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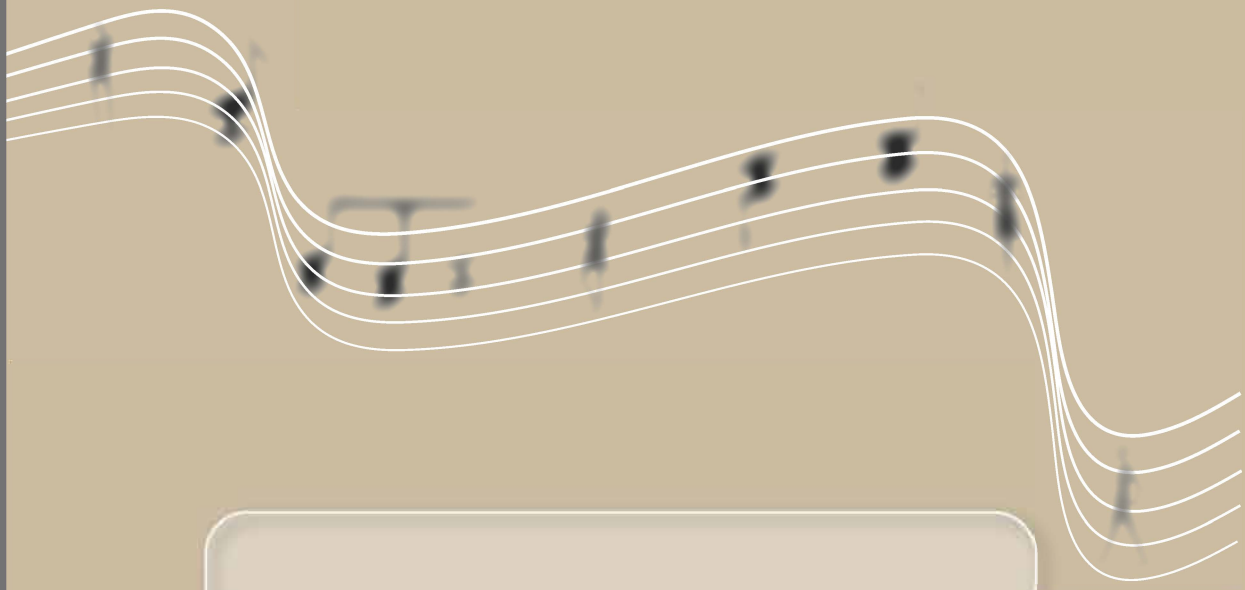

Issue 4/2024

Denial of Aggression Against Ukraine or Occupation of its Territory: a New Case Among the Denial Crimes
Mykola Rubashchenko and Nadiia Shulzhenko

The Obstacles to the Right to a Fair Trial Under the International Law: A Case Study of Al-Anfal and Srebrenica Genocide Trials
Mohamad Almohawes

ACCESS TO JUSTICE IN EASTERN EUROPE

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

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Editor-in-Chief's Note

ABOUT ISSUE 4 OF 2024 AND UKRAINE'S PROGRESS TOWARD EU INTEGRATION

As Editor-in-Chief, I am honored to present this issue of *Access to Justice in Eastern Europe*, a valuable scholarly work that advances the field of legal science.

In this editorial, along with emphasizing especially pertinent articles, I aim to offer reflections on Ukraine's significant progress in its European integration efforts. The formal initiation of negotiations on Chapter 23—Justice and Fundamental Rights—marks a critical milestone in Ukraine's alignment with EU standards and commitment to advancing judicial reforms. The focus on Chapter 23 underscores Ukraine's dedication to enhancing judicial independence, reinforcing the rule of law, and safeguarding fundamental rights—essential steps toward EU accession.

Given Ukraine's transformative reform agenda and the Ukraine Facility Plan aimed at aligning its judicial infrastructure, procedural standards, and legal institutions with acquis, we encourage further submissions that explore these crucial developments. Future issues of *Access to Justice in Eastern Europe* seek to engage with the complexities of Ukraine's legal modernization, offering a platform for scholarly debate on the challenges and opportunities associated with adapting national legislation of other candidate-states to meet the rigorous standards of the EU.

We invite contributions that critically examine the ongoing judicial reforms in Ukraine, especially in the context of Chapter 23, and analyze the impact of these reforms on judicial independence, rule of law, and fundamental rights. Submissions

that provide comparative perspectives, assess specific procedural adaptations, or explore the broader implications for Eastern European legal systems are especially welcome. Through this dialogue, we aim to deepen understanding of Ukraine's integration journey and enrich the broader discourse on access to justice and legal reform in the region.

Ukraine's journey toward EU integration is rooted in historical ties with Europe and a commitment to establishing a transparent and effective judicial system aligned with European standards. Since declaring independence in 1991, Ukraine has aimed to move beyond foreign-imposed legal structures from occupation periods, including Soviet influences that introduced centralized judicial control, dependence on hierarchical courts, and interference from state bodies in judicial proceedings.

Joining the Council of Europe in 1995 laid the foundation for Ukraine's alignment with European law. Ratifying the European Convention on Human Rights in 1997 further demonstrated this commitment, as ECHR case law became a significant influence on national jurisprudence. The European Court of Human Rights has since been instrumental in prompting judicial reforms, particularly concerning the non-enforcement of court decisions, delays in legal proceedings, and the need for judicial independence.

The 2014 EU–Ukraine Association Agreement marked a turning point by establishing a framework for harmonizing Ukrainian legislation with EU laws, prioritizing justice reforms. The Free and Comprehensive Trade Area with the EU was seen as foundational to further integration, necessitating enhanced judicial efficiency, independence, and anti-corruption efforts. These reforms reshaped judicial processes, revised procedural regulations, and led to substantive changes within the Supreme Court.

