAO Council if a case has been submitted to it by the Parties to the dispute. Hence, the Parties in disagreement about a legal issue cannot do so.

Over its nearly 80-year history, the ICAO Council has ruled on the following cases between the Member States under the provisions of the Chicago Convention:[20]

1) India v. Pakistan (1952);[21]
2) Lebanon v. Syria (1956);[22]
3) the United Arab Republic v. Jordan (1958);[23]
4) the United Kingdom v. Spain (1967);[24]
5) Pakistan v. India (1971);[25]
6) Cuba v. United States (1998);[26]
7) the United States v. European Union (2000);[27]

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19 Rules for the Settlement of Differences (n 13) art 8.

20 Chicago Convention (n 1) art 84; Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (Springer 2014) 663-8; Paul S Dempsey, *Public International Air Law* (2nd edn, William S Hein & Co, Inc for the Centre for Research of Air and Space Law, McGill University 2017) 851-70; Sipos (n 17) 204-17.

21 Report of the Council to the Assembly on the Activities of the Organisation in 1952 (ICAO Assembly 7th Sess, Doc 7367 A7-P/1 31/03/53) 74-6 <https://www.icao.int/Meetings/AMC/Pages/Archived-Assembly.aspx?Assembly=a07> accessed 18 February 2024.

22 Annual Report of the Council to the Assembly for 1956 (ICAO Assembly 11th Sess, Doc 7788 A11-P/1) 49 <https://www.icao.int/Meetings/AMC/ArchivedAssembly/en/A11/index.html> accessed 18 February 2024; ICAO Doc 2222, 14/5/56 and ICAO Doc 7739-C/894.

23 Annual Report of the Council to the Assembly for 1958 (ICAO Assembly 12th Sess, Doc 7960 A12-P/1) 60 <https://www.icao.int/Meetings/AMC/Pages/Archived-Assembly.aspx?Assembly=a12> accessed 18 February 2024.

24 Annual Report of the Council to the Assembly for 1967 (ICAO Assembly 16th Sess, Doc 8724 A16-P/3 April 1968) 116 <https://www.icao.int/Meetings/AMC/Pages/Archived-Assembly.aspx?Assembly=a16> accessed 18 February 2024; ICAO Doc 4582, 1/5/67.

25 *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* (ICJ, 18 August 1972) <https://icj-cij.org/case/54> accessed 18 February 2024.

26 Decision of the ICAO Council, C-DEC 154/16; C-DEC 147/9; C-DEC150/17; C-DEC 152/14; C-DEC 153/14.

27 C-DEC 170/16; C-DEC 152/14 and C-DEC 153/14.

8) Brazil v. United States (2016);[28]
9) Qatar v. Bahrain, Egypt, United Arab Emirates and Saudi Arabia (2017);[29]
10) Australia and the Netherlands v. Russian Federation (2022).[30]

Altogether, there are merely ten significant cases in which the ICAO Council has been involved, indicating a relatively low number of disputes addressed.[31] The question of our research focuses on why this is the case. One reason could be that most disputes are resolved via diplomatic channels or alternative dispute settlement mechanisms that do not require intervention from the ICAO Council. Another possibility is that Member States may not favour the ICAO Council dispute resolution procedure or even the outcomes of these decisions.

To shed light on this question, we will briefly introduce the nature of some relevant cases. In advance, it must be mentioned that in the history of the ICAO, only a few controversial cases have reached a final decision by the ICAO Council. Below is a brief history of some selected cases chosen by the authors:

a) The first dispute settled was between India and Pakistan. In *India v. Pakistan* (1952), the disputing parties could not agree. Therefore, they requested the assistance of the ICAO Council. India complained about being unable to use a large part of the national airspace of the neighbouring country because Pakistan demarcated prohibited airspaces irrationally and unnecessarily. Whereas, in the airspaces closed before international air traffic, the scheduled flights of the Iranian airlines could demonstrably overfly, and this discriminative conduct violated Articles 5, 6 and 9 of the Chicago Convention (1944) as well as the rules of the IASTA – International Air Services Transit Agreement (1944).[32] The ICAO Council settled the relations within a few months, and in its decision, it obligated

28 ICAO, 'Annual Report of the Council 2019: Settlement of Differences' <https://www.icao.int/annual-report-2019/Pages/supporting-strategies-legal-and-external-relations-settlement-of-differences.aspx> accessed 18 February 2024.

29 ibid.

30 'Netherlands, Australia launch new case against Russia over MH17: The Dutch and Australian Governments take Russia before the UN's International Civil Aviation Organization' (*Al Jazeera*, 14 March 2022) <https://www.aljazeera.com/news/2022/3/14/netherlands-australia-launch-new-case-against-russia-over-mh17> accessed 18 February 2024; 'Australian Government: ICAO Council decision on jurisdiction in MH17 legal proceedings' (*Attorney-General's portfolio*, 18 March 2023) <https://ministers.ag.gov.au/media-centre/icao-council-decision-jurisdiction-mh17-legal-proceedings-18-03-2023> accessed 18 February 2024.

31 The majority of the State-to-State disputes handled by ad hoc arbitral tribunals, and the International Court of Justice (ICJ). The highest number of cases are related: (1) security; (2) traffic rights; (3) economic rights; and (4) environmental issues. Zhang Luping, *The Resolution of Inter-State Disputes in Civil Aviation* (OUP 2022) 85.

32 International Air Services Transit Agreement (signed 7 December 1944) [1951] UN Treaty Series 252/390. Agreement has been ratified by 135 States.

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both parties to secure unimpeded transit in their national airspaces for each other.[33] Finally, in January 1953, the ICAO Council officially noted that the disagreement had been settled.[34]

b) The fifth dispute emerged again between Pakistan and India, known as *Pakistan v. India* (1971), following the 1965 war and subsequent suspension of transit rights of Pakistan's civil aeroplanes over Indian territories.
   The parties later agreed that transit flights (transit rights) may continue, although the terms of this agreement differed. The dispute was exacerbated by the hijacking of an Indian Airlines Fokker F-27 by two Kashmiri militants on 30 January 1971, which was flown to Pakistan. In response, India suspended all transit flights. Pakistan then turned to the ICAO Council with a petition and a complaint with reference to Article 84 of the Convention and the IASTA Agreement.[35] India initially questioned the Council's jurisdiction, leading to deliberations where the Council convened and affirmed its authority to address the complaint. Dissatisfied with this decision, India appealed to the International Court of Justice as the plaintiff.
   In the lawsuit *India v. Pakistan* (1971-1972),[36] the International Court of Justice rejected India's petition and proclaimed the jurisdiction of the ICAO Council. Later, the parties suspended the procedure before the Council and settled the dispute themselves.

In its judgement, the International Court of Justice emphasised that the court always has to verify its jurisdiction, and if necessary, it has to be examined "ex officio". However, the preliminary decision on jurisdiction and the subsequent decision on the meritorious matters of the case may not be differentiated. Namely, the decision on jurisdiction, even if it does not determine the case's outcome, may affect it on its merits. Neither party is obligated to explain the case's merits to the court that does not have jurisdiction or whose jurisdiction is ambiguous. However, in some cases, jurisdiction issues may affect meritorious matters and require examining specific meritorious parts.

c) The sixth dispute occurred between Cuba and the United States of America in the case of *Cuba v. United States* (1998). On 24 February 1996, Cuba attacked three unarmed civil aeroplanes in international airspace at a distance of 20 nautical miles from the Cuban coastline. The main objective of the pilots of these small aeroplanes was to search and rescue emigrants fleeing on the high seas, an action viewed unfavourably by the Cuban government. It was not inadvertent that the two Cessna 337 civil aeroplanes were shot by the MIG-29 fighter planes of the Cuban Air Force. This happened even though the pilots of the aeroplanes had been in contact with

33 Bin Cheng, *The Law of International Air Transport* (Stevens & Sons Ltd; Oceana Publ 1962) 102.
34 ICAO Doc 7367 A7-P1 (n 21) 74-6; ICAO Doc 7388 C/860.
35 Chicago Convention (n 1) art 84; International Air Services Transit Agreement (n 32) art 2 (s 1-2).
36 *India v Pakistan* (n 25).

the Cuban air navigation control, their onboard transponders had been working, and by observing the aviation rules, they had been flying in international airspace. This incident caused the death of four innocent civilians. The third aeroplane managed to evade the attack due to cloud cover, and its pilots later informed the public about the tragic event, prompting the families to take legal action.[37]

At the request of the UN Security Council, the ICAO investigated the incident of 26 February 1996 and concluded that the US aircraft had been destroyed over the high seas and not in the Cuban airspace.[38] However, that was unrelated to the substance of the Cuban claim before the Council. The political overtones of the situation discouraged the Council from dealing directly with the dispute; it called upon the parties, which agreed to discontinue the proceedings.[39] It is gratifying to note that, despite this isolated incident, Cuba had acceded to all aviation security conventions by the turn of the century and ratified Article 3*bis* of the Chicago Convention.[40] The ICAO Council confirmed the mediation efforts of its President.[41]

d) The ninth case involved Qatar and four other States (Bahrain, Egypt, United Arab Emirates and Saudi Arabia) in *Qatar v. Bahrain, Egypt, United Arab Emirates and Saudi Arabia* (2017). The governments of Bahrein, Egypt, Saudi Arabia, and the United Arab Emirates accused Qatar of supporting terrorist groups and financing their activities.[42] The Government of Qatar renounced the charges and failed to meet the demands itemised in 13 points by the countries to be fulfilled within ten days. In response, the countries participating in the dispute discontinued their relationship with Qatar on 5 June 2017. The countries imposed a blockade, giving Qatari citizens residing in their territories 14 days to leave.[43] Furthermore, they cancelled all traffic (by sea, land and air) with Qatar. The closure of its airspace caused considerable damage to Qatar and led to the cancellation of numerous flights. With neighbouring states' airspace closed, Qatari aircraft were obliged to detour through Iran and Turkey, resulting in increased flying times. The growth of the duration of flights affected mainly the aeroplanes travelling to Africa and South

37 *Armando Alejandre Jr and Others v Cuba*, Case no 11.589, Report no 86/99 (IACHR, 29 September 1999) <https://www.cidh.oas.org/annualrep/99eng/Merits/Cuba11.589.htm> accessed 18 February 2024.

38 United Nations Security Council resolution 1067 'Shooting down of two civil aircraft on 24 February 1996' (adopted 26 July 1996) <http://unscr.com/en/resolutions/1067> accessed 18 February 2024.

39 C-Min/161-6, C-Min 163-17, C-Min 164-11 and C-Min 166-12.

40 'Status of individual States: Cuba' <https://www.icao.int/secretariat/legal/Status%20of%20individual%20States/Forms/AllItems.aspx> accessed 18 February 2024.

41 ICAO Press Release P10 05/98.

42 Andrew McGregor, 'Qatar's Role in the Libyan Conflict: Who's on the Lists of Terrorists and Why' (2017) 15(14) Terrorism Monitor 8 <https://jamestown.org/program/qatars-role-libyan-conflict-whos-lists-terrorists/> accessed 18 February 2024.

43 'Qatar Crisis: What You Need to Know' (*BBC*, 19 July 2017) <https://www.bbc.com/news/world-middle-east-40173757> accessed 18 February 2024.

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America, necessitating more fuel and, in many cases, substituting narrow-body aeroplanes with wide-body ones capable of long-haul flights. Qatar instituted proceedings at the ICAO Council regarding the Chicago Convention and the IASTA Agreement. At the same time, after the blockade, Qatar sued the United Arab Emirates before the International Court of Justice (ICJ) for violating human rights.[44] The four countries executing the blockade lodged a preliminary complaint vis-a-vis the proceedings to be conducted before the ICAO Council, which was dismissed by the overwhelming majority of the ICAO Council. Against the decision of the Council, the boycotting countries took recourse to the ICJ and pleaded for the establishment of the nullity of the decision. On 14 July 2020, the ICJ unanimously dismissed the plaintiffs' action and established that the ICAO Council could bring the final ruling as a body with jurisdiction.[45]

In that case, the ICAO Council's jurisdiction was also established. However, the Parties took pains to reach an agreement in both cases, irrespective of the ICAO Council's decision. Finally, a mutual Agreement was reached between the Parties. This Agreement was signed in Saudi Arabia on 5 January 2021 during the Gulf Cooperation Council Summit.[46]

Taking into account the cases mentioned above, it can be summarised that in these disputes, the ICAO Council did not delve into the merits of the cases; instead, its approach remained more administrative and political. It has been criticised for its perceived lack of judicial activism, judicial capacity, and judicial transparency.[47] It means the ICAO Council cannot carry out its function under the Chicago Convention. As a result, there is often a significant gap between the expectations of states involved in disputes and the approach taken by the ICAO Council. This has led to many cases where states have resolved issues among each other or appealed to the International Court of Justice.

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44 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar v United Arab Emirates*) (ICJ, 4 February 2021) <https://www.icj-cij.org/case/172> accessed 18 February 2024.

45 *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Qatar)* (ICJ, 14 July 2020) <https://www.icj-cij.org/case/173> accessed 18 February 2024; Bhat B Sandeepa and Krishna Tushar, 'Jurisdiction under Article 84 of the Chicago Convention 1944 in the Context of Middle East Conflict' (2022) 2(1) Lex ad Coelum <https://caslnujs.in/2022/01/30/jurisdiction-under-article-84-of-the-chicago-convention-1944-in-the-context-of-middle-east-conflict-2/> accessed 18 February 2024.

46 'Transcript: Closing statement of 41st GCC summit' (*Al Jazeera*, 7 January 2021) <www.aljazeera.com/news/2021/1/7/closing-statement-of-41st-gulf-cooperation-council> accessed 18 February 2024; Attila Sipos, *International Aviation Law: Regulations in Three Dimensions* (Springer Nature 2024) 181.

47 Lumping (n 31) 105.

3.2. Appeal Procedures

The Chicago Convention includes provisions for an appeal procedure:

> "Any contracting State may appeal from the decision of the Council to an ad hoc arbitral tribunal or the Permanent Court of International Justice."[48]
> "Any such appeal shall be notified to the Council within sixty days of receiving notification of the Council's decision."[49]
> "The decisions of the Permanent Court of International Justice and an arbitral tribunal shall be final and binding."[50]

Moreover, there are sanctions if a State does not abide by the decision of the arbitral tribunal or the International Court of Justice. In such cases, international airlines of the disobedient State may be denied operation through the airspaces of other contracting States.[51] However, no use has been made of this enforcement mechanism due to its sensitivity and implications. Additionally, contracting States of the Chicago Convention have taken further steps. Suppose there are contracting States which, despite a final and binding decision of the arbitration tribunal or the International Court of Justice, still allow the airlines of the disobedient State to operate through their airspaces; the voting power of those States in the ICAO Assembly may be suspended.[52] Moreover, in any other matter, the decisions of the Council, if appealed, are suspended until the appeal is adjudged.[53]

The Chicago Convention authorises the Assembly and the Member States of ICAO to apply sanctions vis-à-vis a Member State and its airline which does not adhere to the decision made in a debated matter.

- In an intervention vis-à-vis the Member State, *"the Assembly shall suspend the voting power in the Assembly and the Council (provided that the contracting State is a Member of the Council) of any contracting State that is found in default under the provisions*" of the Chapter XVIII.[54]
- Vis-à-vis the airline of the condemned Member State, *"each contracting State shall undertake not to allow the operation of an airline of a contracting State through the airspace above its territory if the Council has decided that the airline concerned is not conforming*" to the provisions of the Convention.[55]

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48 Chicago Convention (n 1) art 84. The International Court of Justice (ICJ) in The Hague is the Supreme Judicial Organ of the UN, the only permanent international judicial forum of universal character. The duty of the International Court of Justice is the adjudication of cases submitted thereto within the purview of international law. See: United Nations Charter (n 2) ch XIV, art 92.

49 Chicago Convention (n 1) art 84.

50 ibid, art 86.

51 ibid, art 87.

52 ibid, art 88.

53 ibid, art 86.

54 ibid, art 88.

55 ibid, art 87.

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While the application of the former rule has occurred several times, the application of the latter rule has not ensued since it would probably have great political resonance and would divide the parties; therefore, the attached protected interest would be injured to a greater extent. These two sanctioning powers (targeted the operation of the airline and the voting powers in the ICAO Assembly of the States) show that the decision of the ICAO Council in dispute settlement is not legally binding and executed or creates some precedents for the future. The ICAO Council decision can be forced out by economic and administrative sanctions rather than legal consequences (based on international public law). These sanctions are not in favour of the contracting States.

At the 15th Assembly of ICAO (1965), the Member States took a stand on the issues of racial discrimination and apartheid vis-a-vis South Africa (Resolution A15-7). At the 16th Assembly of ICAO (1968), the Member States pronounced that apartheid and other racial discrimination are the primary sources of conflict among nations and peoples. Furthermore, these political views and racial discrimination are contrary to the general principles formulated in the Preamble of the Chicago Convention.[56] The Member States confirmed the former decision at the 18th Assembly of ICAO held in Vienna (1971). As a sanction, they envisaged that South Africa would not receive an invitation to ICAO Assemblies if it continued to maintain its embraced politics condemned by the nations.[57]

The International Court of Justice (ICJ) has had to deal with three types of cases, specifically:

1. incidents involving military aircraft;
2. incidents involving civil aircraft and
3. the appeal procedure under Article 84 of the Chicago Convention.

In the first type, there are some cases concerning border incidents between the United States and the Soviet Union between 1951 and 1957. For example, the United States aircraft were intercepted or destroyed by Soviet aircraft while flying through or near the airspaces of Hungary and Czechoslovakia. Another incident took place in 1954 above the Sea of Japan. The United States, the Soviet Union and other concerned States appeared before the ICJ, but the Soviet Union refused to recognise the competence of the Court. That is why no decisions were made in these cases.[58] A similar case happened in 1999 when Pakistan brought a case against India before the ICJ after the destruction of a

56 Ruwantissa Abeyratne, *Legal Priorities in Air Transport* (Springer 2019) 23-36.

57 The documentation and outcomes relating to past ICAO Assemblies can be found in: 'Sessions of the ICAO Assembly' (*ICAO International Civil Aviation Organization*, 2024) <https://www.icao.int/publications/Pages/assembly-archive.aspx> accessed 18 February 2024.

58 Gilbert Guillaume, 'Les affaires touchant au droit aérien devant la Cour internationale de justice' in Mariette Benkö und Walter Kröll (eds), *Luft- und Weltraumrecht im 21 Jahrhundert* (Carl Heymanns Verlag KG 2001) 75.

Pakistan military aircraft by Indian forces. On 21 June 2000, the ICJ decided it had no jurisdiction to hear the case.[59]

In the second type, for example, in the case of EL AL Israel Airlines (LY) on the route from Tel-Aviv (TLV) to London (LHR) was shot without any advance warning by a MIG-15 fighter plane of the Bulgarian Air Force above the territory of Bulgaria.[60] The case was filed at the ICJ, but no respectable judgment was passed since the mandatory jurisdiction of the court in the case was not established.[61] A further case was related to the downing of an Airbus A-300, operated by Iran Air, by missiles shot from the United States Navy ship Vincennes navigating in the Gulf area. Iran, among other facts, claimed the recognition by the International Court of Justice of an infraction by the United States and the provisions of the Montreal Convention (1971).[62] Furthermore, the compensation for damages suffered by Iranian passengers and crew, that is, the survivors. The ICJ found that the ICAO Council had to decide on this case under Article 84 of the Chicago Convention before it could handle it. The United States Government compensated the victims based on "ex gratia".[63]

In the third type, appeal procedures were launched only twice at the ICJ level in the last 80 years. These cases include India v. Pakistan (1972) [*see*, 3.1.a], Bahrain, Egypt, United Arab Emirates and Saudi Arabia v. Qatar (2020) [*see*, 3.1.d]. It must be noted here that the case of Australia and the Netherlands v. Russian Federation (2022) was not based on an appeal mechanism as the Netherlands and Australia applied directly to ICJ about the competence of the ICAO Council in the case under Article 84 of the Chicago Convention to prevent the decision of the ICAO Council not to deal with the case due to lack of competence.

3.3. Arbitration Procedure

It is also possible to reach an agreement via alternative dispute resolutions. Therefore, if any contracting State Party to a dispute in which the decision of the ICAO Council is under appeal has not accepted the Statute of the International Court of Justice and the contracting States Parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the

59 *Aerial Incident of 10 August 1999 (Pakistan v India)* (ICJ, 21 June 2000) <https://www.icj-cij.org/case/119> accessed 18 February 2024.

60 ICAO Circular 50 - AN/45 [1957] 7 Aircraft Accident Digest 146.

61 *Aerial Incident of 27 July 1955 (Israel v Bulgaria)* (ICJ, 26 May 1959) <https://www.icj-cij.org/case/35> accessed 18 February 2024; ICAO Council Working Paper C-WP/5764 'Report concerning the Libyan Arab Boeing 727-224: 5A-DAH (Sinai – 21 February 1973)' 1 May 1973.

62 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (concluded 23 September 1971) [1975] UN Treaty Series 14118/178.

63 *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)* (ICJ, 22 February 1996) <https://www.icj-cij.org/case/79> accessed 18 February 2024.

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contracting States Parties to the dispute shall name a single arbitrator who shall name an umpire.[64] "If either contracting State Party to the dispute fails to name an arbitrator within three months from the date of the appeal, an arbitrator shall be named on behalf of that State by the President of the Council from a list of qualified and available persons maintained by the Council. If, within thirty days, the arbitrators cannot agree on an umpire, the President of the Council shall designate an umpire from the list previously referred to. The arbitrators and the umpire shall then jointly constitute an arbitral tribunal. Any arbitral tribunal established under this or the preceding Article shall settle its procedure and give its decisions by majority vote, provided that the Council may determine procedural questions in the event of any delay which in the opinion of the Council is excessive".[65]

There are currently three specialised arbitration tribunals exciting in the field of civil aviation: the International Court of Aviation and Space Arbitration (ICASA, Paris, 1994); the International Aviation Court of Arbitration (Shanghai, 2014)[66] and the Hague Court of Arbitration for Aviation (HCAA, the Hague, 2024).[67] The number of arbitration tribunals' cases is growing as the Parties find the advantages of these alternative dispute resolutions; for example, in State-to-State cases, they also have more benefits, such as expert-determined (professional) decisions and a legally binding nature of the judgement.

3.4. Overview of the Forums

The chart compares the three above-introduced forums of the dispute resolution mechanism system in aviation. It examines the primary assessment and summarises the differences. The chart provides enough information to understand why the ICAO Council needs more changes and improvements to provide effective decision-making for its Member States. The dispute resolution mechanism must be reformed in the first step on the regulatory and organisational levels.

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64 The umpire is a third party appointed by the arbitrators to settle disagreements between the arbitrators themselves.

65 Chicago Convention (n 1) art 85.

66 The China Shanghai Pilot Free Trade Zone Arbitration Rules (effective 1 January 2015) <https://ng-lassen.oss-cn-hangzhou.aliyuncs.com/upload_files/file/2020/20200813142126_1384.pdf> accessed 18 February 2024.

67 'The Hague Court of Arbitration for Aviation Conference' (*NAI - Netherlands Arbitration Institute*, 29 January 2024) <https://nai.nl/the-hague-court-of-arbitration-for-aviation-conference> accessed 18 February 2024.