Despite these efforts, Soviet-era legacies persist, impacting judicial functionality and public perception. The period of Soviet occupation dismantled the independent legal profession, established state control over judges, and hindered judicial impartiality. These historical burdens demand comprehensive reforms as Ukraine advances toward European standards.

European law, particularly ECtHR case law, has been pivotal in transforming Ukrainian civil justice. For instance, abolishing the supervisory review protest—a procedure allowing officials to overturn final court decisions—significantly shifted toward judicial integrity. Other ECtHR cases addressed critical issues like unreasonable delays and

repeated appellate reviews, which led to structural reforms, including simplified procedures for resolving straightforward cases.

In response to criticisms regarding non-execution of court decisions, a systemic issue ranking Ukraine third in ECtHR appeals, landmark cases have catalyzed reforms in enforcement systems to ensure Convention compliance and restore public confidence in the legal system's effectiveness.

In recent years, Ukraine has intensified efforts to modernize its judiciary, emphasizing digitalization. Platforms like the Unified Judicial Information and Telecommunication System and the Unified State Register of Judgments have enhanced transparency and accessibility, supporting real-time document access, case tracking, and video conferencing capabilities. Despite gradual implementation, these efforts reflect positive progress. The government's "DIIA" platform, which provides citizens with access to legal services, exemplifies Ukraine's commitment to accessible, transparent justice.

Significant progress has been made in modernizing procedural law and aligning with European standards, though challenges remain. The Ukrainian judiciary must address the influence of entrenched practices and institutional limitations. Integration with the broader Genuine European area of justice, aligning Ukraine's legal rights and obligations with those of EU member states, remains a future goal. Judicial cooperation, mutual recognition of foreign judgments, and harmonization of legal frameworks will require continued dedication and collaboration.

Through sustained reforms, Ukraine is transforming its judicial landscape, aligning with principles of transparency, independence, and efficiency that define the EU's legal order. These reforms, while challenging, are vital for Ukraine's continued progress toward EU membership, contributing to the country's broader goals of stability, rule of law, and integration within the European community.

Chapter 23 represents both opportunities and challenges. Reforms target judicial independence, efficiency, and transparency—key areas for strengthening public trust. The Facility Plan's Component I includes updates to bankruptcy laws and enforcement of court decisions, aligning with EU standards such as Directive (EU) 2019/1023 on preventive restructuring. Additional initiatives focus on digitalization, including UJITS, to streamline court operations and improve public access to justice.

Though, in our opinion, a critical obstacle to implementing these judicial reforms lies in the human resources required to support them effectively. The success of new judicial tools and procedures depends heavily on court employees and judges, who, over three decades of independence, have faced persistent instability—from shifts in procedural legislation to fluctuating political will and trust in the judiciary. Although there has been substantial reshaping of high court staff, around seven hundred first-instance and appellate courts still rely on judges whose careers began in the turbulent 1990s, a period marked by inadequate selection processes and low standards for judicial qualifications.

This continuity presents a challenge: without further investment in judicial training and development, the transformative concepts and procedural reforms risk remaining largely theoretical. A robust commitment to human resource support is essential to fully actualize these reforms and to bring Ukraine closer to EU integration. By fostering a skilled and adaptable judiciary, Ukraine can better navigate the demands of European standards and build a resilient judicial infrastructure capable of sustaining long-term reform.

Our journal issue highlights legal developments in multiple countries, including Albania, Austria, Bosnia and Herzegovina, Kazakhstan, Kosovo, Lithuania, Romania, Slovakia, and Ukraine. We explore contributions from Vietnam, notably from **Khoat Van Nguyen** on the need for globally harmonized sanctions for prosecuting transnational commercial crimes, and from **Oanh Cao** and **Tuan Vu Van** on proposing restorative justice frameworks. These contributions broaden our journal's scope and hold valuable insights for our readership.

In this issue, I draw attention to two standout articles from Ukraine. The first, by **Mykola Rubashchenko** and **Nadiia Shulzhenko**, critically examines Ukraine's criminalization of denial crimes within the broader European trend of historical negationism laws. Their analysis addresses the tension between protecting historical memory and preserving freedom of expression, with Ukraine's distinct legislative approach reflecting its geopolitical context. The simultaneous enactment of conflicting laws has led to inconsistencies within the Ukrainian Criminal Code, and the authors provide constructive recommendations for addressing these challenges as Ukraine aligns its legal system with EU standards.

The second article, by **Ivan Yakoviyk**, **Sergiy Kharytonov** and **Oleksiy Zaytsev**, reopens the debate on combatant immunity amid the Russian-Ukrainian war. They

rigorously examine legal and ethical aspects of this doctrine, particularly regarding Ukraine's international obligations. Their analysis explores the combatant's status and privileges under IHL, critically assesses Ukraine's legal obligations, and addresses the liability of defectors. This article significantly contributes to discussions on combatant immunity, balancing legal obligations and ethical considerations in wartime.

Additionally, **Mohamad Almohawes's** essay on fair trial standards in the al-Anfal and Srebrenica genocide trials examines the disparities in trial approaches for similar crimes. Almohawes argues for a unified framework under the ICC, addressing inconsistencies to ensure equal justice and fair trial standards for international crimes.

Finally, this issue's case notes provide insights into Ukraine's evolving legal landscape. **Oksana Khotynska-Nor** and **Kyrylo Legkykh's** study examines how Ukrainian judges address conflicts of law, offering an empirical perspective on the complexities of the Ukrainian legal system. **Viktoriia Ivanova's** note highlights Ukraine's strategy for restoring property rights to those affected by Russian aggression, detailing the initial legal measures aimed at redress and recovery.

Let us also recognize the dedication of our managing editors, Mag. **Yuliia Hartman** and Mag. **Bogdana Zagrebelna**, and our language editors, **Julie Bold** and **Olha Samofal**. We extend gratitude to our authors and reviewers, whose expertise and trust in our publication ensure its scholarly rigor. This year, our team has shown unwavering commitment to enhancing editorial professionalism, including participation in EASE Editorial School and PUBMET conference, updating our reviewer guidelines, and launching our annual AJEE meeting to foster engagement with our community.

Looking ahead, we have ambitious plans to further our mission, and we wish continued success to our dedicated audience, our exceptional team, and our valued authors.

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

RESEARCH ARTICLE

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Research Article

DENIAL OF AGGRESSION AGAINST UKRAINE OR OCCUPATION OF ITS TERRITORY: A NEW CASE AMONG THE DENIAL CRIMES

Mykola Rubashchenko* and Nadiia Shulzhenko

ABSTRACT

Background: *Denial crimes are considered one of the most controversial topics in modern criminal law. The criminalisation of historical negationism is problematically balanced between two extremes: the need to protect historical memory, public order and the feelings of victims of terrible tragedies and their descendants, and the need to safeguard freedom of expression and academic debate. Despite this tension, the criminalisation of denial crimes has been gaining momentum on the European continent and is constantly expanding.*

For a long time, Ukraine has remained on the sidelines of this complex debate on the prohibition of denials. However, Russian aggression prompted the Ukrainian parliament to criminalise the denial of the aggression against Ukraine and the occupation of its territory. The wording of the law is not trivial and differs from classic European models. Two laws were adopted simultaneously, but they were not synchronised with each other, creating a collision. Despite this, both are widely used.

This article, therefore, demonstrates Ukraine's thorny path to criminalising denials and the legal difficulties that arose from the extreme conditions under which the laws were adopted.

Methods: *In the initial stages of the research process, the authors present a concise overview of the evolution of criminal prohibition of denial across the globe, focusing on recent trends. This is achieved through the application of historical and comparative legal methods.*

The central section of the study is devoted to an examination of the Ukrainian experience, comprising two parts. The first section elucidates the evolution of the concept of criminalisation of these actions in Ukraine through an analysis of legislative initiatives and the outcomes of their assessment. The second section is dedicated to investigating the shortcomings of the legislative process, the challenges encountered in the implementation of adopted amendments, and the formulation of recommendations for the resolution of collision between legal norms, as well as suggestions for improving existing regulatory frameworks. In this endeavour, the authors employ a combination of formal legal and logical methods of cognition.

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Results and conclusions: *Europe is at the heart of the movement to criminalise historical negationism. Most European countries criminalise some form of denial. Ukraine, as a candidate country for accession to the European Union, must harmonise its legislation with EU law. Over the past two decades, numerous draft legislation proposals have been submitted to the Ukrainian parliament with the intention of criminalising the denial of specific historical facts and their legal assessment. However, the Ukrainian experience differs significantly from that of its European counterparts, which mainly focus on liabilities for denying the Holocaust, other genocides, crimes against humanity, and war crimes.*

At present, the criminal law of Ukraine provides for the denial of Russian aggression and occupation in two distinct articles of the Criminal Code of Ukraine. Both articles are applied in practice, resulting in legal uncertainty and a violation of the principle of equality. The article proposes an amendment to the Criminal Code of Ukraine to resolve this collision and, in the interim, to resolve the collision of norms by the principle of in dubio pro homine.

1 INTRODUCTION

In March 2022, the Verkhovna Rada of Ukraine passed two laws that criminalised a range of activities, including the so-called denial crimes (or crimes of negationism). For the first time in Ukraine, criminal investigations were initiated for the denial and justification of specific facts, resulting in a surge in the number of criminal cases that surpassed the scale observed in other countries. In fact, Ukraine is not a pioneer in this complex issue. Indeed, the Ukrainian parliament has been delaying this moment for quite some time.

According to scholars, the history of using state coercion as an element of memory policy dates back to ancient times.[1] Nevertheless, the criminalisation of negationism as a distinct legal concept and the wider debates surrounding it only emerged in the latter half of the 20th century. This can be attributed to the reflections prompted by the Second World War in general and the attempts to prevent the repetition of genocidal practices such as the Holocaust. It is, therefore, unsurprising that Holocaust denial represents a key aspect of the phenomenon of denial in general, marking the point at which the modern history of the criminalisation of negationism begins.

The initial direct criminalisation of Holocaust denial occurred in Israel, where the Knesset enacted the Holocaust Denial Prohibition Law in 1986.[2] In France, in 1990, the Gayssot Law was adopted, which established criminal liability for denying or diminishing the Holocaust

1 Emanuela Fronza, 'The Punishment of Negationism: The Difficult Dialogue Between Law and Memory' (2006) 30(3) Vermont Law Review 610; François Ost, *Le Temps du Droit* (Odile Jacob 1999) 145, doi: 10.3917/oj.ost.1999.01.

2 Israeli Law no 5746-1986 of 8 July 1986 'Denial of Holocaust (Prohibition) Law' <https://main.knesset.gov.il/EN/about/history/Documents/kns11_holocaust_eng.pdf> accessed 28 July 2024.

and crimes against humanity defined by the Nuremberg International Tribunal.[3] In Austria, the constitutional law on prohibition (Verbotsgesetz) was supplemented in 1990 with provisions that severely punish those who deny the Nazi genocide or other Nazi crimes against humanity.[4] In Germany, as early as the late 1970s, the courts began to apply the provisions of criminal law that prohibit hate speech and insulting language in cases of Holocaust denial or minimisation (trivialisation) of the number of victims. This was done through the interpretation of existing legislation.[5] However, it was only in 1994 that a specific clause was incorporated into § 130 of the German Criminal Code, which pertains to the denial of genocide perpetrated under the National Socialist regime.[6]