	ICAO Council	International Court of Justice	Arbitration
CASES	Typically, **public air law** disputes (aviation security), but sometimes commercial (traffic rights, economic rights, environmental issues).	In **all legal disputes** submitted to it by States. + Give **advisory opinions** to UN organs and specialized agencies.	Generally, **private law** disputes.
SELECTION	Parties **cannot choose**; there is a permanent body with 36 Representatives on the Council of ICAO. (Elected for 3 years). Representatives are **not experts** (some may have aviation backgrounds). Forum is seated in **Montreal/Canada**, at the headquarters of ICAO.	Parties **cannot choose**; there is a permanent body with 15 Judges. (members) on the Court. (Elected for 9 years). Judges are **professionals**. Forum is seated in **The Hague/The Netherlands**, seated in the Peace Palace.	Parties **freely select Arbitrators**. Arbitrators are **competent**. Forum is **Neutral** (place/seat). It can be any Forum of their choice ("no home advantage").
LEGAL PROCEDURE	<u>Legal source</u> ➢ Chicago Convention ➢ Rules for the Settlement of Differences ➢ Council's Rules of Procedure Representatives must follow **strict** but **insufficient** rules. **Transparent** The ICAO Council decision is **not final** and **can be appealed** to	<u>Legal source</u> ➢ Statue of the Court ➢ Rules of the Court ➢ Practice ➢ Precedent Rules and procedures are strict and systematic. **Transparent** The judgement is final and legally binding.	**Specific arbitration rules** (international treaties and institutional rules). Arbitrators **can tailor** their procedural rules. **Flexible** process. **Confidential** (the entire process, docs., proceedings, award). [But it can enter to the public, if it has commenced or there is a legal

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	ICAO Council	International Court of Justice	Arbitration
	➢ International Court of Justice; or ➢ Arbitration. The appeal shall be notified to the Council within **2 months** of receiving notification of the Council's decision. The decision's **enforceability is limited**, and this mechanism is sensitive, making enforcement difficult.	The judgement is enforceable. No jurisdiction for non-governmental organisations, individuals, corporations or any other private entity). States must accept the Jurisdiction of the ICJ.	obligation to disclose]. The award is final and legally binding (No appeal, only under limited circumstances; it must be challenged within **3 months**). The award is enforceable. (The award does not have automatic powers). If not followed, the winning party can seek enforcement before the National Court.
COST	Each Party shall bear its own cost.	Parties shall bear their own cost.	The cost is moderate. The winner is fully compensated by the losing side.
SPECIAL POWERS	Representatives have limited powers (exercise voting powers).	Judges exercise wide powers.	Arbitrators exercise wide powers.
REPRESENT-ATION	Representatives have **various backgrounds.** (career diplomats, state or civil aviation professionals, politicians, lawyers, etc.).	**Professional** Judges (selected on high standards and UN principles/policies like geographic distribution).	Can be **anyone** (lawyer, expert, technical or academic person, etc.).

4 CONCLUSION AND RECOMMENDATION

4.1. Conclusion

It is well-known from aviation history that applying dispute settlement based on Chapter XVIII of the Chicago Convention (1944) during the past 80 years has not been encouraging and promising. The numbers speak for themselves, proving this fact: since 1944, only ten cases have been filed to the ICAO Council, and in most cases, the ICAO Council did not decide on the case's merits. Although the legal status of the dispute settlement mechanism of the ICAO Council is obvious, many factors do not substantiate this mandatory function properly. The reasons might be the following:

- The first reason is that the ICAO Council has a diplomatic function. This function has become increasingly important in the previous decades, but this was not the case initially (in the 60s-80s) when the ICAO Council focused more on civil aviation's technical, professional and operational aspects, for example, when drafting and formulating the new Annexes for the aviation industry. Aviation is a crucially important commercial activity for every State, meaning the aviation industry is determined by political interests and decisions (even the liberalised open market and the Single Sky initiative are subject to political decisions with commercial implications). Such political interests and subtle international relations often prevent States from submitting themselves to binding legal procedures.
- It is also visible that the provisions of the Chicago Convention are not detailed, which is expected for an international treaty. Still, the Rules for the Settlement of Differences (1957) and the Council's Rules of Procedure (1969) were also not methodically drafted by the Council Members. The Chicago Convention does not define the exact procedure to be followed by the Council, nor do the Council's Rules of Procedure adequately encompass the possible challenges and the necessary measures. The Council realised the lack of proper procedural guidance from the beginning of the first case [*see* 3.1], but no action has been taken to rectify this. Besides, the current rules are not relevant enough, are not comprehensive, and cannot be executed as the court's decisions. Moreover, the ICAO Council's decision can be appealed to a non-ICAO body, such as the International Court of Justice.[68]
- The reason can be that currently, there are 36 Council Members, meaning these States represent all contracting States. It is peculiar that the 36 Member States account for merely 18.65% of the 193 Member States. Upon a two-thirds majority decision, this proportion of 24 votes accounts only for a ratio of 12.43%. These numbers show the weight of the ICAO Council's decision in the settlement dispute. Those contracting States with no membership in the ICAO Council need

68 Gabriel S Sanchez, 'The Impotence of the Chicago Convention's Dispute Settlement Provisions' (2010) 10(1) Issues in Aviation Law & Policy 35.

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to find support from those States (more often on a regional level) who are ICAO Council members, and this fact states more about the political/diplomatic nature of the Council. It also determines the decision-making mechanism, which does not favour these States.

4.2. Recommendations

It is highly recommended that the whole processual mechanism be revised. The ICAO Council can only achieve its goals without explicit procedural provisions, which should be revised according to needs based on experiences. The solution can be reached in two ways: by establishing a new procedure with legal requirements for dispute settlement or by revising the existing rules mentioned above. The second option is not practicable in light of the lack of revision or modernisation of the Chicago Convention.[69] Therefore, a modernised procedure under the Rules for the Settlement of Differences (1957)[70] or a new regulation is necessary to solve this issue.

ICAO must provide a wider platform for regional organisations such as ECAC, AFCAC, ACAC, and LACAC in dispute resolutions.[71] Since ICAO Council Members, in reality, cooperate on a regional level (for example, there are 8 European Union States and 8 African States representing the ICAO Council), decisions could be more favourable if more contracting States are involved. Regional organisations and Member States (all of which are ICAO Member States) can have greater influence and roles in the decision-making process. Regional groups possess more united power and effective mechanisms than individual states in a debate.

For the mandatory dispute settlement task, ICAO needs a new, dedicated judicial body with clear legal status, jurisdiction, and competence, subject to the control of the Assembly and the ICAO Secretariat. Decisions cannot be based on unbalanced circumstances; for example, the State involved in the dispute should not have membership in the ICAO Council. While the Council Member involved in the case has no voting right and must be neutral during the Council procedure, definitely, in the political arena, it has more influence than those States which are not represented in the

69 Michael Milde, 'Chicago Convention at Sixty: Stagnation or Renaissance?' (2004) 29 Annals of Air and Space Law 443; Sipos (n 17) 210-22.

70 Although, ICAO Council established a Working Group to modernize the ICAO settlement rules, there is no final comprehensive text had been made. At the 38th Session of the Legal Committee (22-25 March 2022), a significant amount of time was dedicated to discussing the progress report of the Working Group for the review of the ICAO Rules for the Settlement of Differences, chaired by Terry Olson (France). See: 'ICAO Legal Committee Meeting' (2022) 3 ECAC News Point 7 <https://www.ecac-ceac.org/news/636-icao-legal-committee-meeting> accessed 18 February 2024.

71 The European Civil Aviation Conference (ECAC), the African Civil Aviation Commission (AFCAC), the Arab Civil Aviation Commission (ACAC), Latin American Civil Aviation Commission (LACAC).

Council (*see*, in the 9th case, Qatar was not a Member in the ICAO Council during the "blockade" period while Saudi Arabia, Egypt and the United Arab Emirates were [3.1.d]).

Therefore, the duty of dispute settlement should be entrusted to a legal rather than a political organ. Only an authorised legal organ can enhance the credibility and authority of its decisions. It is unquestionably desirable that a contracting State, if involved in a dispute, can find remedy in the ICAO, as this is the only and most crucial intergovernmental organisation with all the necessary instruments to reach a mutual agreement under all circumstances.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Практична нотатка

ПРАВОВІ ПРОБЛЕМИ ВРЕГУЛЮВАННЯ СПОРІВ РАДОЮ МІЖНАРОДНОЇ ОРГАНІЗАЦІЇ ЦИВІЛЬНОЇ АВІАЦІЇ

Халід Альшамсі та Аттіла Сіпос*

АНОТАЦІЯ

Вступ. *Міжнародна організація цивільної авіації (ІКАО) є «Клубом» суверенних держав. ІКАО є спеціалізованою установою Організації Об'єднаних Націй (ООН), до якої входять 193 держави-члени. Якщо ці держави та дипломатичні канали не можуть знайти спільного вирішення спору, виникає розбіжність; однак Рада ІКАО виконує важливу функцію у розв'язанні цих спорів. Ця процедура врегулювання визначена Чиказькою конвенцією (1944), Правилами врегулювання розбіжностей (1957) і Правилами процедури Ради (1969). Проте держави-члени не схвалюють ці положення, про що свідчить нечисленна кількість процедур вирішення спорів у Раді ІКАО за останні 80 років. У цій статті було розглянуто ці правові спори та запропоновано обґрунтування, з огляду на характер справ. Рада є унікальним постійним органом ІКАО. Незважаючи на те, що ІКАО з моменту заснування у минулому столітті стала радше політичним (дипломатичним) органом, відсутність успішно завершених розв'язань спорів є, з юридичного погляду, більш ніж цікавою. Ця дослідницька стаття подає приклади недостатньої ефективності врегулювання спорів Радою ІКАО, зосередивши увагу на характері інтересів держави та результатах провадження, а також на ролі в цих спорах Міжнародного суду (ICJ) або арбітражу.*

Методи. *У роботі наголошено на розумінні та аналізі історичного контексту, міжнародної співпраці та дипломатії, а також на нормативно-правових засадах вирішення спорів і їхнього врегулювання. Пошук ґрунтувався на базах даних, наукових журналах і офіційних публікаціях авіаційних органів і організацій, таких як ІКАО. У дослідженні використовувалися якісні та кількісні методи, засновані на емпіричних спостереженнях і дослідженнях (аналіз документів і тематичні дослідження).*

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Результати та висновки. *Рада ІКАО виконує нормотворчі, судові та адміністративні функції. Це квазісудовий орган, і його президент має повноваження вирішувати спори між договірними державами. Однак, якщо ми поглянемо на історію, то за останні 80 років Рада ІКАО розглядала лише 10 випадків. Основною причиною відсутності рішень Ради ІКАО щодо вирішення спорів є зростання дипломатичної (політичної) функції Ради ІКАО. Авіація є важливою комерційною діяльністю для кожної держави, тобто авіаційна галузь визначається політичними інтересами та рішеннями. Такі політичні інтереси та делікатні міжнародні відносини часто заважають державам підкоритися обов'язковим правовим процедурам.*

Іншою причиною меншої кількості спорів у Раді ІКАО є потреба в більшій кількості положень і правил для підтримки прозорих і юридично обов'язкових рішень. Чинні правила не є ані відповідними, ані достатньо вичерпними, і їх не можна виконувати так само, як судові рішення. Крім того, рішення Ради ІКАО можна оскаржити в органах, що не входять до складу ІКАО, наприклад, у Міжнародному суді.

Тому наполегливо рекомендуємо переглянути весь процесуальний механізм або створити новий спеціалізований судовий орган із чітким правовим статусом, юрисдикцією та компетенцією для вирішення спорів.

Ключові слова: *врегулювання спорів, Рада ІКАО, міжнародне публічне повітряне право, Міжнародний суд, арбітраж.*

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Case Note

ASSESSING THE LEGAL RAMIFICATIONS OF THE COVID-19 PANDEMIC ON ADMINISTRATIVE CONTRACTS IN THE UNITED ARAB EMIRATES: COMPARATIVE REVIEW

Sumaya Abdulrahim Hamdan Nasser Al Jahoori*

ABSTRACT

***Background**: This study aims to establish whether COVID-19 qualified as a force majeure event or exceptional circumstance according to the laws of the United Arab Emirates (UAE) and assess if a particular principle can circumvent contractual duties. It investigates how COVID-19 impacted administrative contracts in the UAE, using UAE laws and case studies to explore legal theories that justify failure to perform an obligation in such contracts.*

The UAE, like many other countries, faced an unpredictable event and utilised all its resources and manpower to combat the danger and ensure the safety of its people. This resulted in various restrictions, such as mandatory quarantine for everyone entering the UAE and limitations on travel outside the country. Additionally, certain Emirates within the UAE, such as Abu Dhabi, imposed entry restrictions, requiring a negative COVID-19 test result for entry and later mandating that only vaccinated individuals were permitted to enter.

Additionally, the study explores the necessary criteria for demonstrating force majeure or exceptional circumstances in said contracts. This study used an analytical approach to examine laws and court decisions. Based on the findings, the outbreak of COVID-19 did not directly impact administrative contracts in the UAE. This is likely due to the authorities' effective handling of the situation. Notably, the theories of force majeure and exceptional circumstances could not be automatically and generally applied to all contracts because each contract was unique and required individual considerations. The study presents potential theoretical and practical applications, highlighting opportunities for future research.

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The study aims to determine which legal theory, if any, could be applied to COVID-19 - either force majeure or exceptional circumstances. Additionally, it examines whether the UAE government would impose any restrictions on movement and work in anticipation of any future pandemics, taking into account the country's recent years policies, laws, and crisis preparation measures.

Methods: *This study uses an analytical approach to examine the main theories outlined in the UAE Civil Transaction Law No.30 of 2020 relating to force majeure and exceptional circumstances. These theories could provide relief from contractual obligations if certain criteria are met. The study examines whether COVID-19 qualified for one, both, or none of these theories to relieve the contractor in an administrative contract from their obligations due to the consequences of the pandemic. The study also includes laws and cases from the European Union and the Court of Justice of the European Union, providing a comparative analysis. The purpose is to compare the legal systems of the UAE and the EU, focusing on administrative contracts and decisions made during the COVID-19 pandemic. The study analyses the progress in dealing with the COVID-19 pandemic and the recent federal human resource law amendment. This analysis primarily focuses on UAE laws and cases, utilising a variety of primary sources and secondary resources such as research articles and books.*

Results and conclusions: *The study demonstrated that COVID-19 significantly impacted administrative contracts and decisions globally, particularly in the UAE. However, legal theory can justify deviations from regular protocols due to unforeseeable circumstances. The study aimed to explain these theories with the help of case studies, serving as a guide for future similar events. After careful examination, the study concluded that neither the force majeure theory nor the exceptional circumstances theory applies to all cases. Due to each contract's varying rules and obligations, the court must evaluate each case to determine which theory is applicable, if any.*

However, the study recommended establishing well-defined policies to guide individuals and agencies in the future on how to act accordingly without affecting the essence of the administrative contract and to provide temporary relief that allows the obligator to perform their duty. The study suggested that the UAE might not permit force majeure or exceptional circumstances claims in future pandemics due to the advanced progress, new laws, and policies that impressively address the situation.

The study also explored the new federal human resource law, enforced in 2022, governing public employees and the provisions that make remote work an option during emergencies. The fast adaptation to these circumstances indicated increasing legal flexibility, potentially reducing reliance on legal theories for relief from contractual obligations in the future.

It is important to note that the force majeure or exceptional circumstances doctrine may not always apply to contracts performed during a pandemic or future events similar to COVID-19. No official statement from the court or state has clarified the applicability of these doctrines universally or to specific ones. This indicates that to determine whether a relief from a duty can be considered as falling under these theories, the court must examine it thoroughly and decide definitively. Each case was handled individually to ensure no one was unfairly enriched. This approach will undoubtedly be adopted in the future.

To prevent disputes and ensure prompt resolutions, it is imperative to thoroughly analyse all legal options and establish the applicable theory to meet the contract's completion deadline. Doing so can prevent any possible disputes and guarantee a prompt resolution. This is especially critical in administrative contracts involving employee or contractor rights, especially those who have signed an administrative contract with the government, as timely resolution impacts public service and interests. Delaying such resolutions could hinder the development cycle of administrative agencies.

1 INTRODUCTION

The world was shaken by the unexpected event of COVID-19 in December 2019.[1] Many countries were unprepared for such an event, leading to significant consequences across many levels. The impact of COVID-19 was vast and affected health, economic, social, and political sectors.[2] The pandemic adversely affected the stock market in the Gulf Cooperation Council.[3] It affected the stability of contracts, particularly administrative contracts.[4]

In response to the pandemic, the UAE implemented laws to limit movement, restrict business operations, and shift to remote learning and working.[5] COVID-19 affected several sectors in the UAE, including the education industry[6] and the construction industry.[7] However, during this time, e-commerce in the UAE thrived despite the effects of international supply chain lockdowns.[8]

UAE officials implemented measures to reduce the risk of COVID-19 transmission,[9] but managing governments and businesses amidst these restrictions was challenging,

1 WHO, 'Pneumonia of Unknown Cause – China' (*World Health Organization (WHO)*, 5 January 2020) <https://www.who.int/emergencies/disease-outbreak-news/item/2020-DON229> accessed 20 February 2024.

2 Farida Al Hosany and others, 'Response to COVID-19 Pandemic in the UAE: A Public Health Perspective' (2021) 11 Journal of Global Health 03050, doi:10.7189/jogh.11.03050.

3 Asma Salman and Qaisar Ali, 'Covid-19 and its Impact on the Stock Market in GCC' (2024) 14(1) Journal of Sustainable Finance & Investment 220, doi:10.1080/20430795.2021.1944036.

4 Hassan Elhais, 'Covid-19 Impact on Construction Contracts in UAE' (*HG.org Leading Lawyers*, 29 July 2020) <https://www.hg.org/legal-articles/covid-19-impact-on-construction-contracts-in-uae-56428> accessed 20 February 2024.

5 Resolution of the UAE Cabinet no 19 of 2020 'Regulating Government Work During Emergency Circumstances' [2020] UAE Official Gazette 676.

6 Marvin Erfurth and Natasha Ridge, *The Impact of COVID-19 on Education in the UAEU* (Strategic Report no 1, Sheikh Saud bin Saqr Al Qasimi Foundation for Policy Research 2020).

7 Muhammad Sami Ur Rehman, Muhammad Tariq Shafiq and Muneeb Afzal, 'Impact of COVID-19 on Project Performance in the UAE Construction Industry' (2022) 20(1) Journal of Engineering, Design and Technology 245, doi:10.1108/JEDT-12-2020-0481.

8 Ahmad Ghandour and Brendon J Woodford, 'COVID-19 Impact on E-Commerce in UAE' (2020 21st International Arab Conference on Information Technology (ACIT), Giza, Egypt, 2020) doi:10.1109/ACIT50332.2020.9300077.

9 Resolution of the UAE Cabinet no 19 of 2020 (n 5).

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particularly when fulfilling contractual obligations. The amendments made in response to the pandemic affected the stability of administrative contracts and the contractor's obligations. Additionally, COVID-19 impacted many fields, such as tourism, affecting the state's economic status.[10] Any negative impacts on tourism can have ripple effects on other fields and the tourism industry in the UAE was undoubtedly affected.[11]

Addressing financial responsibilities and establishing laws to prepare for future pandemics or similar events without resorting to legal action is essential. Similar to other contracts, administrative contracts have time constraints, making it essential for legislators to guide the expected procedures.

This study focuses on force majeure and exceptional circumstances as a means of legal relief for failing to meet administrative contract obligations. Additionally, it examines the impact of the pandemic from multiple perspectives and offers practical examples of the measures taken by the UAE government and the rulings of the UAE courts.

Administrative contracts are governed by theories derived from administrative jurisprudence to terminate or limit the contractor's financial burden with the agency. The UAE administrative contracts are a method of accomplishing the agency's goal in different fields. However, the decisions taken by the UAE government to limit the spread of COVID-19 and protect people's lives resulted in legal and economic repercussions across the public and private sectors.

For instance, the Public Prosecution issued a list of violations and fines committed during the pandemic, such as a 50000 AED fine for escaping a health facility.[12] The suspension of work and the imposition of a curfew created significant financial challenges regarding the implementation of contracts that were concluded before the pandemic and were not expected to occur during the implementation of the contract.

Many states have been affected by COVID-19, such as Zimbabwean agricultural supply chains and markets.[13] In response to the economic challenges posed by the pandemic, the

10 Putu Mahardika Adi Saputra, 'COVID-19 and Tourism Industry: An Investigation of Spatial Dependence in Europe' (2023) 9(2) Cogent Social Sciences 2282413, doi:10.1080/23311886.2023.2282413.

11 Asad A Aburumman, 'COVID-19 Impact and Survival Strategy in Business Tourism Market: The Example of the UAE MICE Industry' (2020) 7(1) Humanities and Social Sciences Communications 141, doi:10.1057/s41599-020-00630-8.

12 Resolution of the UAE Cabinet no 19 of 2020 (n 5).

13 Tanyaradzwa Rukasha and other, 'Covid-19 Impact on Zimbabwean Agricultural Supply Chains and Markets: A Sustainable Livelihoods Perspective' (2021) 7(1) Cogent Social Sciences 1928980, doi:10.1080/23311886.2021.1928980.

UAE central bank implemented a strategy to provide economic support to companies and consumers, allocating a budget of 100 billion AED.[14]

During the pandemic, UAE contractors encountered obstacles in fulfilling contracts for various reasons. Contracting parties often took legal action to protect their interests, either by terminating contracts when implementation became impossible or by requesting financial adjustments to the contract if it became too burdensome to execute. This research studies the two theories under UAE law and recent court rulings that justify the obligator's failure to fulfil the contractual obligation.

2 FORCE MAJEURE AS A LEGAL RELIEF OF ADMINISTRATIVE CONTRACTUAL OBLIGATION

Agencies use administrative contracts to achieve various objectives for the betterment of the agency and the state. The contractual obligation between the agency and the contractor requires comprehensive regulations to specify their respective rights and duties. However, to date, UAE laws lack such regulations due to the ongoing evolution of administrative agencies and administrative law. In the absence of applicable laws, courts rely heavily on administrative jurisprudence.[15]

Administrative contracts in the UAE may be regulated by civil contract laws in some cases and by public law in others, depending on many factors. For an administrative contract to be created, it requires more than just acceptance: one party must be an agency governed by public law, the contract must serve the public agency's interest, and it must contain exceptional rules and conditions not available in civil law. Thus, disputes resulting from a contract made using civil law are heard by non-administrative courts, while disputes from administrative contracts are heard by administrative courts.[16]

Many theories have been raised to retain the contract's financial balance and act as a legal justification for failing to execute the contract's obligations. An agency can use two methods to streamline an administrative contract: using its authority as an agency or acting as an

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14 CB UAE, 'The Central Bank of the UAE Announces a Comprehensive AED100 billion Targeted Economics Support Scheme to Contain the Repercussions of the Pandemic COVID-19' (*Central Bank of the UAE*, 30 November 2021) <https://www.centralbank.ae/en/news-and-publications/news-and-insights/thematic-news/the-central-bank-of-the-uae-announces-a-comprehensive-aed-100-billion-targeted-economic-support-scheme-to-contain-the-repercussions-of-the-pandemic-covid-19/> accessed 20 February 2024.

15 Abdul Wahab Abdool, 'Specialized Courts as a Means of Progress and Justice: Model of Specialized Federal Courts in the United Arab Emirates' (The Fourth Conference of the Presidents of the Supreme Courts and Cassation in the Arab Countries, Qatar, 24-26 September 2013).

16 Saif Al-Suwaidi, 'Dissolution of the Administrative Contract' (2021) 18(1) University of Sharjah Journal of Legal Sciences 168, doi:10.36394/jls.v18.

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individual.[17] This study focuses on the first method and explains the legal justification theories that can be used in case of failure to fulfil contractual obligations.

The agency must compensate the contractor under the contract terms, legal requirements, and administrative principles.[18] The oversight of the relationship between agencies and contractors in the UAE is governed by laws at the federal and state levels. These laws establish the rules of conduct and ensure fairness in contractual agreements.[19] Article 116 of Dubai's law regarding contract and warehouse management in the Government of Dubai states that:

> "A. Where, in the course of performance of a contract, inevitable or unforeseeable emergencies occur, which render the performance of the contract onerous for the contracting party and expose him to severe loss due to circumstances beyond his control, the contracting party must continue performing the contract. In this case, the contracted party will have the right to claim fair compensation by submitting a request to the competent committee. The committee will consider the request and submit its relevant recommendations to the Director General to take the actions deemed appropriate in respect of that request. In this regard, coordination with the DOF must be pursued to secure the funds required for compensation.
> B. Where, in the course of the performance of a contract, a force majeure event or inevitable, unforeseeable, and general exceptional circumstances occur that render the performance of the contract impossible, the contract will be deemed revoked, provided that the competent committee verifies the occurrence of such force majeure."[20]

Civil transaction law and civil procedure law are applied to many administrative disputes by UAE courts.

If the contractor fails to fulfil their contract obligations, the agency has the authority to terminate the contract and apply other punishments.[21] Sometimes, unexpected events can arise, which prevent a contractor from fulfilling their obligations under a contract. In such cases, an alternative solution must be found to either allow the obligator to fulfil their obligation once the event has passed or to exempt them from their obligation to ensure fairness legally—a comprehensive definition of what constitutes force majeure and what does not exist.

17 ibid 171.