At present, only a small number of EU countries have not explicitly criminalised the denial of certain facts, limiting themselves to general provisions relating to hate speech. However, in the majority of these countries, criminalisation did not end with the denial of the Holocaust. Subsequently, various jurisdictions have also prohibited the denial of other genocides and crimes against humanity, war crimes, crimes against peace, and crimes of the communist regime through criminal law. For example, § 333 of the Criminal Code of Hungary punishes anyone who publicly denies the fact of genocide or other acts against humanity committed by the National Socialist or Communist regimes, questions, diminishes or attempts to justify it.[7]

In some countries, such as Hungary[8] and Germany[9], the prohibition of denial has generally passed constitutional muster (albeit with difficulty) before the relevant constitutional review bodies. There have been several proceedings before the French Constitutional Council on this issue. In the case of the criminalisation of denial of the Armenian genocide, the Council found that it was unconstitutional because the legislator had prohibited denial of what the legislator (and not a particular judicial body) had classified as genocide, which constituted

3 Martin Imbleau, 'Denial of the Holocaust, Genocide, and Crimes Against Humanity: A Comparative Overview of Ad Hoc Statutes' in Ludovic Hennebel and Thomas Hochmann (eds), *Genocide Denials and the Law* (OUP 2011) 257, doi:10.1093/acprof:oso/9780199738922.003.0008.

4 ibid 260.

5 Robert A Kahn, 'Holocaust Denial and Hate Speech' in Ludovic Hennebel and Thomas Hochmann (eds), *Genocide Denials and the Law* (OUP 2011) 87, doi:10.1093/acprof:oso/9780199738922.003.0004.

6 Christian Mentel, 'The Presence of the Past: On the Significance of the Holocaust and the Criminalisation of its Negation in the Federal Republic of Germany' in Paul Behrens, Olaf Jensen and Nicholas Terry (eds), *Holocaust and Genocide Denial: A Contextual Perspective* (Routledge 2017) 79, doi:10.4324/9781315562377.

7 Criminal Code of Hungary of 25 June 2012 'Büntető Törvénykönyvről' (amended 01 July 2024) <https://net.jogtar.hu/jogszabaly?docid=a1200100.tv#> accessed 28 July 2024.

8 Decision no 16/2013 (Constitutional Court of Hungary, 20 June 2013) <https://njt.hu/jogszabaly/2013-16-30-75> accessed 28 July 2024.

9 Mathias Hong, 'Holocaust, Meinungsfreiheit und Sonderrechtsverbot – BVerfG erklärt § 130 III StGB für verfassungsgemäß' (*Verfassungsblog: On Matters Constitutional*, 5 August 2018) <https://verfassungsblog.de/holocaust-meinungsfreiheit-und-sonderrechtsverbot-bverfg-erklaert-%c2%a7-130-iii-stgb-fuer-verfassungsgemaess/> accessed 28 July 2024.

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an attack on freedom of expression.[10] In another decision, the Council declared that the criminal prohibition of denying crimes against humanity, established by a French or international jurisdiction recognised by France, was compatible with the constitutional provisions on equality and freedom of expression.[11]

At the same time, the Constitutional Court of Spain declared the provision criminalising denial unconstitutional, considering that it could not be established that any denial of genocide objectively contributes to or is likely to create a social atmosphere of hostility. However, the court affirmed the legitimacy of criminalising the justification of genocide.[12] As a result, in 2015, the Spanish Parliament criminalised the public denial, serious diminution and glorification of genocide and crimes against humanity, with an important additional (qualifying) feature indicating that these acts may contribute to an atmosphere of violence, hostility, hatred or discrimination.[13]

The last few years have shown that the criminalisation of denials is only gaining momentum. For example, in 2022, §130 of the German Criminal Code was supplemented with a new part, according to which public denial, approval or gross understatement of genocide, crimes against humanity and war crimes are punishable, regardless of whether they were committed in the past or are occurring in ongoing conflicts and whether they are established by verdicts of international or German courts.[14] Noteworthy, the Israeli parliament successfully passed a preliminary reading of a bill that would criminalise denial, minimisation or approval of the Hamas terrorist attack on southern Israel on 7 October 2023.[15]

In the context of Ukraine's integration into the EU, one cannot fail to mention two European acts. The first one is the "Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems", adopted by the Council of Europe on 28 January 2003. According to Art. 6 of the Protocol, the Parties shall take measures to criminalise the intentional dissemination of material "which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final

10 Décision n 2012-647 DC, Communiqué de presse (Conseil Constitutionnel de la France, 28 février 2012) <https://www.conseil-constitutionnel.fr/actualites/communique/decision-n-2012-647-dc-du-28-fevrier-2012-communique-de-presse> accessed 28 July 2024.

11 Décision n 2015-512-QPC, Communiqué de presse (Conseil Constitutionnel de la France, 8 janvier 2016) <https://www.conseil-constitutionnel.fr/actualites/communique/decision-n-2015-512-qpc-du-8-janvier-2016-communique-de-presse> accessed 28 July 2024.

12 Decision no 235/2007 (Constitutional Court of Spain, 7 November 2007) <https://www.boe.es/buscar/doc.php?id=BOE-T-2007-21161> accessed 28 July 2024.

13 Criminal Code of Spain no 10/1995 of 23 November 1995 (amended 11 June 2024) <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444&tn=1&p=20240611> accessed 28 July 2024.

14 Max Bauer, 'Denial of War Crimes: Silent Tightening of Laws' (*Tagesschau*, 27 Oktober 2022) <https://www.tagesschau.de/inland/gesellschaft/volksverhetzung-107.html> accessed 28 July 2024.