18 Alia G Musa and Shaymaa S Aziz, 'The Impact of the Corona Pandemic on the Financial Balance of Administrative Contract' (2020) 9(1st virtual conf/1) Journal of College of Law University of Kirkuk for Legal and Political Sciences 9.

19 Dubai Law no 12 of 2020 'Concerning Contracts and Warehouse Management in the Government of Dubai' <https://www.gdrfad.gov.ae/themes/gdrfad/content/pdf/law_no.(12)of2020_en.pdf> accessed 20 February 2024.

20 ibid, art 116.

21 Abdol Qader Draji, Agency's Power to apply administrative punishments' (*Almanhal*, 2014) <https://platform-almanhal-com.uaeu.idm.oclc.org/Files/2/79495> accessed 20 February 2024.

2.1. Force Majeure theory within the understanding of UAE law

A force majeure clause is "a Standard Clause that allows the contract parties to allocate the risk of certain force majeure events such as acts of God(School), hurricanes, earthquakes and other natural disasters, epidemics, terrorism, government acts, embargoes, labour strikes and lockouts, and other events beyond the control of the parties."[22]

The French Civil Code defines force majeure as an external interference not resulting from the debtor's bad faith.[23] Force majeure is a doctrine derived from French law and has been applied in situations such as volcanic eruptions, heat waves, floods, and other unpredictable natural disasters. According to the doctrine, if an event is considered a force majeure, the contractor will excuse or be entitled to suspend the performance of all or part of its obligations. [24] The question remains as to how to determine whether the pandemic can be used as legal relief under the force majeure principle within the UAE laws and adjudications.

The contractor with the agency must abide by the contractual obligations, and in the event of a breach, this entails their responsibility. The court has discretionary power to determine whether the breach that necessitates liability has occurred.[25] In Dubai Cassation Court, case No. 453 of 2016 commercial appeal, the court decided that in the event of force majeure, the contractor's failure to comply with their contractual obligations due to force majeure renders the breach legitimate. Still, certain conditions must be met, and the court decides this. According to Article 273 of the UAE Civil Law which states that:

> "(1) In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled. (2) In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware."[26]

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22 'General Contract Clauses: Force Majeure (Short Form): Practical Law Canada Commercial Transactions' (*Thomson Reuters Practical Law*, 30 April 2020) <https://ca.practicallaw.thomsonreuters.com/8-606-9145?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 20 February 2024.

23 Mahmoud Reza Firoozmand, 'Force Majeure Clause in Long-Term Petroleum Contracts: Key Issues in Drafting' (2006) 24(3) Journal of Energy & Natural Resources Law 423, doi:10.1080/02646811.2006.11433445.

24 Seng Hansen, 'Does the COVID-19 Outbreak Constitute a Force Majeure Event? A Pandemic Impact on Construction Contracts' (2020) 6(2) Journal of the Civil Engineering Forum 201, doi:10.22146/jcef.54997.

25 Fouad Al-Shuaib, *COVID-19 Pandemic as Exceptional Event or Force Majeure: According to Recent UAE Judicial Application* (UAE Ministry of Justice 2020) <https://www.moj.gov.ae/Content/Userfiles/Assets/Documents/414a6551.pdf> accessed 20 February 2024.

26 Federal Decree Law no 5 of 1985 'Concerning the Issuance of the Civil Transactions Law of the United Arab Emirates' (amended 27 September 2020) art 273 <https://uaelegislation.gov.ae/en/legislations/1025> accessed 20 February 2024.

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Although the law lacks a list of events that can be considered force majeure, it sets several standards for considering an event as force majeure. First, it must cause the performance to be impossible, which makes exhausted performance only insufficient reason to be considered force majeure. Therefore, the lack of financial balance caused by the event is not enough to apply force majeure. A force majeure event in the administrative contract results in the cancellation of obligations and termination of the contract. However, if the impossibility of performance is partial or temporary, then the obligation will lapse only in the part related to the impossibility. If the contract is continuous and the impossibility is temporary, the obligation will be temporarily terminated. In these two cases, the law allows for the termination of the contract provided the debtor is informed. Thus, COVID-19 can be considered a temporary incident as it lasted for a few months, depending on the state's procedures to face the pandemic. Thus, the court has the discretion to decide on a case-by-case basis.

According to Article 273 of the UAE civil code, if force majeure is available, the obligation on the contractor will be cancelled and not postponed or require compensation.[27] However, the result will depend heavily on the type of contract and obligation. For example, if the performance of the contract becomes entirely impossible, the obligation will be cancelled, and the law will terminate the contract with no compensation by the contractor. If the contract is partly impossible to perform, the obligation will be cancelled only on the part related to the impossibility of performance. However, in this case, the obligee must be informed if the obligator wants to terminate the contract.

In a 2016 case by Dubai Court No. 453, the court decided that the trial court has the complete authority to collect and understand the reality of the case and assess its evidence, including expert report as an element of the evidence in the case. The evidence obtained by the court is subject to the absolute authority of the court to take it when it is convinced of it. To understand the force majeure doctrine, the following criteria must be examined.

The unforeseeable requirement is essential to applying force majeure to a contract. To what extent can an event be considered unforeseeable? Although UAE laws lack a specific definition of an unpredicted element, UAE courts explain this issue well. The constructional appeal, Dubai Court of Cassation, Appeal No. 49 of 2014, states that for the force majeure clause to apply, the event must be unforeseeable when forming the contract. The court further stated that the event could not be avoided. Notably, this element will vary depending on the type of contract, which includes different obligations. Thus, an event may be enforceable for some but not all contracts. In turn, the question of forcibility will need either new regulations to define it and set criteria for applying it, or it will remain a case-by-case study with the court deciding each case separately. Therefore, if one or two

27 Al-Shuaib (n 25).

contracting parties predicted or knew about the force majeure event, invoking force majeure in this case will not be applicable.

Unavoidable elements require that the event be beyond the parties' control or the obligee's control. Once the above-mentioned criteria are met, the court will relieve the obligee from the contractual obligation by considering the contract void.

In 2012, Dubai Court of Cassation construction appeal No.174 determined that force majeure requires an act of God. However, Article 287 of the UAE Civil Transaction Law states that:

> "If a person proves that the loss arose out of an extraneous cause in which he played no part, such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering loss, he shall not be bound to make it excellent in the absence of a legal provision or agreement to the contrary."[28]

Natural disasters and force majeure are mentioned in the article as examples of extraneous causes, demonstrating that force majeure is not limited to acts of God, such as natural disasters. Therefore, the court may find force majeure in any event that meets the requirement to apply the doctrine. To this extent, this may widen or limit the range of force majeure depending on the court's view of each case. Dubai Court of Cassation, Case No. 268 of 2009, ruled on November 15, 2009, stating that not receiving approval for construction drawings by the Dubai Ministry of Land is not considered a force majeure event. Another Dubai Court of Cassation ruling, Case No.578, 23-5-2004, stated that seizing the debtor's money is not considered a force majeure event. Therefore, courts are interpreting the doctrine of force majeure.

In summary, force majeure applies to situations outside the control of both parties in a contract. These events are unavoidable and significantly impact one or both parties' ability to fulfil their obligations. To be considered valid, there must be a clear relationship between the incident and the inability to comply with the contract terms.

2.2. Application of Force Majeure on the Pandemic (The case of COVID-19)

With the increasing number of COVID-19 cases, the demands for applying force majeure to evade contractual obligations were expected to increase. It is necessary to carefully examine the theory to prevent contractors from neglecting their obligations and causing harm to public utilities and the administration's interests. The impact of the pandemic depends on the country's economic and political status. A country with a large population growing economically faces greater risks when closed during the pandemic, and its growth

28 Federal Decree Law no 5 of 1985 (n 26) art 287.

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is impeded. It is illogical to immediately apply the force majeure clause in countries that have experienced little or no effect on contracts during the pandemic. It is comprehensive that force majeure depends on the facts of each case and is decided by the court if the required criteria are applicable. Also, it is essential to note that the pandemic can affect some contracts and not others.

For instance, the UAE Ministry of Education suspended in-person classes and shifted to remote learning due to the pandemic, while other ministries continued operating. During a pandemic, the court must thoroughly review administrative contracts to ascertain whether force majeure excuses the contractor's obligation.

In a recent appeal (No. 838/2020) to the Dubai Cassation Court, the court ruled that COVID-19 cannot be considered a force majeure event in this specific case on 7 October 2020.[29] In this case, the plaintiff filed a lawsuit through a performance order requesting the court to force the defendant to pay 9,754,650 AED. Upon a declaration of indebtedness ratified by the notary, the respondent acknowledged his debt and pledged to pay in six instalments. The respondent failed to pay the first instalment on 25 December 2019. On 5 March 2020, the judge issued an order obligating the debtor to pay. The debtor adheres to fulfilling the force majeure conditions that prevent the performance of the debt, represented in the COVID-19 pandemic, and requested the assignment of an accounting expert.

The court determined that force majeure relieves the contracting party of liability to compensate for damages in the event of contract non-performance or breach of obligation if it was caused by an unforeseeable accident that occurred at the time of the contract and was impossible to prevent or evade, making it impossible to fulfil the obligation. Because assessing whether the incident was force majeure is at the discretion of the trial court, the court considers that COVID-19 cannot be invoked as a force majeure because there are no mutual obligations between the two parties in this regard, as the lawsuit was instituted with a debt that is due and payable. The debt met the conditions for obtaining a performance order from being due, fixed in writing, and a specific amount. Thus, the court did not invoke force majeure as it found that the pandemic did not affect the agreed debt payment. Therefore, depending on the court's interpretation, disputes related to COVID-19 as a force majeure may have varying outcomes.

29 *Case no 838 of 2020* (Dubai Court of Cassation, 7 October 2020).

3 EXCEPTIONAL CIRCUMSTANCES AS A LEGAL RELIEF OF CONTRACTUAL OBLIGATION

Many studies examine the effect of COVID-19 on many aspects of life, such as unpaid leave during the pandemic, which causes emotional exhaustion and increased employee distrust towards organisations.[30] It is important to examine the concept of exceptional circumstances to mitigate their impact in the UAE and provide relief, if possible.

According to Article 249 of UAE Federal law concerning Civil Transactions, the phrase "exceptional circumstances" lacks a definition in UAE laws; however, the law mentions the requirements for its application, and court decisions have interpreted the term. Sudden events may affect the obligor's ability to conduct the contract's obligations.[31] In this case, the financial balance between the contract's parties is affected, and exceptional circumstances should be considered. If the court determines that an event is an exceptional circumstance that burdens performance and threatens a significant loss on the obligor, the court will intervene to reduce the obligor's obligation to a reasonable amount. The court has the discretion to decide the amount of relief provided to the obligor, which depends on the type of the contract and the degree of exhaustion imposed on the obligor due to the implementation of the contract.

3.1. The legal concept of "Exceptional circumstances theory" under the purview of UAE laws

An exceptional circumstance is a theory that is driven by French administrative law.[32] Exceptional circumstances refer to a new event outside the obligor's control, which was not foreseen when the contract was formed but caused performance to be oppressive on the obligor. The agency will be obligated to either pay partial and temporary compensation to the obligor or modify the contract's terms so that the obligor can perform the contract obligations.[33] According to the UAE Federal Law No. (5) 1985 Concerning Civil Transaction Law, Article 249 states that:

> "If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void."[34]

30 Moh'd Juma Abdalla and others, 'COVID-19 and Unpaid Leave: Impacts of Psychological Contract Breach on Organizational Distrust and Turnover Intention: Mediating Role of Emotional Exhaustion' (2021) 39 Tourism Management Perspectives 100854, doi:10.1016/j.tmp.2021.100854.

31 Federal Decree Law no 5 of 1985 (n 26) art 249.

32 Mohamad Qdri Hassan, *Administrative Contracts* (Bright Horizon Bookshop 2016).

33 ibid.

34 Federal Decree Law no 5 of 1985 (n 26) art 249.

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When applying the exceptional circumstances theory, several criteria must be considered.

Article 249 outlines six key criteria for determining exceptional circumstances.[35] The event, akin to force majeure, must be unforeseen, as exemplified by the Dubai Court of Cassation in Appeal No. 496, Constructional Appeal, dated 10 May 2017, where the court ruled that the 2008 global financial crisis did not qualify as an exceptional circumstance or a force majeure event. The court deemed the 2008 crisis predictable, negating the criteria needed to establish the exceptional circumstances clause. Second, the event must be public and not specific to only the obligor or a few people. The obligor must not contribute to the loss by not executing the contract's obligations.[36] Article 287 states that:

> "If a person proves that the loss arose out of an extraneous cause in which he played no part, such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering loss, he shall not be bound to make it excellent in the absence of a legal provision or agreement to the contrary."[37]

The Dubai Court of Cassation, in Appeal No.87, a constructional appeal dated 7 July 2013, ruled that if the obligor shared in creating the oppressive burden, the judge may decide differently. Third, the event cannot be prevented with reasonable effort. Fourth, the event needs to happen after the contract is formed but before it is executed. Fifth, the obligor would view enforcing this obligation as oppressive.

The following is a summary of a court ruling from the Dubai Court of Cassation in Appeal No.18 regarding a constructional appeal on 30 May 2010. The court has the authority to decide and evaluate the obligor's burden in a subjective manner. The criteria for this evaluation depend on the type of contract and the impact of extraordinary circumstances on that contract. Sixth, the judge can reduce the obligation upon examination of the event that caused exceptional circumstances. Any agreement contrary to the judge's decision is void.

His Excellency Dr Louay Mohammed Belhoul, Director General of the Legal Affairs Department of the Government of Dubai, confirmed that the COVID-19 crisis brought about profound social and economic transformations, imposing exceptional circumstances on individuals and societies. His Excellency Dr Belhoul stated that the UAE in general, especially the Emirate of Dubai, were at the forefront of countries that had taken the initiative to manage legal risks in handling those events and to address them.[38]

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35 ibid, art 249.

36 Musa and Aziz (n 18).

37 Federal Decree Law no 5 of 1985 (n 26) art 287.

38 '"Dubai Legal" Holds a Conference Around the Reality of Legal Work in the Time of Covid19' (*Government of Dubai Legal Affairs Department*, 13 September 2020) <https://legal.dubai.gov.ae/en/AboutDepartment/Pages/NewsItem.aspx?NewsID=171> accessed 20 February 2024.

His Highness Sheikh Mohammed bin Rashid Al Maktoum, the Vice President and Prime Minister of the UAE and the Ruler of Dubai, predicted that the future of work requires new approaches. He emphasised that the current reality of work is evolving and must change to accommodate these new developments. Furthermore, he urged that preparations be made differently for a post-COVID-19 world, as it requires unique readiness for the changes it brings.[39]

3.2. Application of Exceptional Circumstances Theory on COVID-19

To meet the criteria for being considered exceptional, the judge must determine whether the unforeseeable circumstances. The timing of this decision is of utmost importance. Regarding COVID-19, when did the pandemic truly begin? The impact on contracts could have ended within the first few weeks or months as countries mitigated risks and controlled the effects. It could have reached the point of force majeure, requiring the court's discretion to invoke exceptional circumstances theory.

In a UAE Supreme Court interpretation request No. 2 of the 2020 Constitutional on 27 April 2020, it was ruled that changing the time of the National Council meeting in response to the COVID-19 emergency was permissible. Thus, in this case, breaching the constitutional rules regarding the sessions of the UAE National Council was justified. The National Council had to meet virtually contrary to the requirements and process of the council's session as per the constitution.[40] Consequently, a request to interpret the constitution was submitted to the UAE Supreme Court. The Court faced the question of whether COVID-19 was an enforceable event that virtually justifies the UAE National Council meeting. The court ruled that COVID-19 was, in fact, an enforceable and sudden event that affected the health and well-being of people, which required applying social distancing on all, including the members of the UAE National Council. The justification provided by the court for disregarding the constitution in this matter was solely based on the considerable effects of COVID-19.

Given the persistent danger posed by the virus, the nation acted in line with the current pandemic stage. Protecting people from potential risks warranted the implementation of procedural and preventive measures. One of the primary reasons state institutions use modern technology and visual communication is to maintain the health of individuals. Communication between employees and remote users was crucial for institutional and governmental performance. Due to the state of emergency and the urgency imposed by the

39 Legal Affairs Department of Dubai, 'Discussing the Reality of Legal Work Under Covid-19' (*Daybreak*, 14 September 2020) <https://www.albayan.ae/across-the-uae/news-and-reports/2020-09-14-1.3959522 > accessed 20 February 2024.

40 *Request for Interpretation no 2/2020* (The Federal Supreme Court UAE, 27 April 2020) <https://www.covid19litigation.org/case-index/united-arab-emirates-federal-supreme-court-request-interpretation-no2-2020-2020-04-27 > accessed 20 February 2024.

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virus, the Federal National Council fulfilled its obligations and dealt with exceptional cases regarding its sessions and format. After considering the opinions of many of its members and the principle of openness or confidentiality in the sessions, it was determined that the Federal National Council could continue to conduct its parliamentary and legislative work. During this urgent and emergency phase, exceptions were made to complete tasks remotely using modern technology. However, it is important to note that this exception only applies to emergencies.

It is worth noting that the courts in the UAE tend to avoid applying the force majeure or exceptional circumstances theory to cases. This prevents it from being declared a judicial principle that can be used in similar future events. This cautious approach suggests that the UAE courts considered the pandemic to fall under one of these theories but preferred to decide on a case-by-case basis rather than categorising them under a specific theory.

Another question arises regarding the procedural aspect of contractual obligation and whether COVID-19 restriction rules affected the procedures. Examples include construction contracts. In instances where restriction rules were implemented to limit the spread of the virus, would the obligor be liable for late submission? The question is whether this liability justified late fees on the obligor.

Publishing a general decision by the court considering COVID-19 as a legal relief of contractual obligation would have been highly unjust, as many companies could have used this justification for failure to execute their contractual obligations despite not being affected at all.[41]

The European Union responded to COVID-19 by implementing policies in various fields, including health, consumer, employment and social policy, internal market, food safety, human rights, external trade and relations, and more. On 22 February 2022, the European Union's Council Recommendation (EU) 2022/290 amended the previous Council Recommendation (EU) 2020/912, which dealt with the temporary restriction on non-essential travel into the EU. This amendment introduced several rules to regulate entry into the EU during the pandemic. It highlighted the need to revise the current approach outlined in the Recommendation (EU) 2020/912, considering the implementation of the EU Digital COVID certificate. Additionally, the updated recommendation had to consider the changing circumstances surrounding the pandemic, such as the emergence of the Omicron variant, the increasing number of vaccinations, and the gradual lifting of travel restrictions worldwide.[42]

41 Yassir Al-Iftaihat, 'Covid-19 Pandemic's Impact on the Execution of Contracts' (2020) 8(6) Kuwait International Law School Journal 778.

42 Council Recommendation (EU) 2022/290 of 22 February 2022 amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2022] OJ L 43/79.

The Court of Justice of the European Union ruled (Case C-206/22) that an employee on paid annual leave placed under quarantine may not be entitled to carry over that leave under EU law.[43] An employee took paid annual leave from 3 to 11 December 2020 but was later placed under quarantine because they had been in contact with someone who tested positive for Covid-19. The employee requested that the employer carry over those days of leave, but the employer refused. As a result, the employee took legal action in the labour court, claiming that the employer's refusal was against EU law. According to the court, national law mandates that employers should allow their workers to carry over their leave days only if they can prove that they were unable to work during the leave period. However, the German Court on 14 December 2023 ruled that being under quarantine alone does not constitute an inability to work. The labour court then asked the Court of Justice whether EU law requires that the leave days coinciding with the quarantine be carried over. The Court of Justice ruled that EU law does not require the days of paid annual leave, during which the worker is not sick but is in quarantine due to being in contact with an infected person, to be carried over.

On the other hand, the UAE Federal Authority for Government Human Resources issued new quarantine rules for Federal employees through Circular No. 4 of 2021. According to the guidelines, Federal employees who had received both doses of the COVID-19 vaccine and had contracted the virus or had been in contact with someone who tested positive needed to quarantine and work remotely for a certain period, as directed by the UAE health authorities. On the other hand, employees who had not received both vaccine doses, had contracted the virus, or had been in contact with someone who tested positive were also required to quarantine. The number of quarantine days was deducted from their annual leave. For those who did not have enough leave balance, the quarantine period was treated as unpaid leave. The Authority also stated that these employees were expected to fulfil any work requirements assigned to them during the quarantine period.[44]

Both the legal systems of the UAE and the European Union took precautionary measures to deal with the impact of COVID-19 on employment and administrative contracts, ensuring the prevention of the spread of the virus. Despite the circumstances, both systems maintained their work cycles to provide essential services to the public, which was vital for the consistency of government operations. It was important to provide relief only when applicable, as there was a risk it could be used to avoid fulfilling contractual obligations, even when feasible.

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43 *TF v Sparkasse Südpfalz* Case C-206/22 (Court of Justice EU (First Chamber), 14 December 2023) <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CJ0206> accessed 20 February 2024.

44 FAHR, 'New Quarantine Rules Federal Government Employees' (*UAE National Emergency and Crisis Management Authority (NCEMA)*, 27 January 2021) <https://covid19.ncema.gov.ae/en/News/Details/1644> accessed 20 February 2024.

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4 SEEKING TO REGULATE THE LEGAL RELIEFS FOR FUTURE RISK EVENTS

This study aimed to address and identify the two main theories and their implication within UAE law by exploring the requirements and applications of force majeure and exceptional circumstances. Determining the applicability of these theories to COVID-19 remained unclear. To date, no court decisions produced by the UAE court have considered the pandemic as a force majeure or exceptional circumstance for many reasons, such as the complexity and variety of obligations towards each contract. The impact of the pandemic was vis-a-vis each contract, necessitating the court to examine the effects of the pandemic on the contractual obligation to ascertain whether relief was warranted or risked unnecessary enrichment.

The distinction between force majeure and exceptional circumstances lies in their effects on contractual obligations. A force majeure clause eliminates the obligation entirely, whereas emergency circumstances only limit it. Second, force majeure clauses should only excuse performance if it is impossible, not just onerous, except in exceptional circumstances. To differentiate between the force majeure doctrine and the doctrine of exceptional circumstances, it is important to consider the effects of the event. Force majeure requires a more extreme impact, as it must be impossible to fulfil an obligation. Exceptional circumstances only require that fulfilling the obligation becomes excessively impossible.[45]

Regarding the outcomes of applying these theories, the penalty under force majeure is the termination of the contract. In contrast, the penalty under exceptional circumstances is the amendment of the contract's terms to restore its financial balance.[46]

In the UAE, civil law articles are primarily used to govern the two theories as specific regulations designed explicitly for theories applied to administrative contracts are lacking. In such cases, courts rely on administrative law jurisprudence and other sources, such as laws and precedents, to make their judgment. Examining the force majeure and exceptional circumstances clauses remains a case-by-case analysis.

To regulate the matter, the UAE legislation must issue administrative laws that regulate the main theory, which may lead to relief of the obligor from their contractual obligations. A specialised committee should be established to study the facts of the proposal for each claim and provide recommendations to provide prompt responses that will not affect the performance of the contract. The committee could recommend legal action for cases where force majeure or exceptional circumstances apply or advise the obligor to fulfil contracts where these theories do not align.

Creating a list of pandemic diseases and the magnitude of those types of pandemics could guide the obligor, the committee, and the court in this matter. Once the obligor's claim

45 Musa and Aziz (n 18).

46 ibid.

matches the requirement and the list provided by the ministry, they could file a claim to the committee for further examination of the facts of the claim, thus reducing the number of useless cases in the court and providing legal consultation to clarify the rules applicable to administrative cases. Thus, it helps push the performance of administrative contracts without interruptions, which is essential for the development of agencies.

One main result of this study is that administrative decisions in the UAE are expected to be less strict in the future compared to the beginning of the pandemic. The reason behind this is the introduction of new public employment legislation, which aims to reduce the severity and rigidity of such decisions. For example, modern employment contracts that allow remote work have been introduced due to the pandemic's impact on administrative conditions in the UAE.