15 Sam Sokol, 'Knesset passes preliminary reading of bill banning denial of October 7 massacre' (*Times of Israel*, 7 February 2024) <https://www.timesofisrael.com/knesset-passes-preliminary-reading-of-bill-banning-denial-of-october-7-massacre/> accessed 28 July 2024.

and binding decisions of the International Military Tribunal established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party."[16]

At the same time, the Protocol allows parties to criminalise denial or minimisation on the basis of aggravating circumstances, in particular if they were committed with the intent to incite hatred, discrimination or violence. It should be emphasised here that the aggravating features of denial are only optional, or in other words, parties may criminalise "naked" (direct) denial (without qualifying features). When Ukraine ratified the Protocol in 2006, it exercised this right and abandoned the construction of a "naked" denial, at least for the time being.[17]

The second one is the Council Framework Decision 2008/913/JHA, which obliges EU member states to punish publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Arts. 6, 7 and 8 of the Statute of the International Criminal Court, and the crimes defined in Art. 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group (Art. 1 (1)).[18] In comparison to the Additional Protocol, the Framework Decision explicitly provides for a mandatory qualifying feature - the ability to incite violence or hatred. Moreover, it also gives Member States "the choice to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting" (Art. 1(2)).[19] This Framework Decision is part of the EU's *aqui communitaire*, which must be implemented in the legislation of the candidate country before joining the EU.

In view of the above additional features, it may seem that Article 161 of the current Criminal Code of Ukraine (*further – CCU*) already indicates compliance, as it provides for punishment for incitement to national, regional, racial or religious hatred and enmity, as well as for humiliation of national honour and dignity, and insulting the feelings of citizens in connection with their beliefs.[20] However, given that the German parliament made the

16 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (28 January 2003) <https://rm.coe.int/168008160f> accessed 28 July 2024.

17 Law of Ukraine no 23-V of 21 July 2006 'On the ratification of the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems' [2006] Official Gazette of Ukraine 31/ 2202.

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

19 ibid.

20 Criminal Code of Ukraine no 2341-III of 5 April 2001 (amended 8 May 2024) <https://zakon.rada.gov.ua/laws/show/2341-14> accessed 28 July 2024.

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above-mentioned amendments in 2022 with this Framework Decision in mind, Ukraine may still have to directly criminalise the acts described in the Framework Decision.

This brief introductory overview demonstrates that in the information society, legislators in different countries are actively turning to criminal law in the formulation and implementation of memory policies. It is also clear that the debate on whether and to what extent it is acceptable for the state to restrict freedom of expression and historical research in this way will only continue. The culmination in the history of crimes of denial seems to be yet to come. With the criminalisation of denial of Russian aggression and occupation, Ukraine has contributed to this discourse and is broadening the scope of the debate. The following sections will show Ukraine's long journey towards this step (Section 3), as well as the formal and legal challenges faced by the Ukrainian legal system in connection with this criminalisation (Section 4 and 5).

2 RESEARCH METHODOLOGY

The first part of this study (Section 3) employed an in-depth analytical approach based on the historical-legal method, focusing on the numerous bills on the prohibition of denials registered in the Ukrainian parliament over the past two decades. This analysis demonstrated the significant complexities and originality of Ukraine's path compared to other countries.

In the second part (Sections 4 and 5), we focused on the legal analysis of the laws that criminalise denial of Russian aggression and occupation. The logical analysis (induction, deduction, analysis, synthesis) allowed us to identify legislative failures that resulted in the double criminalisation of denials that are punished differently, as well as to identify difficulties in applying the adopted amendments. Applying the concept of legal certainty and the *pro homine* principle helped us to propose ways to resolve the collision of laws and formulate recommendations for improving the norms of criminal law.

3 THE THORNY PATH OF CRIMINALISING DENIALS IN UKRAINE

3.1. Denial of Genocide

In 1991, after the fall of the Soviet curtain, Ukrainian society and the entire world learned about the horrific crimes of the totalitarian communist regime, including the man-made famine of 1932–1933, which prompted new historical and other research. After the Orange Revolution of 2004, the politics of memory began to take a more prominent place in political debate. In 2006, the Ukrainian parliament adopted the Law of Ukraine 'On the Holodomor of 1932–1933 in Ukraine'. The first two articles of this law call the Holodomor of 1932–1933

in Ukraine a genocide of the Ukrainian people, and public denial of the Holodomor of 1932–1933 in Ukraine is recognised as an outrage to the memory of millions of Holodomor victims, a humiliation of the dignity of the Ukrainian people and is considered illegal.[21] At the same time, despite the indication of the unlawfulness of public denial, no mechanisms of responsibility for such denial have been introduced. In its current form, the law only allows for the possibility of filing a civil lawsuit for the protection of honour and dignity. Several such lawsuits were filed but were unsuccessful because the deniers acknowledged the fact of the Holodomor but disagreed with its assessment as genocide. The most famous was the lawsuit for the protection of honour and dignity filed in 2010 against the then President of Ukraine, Viktor Yanukovych, which was dismissed.[22]

The official recognition by the Verkhovna Rada of Ukraine of the Holodomor of 1932–1933 as an act of genocide paved the way for further criminalisation of denial of this fact. The first draft law criminalising the public denial of the Holodomor as an act of genocide was registered in December 2006.[23] The following year, a similar law was initiated by the then-President of Ukraine, Viktor Yushchenko.[24] In both cases, the need to adopt the law was justified by the need to protect the historical memory of millions of victims. According to the conclusions of the Chief Scientific and Expert Department of the Verkhovna Rada of Ukraine Secretariat (CSED), the draft laws proposed were to be rejected on the grounds of unjustified interference with freedom of expression. As a result, they were not even included in the parliamentary agenda. Subsequent draft laws sought to criminalise either only the public denial of the Holodomor of 1932–1933 as genocide[25] or, along with it, the public denial of the Holocaust.[26]

21 Law of Ukraine no 376-V of 28 November 2006 'On the Holodomor of 1932-1933 in Ukraine' [2006] Official Gazette of Ukraine 48/3186.