Article 6 of the human resources law in the federal government states that:

> "Employment in federal entities shall be subject to one of the following patterns: A. Full-Time: Working for a single federal entity for the full daily working hours, throughout official working days, whether from the workplace, remotely or the hybrid work mode, in accordance with the employment contract or what is agreed upon between the federal entity and the employee. B. Part-Time: Working for a federal entity for a specific number of working hours or days scheduled for work, whether from the workplace, remotely or in a hybrid work mode, in accordance with the employment contract or what is agreed upon between the federal entity and the employee. C. Temporary Work: Work which nature of implementation nature requires a specific period of time, or which focuses on a certain work, ending with its completion. D. Flexible Work: Work which performance hours or working days change according to the employer's volume of work and economic and operational variables, where the employee may work for the employer at variable times according to work conditions and requirements. 2. Based on the Authority›s recommendation, and by a resolution of the Council of Ministers, employment patterns mentioned."[47]

The introduction of remote or hybrid work modes and flexible work represents significant advancements in UAE regulations. These improvements have the potential to benefit administrative agencies, corporations, and individuals who interact with them. The legal reforms suggest a more adaptable approach to handling future crises rather than completely halting work, which could result in financial losses for the UAE.

47 Federal Decree Law no 49 of 2022 'On Human Resources in Federal Government' [2020] UAE Official Gazette 737, art 6.

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5 CONCLUSIONS AND RECOMMENDATIONS

In summary, the force majeure theory differs from exceptional circumstances in several aspects. Firstly, the force majeure theory requires that the obligation becomes impossible due to an unexpected event. In contrast, exceptional circumstances only make it difficult for the contractor to perform the contract due to the unforeseen event. Both theories require that the event is sudden and that neither party to the contract had any idea that it would occur in the future at the time of signing the contract. Each theory has a different result. Force majeure cancels a contract, while exceptional circumstances provide temporary relief from contractual obligations.

It must be noted that the force majeure or exceptional circumstances doctrine may not always apply to contracts performed during the pandemic. Notably, there has been no official statement by the court or the state regarding the applicability of these doctrines to all or certain contracts. Each case has been handled individually to ensure no one is unfairly enriched. This approach will certainly be adopted in the future. It is imperative to thoroughly analyse all legal options and establish the applicable theory to meet the deadline for completing the contract. Doing so can prevent any possible disputes and guarantee a prompt resolution.

The study discovered that neither the force majeure nor the exceptional circumstances theory can be universally applied to all cases. As every contract has its own set of rules and obligations, the court must evaluate each case to determine which theory, if any, is appropriate. However, the study proposes that established policies should be created to guide individuals and agencies in the future on how to act without affecting the essence of the administrative contract and to provide temporary relief that allows the obligor to fulfil their duty. In future pandemics, the UAE may not allow force majeure or exceptional circumstances claims due to the advanced progress, new laws, and policies that effectively address the situation, as suggested by the study.

The new federal human resource law acknowledges the positive impact of COVID-19 on UAE administrative law, allowing for flexible and remote work and education, which is a significant outcome of this study. It is recommended that a separate law be established to govern administrative cases instead of relying on civil transaction law and civil procedural law. Administrative cases are distinct in nature and require unique regulations for administrative decisions and contracts.

The United Arab Emirates should prioritise creating a crisis and pandemic preparation strategy that does not require suspending the agency's work or terminating administrative contracts. This preparation can take the form of more flexible laws. A well-defined policy should clearly outline the criteria for applying the force majeure or exceptional

circumstances theory to future events involving administrative contracts. This will help both the agency and contractors navigate the situation before resorting to legal action.

To effectively manage crises, administrative agency committees specialised in crisis decision management should be established to thoroughly review each administrative decision or contract during a crisis to prevent cancellation. It is recommended that government agencies avoid imposing any restrictions on movement or work during future pandemics that could potentially hinder administrative work. The financial repercussions of the pandemic had a considerable effect on the UAE, making it essential to avoid any monetary losses to prevent claims for compensation from those negatively impacted in the future.

It is important to educate people about the legal theories of relief of contractual obligations, which can be used during difficult situations. In addition, it is important to stay up-to-date with the new legislation issued by the UAE legislative and understand legal tools that can be used during a crisis. Furthermore, having a good understanding of administrative law is crucial for administrative agencies to ensure the proper application of the law.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Практична нотатка

ОЦІНКА ПРАВОВИХ НАСЛІДКІВ ПАНДЕМІЇ COVID-19 ЩОДО АДМІНІСТРАТИВНИХ ДОГОВОРІВ В ОБ'ЄДНАНИХ АРАБСЬКИХ ЕМІРАТАХ: ПОРІВНЯЛЬНИЙ ОГЛЯД

Сумая Абдуларагім Гамдан Нассер Аль Джагоорі*

АНОТАЦІЯ

Вступ. *Це дослідження має на меті встановити, чи кваліфікується COVID-19 як форс-мажор або надзвичайна обставина відповідно до законів Об'єднаних Арабських Еміратів (ОАЕ), і оцінити, чи може такий інститут дозволити обійти договірні зобов'язання. У цій статті з'ясовується, як COVID-19 вплинув на адміністративні договори в ОАЕ, за допомогою використання законів ОАЕ та тематичних досліджень для того, щоб вивчити юридичні теорії, які виправдовують невиконання зобов'язань у таких договорах.*

ОАЕ, як і багато інших країн, зіткнулися з непередбачуваною подією та використали всі свої ресурси та робочу силу для боротьби з небезпекою та для захисту свого народу. Це призвело до різноманітних обмежень, таких як обов'язковий карантин для всіх, хто в'їжджає в ОАЕ, і обмеження на виїзд з країни. Крім того, деякі Емірати в ОАЕ, такі як Абу-Дабі, запровадили обмеження на в'їзд, що зобов'язувало надати негативний результат тесту на COVID-19, а пізніше в'їзд дозволявся лише вакцинованим особам.

Крім того, у статті розглядаються необхідні критерії для демонстрації форс-мажорних або надзвичайних обставин у зазначених контрактах. У цьому дослідженні використовувався аналітичний підхід до вивчення законів і судових рішень. З огляду на отримані результати, спалах COVID-19 не вплинув безпосередньо на адміністративні договори в ОАЕ. Ймовірно, це пов'язано з ефективним підходом влади до ситуації. Слід зазначити, що теорії форс-мажорних обставин і надзвичайних обставин не можна було автоматично й загально застосовувати до всіх договорів, оскільки кожен договір був унікальним і вимагав індивідуального розгляду. У статті представлено потенційні теоретичні та практичні особливості, що відкриває можливості для майбутніх досліджень.

Метою роботи є визначити, яку юридичну теорію, якщо така існує, можна застосувати до COVID-19 – форс-мажорних чи надзвичайних обставин. Крім того, перевірити, чи буде уряд ОАЕ запроваджувати будь-які обмеження на пересування та роботу в очікуванні будь-яких майбутніх пандемій, взявши до уваги політику країни, закони та заходи з підготовки до кризи останніх років.

Методи. *У цій роботі використовується аналітичний підхід для вивчення основних теорій, викладених у Законі ОАЕ про цивільні транзакції № 30 від 2020 року щодо форс-мажору та надзвичайних обставин. Ці теорії можуть забезпечити звільнення від договірних зобов'язань, якщо виконуються певні критерії. У дослідженні перевіряється, чи відповідає COVID-19 одній, обом або не відповідає жодній із цих теорій для звільнення підрядника за адміністративним договором від його зобов'язань через наслідки пандемії. У цій роботі також розглядаються та порівнюються закони та справи Європейського Союзу та Суду Європейського Союзу. Мета — порівняти правові системи ОАЕ та ЄС, зосередившись на адміністративних договорах і рішеннях, прийнятих під час пандемії COVID-19. Також здійснюється аналіз прогресу у боротьбі з пандемією COVID-19 і нещодавню поправку до федерального закону про кадри. Цей аналіз, у якому використовуються різноманітні першоджерела та вторинні ресурси, зокрема дослідницькі статті та книги, здебільшого зосереджується на законах і справах ОАЕ.*

Результати та висновки. *У результаті дослідження було з'ясовано, що COVID-19 значно вплинув на адміністративні договори та рішення в усьому світі, особливо в ОАЕ. Проте юридична теорія може виправдати відхилення від регулярних протоколів через непередбачувані обставини. Також було досягнуто мети пояснити ці теорії за допомогою тематичних досліджень, які слугуватимуть прикладом для майбутніх подібних заходів. Після ретельного вивчення означеної теми було зроблено висновок, що ні теорія форс-мажору, ні теорія надзвичайних обставин не застосовуються до всіх випадків. Через різні правила та зобов'язання кожного договору суд повинен оцінити кожну справу, щоб визначити, яка теорія може бути застосована, якщо така є.*

Тож, з огляду на результати дослідження, рекомендовано встановити чітко визначену політику, якою б керувалися особи та установи в майбутньому щодо того, як потрібно діяти, щоб не вплинути на суть адміністративного договору, і як забезпечити тимчасове послаблення умов договору, яке дозволить зобов'язаному виконувати свої обов'язки. У статті припускається, що ОАЕ, можливо, не дозволять посилатися на форс-мажорні або виняткові обставини під час майбутніх пандемій завдяки значному прогресу, новим законам і політиці, які вражають своєю ефективністю у вирішенні цієї ситуації.

У дослідженні також розглядався новий федеральний закон про кадри, який набрав чинності у 2022 році, що регулює діяльність державних службовців, і положення, які дозволяють віддалену роботу в надзвичайних ситуаціях. Швидка адаптація до цих обставин вказує на збільшення правової гнучкості, що потенційно зменшує залежність від правових теорій для звільнення від договірних зобов'язань у майбутньому.

Важливо зазначити, що доктрина форс-мажорних обставин або надзвичайних обставин не завжди може застосовуватися до договорів, укладених під час пандемії або майбутніх подій, подібних до COVID-19. Жодна офіційна заява суду чи держави не надала

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універсального чи конкретного роз'яснення щодо застосування цих доктрин. Це вказує на те, що для визначення того, чи може звільнення від обов'язку вважатися таким, що підпадає під дію цих теорій, суд повинен його ретельно вивчити та прийняти остаточне рішення. Кожен випадок розглядався індивідуально, щоб ніхто не був несправедливо збагачений. Цей підхід, безсумнівно, буде прийнятий у майбутньому.

Щоб запобігти виникненню спорів і забезпечити їхнє швидке вирішення, необхідно ретельно проаналізувати всі юридичні варіанти та створити прикладну теорію, яка допоможе дотриматися терміну завершення договору. Це може запобігти будь-яким можливим спорам і гарантувати швидке вирішення проблеми. Це особливо критично в адміністративних договорах, які стосуються прав працівників або підрядників, зокрема тих, хто підписав адміністративний договір з урядом, оскільки своєчасне вирішення проблеми впливає на державну службу та інтереси. Затримка у вирішенні таких спорів може перешкоджати циклу розвитку адміністративних органів.

Ключові слова: *COVID-19, форс-мажорні обставини, надзвичайні обставини, адміністративні договори.*

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Case Note

ENHANCING DIGITAL TRANSACTIONS WITH BLOCKCHAIN TECHNOLOGY: DESCRIPTIVE-ANALYTICAL STUDY

Habiba Al Shamsi*

ABSTRACT

Background: *The emergence of Blockchain technology has led to profound transformations in digital transactions, offering a secure and transparent ledger for recording and processing transactions. This innovation holds promise for enhancing security, efficiency, and cost-effectiveness across various sectors, including healthcare, education, finance, and real estate.*
Methods: *This descriptive-analytical study explores the potential of Blockchain technology to revolutionise digital transactions. It employs a comprehensive review of existing literature and case studies to analyse the impact and applications of Blockchain across different domains.*
Results and conclusions: *This research underscores the multifaceted benefits of Blockchain technology in streamlining processes, reducing transaction times, minimising fraud, and lowering costs across diverse industries. Blockchain emerges as a pioneering technology, functioning as the largest decentralised open database and facilitating transparent and secure data management. The technology, categorised into public, private, and hybrid types, comprises fundamental elements such as blocks, consensus mechanisms, cryptographic hash functions, and timestamps. With its core functions of transmission, storage, and automation, Blockchain disrupts conventional processes. Smart contracts, supported by external intermediaries like Oracle Programs, access data from external systems, enhancing their functionality and applicability. Moreover, Blockchain enables a departure from routine practices, ensuring robust monitoring of manufacturing processes, evaluating product quality, and verifying compliance with standards prior to market release.*

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1 INTRODUCTION

Blockchain technology has the potential to revolutionise digital transactions by providing a secure and transparent ledger system. This innovation promises enhanced security, efficiency, and cost-effectiveness across various sectors, including healthcare, education, finance, and real estate. However, despite its numerous advantages, significant challenges must be addressed for effective implementation; one major issue is transaction speed. Blockchain networks, particularly public ones like Bitcoin, often experience slower transaction processing times compared to traditional banking systems, which can handle payments almost instantaneously. This delay is primarily due to the time required for consensus mechanisms to validate and add transactions to the blockchain. To address this, several solutions are being explored. The development of faster consensus algorithms, such as Proof of Stake (PoS), which requires less computational power and time compared to Proof of Work (PoW), can significantly reduce transaction times.

Additionally, Layer-2 scaling solutions like the Lightning Network for Bitcoin enable off-chain transactions later settled on the blockchain, thus increasing the overall transaction speed and reducing congestion. Another substantial challenge is the legal and regulatory hurdles in real estate transactions. Existing legal frameworks for property rights registration are typically incompatible with blockchain technology, leading to potential conflicts and inefficiencies. The traditional process of property registration involves multiple intermediaries and verification steps, which are not inherently built into blockchain systems. To mitigate this, efforts are underway to harmonise blockchain protocols with existing legal systems. Smart contracts, which are self-executing contracts with the terms directly written into code, can be designed to comply with legal standards. Collaborations with regulatory bodies are essential to update and adapt laws to accommodate the use of blockchain for property transactions. This may include the development of new legal frameworks that recognise and validate blockchain-based property records.

Scalability is another critical issue. Blockchain networks struggle to process large volumes of transactions efficiently, which can hinder their adoption for high-frequency trading or large-scale applications. The inherent design of blockchain, where each node in the network must validate every transaction, can lead to significant bottlenecks. Implementing sharding techniques, where the blockchain is divided into smaller, more manageable pieces, can help enhance scalability. Each shard processes its transactions independently, thereby increasing the overall capacity of the network. Additionally, employing sidechains, which are separate blockchains linked to the main blockchain, can offload transactions from the main chain, further improving scalability.

Furthermore, the energy consumption associated with blockchain mining operations is exceedingly high, raising environmental concerns. Mining, particularly in PoW systems, involves solving complex mathematical problems that require substantial computational power and energy. Transitioning to more energy-efficient consensus mechanisms, such as

PoS, can help reduce the energy footprint of blockchain operations. In PoS systems, validators are chosen based on the number of coins they hold and are willing to "stake" as collateral, which consumes significantly less energy compared to PoW. Additionally, developing green energy mining solutions, such as utilising renewable energy sources for mining operations, can further mitigate environmental impacts.

By addressing these issues, blockchain technology can be more effectively integrated into various sectors, realising its full potential while mitigating associated risks. This balanced approach ensures that the transformative promise of blockchain is met with practical solutions to its current limitations.

2 NATURE OF BLOCKCHAIN TECHNOLOGY

To explore the nature of blockchain technology, three key aspects will be covered: defining this modern technology, clarifying its types, and determining its elements.[1]

Blockchain technology is defined as a database that stores records in a block (instead of a collection in a sheet or table). Each block is linked to the next blocks and is signed with a common encrypted signature in cooperation with anyone with sufficient powers. According to the stated definition, blockchain is the largest digital database characterised by security, transparency, credibility,[2] low costs, and immutability. The International Business Machines Corporation (IBM) defines blockchain as a shared ledger technology that allows any network participant to view the transaction system records.[3]

Accordingly, this technology is a decentralised database that stores a record of assets and business processes and collects data and information about all performed transactions within chronologically serial blocks from oldest to newest. These blocks form a chain called a blockchain. Each block contains information related to the previous block.[4] More simply, it is a global ledger that uses the highest level of encryption. When a transaction is carried out, it is published globally, and data is collected in separate blocks, each linked to the previous block and sealed with a digital signature, forming an endless chain that is difficult, if not impossible, to breach. Breaching one block requires altering all the previous blocks, making it highly secure.

1 Farouq Ahmad Faleh Alazzam and others, 'The Nature of Electronic Contracts using Blockchain Technolog – Currency Bitcoin as an Example' (2023) 17(5) Revista de Gestão Social e Ambiental e03330, doi:10.24857/rgsa.v17n5-014.

2 Lian Yuming, *Sovereignty Blockchain 1.0 : Orderly Internet and Community with a Shared Future for Humanity* (Springer 2021) 25.

3 'What is Blockchain?' (*IBM*, 2023) <https://www.ibm.com/topics/blockchain> accessed 7 April 2024.

4 This definition was adopted by the United Kingdom Government Office in its report to the English Government. 'Chief Scientific Advisers' (*Gov.UK*, 2023) <https://www.gov.uk/government/groups/chief-scientific-advisers> accessed 7 April 2024.

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Blockchain technology is not merely a means of digital document storage but a record that aims to prove the existence of such documents and track related transactions. Each block could represent documents, such as transfer documents, concluded contracts, or tax-related transactions. Thus, it is the latest method for collecting and storing administrative and legal processes and transactions.

This technology ensures greater confidence in the encryption system, transparency, credibility, collective oversight, and the ability to mutually verify user transactions, i.e., for all parties simultaneously. Moreover, it provides robust privacy protection, which constitutes the core of blockchain technology. This herald promising applications in strategic areas, such as banking, energy, agriculture, supply chain management, intellectual property, healthcare, digital identity, and other fields, whether in the public or private sector.[5]

Digital blockchain can be categorised based on the authorisation of individuals to access it, and it can be divided into three types: public, private, and hybrid.

Public blockchains, such as Bitcoin, are open to everyone and do not require special permission to join or leave. This is possible because they can be conducted directly without the need for a neutral intermediary to secure them.[6].

Private blockchains, known as permissioned blockchains, are blockchains in which access to data is limited to network users only. Therefore, contrary to the above, it is only possible to enter it with access permission through a central unit, which gives permission to enter the blockchain and conducts and verifies transactions. This type of blockchain is a closed and restricted network subject to the control of an intermediary who can, at any time, change the use controls, such as if an enterprise desires to create its own supply chain to follow up on the movement of supplied goods.[7] It is worth noting that this type is more vulnerable to piracy because securing transactions is made

5 UK Government Office for Science, *Distributed Ledger Technology: Beyond Block Chain: A report by the UK Government Chief Scientific Adviser* (*Gov.UK*, 19 January 2016) <https://www.gov.uk/government/publications/distributed-ledger-technology-blackett-review> accessed 7 April 2024.

6 It is necessary to indicate that Ethereum Platform, which is used to create a decentralized network files, depends on Ether as a cryptocurrency. It includes two types of accounts: externally owned accounts and contract accounts. See: Mohamed Kais Adel Al-Gnbri, 'Blockchain Technology and its Repercussions on the Internal Auditing Profession' (2020) 11 Internal Auditing Journal 26; Parth Kothari and others, 'Smart Contract for Real Estate Using Blockchain' (Proceedings of the 3rd International Conference on Advances in Science & Technology (ICAST) 2020) doi:10.2139/ssrn.3565497 <https://ssrn.com/abstract=3565497> accessed 7 April 2024; Rahime Belen-Saglam and others, 'A Systematic Literature Review of the Tension between the GDPR and Public Blockchain Systems' (2023) 4(2) Blockchain: Research and Applications 100129, doi:10.1016/j.bcra.2023.100129.

7 Ayman Mohamed Sabry Nakkhal, 'The Impact of the use of Digital Block Technology "Blockchain" on the Responsibility of the Auditor' (2020) 24(1) Accounting Thought Journal 11.

by the network administrator. Therefore, some consider it just a deceptive or fake appearance of blockchain technology.[8]

Hybrid blockchains[9] combine the characteristics of the previous two types, forming a somewhat open network, i.e., between a limited number of enterprises that are linked to each other through common transactions, such as commercial companies, financial banks, and some government agencies.[10]

The blockchain system consists of four elements: block, single order, hash, and time stamping, which together form the blockchain. They are explained as follows:

It is the building unit of blockchain. It can be metaphorically called "A container that holds the upper part of the blockchain." It contains the block number, code of the previous block, time stamping, i.e., when a blockchain is created, and data of the agreement algorithms. The second part is the blockchain content, the lower part of the blockchain. It contains transaction data, such as amounts, addresses of parties, and the code of the current blockchain.[11]

Hence, the block is a set of processes or functions required to be performed or executed within the blockchain, such as money transfer, data recording, or follow-up of a specific situation. Thus, each block accommodates a certain amount of similar transactions. Then, another block is created that is chronologically linked to it. Each group of these blocks is regulated by a single blockchain, and the blockchains grow steadily with each group of transactions recorded in a new block. This is to prevent any fake transactions within the block, which may freeze the blockchain or prevent it from recording and finalising transactions.[12]

The structure of the block has a single order. It is the sub-process that takes place within a single block. Therefore, along with other single orders, it represents the block itself.

In the structure of the blockchain program, the hash also takes place. It is the encryption, i.e., a code or a symbol of fixed length. It is the distinctive DNA of the blockchain. It can be called a digital signature. It is produced through an algorithm within the blockchain program called the 'Hash Function.' It has four main functions: distinguishing a blockchain

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8 Ihab Khalifa, 'Blockchain: The Next Technological Revolution in the World of Finance and Management' (2018) 3 Academic Papers of the Future Center for Advanced Research and Studies 1 <https://futureuae.com//media/Ehabpdf_d1f747f1-7ba7-4390-bd3f-918c5dbf6ead.pdf> accessed 7 April 2024.

9 It is called hybrid because some of the devices connected to this network may be public and others may be private.

10 Ashraf Gaber, 'Blockchain and Digital Evidence of Copyright' (2020) 1 International Journal of Doctrine, Judiciary and Legislation 37, doi:10.21608/IJDJL.2020.49876.1038.

11 Mada Al-Rahili and Hanaa Al-Dahawi, 'Development of Real Estate Rental Sector Aligned with the Digital Transformation of Saudi Arabia: Proposed Study of Blockchain Technology' (2020) 1 Journal of Information Studies and Technology 6, doi:10.5339/jist.2020.5; Gaber (n 10) 38.

12 Khalifa (n 8) 2.

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from others, identifying each block, marking each piece of information within the block itself with a distinct hash, and finally linking blocks to each other within the blockchain. Therefore, the hash does not allow modification to blocks that have been created, as each block is linked to the previous hash and the following hash. Thus, the hash goes in only one direction of the original block that follows it.

One of the elements of a blockchain system is time stamping. It is the stamp, or what is referred to as the digital date. It is the time at which any process is conducted to create a block or data within the blockchain. A unique digital stamp consisting of an encrypted set of letters and numbers is created, which in turn constitutes the code or hash that distinguishes the data creation process from all others.

3 LEGAL IMPORTANCE OF BLOCKCHAIN TECHNOLOGY

This chapter will discuss three issues to shed light on the legal importance of this technology by listing its most important functions, explaining its characteristics,[13] and finally presenting the most important blockchain applications, as described in the following three sections:

3.1. Functions of Blockchain Technology

Blockchain technology provides clear functions, especially in a world that needs to provide and create an ideal environment for trust and security. It is a database in which data is stored and managed from a single source. Data management and storage processes are characterised by being decentralised and distributed across a computer network (peer-to-peer network, i.e., decentralised). This database is secured by protected encryption, through which transactions are processed by computers and ultimately uploaded to the database. This network is either completely public, i.e., available to all interested users, or private, i.e., designed for users with the ability or permission to participate.

It is available to participants with no need to transfer information, manually or in writing, from one party to another. Further, there is no need to store information. Thus, the blockchain database has grown to form a comprehensive record that includes all transactions conducted since the creation of the database. Therefore, once data is stored, it becomes impossible to delete, remove, change, or edit it. According to the blockchain system, data is immutable and resistant to modification, manipulation, or fraud.[14]

In view of the foregoing, it can be said that this technology performs three simultaneous functions: transmission, storage, and automation.

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13 Enas Mohammed AlQodsi, Iyad Mohammad Jadalhaq and Mohammed El Hadi El Maknouzi, ‘Comparative Legal Perspectives on Voluntary Restraints: Analyzing the Adaptation of Preventive Conditions on Property Rights’ (2024) 10(9) Heliyon e30509, doi:10.1016/j.heliyon.2024.e30509.

14 Kothari and others (n 6).

From the outset, blockchain technology aims to facilitate two main processes: the transfer of cryptocurrencies and the transfer of assets. The first process enables the creation of virtual or digital currencies, such as cryptocurrencies like Bitcoin and Ethereum, represented by digital symbols that are traded securely without intermediaries. These transactions occur on decentralised networks, ensuring transparency and security.

In the second process, blockchain technology allows for the transfer of various types of assets. For example, it supports the secure transfer and management of assets like real estate titles, intellectual property rights, and commodities. This capability is bolstered by the technology's decentralised ledger system, which records ownership changes transparently and immutable. While blockchain enhances transactional transparency and security, it is important to note that it operates within the legal frameworks governing asset transfers, ensuring compliance with applicable laws and regulations.[15]

A blockchain has a very important characteristic, namely keeping records, which allows no opportunity for fraud and deception during the execution of transactions. It helps access, exchange, and manage data at any time between users, which raises confidence in the data exchange process at all levels and in all areas. In banking transactions, when exchanging customer data, blockchain technology accurately determines their financial position and solvency to ensure that none are included in the trading ban list.[16] Within the Insurance Law, this function helps exchange data between insurers, especially during reinsurance processes. Likewise, in the medical area, the storage function enables the exchange of patient information and data through their electronic files and records, which ensures that no medical errors have occurred and the confidentiality of this data is maintained.

Blockchain technology can be considered the foundation on which artificial intelligence is based. In addition to both the functions of storing and retrieving the digital content installed on it securely and transparently for all users, it enhances and develops artificial intelligence systems[17] by allowing the integration of systems with the digital content stored on it. The best evidence is what blockchain technology offers as a platform that supports the automation of the contractual process, commencing from the preliminary stages of the contract, the stage of conclusion, and ending with its performance, passing through the application of some penalties for violation of implementation. Truly, it manages the contract system via an intelligent self-management.[18]

15 Gaber (n 10) 39.

16 Emad Abdel Rahim Dahiyat, 'Online Shopping and Consumer Rights in the UAE: Do we Need a Specific Law?' (2019) 33(1) Arab Law Quarterly 35, doi:10.1163/15730255-12331014.

17 Yue Liu and others, 'Decentralised Governance for Foundation Model based Systems: Exploring the Role of Blockchain in Responsible AI' (*arXiv*, 21 February 2024) arXiv:2308.05962v3 [cs.SE], doi:10.1109/MS.2024.3369551.

18 Gaber (n 10) 40.

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3.2. Characteristics of Blockchain Technology

There is no doubt that the emergence of blockchain technology has provided great opportunities to deliver decentralised services,[19] especially in an environment and climate that requires more trust, such as government services for documenting personal data, whether in the area of identity, taxes, or medical records. The blockchain system provides a distinctive environment that is the most secure in storing and encrypting data to date. It is supported by the encryption feature, which replicates all data or processes recorded on the network in all connected devices. This achieves administrative decentralisation and a lack of central control over records. Thus, there is no employee or specific person responsible for the system. Rather, all network participants are the guarantors of trust and decentralisation, meaning no intermediation or documentation offices exist.[20]

Rather, they are replaced by the blockchain network as a third party distributing documented information. At the same time, this network places trust directly in its members, where every member or participant, whether a consumer or a supplier, becomes a contributor to the documentation and proof process through smart, direct communication devices.[21]

Given the multiplicity of functions provided by the blockchain system, a multitude of characteristics it possesses can be found. It is an administrative and financial system capable of accomplishing unique functions while saving the greatest possible time, effort, and cost. At the same time, it ensures the monitoring of all processes carried out by this unique system. In view of the above, it can be said that blockchain technology has several advantages and characteristics within which individuals' transactions are carried out.

The first advantage to draw attention to in this study is open record. It allows all users, whether a public or private entity, to record and manage their data and information. Such information is available to everyone, and all participants within the blockchain can view each other's property. This may be the main flaw of this system, as it enables one to know personal information relating to specific individuals. For example, when it comes to sending money, one may know the amount of money, the purpose of sending it, and the

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19 Surbhi Sharma and Rudresh Dwived, 'A Survey on Blockchain Deployment for Biometric Systems' (2024) 4(2) IET Blockchain 124, doi:10.1049/blc2.12063.

20 It is known that any financial transaction using money requires an intermediary to carry it out, whether by banks, government institutions, or companies. Most of them still suffer from slow and routine completion of transactions, in addition to high commission rates or fees imposed on services. See: Saleh Ali Abu Al-Nasr, 'Blockchain Technology and the Impact of its Application in the Financial Sector (Banks) in the Kingdom of Saudi Arabia' (2022) 23(1) Journal of the Faculty of Economics and Political Science of Cairo University 46, doi:10.21608/jpsa.2022.211366.

21 Marcelo Corrales, Mark Fenwick and Helena Haapio, 'Digital Technologies, Legal Design and the Future of the Legal Profession' in M Corrales, M Fenwick and H Haapio (eds), *Legal Tech, Smart Contracts and Blockchain* (Perspectives in Law, Business and Innovation, Springer 2019) 4, doi.org/10.1007/978-981-13-6086-2_1.

sender's relationship to the recipients at the time of sending by reviewing the record. Accordingly, this information can be used later to organise a criminal act within family members. However, it may be difficult to pinpoint their true identities because the blockchain allows them to use nicknames, which makes it difficult to pinpoint a person's true identity, even though it is easy to know the amount of money and properties.[22]

The next one is a distributed database. It is a decentralised network,[23] as the blockchain is distributed among all individual participants across the world. This is an element of security. If a hacker wants to break through the blockchain, it must break through all individuals in it, which seems unlikely.

The blockchain system also allows the tracking of all steps related to a transaction, which reflects positively on ensuring that the service is provided with the best possible quality. By using the capabilities of computers to search for the correct hash or distinctive code of transaction to be carried out successfully, it ensures that the quality of manufacturing processes is monitored, the quality of final products is evaluated, they comply with standards before being put on the market, and no tampering or fraud occurs.[24]

This blockchain can settle transactions and deals in record time and more quickly compared to other systems that require more traditional manual auditing.[25]

The blockchain system undoubtedly helps government agencies achieve institutional effectiveness, as all individual transactions are clear within the blockchain. If information, certificates, or documents need to be verified, they can be viewed easily, which saves time and breaks the routine.

3.3. Applications of Blockchain Technology

Blockchain technology has revolutionised various sectors by enhancing transparency, security, and efficiency. Below is a detailed exploration of its applications, focusing on real-world implementations in legal contexts and other critical areas.

Blockchain enables individuals to register various assets, including jewellery, cars, patents, and intellectual property rights. This secure and transparent registration system protects ownership rights and facilitates transactions. For example, individuals can sell possessions via blockchain or conduct other transactions, ensuring data immutability and transparency.

22 ibid 4.
23 Archana Chhabra and others, 'Navigating the Maze: Exploring Blockchain Privacy and Its Information Retrieval' (2024) 12 IEEE Access 32089, doi:10.1109/ACCESS.2024.3370857.
24 Khalifa (n 8) 2.
25 Ayman Mohammad Sabry Nakkhal, 'The Impact of Blockchain on Auditor Responsibility' (2020) 24(1) Accounting Thought Journal 754.

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Blockchain technology can replace traditional intermediaries in various processes. For instance, blockchain can substitute real estate registries and traffic departments, offering a more transparent and efficient system.

In banking, blockchain reduces transaction processing costs, accelerates operations, and ensures data security. It minimises fraud and operational errors and enhances trust in financial transfers. Banks can benefit from blockchain's decentralised infrastructure, which reduces operating costs and improves efficiency.

Blockchain is used to document various transactions, whether personal, corporate, or governmental. This includes monitoring aircraft itineraries, factory production lines, or oil tankers, all under careful scrutiny to ensure quality and accuracy.

One of the known fields of using blockchain technology is smart contracts. Smart contracts are self-executing contracts with terms directly written into code. They facilitate automated, secure execution of agreements, reducing the need for intermediaries and minimising transaction costs. Key stages include:

1) **Contract Negotiation**: Automatically sending contract documents on specified dates.
2) **Contract Performance**: Executing obligations upon specific events, such as insurance payouts for crop damage.
3) **Contract Termination**: Automatically terminating contracts if obligations are unmet.

In addition to the above, blockchain simplifies real estate trading by providing a transparent platform for property transactions. It allows easy review and evaluation of property conditions without needing technical inspections. This transparency attracts owners, lessees, and buyers, enhancing the overall efficiency of the real estate market.

The practical applications of blockchain technology in legal contexts have expanded significantly, offering innovative solutions for handling legal disputes, property transactions, notarisation, digital identity management, and corporate filings. These applications leverage blockchain's features of transparency, security, and immutability to enhance the efficiency and reliability of various legal processes.

A primary example is blockchain courts in China. China has pioneered blockchain technology in its legal system by establishing blockchain courts. These courts aim to handle legal disputes more efficiently and transparently. Key aspects include:

1) **Immutable Records**: Blockchain ensures that all case records and evidence are stored in an immutable ledger, which prevents tampering and guarantees the integrity of the information. This feature is crucial for maintaining trust and transparency in judicial processes.
2) **Efficiency and Speed**: The automation capabilities of blockchain reduce the time required for various legal procedures, from filing cases to rendering

judgments. Smart contracts can automate certain aspects of the legal process, such as the execution of court orders, which streamlines operations and reduces administrative burdens.

3) **Transparency**: All parties involved in a legal dispute can access the blockchain ledger to verify the authenticity of records and evidence. This openness fosters trust in the judicial system and ensures that all actions taken by the court are visible and accountable.

Another example can be found in Sweden. Sweden has implemented blockchain technology in its real estate registers to enhance the security and efficiency of property transactions. Blockchain's decentralised and immutable nature ensures that property transactions are secure and resistant to fraud. Each transaction is recorded in a blockchain ledger, creating a transparent and tamper-proof history of property ownership. By automating the recording and verification of property transactions, blockchain reduces the time and cost associated with traditional real estate processes. Smart contracts can facilitate automatic transfers of ownership and payments once predefined conditions are met, expediting transactions. The transparency and immutability of blockchain make it difficult for fraudulent activities to occur. All parties involved in a property transaction can verify the authenticity of the records, reducing the risk of disputes and legal challenges.

The United Arab Emirates (UAE) has adopted blockchain technology for notarisation services, transforming how documents are verified and authenticated. Blockchain enables the secure and efficient verification of documents, significantly reducing the time required for notarisation. Documents are uploaded to the blockchain, where their authenticity is verified and recorded in an immutable ledger. The decentralised nature of blockchain ensures that notarised documents are stored securely and cannot be altered or tampered with. This enhances the integrity and trustworthiness of official documents. The automation capabilities of blockchain can simplify and accelerate various notarisation processes, such as verifying signatures, validating documents, and issuing certificates. This reduces administrative burdens and improves overall efficiency.

Estonia has been a pioneer in incorporating blockchain technology into its e-residency and digital identity systems. These systems provide a secure and transparent platform for managing digital identities, which are crucial for various legal and administrative processes. Blockchain ensures the secure and immutable storage of digital identities, protecting against identity theft and fraud. Residents and e-residents can use their digital identities to access a wide range of online services, from banking to government services. The transparency of blockchain allows individuals and organisations to verify the authenticity of digital identities and transactions. This fosters trust in digital interactions and enhances the security of online services. Blockchain simplifies and accelerates various administrative processes by enabling the secure and efficient verification of digital identities. This reduces the need for physical documentation and in-person verification, improving overall efficiency.

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Delaware in the USA, known for its business-friendly legal environment, has adopted blockchain technology for corporate filings. This innovation enhances the security and transparency of managing corporate records and transactions. In this case, blockchain ensures that corporate records are stored securely and cannot be altered or tampered with. This protects against fraud and unauthorised access, ensuring the integrity of corporate data. The transparency of blockchain allows all parties involved in corporate transactions to verify the authenticity and accuracy of records. This reduces the risk of disputes and enhances trust in corporate governance. Blockchain automates various aspects of corporate filings, such as updating shareholder records, recording transactions, and issuing dividends. This reduces administrative burdens and improves the efficiency of corporate management.

The integration of blockchain technology into legal contexts worldwide has proven to be transformative. By ensuring the security, transparency, and efficiency of various legal processes, blockchain addresses many of the challenges faced by traditional systems. As more countries and sectors adopt this technology, its potential to revolutionise the legal landscape continues to grow, offering innovative solutions that enhance trust, reduce fraud, and improve overall efficiency in legal and administrative processes.

Blockchain technology ensures that daily transactions, such as money transfers, shipments, and government transactions, are secure and transparent. This reduces the risk of fraud and errors, enhancing customer confidence and trust.

Blockchain technology's immutable nature prevents manipulation of transactions post-completion. This characteristic is crucial for ensuring the integrity of various processes, from money transfers to property registration. The technology's potential to prevent fraud and enhance security makes it invaluable in creating customer confidence and raising reassurance in various sectors globally. By focusing on these practical applications, the transformative potential of blockchain technology in enhancing legal systems, property registration, financial transactions, and more can be appreciated.

3.4. Recommendations for Legal Integration

To effectively integrate blockchain technology into real estate asset management, developing comprehensive frameworks that align with existing legal systems governing property rights and registrations is essential. These frameworks must address regulatory requirements while leveraging the efficiency and transparency benefits of blockchain. Establishing industry standards for blockchain applications in real estate transactions, including standardised smart contract templates, verification processes, and data security protocols, promotes uniformity and reliability across platforms. Implementing training programs for real estate professionals, auditors, and stakeholders on the benefits, implementation strategies, and legal implications of blockchain technology enhances competency and promotes the effective utilisation of blockchain tools in real estate asset

management. Collaborating with regulatory bodies to clarify the legal implications and obligations related to blockchain technology in real estate transactions reduces uncertainty and encourages broader adoption among stakeholders. Additionally, enhancing blockchain platforms with robust privacy and security measures safeguards sensitive real estate data from unauthorised access and ensures compliance with data protection regulations. By integrating these recommendations, the seamless adoption of blockchain technology in real estate asset management can be achieved, enhancing efficiency, transparency, and trust among stakeholders while respecting legal frameworks and regulatory requirements.

4 JUSTICE AND RIGHTS PROTECTION

Blockchain technology represents a paradigm shift in enhancing justice and rights protection within the UAE's legal framework. At its core, blockchain offers unparalleled transparency, immutability, and security, making it an ideal tool for safeguarding sensitive legal and financial transactions.[26]

In the UAE, blockchain's impact on justice and rights is profound, particularly in the realm of intellectual property (IP) rights protection. Intellectual property assets, such as patents, trademarks, and copyrights, are critical to fostering innovation and economic growth.[27] Blockchain provides a robust solution for securely recording and verifying ownership of these assets. By immutably storing IP transactions on a decentralised ledger, blockchain ensures that ownership claims are tamper-proof and indisputable. This capability is crucial in legal disputes where proving ownership and authenticity is paramount. Through initiatives like the Emirates Blockchain Strategy 2021, the UAE government recognises the transformative potential of blockchain in protecting IP rights, thereby fostering a conducive environment for innovation-driven industries.

In addition to IP rights, blockchain technology holds promise in revolutionising electoral processes. Transparent and secure voting systems powered by blockchain can eliminate concerns over electoral fraud and manipulation. Each vote cast is recorded on the blockchain in a manner that prevents unauthorised changes or deletions. This ensures the integrity and accuracy of election results, upholding democratic principles of fairness and transparency. By leveraging blockchain for elections, the UAE can enhance public confidence in the electoral process and strengthen democratic governance.

Furthermore, blockchain's application extends to land registry systems, which are foundational to property rights protection. In the UAE's booming real estate sector,

26 Vishnu Chandra and Baladevan Rangaraju (eds), *Blockchain for Property: A Roll Out Road Map for India* (India Institute 2017).

27 Enza Cirone, 'Building a Techno-Legal Framework for Blockchain Technology and Data Protection under EU Law' (Doctoral thesis, Università degli Studi di Firenze 2024) <https://hdl.handle.net/2158/1349674> accessed 7 April 2024.

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blockchain offers a decentralised platform for recording property transactions securely and transparently. Traditional land registry systems often face challenges such as fraudulent transactions and lengthy bureaucratic processes. Blockchain addresses these issues by maintaining an immutable record of property ownership and transaction history. This not only reduces the risk of disputes but also streamlines property transactions, making the process more efficient and trustworthy.

To fully realise the benefits of blockchain in justice and rights protection, the UAE is actively developing and refining legal frameworks that accommodate blockchain technology. These frameworks aim to clarify the legal status of blockchain records and smart contracts,[28] ensuring their enforceability under UAE law. Collaborative efforts between technologists, legal experts, and policymakers are crucial in shaping these frameworks and addressing regulatory challenges associated with blockchain adoption.

Moreover, the UAE government's proactive stance on integrating blockchain into public services underscores its commitment to transparency, accountability, and efficiency. By embracing blockchain technology, the UAE aims to reduce administrative burdens, combat corruption, and enhance public trust in government operations.

In conclusion, blockchain technology holds immense potential in advancing justice and rights protection within the UAE and beyond. By leveraging its transparency, immutability, and security features, the UAE can establish itself as a global leader in innovative governance and legal practices. Through strategic integration and ongoing collaboration, blockchain will continue to play a pivotal role in shaping a more secure, transparent, and equitable society in the UAE.

5 CONCLUSIONS

Blockchain technology stands at the forefront of innovation, offering profound implications across various sectors worldwide. This study has delved into its fundamental characteristics, diverse applications, and the transformative potential it holds, especially within the context of the Arab region. As global interest in AI integration grows, blockchain emerges as a pivotal tool in enhancing transparency, security, and efficiency in legal and transactional processes.

The categorisation of blockchain into public, private, and hybrid variants underscores its versatility, supported by essential components like blocks, consensus mechanisms, hashing, and timestamping. Its inherent functionalities–transmission, storage, and automation–demonstrate its capacity to revolutionise traditional practices. Smart contracts, facilitated

28 Enas Mohammed Alqodsi and Leila Arenova, 'Smart Contracts in Contract Law as an Auxiliary Tool or a Promising Substitute for Traditional Contracts' (2024) 16(3) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 06524004, doi:10.1061/JLADAH.LADR-1132.

by Oracle programs, exemplify blockchain's capability to automate and secure contractual agreements, thereby streamlining operations and reducing transactional friction.

Moreover, blockchain technology is crucial in breaking traditional routines, monitoring manufacturing processes, ensuring product quality, and enforcing regulatory compliance. The significant operational savings reported in the banking sector of the United Arab Emirates serve as a testament to blockchain's efficiency in handling global transactions securely and cost-effectively.

6 RECOMMENDATIONS

1. Legal Framework Advancement:

Initiating comprehensive studies to thoroughly assess blockchain's legal implications in the Arab region is essential. These studies should include detailed examinations of how blockchain enhances the authenticity and security of digital proof and electronic transactions. Comparative analyses with global best practices and case studies specific to Arab countries will be crucial in developing robust legislative frameworks. Collaboration with legal experts, policymakers, and industry stakeholders is needed to draft clear regulatory frameworks that facilitate the adoption of blockchain technology. Addressing legal challenges such as contract enforcement, data privacy, intellectual property rights, and liability in transactions conducted via blockchain is imperative. This proactive approach will ensure legal certainty and foster innovation in blockchain applications across various sectors.

2. Educational Initiatives:

Establishing specialised training programs tailored for legal professionals, government officials, and industry leaders is crucial to enhancing their understanding of blockchain technology. These programs should focus on practical applications, legal implications, and regulatory compliance specific to the Arab region. Incorporating case studies and simulations will prepare stakeholders for real-world scenarios involving blockchain implementation. Additionally, launching targeted awareness campaigns through seminars, workshops, and industry conferences is necessary to educate a broader audience about blockchain's transformative potential. These campaigns should highlight successful use cases and practical challenges faced in integrating blockchain into existing legal and transactional frameworks. Engaging with academia, research institutions, and international experts will further enrich discussions on emerging trends and innovations in blockchain technology.

3. Collaborative Research Initiatives:

Fostering collaborative research initiatives between government entities, academic institutions, and private sector organisations is essential to explore blockchain's applications

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across diverse sectors. Encouraging interdisciplinary research will address technological advancements, regulatory requirements, and societal impacts of blockchain adoption. Additionally, conducting studies to assess the feasibility of integrating blockchain across regional borders within the Arab region is crucial. Exploring potential frameworks for cross-border transactions, regulatory harmonisation, and interoperability of blockchain platforms will promote regional cooperation and enhance the scalability of blockchain solutions in facilitating international trade, finance, and governance.

4. Support for Blockchain Startups:

Establishing incubation programs and funding opportunities is essential to support blockchain startups and innovators in the Arab region. Providing mentorship, networking platforms, and access to resources will enable these startups to develop and scale blockchain-based solutions effectively. Additionally, creating innovation hubs and technology clusters specialising in blockchain research and development will facilitate collaboration among startups, academic institutions, and industry leaders, thereby accelerating innovation and promoting entrepreneurship in blockchain technology.

5. Policy Advocacy and International Engagement:

Advocating for favourable policies that promote blockchain adoption and innovation at national and regional levels is crucial. Engaging with policymakers, regulatory bodies, and international organisations allows for influencing policy decisions that support blockchain's integration into mainstream economic and legal frameworks. Furthermore, strengthening international collaboration and knowledge exchange on blockchain technology through partnerships with global organisations, diplomatic missions, and international forums is essential. Participating in global initiatives helps shape international standards, protocols, and governance frameworks for blockchain technologies, ensuring their effective implementation and scalability worldwide.

In summary, advancing blockchain technology in the Arab region requires a multi-dimensional approach encompassing legislative refinement, educational empowerment, collaborative research, support for startups, and proactive policy advocacy. By fostering an enabling environment and building capacity among stakeholders, the Arab region can harness the full potential of blockchain to drive economic growth, enhance transparency, and promote digital innovation across sectors. In conclusion, while blockchain technology promises transformative benefits across various domains, including legal and transactional sectors in the Arab region, future studies must underscore these advancements with empirical evidence tailored to regional contexts. This approach ensures that policy recommendations and practical applications align effectively with regional realities, fostering sustainable development and innovation in blockchain technology.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Практична нотатка

ПОКРАЩЕННЯ ЦИФРОВИХ ТРАНЗАКЦІЙ ЗА ДОПОМОГОЮ ТЕХНОЛОГІЇ БЛОКЧЕЙН: ОПИСОВО-АНАЛІТИЧНЕ ДОСЛІДЖЕННЯ

Хабіба Аль Шамсі*

АНОТАЦІЯ

Вступ. *Поява технології блокчейн призвела до ґрунтовних трансформацій у сфері цифрових транзакцій, запропонувавши безпечний і прозорий реєстр для запису та обробки транзакцій. Ця інновація обіцяє підвищити безпеку, ефективність та*

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рентабельність у різних секторах, включно з сектором охорони здоров'я, освіти, фінансів та нерухомості.