22 'The Court Acquitted Yanukovych in 2 Minutes in the Holodomor case – "Svoboda" ' (*Ukrainska Pravda*, 8 December 2010) < https://www.pravda.com.ua/news/2010/12/8/5654370/ > accessed 28 July 2024.

23 Draft Law of Ukraine no 2816 of 22 December 2006 'On Amendments to the Criminal Code of Ukraine (Regarding Responsibility for Public Denial of the Fact of the Holodomor of 1932-1933 as Genocide of the Ukrainian People)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=29140> accessed 28 July 2024.

24 Draft Law of Ukraine no 3407 of 29 March 2007 'On Amendments to the Criminal and Criminal Procedure Codes of Ukraine (Regarding Responsibility for Denying the Holodomor)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=29881> accessed 28 July 2024.

25 See for example: Draft Law of Ukraine no 1427 of 24 January 2008 'On Amendments to the Criminal Code of Ukraine (Regarding Responsibility for Public Denial of the Fact of the Holodomor of 1932-1933 as Genocide of the Ukrainian People)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=31473> accessed 28 July 2024.

26 See for example: Draft Law of Ukraine no 1143 of 07 December 2007 'On Amendments to the Criminal and Criminal Procedure Codes of Ukraine (Regarding Responsibility for Public Denial of the Holodomor of 1932-1933 in Ukraine)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=30993> accessed 28 July 2024.

In 2015, the Verkhovna Rada of Ukraine adopted a resolution recognising the deportation of Crimean Tatars from Crimea in 1944 as genocide of the Crimean Tatar.[27] This restoration of historical truth by the Ukrainian parliament naturally became the formal basis for the emergence of draft laws criminalising the denial of the 1944 genocide of the Crimean Tatar people.[28]

In general, since 2006, after each parliamentary election, one or more bills have been registered in each convocation to criminalise public denial of genocide, but none of them have been adopted. Most of these drafts concerned the prohibition of denying the assessment of the Holodomor of 1932–1933 as an act of genocide against the Ukrainian people, while a smaller number concerned the prohibition of denying the Holocaust and the genocide of Crimean Tatar.

In the Ukrainian parliament, proposals to punish the denial of the genocide of the Ukrainian people are dominated, which makes the problem of the priority of geographical and specific historical conditions in the practices of criminalising denial by different countries as relevant as possible. The criminalisation of Holocaust denial is currently the closest to gaining legal force. A few days before the full-scale Russian invasion, the Verkhovna Rada of Ukraine passed a law that added to Art. 161 of the CCU, which provides for a classic hate crime, the act of manifestations of anti-Semitism.[29] At the same time, the term "manifestations of anti-Semitism" is defined in the previously adopted Law of Ukraine "On Preventing and Combating Anti-Semitism in Ukraine" and includes, among other things, "denial of the fact of persecution and mass extermination of Jews during the Second World War (Holocaust)".[30] This would effectively criminalise Holocaust denial, but at the time of writing, the President of Ukraine has not yet signed the adopted law, which prevents it from entering into force.

Thus, unlike some EU countries that initially criminalised Holocaust denial, the first attempts to introduce a criminal prohibition on denying certain facts in Ukraine concerned the Holodomor of 1932–1933, in particular, its assessment as genocide. Subsequent draft laws also mentioned public denials of the Holocaust and the genocide of the Crimean Tatar people. Only the criminalisation of Holocaust denial was embodied in the adopted law, but even this has not yet been signed by the President.

27 Resolution of the Verkhovna Rada of Ukraine no 792-VIII of 12 November 2015 'On Recognition of the Genocide of the Crimean Tatar People' [2015] Official Gazette of Ukraine 93/3166.

28 See for example: Draft Law of Ukraine no 4120 of 19 February 2016 'On Amendments to Certain Legislative Acts of Ukraine (Regarding Criminal Responsibility for Denial of the Holodomor, Holocaust, Genocide of the Crimean Tatar People)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58243> accessed 28 July 2024.

29 Draft Law of Ukraine no 5110 of 19 February 2021 'On Amendments to Article 161 of the Criminal Code of Ukraine to Implement the Provisions of the Law of Ukraine "On Prevention and Counteraction of Anti-Semitism in Ukraine" ' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71166> accessed 28 July 2024.

30 Law of Ukraine no 1770-IX of 22 September 2021 'On the Prevention and Counteraction to Anti-Semitism in Ukraine' [2021] Official Gazette of Ukraine 81/ 5100.

3.2. Denial of Fascist Crimes

Another area is the criminalisation of fascist crimes. In 2010–2012, four draft laws were registered to criminalise the public denial or justification of crimes against humanity committed by the Nazis and their supporters in World War II, some of which also included the ban on denying the Holodomor of 1932–1933 and the Holocaust (drafts No. 4745, 10050, 11150, 11150-1). Identical or similar draft laws were generally not rare.

An analysis of the CSED's opinions on these drafts shows that the main comments were that, firstly, the concepts of "fascism", "Nazism" and other similar terms are vague and lack legal certainty. Secondly, such acts as public approval, denial and justification do not pose a public danger, necessary to recognise them as crimes, and are forms of realisation of the right to freedom of thought and speech and expression. Thirdly, Art. 161 of the CCU, which provides for hate speech, already provides for liability for truly dangerous statements.