Методи. *Ця описово-аналітична робота досліджує потенціал технології блокчейн для революційної зміни в цифрових транзакціях. У ній використовується всебічний огляд наявної літератури та тематичних досліджень для аналізу впливу та застосування блокчейн у різних сферах.*

Результати та висновки. *Це дослідження підкреслює багатогранні переваги технології блокчейн в оптимізації процесів, скороченні часу транзакцій, мінімізації шахрайства та зниженні витрат у різних галузях. Блокчейн є новаторською технологією, яка функціонує як найбільша децентралізована відкрита база даних і сприяє прозорому та безпечному управлінню даними. Ця технологія, що поділяється на публічні, приватні та гібридні типи, складається з таких фундаментальних елементів, як блоки, механізми консенсусу, криптографічні хеш-функції та часові мітки. Завдяки своїм основним функціям передачі, зберігання та автоматизації, блокчейн руйнує традиційні процеси. Смарт-контракти, які підтримуються зовнішніми посередниками, такими як програми Oracle, отримують доступ до даних із зовнішніх систем, що покращує їх функціональність і застосовність. Крім того, блокчейн дозволяє відійти від рутинних практик, завдяки можливості забезпечувати надійний моніторинг виробничих процесів, здійснювати оцінку якості продукції та перевірку відповідності стандартам перед випуском на ринок.*

Ключові слова: *блокчейн, збережені дані, біткоїн, цифрові транзакції.*

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Review Article

POTENTIAL CONFLICTS IN PERSONAL DATA PROTECTION UNDER CURRENT LEGISLATION IN VIETNAM COMPARED WITH EUROPEAN GENERAL DATA PROTECTION REGULATION

Hoa Thanh Ha and Tuan Van Vu*

ABSTRACT

Background: *Transatlantic data transfers are a critical component of the global digital economy, facilitating commerce and communication among countries worldwide. However, these transfers have been fraught with legal and regulatory challenges, particularly concerning protecting personal data due to the lack of a comprehensive global privacy law.*

Methods: *This comparative, descriptive study exploits secondary resources by comparing and contrasting the principles of the European General Data Protection Regulation and the new Decree on personal data protection in Vietnam to provide deep insights into the differences between them.*

Results and Conclusions: *Although the Decree takes advantage of many of the European General Data Protection Regulation's principles, i.e., the rights of data subjects, consent requirements, and the need for impact assessments, it has its provisions specific to the Vietnamese context, such as the absence of "legitimate interests" as a legal basis for processing and the unique enforcement mechanisms. Despite many similarities, the specific requirements around consent, data subject rights, breach notification, extraterritorial data transfers, and enforcement mechanisms might result in conflicts among these legislative documents. The Decree, which would become more effective, shall rely on its enforcement mechanisms and the ability to impose meaningful sanctions for non-compliance; thus, it should incorporate a more detailed sanctions regime to deter violations effectively.*

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1 INTRODUCTION

Transatlantic jurisdictional conflicts regarding privacy and personal data protection have emerged as growing global concerns worldwide. The increased reliance on the Internet and e-commerce activities has prompted countries to enact data privacy laws to safeguard individuals' personal data. However, the situation where there is a lack of one comprehensive international privacy law governing personal data protection worldwide[1] necessitates a global legal instrument to establish a common unified framework for lawfully collecting, using, and storing the personal data of individuals.[2] Currently, personal data protection is counted as a relatively new field of laws which has been constructed and developed within certain countries or regions.[3]

Unfortunately, since no single supervising authority is in charge of enforcing a comprehensive international regulatory framework, States must individually legislate and implement their own legislative regulations to address the issue of personal data protection, which directly affects transatlantic privacy data. Besides, differences in transatlantic regulations are likely to create legal hindrances for multi-jurisdictional businesses to comply with potentially conflicting rules.[4] Due to the rapid global integration, personal information sharing and use occur across national borders. It is consequently impossible to adequately protect citizens' privacy data within a country's borders. In this regard, data privacy protection can be seen as an international issue that needs harmonisation and comprehensive solutions to be regulated by the world privacy laws applicable within certain countries or regions.[5]

1 Alsamara Tareck, 'Legal Mechanisms for the Stimulation of the Digital Economy in Developing Countries' (2023) 6(Spec) Access to Justice in Eastern Europe 72, doi:10.33327/AJEE-18-6S002.

2 Florent Thouvenin and Aurelia Tamò-Larrieux, 'Data Ownership and Data Access Rights: Meaningful Tools for Promoting the European Digital Single Market?' in M Burri (ed), *Big Data and Global Trade Law* (CUP 2021) 316, doi:10.1017/9781108919234.020.

3 Emmanuel Pernot-Leplay, 'China's Approach on Data Privacy Law: A Third Way Between the US and the EU?' (2020) 8(1) Penn State Journal of Law & International Affairs 49.

4 Giovanni Comandè and Giulia Schneider, Differential Data Protection Regimes in Data-Driven Research: Why the GDPR is More Research-Friendly Than You Think' (2022) 23(4) German Law Journal 559, doi:10.1017/glj.2022.30; Giovanni de Gregorio, 'The Transnational Dimension of Data Protection: Comparative Perspectives from Digital Constitutionalism' (2022) 1(2) The Italian Review of International and Comparative Law 335, doi:10.1163/27725650-01020006; Peter J van de Waerdt, 'Information Asymmetries: Recognizing the Limits of the GDPR on the Data-Driven Market' (2020) 38 Computer Law & Security Review 105436, doi:10.1016/j.clsr.2020.105436.

5 Gregorio (n 4); M Bas Seyyar and Zjmh Geradts, 'Privacy impact assessment in large-scale digital forensic investigations' (2020) 33 Forensic Science International: Digital Investigation 200906, doi:10.1016/j.fsidi.2020.200906; Mistale Taylor, 'Limits that Public International Law Poses on the European Union Safeguarding the Fundamental Right to Data Protection Extraterritorially' in M Taylor, *Transatlantic Jurisdictional Conflicts in Data Protection Law: Fundamental Rights, Privacy and Extraterritoriality* (CUP 2023) 57, doi:10.1017/9781108784818.004.

The need to establish a comprehensive international data privacy law has caused a longstanding debate and many challenges.[6] This is because the differing legal approaches to personal data protection laws in effect in different countries or regions need to comply with a feasible international privacy law. The current situation shows that 71 per cent of the countries have adopted their data protection and privacy legislation while 9 per cent have drafted their own. Remarkably, 15 per cent of the countries have no legislation for data protection and privacy law, whereas 5 per cent have no data for this kind of legislation.[7] From the previous figures, it is notable to recognise that international regulations on data privacy protection have gained greater attention all over the world. States have promulgated their own data privacy laws to supply sufficient protections for personal transatlantic exchanges.

A lack of international regulatory framework results in the different data privacy laws across the world, which proves the incident that the law of personal data protection in one country possibly provokes a direct legal conflict with one another in international data transfers due to contradictory scopes of the privacy data laws; thus, this divergence causes legal ambiguity and gaps in privacy protections.[8] In addition, some countries have yet to legitimise data privacy laws or have not seriously taken legal personal data protection issues into consideration. These formidable obstacles call for the legal adequacy requirement for transatlantic data, only settled by a single supervisory authority that enforces a comprehensive international data privacy law.[9]

Although there is no single regulatory instrument addressing personal data protection on an international scale, some prominent examples of privacy laws have significant features applicable within certain countries or regions.[10] For instance, the European-style General Data Protection Regulation (hereinafter the GDPR)[11] in the European Union (EU) embraces the critical concept that protecting personal data implements a basic right. According to Art. 8(1) of the Charter of Fundamental Rights of the European Union (the

6 Mistale Taylor, 'Data Protection and the Free Flow of Information' in M Taylor, *Transatlantic Jurisdictional Conflicts in Data Protection Law: Fundamental Rights, Privacy and Extraterritoriality* (CUP 2023) 150, doi:10.1017/9781108784818.007.

7 'Data Protection and Privacy Legislation Worldwide' (*UN Trade & Development - UNCTAD*, 2024) <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide> accessed 10 March 2024.

8 Gregorio (n 4).

9 Patrik Hummel, Matthias Braun and Peter Dabrock, 'Own Data? Ethical Reflections on Data Ownership' (2020) 34 Philosophy & Technology 545, doi:10.1007/s13347-020-00404-9.

10 Comandè and Schneider (n 4); Paul Quinn and Gianclaudio Malgieri, 'The Difficulty of Defining Sensitive Data - The Concept of Sensitive Data in the EU Data Protection Framework' (2021) 22(8) German Law Journal 1583, doi:10.1017/glj.2021.79.

11 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) (GDPR) [2016] OJ L 119/1 <http://data.europa.eu/eli/reg/2016/679/oj> accessed 10 March 2024.

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'Charter')[12] and Art. 16(1) of the Treaty on the Functioning of the European Union (TFEU),[13] these legal normative regulations stipulate that each legal person endows the right to the personal data protection.[14]

In contrast, personal data is likened to a commodity in the market under the Privacy Act of 1974 in the United States,[15] and its focal notion concentrates on policing fairness in exchanges of personal data.[16] In contrast, China's Personal Information Protection Law (PIPL)[17] is deeply rooted in the legal transplantation of both the US and the EU reference models but incorporates distinctive features. The PIPL emphasises protecting individuals' rights against private entities while simultaneously enhancing government access to personal data. In simple terms, privacy protection is determined by individuals' rights.[18]

Meanwhile, remarkably, given the recent situation in Vietnam, the Government has enacted the long-awaited Decree No.13/2023/ND-CP (hereafter the Decree)[19] on personal data protection. This constitutes the first-ever consolidated and comprehensive legal instrument for collecting and processing personal data in Vietnam and officially came into effect on 1 July 2023.

For the corpus of this paper, the extent of the Decree will be examined to contrast and compare with one of the international privacy laws currently taking effect in the European Union, namely the GDPR issued on 27 April 2016 and the regulation on 25 May 2018.[20] Data privacy laws (personal data protection laws used interchangeably in this article) are considered emerging fields of laws worldwide. In exploring the data privacy interoperability between the Decree and GDPR, this study compares and contrasts the respective legal identities legitimised for protecting personal data in Vietnam and the EU.

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12 Charter of Fundamental Rights of the European Union (2012/C 326/02) [2012] OJ C 326/391 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:C2012/326/02&qid=1715593591875> accessed 10 March 2024.

13 Treaty on the Functioning of the European Union (TFEU) [2016] OJ C 202/47 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=legissum:4301854> accessed 10 March 2024.

14 Paul M Schwartz and Karl-Nikolaus Peifer, 'Transatlantic Data Privacy Law' (2017) 106(1) Georgetown Law Journal 123.

15 US Department of Justice, *Overview of the Privacy Act of 1974* (2020 edn) <https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition> accessed 10 March 2024.

16 Schwartz and Peifer (n 14) 127.

17 Personal Information Protection Law of the People's Republic of China of 20 August 2021 (PIPL) <https://personalinformationprotectionlaw.com/> accessed 10 March 2024.

18 Pernot-Leplay (n 3); 'The China Personal Information Protection Law (PIPL)' (*Deloitte,* May 2021) <https://www2.deloitte.com/cn/en/pages/risk/articles/personal-information-protection-law.html> accessed 10 March 2024.

19 Decree of the Government of the Socialist Republic of Vietnam no 13/2023/ND-CP of 17 April 2023 'On Personal Data Protection' (Decree no 13/2023/ND-CP) <https://english.luatvietnam.vn/decree-no-13-2023-nd-cp-dated-april-17-2023-of-the-government-on-personal-data-protection-249791-doc1.html> accessed 10 March 2024.

20 GDPR (n 11).

This research also emphasises noticeable differences between the two legal systems addressing the newly appearing issues of data privacy laws. In particular, this study employs a qualitative method of a descriptive comparative research design to reflect the potential of the two legal systems to seek mutually acceptable standards of data privacy protection. To overcome the potential jurisdictional disputes over Vietnam - EU data privacy interoperability, both the Decree and GDPR have to be harmonised to align more with mutual international standards of practical personal data processing activities. Consequently, the future of transatlantic data between the two systems of data privacy law, Vietnam and the EU, has to acquire a profound understanding of protecting personal data within these new respective structures.

2 METHODS AND MATERIALS

The study used a qualitative approach to theoretically synthesise, analyse, and compare the secondary sources following a recent model introduced by Long-Sutehall[21] about addressing a secondary analysis of primary qualitative datasets. The research compared the new Decree on personal data protection in Vietnam and the EU's General Data Protection Regulation 2016/679 to determine if any potential conflicts exist in implementing these legal normative documents in practice. The legally incompatible authorities of these Regulations would be for the interests of data subjects who have to go between these two influential jurisdictions.

3 OVERVIEW OF THE NEW DECREE ON PERSONAL DATA PROTECTION IN VIETNAM AND THE EU'S GENERAL DATA PROTECTION REGULATION 2016/679

3.1. Key takeaways from Vietnam's Personal Data Protection Decree 2023[22]

Until 17 April 2023, Vietnam had a fragmented legal framework for regulating personal data protection governed by 19 laws and regulations. Recognising the need for a more cohesive approach, the government issued a draft on 9 February 2021, which underwent several revisions before the official promulgation of the Decree of Personal Data Protection (the Decree). In the short term, the Decree is a foundational step towards future legislation and aims to consolidate existing laws and regulations into a comprehensive and uniform framework for safeguarding individuals' data.

Although regarded as having a lower legal status in Vietnam's statutory hierarchy compared with laws and codes, the Decree has significant impacts on the regulation of

21 Tracy Long-Sutehall, Magi Sque and Julia Addington-Hall, 'Secondary Analysis of Qualitative Data: A Valuable Method for Exploring Sensitive Issues with an Elusive Population' (2010) 16(4) Journal of Research in Nursing 335, doi:10.1177/1744987110381553.

22 Decree no 13/2023/ND-CP (n 19).

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personal data protection in the current situation in Vietnam as personal data protection characterises a new and developing legal regulation. Despite its inferior status, this first comprehensive legislative instrument on personal data protection regulates all activities regarding personal data protection. In the event of those who disrespect any provisions of the Decree, they might receive some forms of punishment from its legal enforcement.

The Decree prescribes the important obligations of agencies, organisations, and individuals to comply with the regulations prescribed by the Decrees in accordance with the merits they receive thereof. Compared with the GDPR, the Decree characterises exclusive provisions designated to fit into only Vietnam's context. For example, Art. 3(4) stipulates that "collected personal data must be appropriate and within the scope and purposes of processing. Purchase and sale of personal data in any form shall not be permitted, unless otherwise provided by law".[23] According to this rule, the commodification of personal data is strongly prohibited, and those committing this activity without conformity with the law confront severe legal consequences. Moreover, Art. 3 points out that the data subjects have the right to be informed about activities concerning his/her personal data processing, which connotes the fact that without their consent any action such as personal data collection, transfer, or purchase thereof, unless otherwise provided by law, is regarded as the violation of the Decree and must be in charge of relevant legal litigation.

Similarly, Art. 2(9-10) declares that a controller refers to an organisation or individual deciding the purposes and means of personal data processing. Similarly, a processor denotes an organisation or individual processing personal data under the supervision of the controller; he/she enters into a contract or agreement with the controller. In a sense, the Decree recognises the roles of Personal Data Controllers and Personal Data Processors as separate entities. This legal distinction between the two categories has made the Decree unique and different from other data protection laws worldwide. Although a lack of classification between Personal Data Controllers and Processors possibly leads to clarity and precision in determining the liabilities and unity of different subjects in terms of personal data processing, privacy laws might accumulate more unnecessary complexity because of the overlapping conceptual distinction between Personal Data Controller and a Personal Data Processor. As a result, the inclusion of both aforementioned entities causes much difficulty in navigating and harmonising the requirements of transboundary privacy laws.

Another remarkable difference is how the Decree specifies a general provision for those who violate its regulations. Based on the level of violation of the Decree, respective punishments are given to violators, such as disciplinary action, administrative penalties, or criminal prosecution, which is outlined in Art. 4. Astonishingly, while some States in the EU and the US empower their own independent personal data protection

23 ibid, art 3(4).

commission to govern the enforcement of the Privacy Act,[24] the Decree is vested its authority by the Government which shall perform the uniform state management of personal data protection (as stated in Art. 5) under the control of an existing agency within the Ministry of Public Security (MPS), the Department of Cyber Security and Hi-tech Crime Prevention (A05).

Art. 1(2.d) addresses foreign agencies, organisations, and individuals directly engaged in or related to processing personal data in Vietnam, subjecting them to regulation under the Decree. However, this provision raises questions about the extent of foreign involvement in personal data processing activities and requires more clarification regarding the specific aspects and scope of regulation applicable to foreign agencies. Otherwise, this legal ambiguity will likely put many third-party service providers or software vendors at risk in terms of violating the limitation of personal data processing involvement as outlined in Art. 2(12).

Remarkably, the Decree clearly defines the nature of personal data as prescribed in Art. 2(1). It prescribes that "Personal data means any information in the forms of symbols, letters, figures, images, sounds or similar forms in the electronic environment that is associated with a particular person or may lead to the identification of a particular person. Personal data includes basic personal data and sensitive personal data."[25] Expanding on the above rule, Art. 2(1) mentions two typical terms, namely basic personal data and sensitive personal data. In particular, two terms in Art. 2 are defined as follows:

"*3. Basic personal data includes:*

a) Family name, middle name, and first name as stated in a birth certificate, other name (if any);
b) Date of birth; date of death or missing;
c) Gender;
d) Place of birth, place of birth registration, place of permanent residence, place of temporary residence, current place of residence, native place, contact address;
dd) Nationality;
e) Image of the individual;
g) Telephone numbers, people's identity card numbers, personal identification numbers, passport numbers, driver's license numbers, numbers on vehicles' number plates, personal tax identification numbers, social insurance numbers, health insurance card numbers;
h) Marital status;
i) Information about family relationships (parents, children);
k) Information about the digital account of the individual; personal data on activities, history of activities in cyberspace;

24 Pernot-Leplay (n 3).
25 Decree no 13/2023/ND-CP (n 19) art 2(1).

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l) Other information associated with a particular person or leading to the identification of a particular person, other than those specified in Clause 4 of this Article.

4. Sensitive personal data means any personal data associated with an individual's privacy rights of which the violation directly affects his/her lawful rights and interests, including:

a) Political opinions, religious opinions;
b) Health status and private information recorded in the health record, excluding the information about blood type;
c) Information relating to racial origin, ethnic origin;
d) Information about the inherited or acquired genetic characteristics of the individual;
dd) Information about physical characteristics, and unique biological characteristics of the individual;
e) Information about the sex life, and sexual orientation of the individual;
g) Data on crimes and offenses are collected and stored by law enforcement authorities;
h) Client information of credit institutions, foreign bank branches, intermediary payment service providers, and other authorized organisations, including client identification information prescribed by law provisions, information on accounts, deposits, deposited assets, transactions, organisations and individuals being securing parties at credit institutions, bank branches, intermediary payment service providers;
i) Location data of the individual identified through location services;
k) Other personal data being particular and requiring necessary security measures under law provisions."[26]

According to the Decree, more stringent protection measures for sensitive personal data than for basic personal data shall be implemented to avoid the possibility of the sale or purchase of personal data. For example, in processing any sensitive personal data, unless otherwise provided by law, regulated agencies must inform data subjects about the processing of their sensitive personal data and obtain explicit consent from them. Accordingly, organisations that are disciplined by the Decree have to set up a department in charge of processing and supervising the protection of sensitive personal data within their organisations and these departments are closely collaborated with the A05 in all situations. It cannot be denied that the Decree on Personal Data Protection in Vietnam has a far-reaching consequence in protecting personal data and marks a historic milestone for a more comprehensive, internationalised, stringent law in the coming time.

Currently, the Decree not only sets out the essential concepts and principles of personal data protection but also introduces specific provisions for data processors and controllers. It also establishes a legal framework for obtaining consent regarding data processing activities, transboundary data transfers, and child data protection. This may ensure privacy and provide stricter security of individuals' data.

26 ibid, art. 2.

In practice, the present legal enforcement of the Decree has been in effect and gained some achievements to handle many of the current serious challenges in terms of confronting personal data protection in Vietnam; however, it still contains significant legal loopholes that call for more actions to be dealt with in forthcoming time via directives, circulars or joint-circulars. It fails to stipulate any specific procedure for addressing complaints about the violations of personal data protection. Furthermore, the Decree must clarify the conflicting provisions on the sale of personal data.

As stated in Art. 4, handling a breach of personal data protection regulation stipulates that "agencies, organisations, and individuals breaching the personal data protection regulation shall, depending on the seriousness of their breaches, be disciplined, administratively or criminally handled in accordance with regulations."[27] As such, the Decree does not clarify the principles for settling conflicts on personal data privacy violations. In addition, the Decree has to be supplemented with regulations regarding the impact of transboundary data transfers together with transparent guidelines and requirements for such transfers and greater clarity on transatlantic activities.

At present, the Vietnamese government prioritises digital transformation to simplify all procedures and cut down on administrative procedures handled directly by humans. This means that more security shall be assigned to biometric data; thus, the Decree should revise its provisions to consider the issue of biometric data. In other words, guidelines on automated processing shall be provided, and statutory regulations for biometrics shall also be constituted.

Decision No. 749/QD-TTg 2020 on approving the national digital transformation program through 2025, with orientations toward 2030 by the Prime Minister firmly asserts that the utmost priority shall be given to three pillars: digital government, digital economy, and digital society, in which the strategy of "moving to the cloud" is seen as the most important factor to help enterprises develop in a digital economy.[28] For this reason, the Decree should be revised to tackle growing issues such as automated personal data processing, biometrics or facial recognition, transatlantic personal data transfer, and protected digital cross-border business activities.

The rapid advancement of the Industrial Revolution (IR) 4.0 in Vietnam, as reported by the International Labour Organisation (ILO)[29] - Country Office for Vietnam,

27 ibid, art. 4.

28 Decision of the Prime Minister of the Socialist Republic of Vietnam no 749/QD-TTg 2020 of 3 June 2020 'On Approving the National Digital Transformation Program Through 2025, with Orientations Toward 2030' <https://english.luatvietnam.vn/decision-no-749-qd-ttg-on-approving-the-national-digital-transformation-program-until-2025-with-a-vision-184241-doc1.html> accessed 10 March 2024.

29 ILO, 'Industrial Revolution (Ir) 4.0 in Viet Nam: What Does it Mean for the Labour Market?: Policy brief' (*International Labour Organisation - ILO*, 30 May 2018) <https://www.ilo.org/publications/industrial-revolution-ir-40-viet-nam-what-does-it-mean-labour-market> accessed 10 March 2024.

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underscores the importance of Vietnam's commitment to personal data protection and privacy. A robust personal data protection framework in Vietnam is essential for its successful integration into the global economy, ensuring compliance with privacy laws in the region and around the world.

3.2. Overview of the EU's General Data Protection Regulation (GDPR) 2016/679[30]

One of the most influential, effective, and statutory resolutions has geographically shown tremendous power over privacy laws in European countries. Since GDPR became effective on 25 May 2018, it has been regarded as the strongest legislative instrument of data protection rules worldwide. It instructs how individuals can control their personal information and determines to what extent organisations can process their personal data.

The GDPR comprises 11 chapters, containing 99 individual articles therein as a result of long-planned data protection reforms to undergo more than four years of extensive discussions and lengthy negotiations to commonly promulgate the GDPR's final framework for laws across the European continental countries.[31] The European Parliament and European Council officially adopted the GDPR in April 2016, which was enforced around two years later across Europe to modernise the laws that protect individuals' privacy laws. The GDPR was generated, standardised, and compromised data privacy laws among European countries to secure greater legal protection and rights for individuals. The GDPR's legislative authority includes more disciplinary sanctions to regulate how businesses and other agencies can address the information of those who involve them.

The crucial element that functions as the heart of the GDPR is personal data protection, precisely referring to the four factors that centralise all the legislative measures. The four fundamental data subjects are clearly defined as data controllers (Art. 4.7), data processors (Art. 4.8), recipients (Art. 4.9), and third parties (Art. 4.10) of the GDPR. The details of the four key elements mentioned above are specified in Chapter 3, Chapter 4, and Chapter 6 of the GDPR.

Firstly, regarding the data subject's rights, these regulations are grouped in Chapter 3, including five sections with twelve articles. The rights of the data subject enshrined in this chapter are greatly renewed in terms of how personal data regulations are addressed. It encompasses eight principal data subject rights in addition to the right to

30 GDPR (n 11).

31 Michèle Finck, 'Hidden Personal Insights and Entangled in the Algorithmic Model: The Limits of the GDPR in the Personalisation Context' in U Kohl and J Eisler (eds), *Data-Driven Personalisation in Markets, Politics and Law* (CUP 2021) 95; Chris Jay Hoofnagle, Bart van der Sloot and Frederik Zuiderveen Borgesius, 'The European Union general data protection regulation: what it is and what it means' (2019) 28(1) Information & Communications Technology Law 65, doi:10.1080/13600834.2019.1573501; Schwartz and Peifer (n 14).

withdraw consent which empowers individual autonomy over personal data and as well as data processing as follows:

- *Right to be informed* (Arts. 12-14): Data subjects are informed about the collection and purpose of using personal data according to these regulations. In particular, they have the right to know the purpose of data processing, the retention length, and other specified rights granted to them accordingly.
- *Right to access* (Art. 15): Data subjects have the right to request and receive a copy of their personal data and information about the aims and the extent of their personal data from one organisation addressing their personal data.
- *Right to rectification* (Art. 16): Data subjects have the right to request to correct or update their inaccurate or outdated personal data held by an organisation.
- *Right to be forgotten/ Right to erasure* (Art. 17): Data subjects have the right to request their personal data be removed in some situations. However, the deletion of their personal data characterizes no absolute rights as it is subject to exemptions depending on some situations.
- *Right to data portability* (Art. 20): Data subjects have the right to request that their personal data be transferred to another controller or receive it in a structured, normally used, and machine-readable format. The data is surely in machine-readable electronic format.
- *Right to object* (Art. 21): Data subjects have the right to object to the processing of their personal data, especially for the purpose of direct marketing. It is unlawful for an organization to continue processing data if it cannot provide legitimate grounds for processing the personal data for the sake of the interests, rights, and freedoms of the data subject.
- *Right to object to automated processing* (Art. 22): Data subjects have the right to overrule any decision made solely with their data based on automated decision-making or profiling. Accordingly, they have the right to call for human intervention to give their viewpoints and take responsibility for their decision.
- *Right to restrict processing* (Arts. 18 and 23): Data subjects have the right to request to restrict or suppress the processing of their personal under some circumstances.

Secondly, the framework for the roles, obligations, and responsibilities of data controllers and data processors is comprehensively stipulated in Chapter 4 of the GDPR. Data controllers and data processors are structured into five sections concentrating on the necessity of obeyance the regulation, the need for data security, the data protection impact assessment and prior consultation, the legal requirements for data protection officers, and the mandatory compliance and significant penalties for non-compliance of ensuring data protection for data controllers and processors. These aspects are laid out legibly as follows:

- Section 1 General Obligations emphasises the responsibilities and compliance of data controllers and processors. This section including eight articles (Arts. 24-31) species the data controllers' duties to impose practical measures to ascertain the

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GDPR compliance (Art. 24). It is their tasks not only to adopt data protection by design and by default but also to scrutinize the nature, scope, context and processing intentions (Art. 25). This section also stipulates the corresponding accountabilities of joint controllers in terms of ensuring data protection compliance (Art. 26). Moreover, it is mandatory for non-EU controllers or processors to have a representative within the EU take charge of transatlantic data exchange (Art. 27). Similarly, data processors are under the supervision of the controllers' instructions (Art. 28), and they jointly responsible for the security of the data (Art. 29). In addition, they are cooperatively in charge of archiving records of processing activities confidentially (Art. 30). Finally, this section states that it is compulsory for them to cooperate closely with their supervisory authorities regarding their performance on demand (Art. 31).

- Section 2 notifies the security of personal data, especially data protection and breach notifications; these regulations are laid down in Arts. 32-34. In particular, data controllers and processors are aware of a level of security which meets the requirement of the appropriate level of risk of data processing (Art. 32). In the event of personal data breaches, data controllers and supervisors have to report officially to the supervisory authority within 72 hours (Art. 33). Accordingly, it is necessary to establish communication of a personal data breach to the data subject in certain circumstances (Art. 34).
- Section 3 focuses on data protection impact assessment and prior consultation. In other words, this chapter specifies how to assess and consult on data protection risks in two articles (Arts. 35-36). Data protection impact assessments are necessary for high-risk processing, specified in Art. 35. In the same vein, prior consultation with the supervisory authority is required in case processing personal data might lead to a high risk in the lack of preventative measures implemented by the controllers to lower the potential risk (Art. 36).
- Section 4 particularises the roles and responsibilities of a data protection officer, which encompasses three articles (Arts. 37-39). Controllers and processors must appoint a Data Protection Officer (DPO) under certain conditions. The DPO shall be chosen on account of his/her professional experiences; that is, he/she shall have professional knowledge of data protection law, practical experience as well as the autonomous capacity to handle tasks effectively. The profiles of the data protection officer shall be available to the public and the supervisory (Art. 37). The DPO shall be involved properly and promptly in all matters related to the protection of personal data. Furthermore, he/she shall be under the control of secrecy or confidentiality regarding the lawful performance of his/her tasks. If the DPO is possibly designated to engage in other tasks and duties, he/she shall be aware of the fact that some tasks and responsibilities do not create a conflict of interest (Art. 38).

The DOP shall be under the supervision of the controllers or the processors and those who are involved in the processing of their obligations in accordance with the statutory

provisions. He/she shall regulate the lawfulness of the GDPR with other data privacy jurisdictions in respect of personal data protection. The detailed provisions are listed in Art. 39 thereof. The last section of Chapter 4 is Section 5, which encompasses codes of conduct and certification. The section establishes data protection standards in four articles (Arts. 40-43). In detail, codes of conduct shall be jointly drawn up to help demonstrate compliance with other legal normative documents for the purpose of the proper application of this regulation (Art. 40). The supervision of compliance with a code of conduct shall be monitored by a body with an appropriate level of expertise concerning the subject-matter of the code and is accredited for the commission by the competent supervisory authority (Art. 41).

Certification mechanisms shall be lawfully given by competent bodies that oversee the establishment of data protection certification mechanisms and of data protection seals and marks, which are directly provided by controllers or processors. The competent supervisory authority shall issue the certification mechanism to a controller or processor provided that this body has necessary documentation with all information and access to its processing activities under the provision of the certification procedure (Art. 42). The certification bodies shall take charge of issuing and renewing certification under legislative requirements. Those bodies must take full responsibility and duty to supervise all the procedures for the existence of data protection certification mechanisms (Art. 43).

Thirdly, Chapter 6 of the GDPR establishes the legal framework for establishing, operating, and powers of independent supervisory authorities in each member of the European countries. These authorities are crucial for protecting the free flow of personal data and the consistent application of the GDPR across the European Union (EU). They are endowed with investigative, corrective, and advisory powers and expected to operate with complete independence and adequate resources. Member States are responsible for their establishment, appointment of members, and for providing necessary resources, as well as reporting their activities to the Commission. This chapter comprises two sections. Section 1 focuses on the independent status of each Member State, while Section 2 delineates the competence, tasks, and powers of each Member State. Notably, Section 1 stipulates the independent status of each country in the EU, which covers four articles (Arts. 51-54).

Each Member State shall set up one or more independent public authorities to oversee the consistent application of this Regulation. To help the free flow of personal data within the Union, the State shall mandate one representative supervisory authority to officially take responsibility for coordinating with other authorities with regard to ensuring compliance with their competencies (Art. 51). The duties and liabilities of each supervisory authority shall be autonomous according to the Regulation. That is, the member of each supervisory authority shall carry out their duties independently without interference from outside influence as long as out of the scope and limitations of the Regulation. In other words, the independence of supervisory authorities is emphasised to ensure impartiality and objectivity in their duties. Each supervisory authority is endowed with the right to choose

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and monitor their employees under the Regulation (Art. 52). The members of the supervisory authority are appointed under specific conditions to ensure their capability and integrity. These conditions may include a minimum term of four years and provisions for dismissal only under circumstances such as inability to perform duties or serious misconduct. Member States must notify the Commission of the laws adopted for the establishment of their supervisory authorities and any subsequent amendments (Art. 53).

Rules for the establishment of supervisory authority are clearly prescribed in the Regulation. Each Member State is subjected to the provisions detailed in the Regulation. Remarkably, each supervisory authority member and the staff shall comply with a duty of professional secrecy during and after their term of office. They are in charge of preserving confidential information throughout their lifetime (Art. 54).

Section 2 of Chapter 6 of GDPR deals with the competence, tasks, and powers of independent supervisory authorities. Specifically, supervisory authorities can perform tasks and exercise powers on their own Member State's territory. The details thereof are prescribed in Arts. 55-56. Typically, when more than one supervisory authority is established in a Member State, a mechanism is set to designate a lead supervisory authority to represent the others on the Board and ensure compliance with the consistency mechanism. The lead supervisory authority has specific responsibilities, including deciding whether to handle a case within three weeks of receiving a complaint.

The duties and competence of independent supervisory authorities are clearly designated in Articles 57-58 herein. These include monitoring and enforcing the GDPR, understanding risks, rules, safeguards, and rights related to data processing, and having governmental dominion over the business. Their powers are extensive, encompassing investigative, corrective authorisation, and advisory powers to ensure compliance with the GDPR.

Lastly, regarding activity reports, this Regulation is laid out in Art. 59 GDPR, in which supervisory authorities are required to produce annual activity reports detailing their activities related to GDPR compliance. These reports must be submitted in compliance with each Member State's law and made publicly available.

In reality, the GDPR not only identifies the role of data subjects but also recognises pseudonymised data, whose principles are enshrined in law, particularly in Art. 4(5) thereof. In a sense, "pseudonymisation" refers to the procedure of dealing with personal data process in which the personal data is anonymous to a specific data subject without the requirement of more information as long as the supplemented information is stored separately and under the control of technical and organisational means that personal data are not retrieved to an identified or identifiable natural person. In this regard, a natural person refers only to a living human being, so the GDPR does not cover and protect the decreased or the legal persons' data such as corporations.[32]

32 Finck (n 31).

According to the GDPR, there is a close tie between the data controllers and data processors in that the data controllers shall be in charge of the data processors if something wrong takes place, and this legal bond is laid down in detail at length in one chapter with 24 articles (Arts 24-42) therein. The GDPR also tries to keep data processors away from predictable principal-agent problems by regulating the controllers to solely take responsibility for being on behalf of the data processors, who must be competent and liable. To bear a chain of legal responsibilities, the controllers have the authority to supervise and be responsible for the processors for their disobedience. In other words, the controllers shall take charge of the processors' performance unless required by Union or Member State law (Art. 29 GDPR).

The GDPR is fundamentally built around seven key principles, which are considered the core of any legislative documentation. The seven principles of GDPR are laid out in Chapter 2, including seven articles (Arts. 5-11) designed to guide how personal data can be collected, processed, and managed by organizations or agencies with the consent of the data subjects. To make it more legitimate, suitable recitals are mentioned at the end of each article; thus, the GDPR can be seen as an overarching framework that is created to design its own broad objectives so that members of the European countries have to adjust their data protection rules lawfully to be in line with the GDPR.[33]

Overall, the GDPR is the most consequential regulatory development in information policy in the free flow of personal data protection policy in the age of the global digital economy. Yet, it brings privacy regulations into a complex and protective regulatory polity.

4 POTENTIAL CONFLICTS BETWEEN TWO LEGAL INSTRUMENTS IN PRACTICAL IMPLEMENTATION

In an era of data-driven decision-making, understanding the nuances of various data protection laws is crucial for businesses operating globally. The Decree represents the country's first comprehensive data protection law, aiming to safeguard the personal data of its citizens.[34] The introduction of the Decree has added a new dimension to this complex landscape, drawing comparisons to the well-established GDPR.[35] In general, GDPR and Vietnam's Decree have a broad scope, applying to entities within and outside their respective jurisdictions if they process relevant data subjects' personal data. The Decree applies to Vietnamese individuals and organisations, including those operating offshore and foreign entities operating in Vietnam or directly engaging in personal data

33 Manuel Klar, 'Binding Effects of the European General Data Protection Regulation (GDPR) on US Companies' (2020) 11(2) Hastings Science and Technology Law Journal 101; Pernot-Leplay (n 3); Michael Veale and Frederik Zuiderveen Borgesius, 'Adtech and Real-Time Bidding under European Data Protection Law' (2022) 23(2) German Law Journal 226, doi:10.1017/glj.2022.18.

34 Decree no 13/2023/ND-CP (n 19).

35 GDPR (n 11).

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processing activities in Vietnam. GDPR similarly applies to any company that processes data on European residents, regardless of the company's location. While it shares commonalities with GDPR, notable differences impact how personal data is processed within Vietnam relating to the two regulatory frameworks due to differences in legal frameworks, enforcement mechanisms, and specific requirements. The following principal points shall be taken into careful consideration for the sake of preventing potential legal conflicts as follows:

a) Concerning scope and applicability, the Decree currently applies to a broad range of entities, including both domestic and foreign organisations or individuals processing personal data in Vietnam, as well as Vietnamese entities processing data outside of Vietnam, which is laid down in Art. 1. The GDPR, in contrast, applies to entities within the EU and those outside the EU that offer goods or services to, or monitor the behaviour of EU data subjects (Art. 3). This difference in scope denotes that businesses have to change their compliance strategies due to the geographic locations of their data subjects.

b) In terms of definitions and categories of data, the Decree, like the GDPR, sets out a detailed definition of personal data and clearly distinguishes between "basic" and "sensitive: personal data. According to the Decree (Art. 2), sensitive personal data constitute categories namely location data, creditworthiness, and financial data, which is considered more stringent and broader than the GDPR's definition of sensitive data (Art. 4) in that the GDPR does not categorise financial information into sensitive data.

c) Regarding consent and legal bases for processing, both the Decree and GDPR emphasise consent as a legal basis for processing personal data but differ significantly in their scope and flexibility of legal bases. The Decree does not recognise "legitimate interests" as a basis for processing, while the GDPR allows for a broader range of legal bases for processing, including legitimate interests, defined in Art. 7 therein. However, the Decree has more stringent consent rules and requires explicit consent for specific data processing activities, especially for sensitive personal data (Art. 11). This might lead to potential conflicts in case transatlantic personal data takes place.

d) As for data subject rights, both regulations grant data subjects a range of rights over their personal data, including the right to be informed, access, correct, delete, and restrict processing. The Decree also introduces the right to self-defense (Art. 9(11)), especially for sensitive personal data, which is not explicitly provided under the GDPR. In particular, the Decree introduces an absolute right to object to processing (Art. 12), as well as correction and deletion rights, and organisations must notify individuals of the consequences of withdrawing consent (Art. 13), which may differ from the GDPR's approach.

e) With regard to cross-border data transfers, the Decree has specific requirements for cross-border data transfers and introduces conditions such as obtaining consent for

the transfer of personal data (Art. 25); whereas, the GDPR has a different approach, allowing transfers based on adequacy decisions, appropriate safeguards, or specific derogations (Art. 44). Businesses must carefully take care of these requirements to ensure the lawful movement of data flows.

f) For data processing obligations, the Decree requires the establishment of a data protection department (Art. 29) and a data protection officer within organisations, with exemptions for certain enterprises until two years after their establishment. At the same time, the GDPR mandates the appointment of a data protection officer for specific organisations based on their core data processing activities but does not require the creation of a specific department (Art. 37). This difference highlights the varying emphasis on organisational accountability in data processing between the two regulations.

g) Concerning enforcement and sanctions, the Decree lacks a specific fine structure for violations, and the Department of Cybersecurity and Hi-tech Crime Prevention under the Ministry of Public Security (MPS) is entrusted with enforcement (Art. 30). In contrast, the GDPR provides a clear and prescriptive list of fines and sanctions for non-compliance (Arts. 77-84). This might bring about some difficulties in addressing the transborder flow of data.

h) With respect to prohibitions and purpose limitation, the Decree takes a more stringent stance by explicitly prohibiting the sale and purchase of personal data unless permitted by law (Art. 22). Although the GDPR imposes purpose limitation, it does not explicitly address the sale and purchase of personal data[36].

i) When considering the rights of the data subject, it is well noted that Art. 9 (11) stipulates the right to self-defence; that is, the data subject shall have the right to protect himself/herself in accordance with the Civil Code, other relevant laws and this Decree, or request competent agencies or organisations to implement methods of protection of civil rights prescribed in Art. 11 of the Civil Code.[37] This is a novel concept for Europeans and may deserve some additional explanation since the European legislators may consider whether to adopt this additional right, which is so far not contained in the GDPR.

Overall, Vietnam's Personal Data Protection Decree 2023 introduces a comprehensive data protection framework with several key differences from the GDPR. These differences include the legal bases for processing, data subject rights, cross-border data transfer requirements, enforcement mechanisms, and prohibitions on data sales. Since the Decree

36 Communication from the Commission to the European Parliament and the Council: First report on application and functioning of the Data Protection Law Enforcement Directive (EU) 2016/680 ('LED')' of 25 July 2022 (COM(2022) 364 final) <https://commission.europa.eu/publications/first-report-application-and-functioning-data-protection-law-enforcement-directive-eu-2016680-led_en> accessed 10 March 2024.

37 Law of the Socialist Republic of Vietnam no 91/2015/QH13 of 24 November 2015 'Civil Code' <https://vietanlaw.com/the-law-no-91-2015-qh13/> accessed 10 March 2024.

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came into effect, these differences have become apparent, prompting the need for careful attention to ensure compliance with both Vietnamese and EU data protection laws. Further guidance from the Ministry of Public Security could offer clarification on the Decree's provisions and assist businesses in aligning their practices with the new requirements.

5 CONCLUSIONS

The GDPR and Vietnam's Decree play crucial roles in the protection of personal data. The GDPR's broad scope and stringent penalties have made it a global standard, while the Decree's comprehensive approach demonstrates Vietnam's commitment to data protection. Both regulations emphasise the importance of consent, data subject rights, and the safe handling of cross-border data transfers.

As data protection continues to gain prominence, the roles of these regulations in shaping data protection practices and ensuring compliance cannot be overstated. Organisations operating under the GDPR and Vietnam's Decree must carefully navigate the differences between the two regulations to avoid potential violations. While there are many similarities, the specific requirements around consent, data subject rights, breach notification, cross-border data transfers, and enforcement mechanisms can lead to conflicts. Businesses must understand both sets of regulations and ensure that their data protection practices are tailored to comply with each framework's unique requirements.

Breaching data protection regulations in the EU and Vietnam carries significant legal implications, including fines, penalties, and operational disruptions. While the GDPR is known for its hefty fines and broad scope, Vietnam's Decree introduces specific requirements and penalties that organisations must navigate carefully. It is crucial for entities operating in these jurisdictions to understand and comply with each regulation to avoid legal repercussions. In fact, the Decree adopts many of the GDPR's principles, such as the rights of data subjects, consent requirements, and the need for impact assessments; yet, it also includes provisions specific to the Vietnamese context, such as the absence of "legitimate interests" as a legal basis for processing and the unique enforcement mechanisms.

The implementation of Vietnam's Decree will have a profound impact on international companies operating in Vietnam. These companies must navigate the new requirements for consent, data processing, and cross-border data transfers, as well as adhere to data localisation mandates. The Decree aligns Vietnam's data protection standards with global norms, such as the GDPR, and introduces stringent measures to safeguard personal data. However, its effectiveness will depend on its enforcement mechanisms and the ability to impose meaningful sanctions for non-compliance. Given the Decree's alignment with global standards and its aim to protect the personal data of Vietnamese citizens, it is a strong candidate for becoming a personal data protection law. Nonetheless, to ensure its success, Vietnam may need to address the enforcement challenges and consider incorporating a more detailed sanctions regime to deter violations effectively.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Стаття-огляд

МОЖЛИВІ КОНФЛІКТИ ЩОДО ЗАХИСТУ ПЕРСОНАЛЬНИХ ДАНИХ ЗГІДНО З ЧИННИМ ЗАКОНОДАВСТВОМ В'ЄТНАМУ ПОРІВНЯНО З ЄВРОПЕЙСЬКИМ ЗАГАЛЬНИМ РЕГЛАМЕНТОМ ПРО ЗАХИСТ ДАНИХ

Хоа Тхань Ха та Туан Ван Ву*

АНОТАЦІЯ

Вступ. *Трансатлантична передача даних є критично важливим компонентом глобальної цифрової економіки, що сприяє торгівлі та комунікації між країнами в усьому світі. Однак ці передачі пов'язані з правовими та регулятивними проблемами, зокрема щодо захисту персональних даних через відсутність комплексного глобального закону про конфіденційність.*

Методи. *У цьому порівняльно-описовому дослідженні використовуються вторинні ресурси за допомогою порівняння та протиставлення принципів європейського Загального регламенту про захист даних і нового Указу про захист персональних даних у В'єтнамі, щоб забезпечити глибоке розуміння відмінностей між ними.*

Результати та висновки. *Незважаючи на те, що Указ використовує багато принципів європейського Загального регламенту про захист даних, а саме права суб'єктів даних, вимоги щодо згоди та необхідність оцінки впливу, він містить положення, специфічні для в'єтнамського контексту, такі як унікальні механізми забезпечення та відсутність «законних інтересів» як правової основи для обробки. Незважаючи на багато спільного, конкретні вимоги щодо згоди, прав суб'єктів даних, повідомлення про порушення, екстериторіальної передачі даних і механізмів, що забезпечуватимуть виконання, можуть призвести до конфліктів між цими законодавчими документами. Указ, який міг би стати ефективнішим, має спиратися на механізми його виконання та можливість накладати значні санкції за невиконання; таким чином, він повинен містити більш детальний режим санкцій для ефективного стримування порушень.*

Ключові слова: *можливий конфлікт, законодавство, трансатлантичні дані, конфіденційність даних, регулювання.*

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Note

THE USE OF ARTIFICIAL INTELLIGENCE IN ACADEMIC PUBLISHING: PRELIMINARY REMARKS AND PERSPECTIVES

Ganna Kharlamova* and Andriy Stavytskyy

ABSTRACT

Artificial intelligence programs are constantly developing, becoming an increasingly powerful tool for solving various problems. First of all, attempts have been made to use artificial intelligence (AI) to generate new texts, but practice shows that the level of creativity exhibited by these programs is still insufficient for producing substantial articles. Of course, this will not prevent AI programs from developing text, including generation of not only dissimilar text, but capably accomplishing certain conceptual tasks. However, even today, it is possible to use AI programs to solve standard tasks in the preparation, editing, reviewing, processing, and publication of scientific texts. This article will provide an overview of the latest trends in the use of AI programs for academic publishing using examples of several scientific journals. We will look at different levels of AI and their impact on editorial work and review the potential of AI in complementing human input.

Next, we will consider the following stages of working with scientific texts in the editorial offices of scientific journals: author and article registration in the journal system; initial analysis of the article; choice of reviewers; article review; communication with the author regarding received reviews; publication decision; proofreading and publication of work; its registration in database systems.

In the conclusion, we summarise tips for editors on how to use AI.

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1 INTRODUCTION

The rapid development of AI and robotics in the modern world opens new horizons of possibilities and has a profound impact on society.[1] AI is poised to become a pivotal factor in our future, unlocking new horizons and opportunities while also freeing up substantial time for more creative and innovative pursuits, but it is crucial to recognise that AI is merely a tool designed to support and enhance human potential. AI itself is an algorithm based on computational information processing and an analytical approach.[2] Its power lies in its ability to efficiently process complex tasks and provide enhanced human cognition. Thus, AI can greatly facilitate the decision-making process in cases where complex problems need solutions.

However, it is important to note that humans remain indispensable in the context of understanding and managing uncertainty. The distinctiveness of human intelligence lies is encompassed in its integrity and intuitive approach to problem-solving. The idea of "intelligence augmentation" assumes that AI systems should serve to qualitatively enhance human input, not replace it. AI can become an invisible partner of newsrooms, thereby helping to harness the human potential in the most effective and balanced manner.

There are several evolutionary levels of AI, namely:[3]

1. Artificial Narrow Intelligence (ANI) or weak AI. This AI system excels at certain activities, such as winning at chess, driving a car, etc.
2. Artificial General Intelligence (AGI), also known as powerful AI or human-level AI, is intelligent and capable just like humans. As such, it can learn and work in a way that is no different from humans.
3. Artificial superintelligence (ASI) far exceeds human capabilities and can be defined as "any intelligence that greatly exceeds human cognitive capabilities in virtually all domains of interest."[4]

ANI is already becoming evident. For example, it is used in self-driving cars, voice interaction (e.g., Siri/Cortana), recommendations (e.g., on Amazon or Facebook), automatic translation

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1 Margaret A Goralski and Tay Keong Tan, 'Artificial Intelligence and Sustainable Development' (2020) 18(1) The International Journal of Management Education 100330, doi:10.1016/j.ijme.2019.100330; Andreas Kaplan and Michael Haenlein, 'Rulers of the World, Unite! The Challenges and Opportunities of Artificial Intelligence' (2020) 63(1) Business Horizons 37, doi:10.1016/j.bushor.2019.09.003; Vincent C Müller and Nick Bostrom, 'Future Progress in Artificial Intelligence: A Survey of Expert Opinion' in VC Müller (ed), *Fundamental Issues of Artificial Intelligence* (Synthese Library 376, Springer 2016) 555, doi:10.1007/978-3-319-26485-1_33.

2 Christoph Lutz, 'Digital Inequalities in the Age of Artificial Intelligence and Big Data' (2019) 1(2) Human Behavior and Emerging Technologies 141, doi:10.1002/hbe2.140.

3 Nick Bostrom and Eliezer Yudkowsky, 'The Ethics of Artificial Intelligence' in K Frankish and W Ramsey (eds), *The Cambridge Handbook of Artificial Intelligence* (CUP 2014) ch 15, 316, doi:10.1017/CBO9781139046855.020.

4 Nick Bostrom, *Superintelligence: Paths, Dangers, Strategies* (repr, CUP 2016) 22.

(Google Translate), and in more advanced programs, as was demonstrated in recent years with AlphaGo, AlphaZero, and AlphaFold from Deep Mind. Even though we still live in an era of ANI, the next level, AGI, may not be too far in the future.