Despite the critical perception, on 16 January 2014, during the Revolution of Dignity, the parliamentary majority supporting then-President Viktor Yanukovych adopted a package of laws with significant procedural violations that allowed for significant restrictions on human rights and freedoms, especially in the context of the ongoing protests. These laws were conventionally called dictatorial laws, one of which supplemented the CCU with Art. 436-1 and criminalised public denial and justification of crimes against humanity committed by the Nazis in World War II, in particular crimes committed by the Waffen-SS organisation, its subordinate structures, and those who fought against the anti-Hitler coalition and collaborated with the Nazi occupiers.[31]

The law criminalising the public denial and justification of fascism was re-adopted in the same wording on 28 January 2014. It remained in force for just over a year, although it was never applied. In April 2015, Art. 436-1 was restated in a new wording, which, instead of public denial and justification, still provides for liability for the production, distribution and public use of symbols of the communist and national socialist (Nazi) totalitarian regimes.[32]

Therefore, historically, the first successful (in the sense of the law coming into force) example of the criminalisation of crimes of denial in Ukraine was the public denial and justification of crimes against humanity committed by the Nazis in World War II. It can hardly be argued that this law also included cases of denial or justification of genocide (including the Holocaust) committed by the Nazis since *de jure,* the terms "genocide" and "crimes against humanity" are traditionally distinguished, including in international criminal law. The real intentions of the legislator remain unclear.

31 Law of Ukraine no 729-VII of 16 January 2014 'On Amendments to the Criminal Code of Ukraine Regarding Responsibility for Denying or Justifying the Crimes of Fascism' [2014] Official Gazette of Ukraine 8/239.

32 Law of Ukraine no 317-VIII of 9 April 2015 'On the Condemnation of the Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of their Symbols' (amended 27 July 2023) <https://zakon.rada.gov.ua/laws/show/317-19> accessed 28 July 2024.

However, this case was definitely not successful in terms of the actual application of the law in practice. In the end, the prohibition of symbols, which has significant advantages in terms of legal certainty, seemed much more practical to the legislator. Court statistics later confirmed this, as 160 people were convicted under Art. 436-1 of the CCU (as amended) in 2015-2023.[33]

3.3. Denial of Russian Aggression and Occupation

Russia's ongoing aggression against Ukraine, which began in 2014, was hybrid and covert until the open invasion in 2022. The Russian Federation has referred to the hostilities in Donbas as a civil war within Ukraine, denied its decisive influence on the so-called Donetsk National Republic ('DNR') and Luhansk National Republic ('LNR'), and disseminated these narratives in the international arena and among the Ukrainian population. It is, therefore, not surprising that draft laws on criminal penalties for denying the facts of Russian aggression against Ukraine and its occupation of Ukrainian territory have been introduced in the Ukrainian parliament.

Three draft laws were registered in the Verkhovna Rada of Ukraine of the VIII convocation (2014–2019), which proposed to supplement the CCU with an article on public denial or justification of the Russian Federation's aggression against Ukraine and one draft law on criminalising public denial of the occupation of Ukraine's territories by the Russian Federation (drafts No 2080, 2486, 3771, 7354). None of these drafts were adopted. We can assume this was due to the negative opinions received from various law schools and legal experts. The CSED noted that public denials of the facts of aggression and occupation are a form of exercising the constitutional right to freedom of thought and speech, to the free expression of one's views, and that the public danger is posed by the crimes against peace and security of mankind (including aggression), not by judgments as to whether certain individuals or organisations committed such crimes and whether an act of aggression by a particular state took place in a particular case.[34] Indeed, it is understandable to argue that it is necessary to try those responsible for crimes, but it is much more problematic that the law is used to punish those who deny the actions of the perpetrators.[35]

33 'Judicial Statistics: Annual Reporting' (*Judicial Power of Ukraine*, 2024) <https://court.gov.ua/inshe/sudova_statystyka/> accessed 28 July 2024.

34 Conclusion of the Chief Scientific and Expert Department of the Verkhovna Rada of Ukraine Secretariat to the Draft Law of Ukraine no 7354 of 5 December 2017 'On Amendments to Certain Legislative Acts of Ukraine (Regarding Criminal Liability for Denying the Fact of Military Aggression of the Russian Federation against Ukraine)' <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63059> accessed 28 July 2024.

35 Lawrence Douglas, 'From Trying the Perpetrator to Trying the Denier and Back Again: Some Reflections' in Ludovic Hennebel and Thomas Hochmann (eds), *Genocide Denials and the Law* (OUP 2011) 50, doi:10.1093/acprof:oso/9780199738922.003.0003.

In the Parliament of the current IX convocation, there are more than ten similar draft laws with different options for introducing liability. Interestingly, as if responding to the criticism expressed, most of the drafts limited the scope of criminalisation in one way or another: only public figures (primarily national), including officials, were proposed to be punished for public denials. The CSED continued to be critical of such initiatives in its scientific conclusions, pointing out that a person's value judgements cannot entail liability (the latter is not necessary and appropriate).

In contrast to these drafts, Draft Law 5102 of 18 February 2021 provided for the addition of Art. 436-2 to the CCU to criminalise the justification, recognition as lawful, denial of Russian aggression against Ukraine and the occupation of its territory, and glorification of the aggressor and its representatives.[36] Later, in the context of the full-scale Russian invasion, the draft law was passed into law. It is interesting to note that this time, the CSED, emphasising that the draft was reviewed in a short time and under extraordinary conditions, made a number of comments. Still, none of them were concerned about the criminalisation of denials.

At the same time, the parliament was working on adding an article on collaborationism to the CCU. Among a number of documents, Draft Law No. 5144 of 24 February 2021 provided for a broad list of acts recognised as collaborationist activity, including public denials of aggression against Ukraine and the occupation of its territory.[37] In the extraordinary circumstances of a large-scale Russian offensive in March 2022, this draft law was also adopted as law without synchronisation with the adopted draft law 5102. Here, too, the CSED did not comment on the criminalisation of denials.