2 POTENTIAL APPLICATIONS OF AI IN VARIOUS PROCESSES OF ACADEMIC PUBLISHING, ESPECIALLY KNOWLEDGE EXCHANGE

Here are the following opportunities created with the help of AI systems:

a) a combination of people working on the same problems;
b) facilitation of shared intelligence and shared organisational memory;
c) creation of a comprehensive view of knowledge sources and bottlenecks;
d) creation of more coordinated, connected systems within organisational levels;
e) facilitation of feedback and peer review of communication systems (e.g., Slack);
f) facilitation of smart sharing in real time.

AI systems can also generate dynamic social graphs that capture the relationships between people and teams to provide a complete perspective on knowledge sources and bottlenecks.

During each of these stages, AI programs can provide valuable assistance to the editorial staff in various ways.

2.1. Author and Manuscript Registration (Validation) in the Journal System

Considering some individuals' potential desire to check the integrity of the journal by registering fake authors, AI can search for information about a given author and fill in their profile with publication history. Of course, this only refers to the automation of the search in the pre-defined database of publications and the presentation of information in a standardised form, as well as warning about a possible fraudulent type of data submission.

2.2. Initial Analysis of the Manuscript

In the second stage, the manuscript itself is checked. It should be determined whether the manuscript is relevant to the aim and scope of the academic/scholarly journal, whether its formatting and structure generally meet the set requirements, whether it does not contain overlaps/plagiarism, and whether the classifiers of the work are correctly provided. These tasks are relatively straightforward from the point of view of implementation. For this, you should use any AI program that supports an API (Application Programming Interface). This allows granting access to the manuscript from the journal management system to the AI program. The AI can provide answers to some pre-defined questions:

1. Does the topic of the work coincide with those specified for the academic/scholarly journal?

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2. Are the Journal Economic Literature Classifications (JELs) correctly indicated in the content of the manuscript?
3. Are the formatting and all structural elements of the manuscript in accordance with the requirements on the journal's website?
4. Does the grammar and work style meet generally accepted standards?
5. Were AI programs used to paraphrase the text or form new text in the manuscript?

Ethical issues are steadily arising in the upcoming era of AI – authorship, initially. Today, scientists can use not only ChatGPT for certain text generation, but also AI platforms such as:

a) ChatABC:[5] is the best ChatGPT program with features like team collaboration, a fast library, seamless service, and more. It provides the ability to download documents and use voice.
b) Paperpal:[6] The perfect writing tool for academics. It is a machine-learning writing assistant designed to help users write high-quality academic manuscripts in minutes. It provides real-time tips and feedback to improve your writing skills and integrates with Microsoft Word, making it easy to use for those familiar with the popular word-processing software. [7]
c) Consensus:[8] This is a GPT-4-based function that summarises the responses of scientific studies. Consensus uses AI to search for answers in scientific manuscripts. The best way to search for information is to ask the right scientific question.
d) Scite_[9]: It is ChatGPT for science. It uses 1.2b citation statements extracted and analysed from over 33m full-text manuscripts.
e) QuillBot:[10] It has a ChatGPT generator. Its text features range from changing words with synonyms using a thesaurus to changing the structure of a sentence by permuting the sentence. It also displays readability statistics, so you know how QuillBot has improved your writing.
f) In turn, to check whether the text has been partially or fully generated by AI, the editorial office can use many conventionally-named anti-AI programs.[11] Some include:
    1) GLTR[12]: The program uses a simple but effective way of analysing texts.
    2) GPT-2 Output Detector:[13] Makes it possible to detect structural features characteristic of AI within texts.

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5 *ChatABC* <https://chatabc.ai> accessed 20 June 2023.
6 *Paperpal* <https://paperpal.com> accessed 20 June 2023.
7 A Gasparini and H Kautonen, 'AI-Based Tools' (*Doria*, March 2023) <https://www.doria.fi/bitstream/handle/10024/186899/AI-based-tools-2023-03.pdf?sequence=1&isAllowed=y> accessed 30 May 2023.
8 *Consensus* <https://consensus.app> accessed 20 June 2023.
9 *Scite* <https://scite.ai> accessed 30 May 2023.
10 *QuillBot* <https://quillbot.com> accessed 30 May 2023.
11 Natalya Kyryk, 'Catch the Robot: Services for Checking Texts for Artificial Intelligence' (*WordFactory*, 2022) <https://wordfactory.ua/gpt-chat-detector> accessed 30 May 2023.
12 *GLTR* <http://gltr.io> accessed 30 May 2023.
13 *GPT-2 Output Detector* <https://openai-openai-detector--2fqjw.hf.space> accessed 30 May 2023.

3) GPT Radar:[14] Details its findings and provides an integrated assessment.
4) Hive Moderation:[15] Promises verification of texts in less than 200 ms (0.2 seconds) with 99% accuracy.

2.3. Is there no Plagiarism in the Work?

To ensure a lack of plagiarism, the AI program must be integrated with the journal's existing plagiarism-checking system. The integrated system can automatically perform the plagiarism check and provide a preliminary conclusion.

It is obvious that such formalisation of the work requires certain programming on the part of the editor at the current stage, but the output will be a proposal to the editor-in-chief for further consideration of the work, or its rejection with a letter prepared accordingly by the AI program.[16]

2.4. Selection of Reviewers

As a rule, the editor selects reviewers who, in their subject area, have specified either the same topic or the same JELs as those selected in the paper itself. At the same time, the editor does not always remember all the particular reviewer's fields to send him/her a work to review, especially over a long period in which the scientific interests of the reviewer can change with time. It is obvious that the AI program is tasked with determining the most relevant experts for reviewing, based on the database of reviewers and the database of previous reviews. Also, if the reviewer rejects or declines the invitation, the AI program can independently choose a replacement. So, AI may determine (suggest) a list of potential reviewers based on their scores (determined by the editor), history of reviewing (last review date), and semantic analysis of reviewed text and matching with keywords/publication records in reviewers' profiles (especially a task for AI). In case of overdue review, the program should independently notify the reviewer about this and, in case of further violation, select an appropriate replacement.

14 *GPT Radar* <https://gptradar.com > accessed 30 May 2023.
15 *Hive Moderation* <https://hivemoderation.com> accessed 30 May 2023.
16 Mohammad Khalil and Erkan Er, 'Will ChatGPT get you caught? Rethinking of Plagiarism Detection' (*arXiv:2302.04335*, 8 February 2023) doi:10.48550/arXiv.2302.04335; György Molnár and Cserkó József, 'AI Based Plagiarism Checking: Ease of use and appli7cable system for teachers to find similarities in students' assessments' (2022 IEEE 5th International Conference and Workshop Óbuda on Electrical and Power Engineering (CANDO-EPE), Budapest, Hungary, 21-22 November 2022) 187, doi:10.1109/CANDO-EPE57516.2022.10046379; Catherine A Gao and others, 'Comparing Scientific Abstracts Generated by ChatGPT to Original Abstracts Using an Artificial Intelligence Output Detector, Plagiarism Detector, and Blinded Human Reviewers' (2023) 6(1) NPJ Digital Medicine 75, doi:10.1101/2022.12.23.521610.

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2.5. Manuscript Review

Upon receipt of all necessary reviews, the AI program can prepare an email regarding the further fate of the manuscript based on the number of potential publications, the quality of the reviews, and the quality of other submitted works. This will allow the editor to receive a ranking of all submitted manuscripts, which will allow the selection of the best manuscripts without relying on the submission time priority. Considering that in peer-reviewed journals, each publication usually goes through several rounds of review, automation and ranking of manuscripts can be useful for the editors.

2.6. Communication with the Author Regarding Received Reviews

During all stages of communication with the author, AI programs allow you to create personalised letters instead of built-in unsubscribes, which are provided in all journal management systems. At the same time, there is a risk that the authors' letters will also be formed by AI software.

2.7. Decision on Publication

As already mentioned above, the AI program can form a rating of each submitted work based on the received reviews. This task is based on the possible complementarity of people and AI in decision-making situations, which are typically characterised by uncertainty, complexity, and ambiguity (Tab. 1).[17] However, this rating can be based on sensitive text analysis that is already successfully used in machine learning systems. When building the skeleton of the next issue, the AI program may be given additional tasks regarding the selection of works, based not only on the rating but also on other parameters, particularly the number of publications from one country, the total amount of papers per issue, etc.

***Table* 1. The scheme of AI integration in decision-making**

Task	Human	AI
Uncertainty	Make swift intuitive decisions in the face of the unknown	Provide access to "real-time" information (e.g., anomaly detection)
Complexity	Decide where to seek and gather data, choose among options with equal data support	Collect, curate, process, and analyse data
Equivocality	Negotiate, build consensus, and rally support	Analyse sentiments and represent diverse interpretation

17 Created by authors based on Mohammad Hossein Jarrahi, 'Artificial Intelligence and the Future of Work: Human-AI Symbiosis in Organizational Decision Making' (2018) 61(4) Business Horizons 577, doi:10.1016/j.bushor.2018.03.007.

2.8. Proofreading and Publication of Work and its Registration in Database Systems

At the final stage, AI software can perform almost automatic communication for the final proofreading of the text as well as consolidate the final consent for publication. After the manuscript is accepted and the version of the record is published, the AI software automatically registers the manuscript in all necessary databases and integrates the badge into the manuscripts on OJS (Fig. 1). Such AI software makes it possible to increase the visibility of the author and his/her results, and, accordingly, to increase the journal's impact. Another AI-related task is to develop a banner to promote the manuscript. Currently, AI programs can create images and banners based on textual analysis of the manuscript itself.[18]

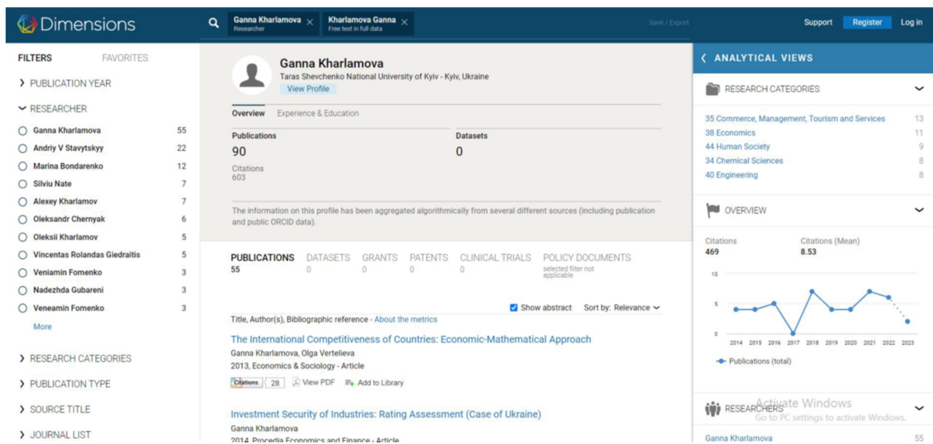

Figure 1. Dimensions.ai badge (example of Ganna Kharlamova's profile)

In this way, AI can streamline the content creation process, including automatic translation, grammar checking, and formatting rules, allowing publishing teams to focus on combining quality and quantity when creating content. AI systems can also generate dynamic social graphs that capture the relationships between people and teams to provide a complete perspective on knowledge sources. It should be noted that AI programs are not yet ready to fully adopt these tasks, especially in terms of integration with other programs, such as plagiarism checkers. However, this is easily solved by creating small programs. For example, in Python, standard libraries can be used to communicate between programs.

18 Marian Mazzone and Ahmed Elgammal, 'Art, Creativity, and the Potential of Artificial Intelligence' (2019) 8(1) Arts 26, doi:10.3390/arts8010026.

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However, along with highlighting the advantages of AI, we should mention the main disadvantages as well:

1) AI systems often struggle with grasping the nuanced and contextual aspects of language. While they can perform automated tasks, like grammar and spell-checking, they may not fully comprehend the intended meaning, tone, or cultural nuances of the content. This limitation can result in inaccuracies, misinterpretations, or inappropriate suggestions. So, the necessity of a human review is still vital.[19]
2) AI models are trained on large datasets that may contain inherent biases present in the data. As a result, AI systems can inadvertently perpetuate or amplify existing biases, including gender, racial, or cultural biases, in the editorial process. This can lead to biased language suggestions, unfair content selection, or skewed perspectives, which can have negative societal implications. So, the editors cannot fully rely on AI systems.[20] The use of AI in editorial processes raises ethical considerations regarding accountability for errors or biased content. When AI systems are involved in content creation or editing, it can be challenging to assign responsibility for any misinformation, inappropriate suggestions, or biased content as the decision-making process is automated and may lack transparency.
3) Still, and especially in "predatory" or not physical editorial offices, the automation of certain editorial tasks through AI can lead to concerns about job displacement for human editors. While AI can streamline and enhance efficiency, it may also lead to workforce reductions and job losses in the editorial industry, potentially impacting employment opportunities and livelihoods.[21]
4) The concerns as to the authorship of papers.[22]

However, it's important to note that these disadvantages do not imply that AI should not be used in editorial processes. Instead, they highlight the need for careful considerations, human oversight, and continuous improvements to ensure that AI systems are used

19 Ahmed Tlili, Daniel Burgos, and Chee-Kit Looi, 'Guest Editorial: Creating Computational Thinkers for the Artificial Intelligence Era-Catalyzing the Process through Educational Technology' (2023) 26(2)Educational Technology & Society 94, doi:10.30191/ETS.202304_26(2).0007; Xiaoxu Ling and Siyuan Yan, 'Let's be Fair. What about an AI editor?' [2023] Accountability in Research 1, doi:10.1080/08989621.2023.2223997.

20 Donghee Shin and Kerk F Kee, 'Editorial Note for Special Issue on Al and Fake News, Mis(dis)information, and Algorithmic Bias' (2023) 67(3) Journal of Broadcasting & Electronic Media 241, doi:10.1080/088381 51.2023.2225665.

21 Shashank Awasthi and others (eds), *Artificial Intelligence for a Sustainable Industry 4.0* (Springer Intern Pub 2021).

22 Joseph Crawford and others, 'Artificial Intelligence and Authorship Editor Policy: ChatGPT, Bard Bing AI, and beyond' (2023) 20(5) Journal of University Teaching & Learning Practice 1, doi:10.53761/1.20.5.01; Seong Ho Park and others, 'Ethical Challenges Regarding Artificial Intelligence in Medicine from the Perspective of Scientific Editing and Peer Review' (2019) 6(2) Science Editing 91, doi:10.6087/kcse.164.

responsibly, ethically, and in conjunction with human expertise to mitigate these challenges. Additionally, we overlook the challenges of integrating AI software with journal management systems. Still, we should admit[23] and acknowledge that some tasks can be successfully handled by functions of existing journal management systems without the need for AI, e.g., manuscript submission and tracking; peer review management; editorial workflow management (however, we foresee the integration of AI in this process to better synthesise it with other user services, even outside the editorial process); content management (like DOI, etc.); user access and permissions. So, while AI can enhance certain aspects of journal management systems, such as automated plagiarism detection or reviewer recommendation systems, the core functions mentioned above can be performed effectively without AI. These functions primarily rely on well-designed user interfaces, databases, and workflow management tools to streamline the editorial process and enhance efficiency.

3 CONCLUSIONS

In general, all current uses of AI in the publishing industry involve a machine or deep learning, either alone or in combination with other technologies, such as natural language processing (NLP), voice recognition, or computer vision.

Key theses:

1) AI only complements knowledge management in editorial offices;
2) AI systems can only imitate human knowledge and editorial functions;
3) AI offers opportunities for extending computing power, information processing, and analytical capabilities.

AI is a significant advancement in editorial functions where acceleration is needed and possibly assist with significant cost savings:

- checking for plagiarism;
- checking grammar and style;
- providing accurate information and fact-checking;
- reviewing (desk review);
- formatting and reference formatting;
- generating a banner for promotion.

The paper concludes that AI can streamline the content creation process, including automatic translation, grammar checking, and formatting rules, allowing publishing teams to focus on combining quality and quantity when creating content. However, AI and publishing will inevitably clash over copyright. AI can be complicit in the piracy of copyrighted works.

23 Okyay Kaynak, 'The golden age of Artificial Intelligence: Inaugural Editorial' (2021) 1 Discover Artificial Intelligence 1, doi:10.1007/s44163-021-00009-x.

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The symbiosis between editorial management platforms and AI can open new opportunities for content creation, optimisation, and distribution. AI can be used in editorial platforms to improve efficiency and quality of work.

Editorial management platforms can integrate AI to provide automated content processing and analysis. AI can detect and correct errors, improve the structure and content's organisation, and provide an automatic selection of relevant keywords and tags. This makes it possible to increase the efficiency of the editorial process and ensure high-quality content.

In addition, AI can be used to support the distribution of content on various platforms and communication channels. It can analyse data about the audience, account for their interests and behaviour, and, based on this, recommend optimal channels and content distribution strategies. This helps to reach a wider audience and increases the effectiveness of communication.

Thus, the symbiosis of editorial management platforms and AI can improve the processes of content creation and distribution, ensuring greater efficiency and high quality. The integration of AI into editorial platforms is becoming an important step in the development of the media industry and helps to solve complex tasks related to the processing and management of a large amount of content.

In summarisation, the following are tips for editors to better use AI:

1) Opportunities: Understanding the potential of AI will allow editorial offices to use it more effectively to improve their work.
2) Manuscript quality: Using AI to automatically check spelling, grammar, and the style of texts. This will help ensure high-quality content and reduce the likelihood of errors.
3) Optimising processes: Automating routine tasks, such as identifying keywords, categorising materials, or translating texts. This will allow editors to save time and focus on more complex tasks.
4) Personalisation of content: Analysis of user activity and recommendations of individualised content will potentially lead to increasing the impact of the text.
5) Analytics: Analysing data about the audience of readers, including their interest in certain content, popular topics, and trends. This will help invite authors to meet the needs of scientific trends and increase the impact of the issue.
6) Automatic news monitoring: Monitoring of news sources and automatic detection of scientific trends and brand markers. This will make it possible to quickly respond to urgent scientific gaps and distribute manuscripts with a high level of citation.
7) Improve SEO: Using AI algorithms to analyse keywords, competition, and search engine popularity. This will help optimise your content for better search engine rankings.

8) Automatic image recognition: Help to process and categorise large volumes of photo and video material faster, thus verifying the validity of references and ensuring academic integrity.
9) Forecasting: Predicting popularity and response to different types of content. This will make it possible to understand what content is most interesting for the publication's audience.
10) Ethics of use: Compliance with ethical standards is essential. Ensuring transparency, confidentiality, and fairness are important aspects of using AI in editorial processes.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Нотатка

ВИКОРИСТАННЯ ШТУЧНОГО ІНТЕЛЕКТУ В АКАДЕМІЧНИХ ВИДАННЯХ: ПОПЕРЕДНІ ЗАУВАЖЕННЯ ТА ПЕРСПЕКТИВИ

Ганна Харламова* та Андрій Ставицький

АНОТАЦІЯ

Програми штучного інтелекту постійно розвиваються і стають все більш потужним інструментом для вирішення різноманітних завдань. Перш за все, були зроблені спроби використати штучний інтелект (ШІ) для генерації нових текстів, але практика показує, що рівень креативності цих програм усе ще недостатній для створення змістовних статей. Звісно, це не завадить програмам ШІ розробляти текст, у тому числі генерувати не тільки несхожий текст, але здатний виконувати певні концептуальні завдання. Проте вже сьогодні є можливість використовувати програми ШІ для вирішення стандартних завдань із підготовки, редагування, рецензування, обробки та публікації наукових текстів. У цій статті буде здійснено огляд останніх тенденцій у використанні програм ШІ для академічних видань на прикладі кількох наукових журналів. Ми розглянемо різні рівні ШІ та їх вплив на редакційну роботу, а також проаналізуємо потенціал ШІ в доповненні людського внеску.

Далі розглянемо такі етапи роботи з науковими текстами в редакціях наукових журналів: реєстрація автора та статті в системі журналу; первинний аналіз статті; вибір рецензентів; рецензування статті; спілкування з автором щодо отриманих рецензій; рішення про публікацію; коректура та публікація роботи; її реєстрація в системах баз даних.

У висновку ми узагальнюємо поради для редакторів щодо використання ШІ.

Ключові слова: *штучний інтелект, редактори, редакційний менеджмент, академічне видання, дослідницька доброчесність, відкрита наука, Україна.*

BOOK REVIEW

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Book Review

REVIEW OF THE MONOGRAPH “KINDESWOHL UND ELTERNSCHAFT” BY ELMAR BUCHSTAETTER

Vytautas Nekrošius*

The book under review, titled “Kindeswohl und Elternschaft: Schwerpunkt Eltern-Kind-Zuordnung in alternativen und grenzüberschreitenden Familien” (translated as “The Best Interests of the Child and Parenthood: Parent-Child Assignment in Alternative and Cross-Border Families”) by Dr. Elmar Buchstaetter, is written in German. It is based on the author's dissertation thesis at Paris Lodron University Salzburg, Austria and was published by esteemed Jan Sramek Verlag, Vienna, 2023, 236 pages, ISBN: 978-3-7097-0345-8.[1]

In his research, Dr. Elmar Buchstaetter goes beyond merely defining and structuring the concept of the best interests of the child. He explores the topic within the wider framework of family dynamics, parenthood, and other aspects of family law. The book places significant emphasis on analysing the ECHR as well as the case law of the ECtHR. Moreover, it provides a detailed comparative review of Austrian, German and Swiss case law.

The author clarifies at the outset that the purpose of his work is not to ascribe new ethical-philosophical meanings to existing laws or to reclassify norms in a dogmatic way. Instead, the aim is to delineate the substantive dimensions of the best interests of the child principle across various methods in establishing legal parenthood, balancing the rights and duties of adults and children.

1 Elmar Buchstaetter. *Kindeswohl und Elternschaft: Schwerpunkt Eltern-Kind-Zuordnung in alternativen und grenzüberschreitenden Familien* (Jan Sramek Verlag 2023).

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The first chapter examines the structural differences between registered partnerships and civil marriage as well as the impact of advancing gender equality on these legal institutions. The increasing societal relevance of informal partnerships is addressed along with the various functions of the family. The second chapter questions the position of children in Austrian family law before it turns to the legal assignment of children to legally recognised family models. A primary objective of this chapter is to systematically capture relevant norms for further comparative analysis. The book's further structure follows the legal significance of the methods for establishing legal parent-child relationships: from the law of descent through adoption and foster care to de facto adult-child relationships. The book's main focus, however, is on the legal assignment of children in cases where the biological or genetic parenthood of one or both parents diverges, as well as on the legal and ethical issues of current reproductive medicine. In this area, cross-border proceedings are increasing, raising difficult questions about the conflict of laws and recognition of foreign decisions on parenthood.

The key research findings are as follows:

- When registered partnerships were introduced as a second form of legal adult relationships alongside civil marriage in 2010, the regulations were restrained: They granted same-sex couples a certain legal status but did not aim for equality with marriage concerning legal parenthood. Eventually, however, following the case law of the ECtHR and the Austrian Constitutional Court, a significant equalisation of marriage and registered partnership could be achieved. With the opening of marriage to same-sex partners, the registered partnership was also made accessible to different-sex partners, aiming to ensure some equality between the two legal institutions. Despite their increasing societal relevance, informal partnerships still have an overall significantly weaker legal position than marriage.
- The best interests of the child are a guiding principle in family law and must be considered in all questions regarding the establishment of parenthood. This is especially crucial for same-sex parents who wish to undergo medically assisted reproduction, whether at home or abroad. Balancing the parents' interests with the child's best interests is indispensable.
- Access to legal parenthood still strongly depends on the underlying adult relationship of the intended parents. Especially when utilising reproductive techniques prohibited by foreign national law, the recognition of the child's legal status is problematic. In such cases, the type of foreign decision determines whether legal parenthood by descent is recognised or if the genetically unrelated parent is referred to adoption. Comparative law reveals differing perspectives among Central European supreme courts on this issue.

The entire work is not only intriguing and well-written but also shows a high quality of reasoning through in-depth analyses and well-founded conclusions. For these reasons, Dr. Elmar Buchstaetter's book is strongly recommended for family law experts as well as anyone interested in family relations.

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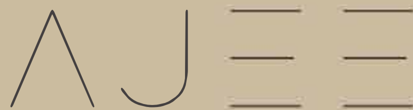

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