Thus, in the face of the threat of losing the Ukrainian statehood and under martial law, the Ukrainian parliament established criminal liability for denying Russian aggression and occupation. Despite the fact that all previous attempts at criminalisation had faced severe criticism from the expert community, the new realities allowed the risks of unjustified interference with freedom of speech and expression to be ignored. Theorists and practitioners have faced the difficult task of trying to understand how such a step is compatible with the values of a democratic state that is nevertheless struggling to exist.

36 Draft Law of Ukraine no 5102 of 18 February 2021 'On Amendments to Certain Legislative Acts of Ukraine (Regarding Strengthening Criminal Liability for the Production and Distribution of Prohibited Information Products)' <https://itd.rada.gov.ua/billInfo/Bills/Card/25645> accessed 28 July 2024.

37 Draft Law of Ukraine no 5144 of 24 February 2021 'On Amendments to Certain Legislative Acts (Regarding Establishment of Criminal Liability for Collaborationist Activity)' <https://itd.rada.gov.ua/billInfo/Bills/Card/25699> accessed 28 July 2024.

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4 A BANAL MISTAKE OR CONSCIOUS DOUBLE CRIMINALISATION?

4.1. The Problem of Double Criminalisation of Public Denial

The full-scale Russian aggression in February 2022 forced parliamentarians to quickly press the 'play' button to criminalise denial of aggression and occupation. It is only natural that with Russian troops on the outskirts of Kyiv, there was no time to thoroughly discuss the controversial issues and improve the drafts before they were adopted. Both laws criminalising denial were adopted on the same day—3 March 2022, the second week of the full-scale Russian invasion of Ukraine. Table 1 compares the content of these laws.

Table 1. Comparison of the texts of Articles 111-1 and 436-2 of the CCU

Part 1 of Article 111-1 of the CCU (Collaborationist activities), Law No. 2108-IX (draft law 5144)	**Part 1 of Article 436-2 of the CCU** (Justification, recognition as lawful, denial of the aggression of the Russian Federation against Ukraine, glorification of its participants), Law No. 2110-IX (draft 5102)
A *citizen of Ukraine* punished if he/she: 1) *publicly* denies: a. aggression against Ukraine, b. the establishment and approval of the occupation of a part of the territory of Ukraine, 2) *publicly calls* for: a. support for the decisions or actions of the aggressor state, armed formations or occupation administration of the aggressor state, b. cooperation with the aggressor state, armed formations or occupation administration of the aggressor state, c. non-recognition of the extension of the state sovereignty of Ukraine to the occupied territories of Ukraine.	A *person* is punished if he/she: 1) denies: a. the aggression of the Russian Federation against Ukraine, which began in 2014, including by presenting the aggression of the Russian Federation against Ukraine as an internal civil conflict, b. the occupation of part of the territory of Ukraine, 2) *justifies or recognises the above facts as legitimate*, 3) *glorifies*: a. persons who carried out the aggression of the Russian Federation against Ukraine, b. representatives of the armed forces of the Russian Federation / of irregular illegal armed formations / of the occupation administration of the Russian Federation (…)
punishment: only deprivation of the right to hold certain positions or engage in certain activities for a period of 10 to 15 years	the maximum penalty is imprisonment for up to 3 years

The naked eye can notice significant differences between the two provisions: the first one provides only for public denials, while the second one refers to denial as such (i.e., both public and non-public); the first one punishes only a citizen of Ukraine, while the second one – any person; the first refers to any aggression/occupation (at least formally), while the second refers only to those committed by the Russian Federation since 2014; the first alternatively provides for public calls for certain actions, while the second provides for justification, recognition of certain facts as legitimate and glorification of the relevant participants in the aggression/occupation. It is equally important that Art. 111-1 is included in Section I of the Special Part of the CCU "Crimes against the Bases of National Security of Ukraine", while Art. 436-2 is part of the last section, which contains crimes against the peace and security of mankind and international law and order (such as the crimes of aggression, genocide, war crimes, etc.).

On the other hand, even a brief reading of their content leads to the conclusion that public denial of Russian aggression and occupation, if committed by a citizen of Ukraine, is twice criminalised. It is important to note here that public denials and those committed by a citizen of Ukraine are, quite understandably, the most common cases of denial crimes in practice. Both articles provide for liability for this, but the punishments differ significantly: for public denial as a type of collaborationism, a person faces 'symbolical' punishment (as a result, such denial is not even a crime, but only a criminal offence), while for denial under Para. 1 of Art. 436-2, a person faces 3 years in prison (a minor crime), and in the presence of aggravating circumstances under Part 3 of this article (if the denial is committed by an official, repeatedly, or by an organised group, or with the use of the media) - 8 years in prison (a serious offence).

4.2. The Collision

The parallel existence of these two articles has given rise to a substantive collision that national criminal law has never faced before. The tangle of different features has turned out to be so complicated that classical methods of interpretation still lead researchers to a dead end.

On the one hand, Pt. 1 of Art. 111-1 of the CCU describes acts that are specified by method (publicity) and person (citizen of Ukraine), which indicates its narrower content and special nature. On the other hand, there are grounds for the opposite conclusion - Art. 436-2 of the CCU refers only to the denial of aggression/occupation of the Russian Federation, not aggression/occupation in general and is placed in the section on crimes against peace.

In practice, it is not surprising that the investigation authorities used both articles. In similar circumstances, some Ukrainian citizens were convicted under Pt. 1 of Art. 111-1 of the CCU, while others were convicted under the more severe Art. 436-2 of the CCU. Official statistics show staggering figures: since these provisions came into force on

31 December 2023, 374 people were convicted under Art. 111-1(1) of the CCU and 672 under Art. 436-2 of the CCU.[38]

Although it is clear that both articles provide for not only public denial but also other related acts (public calls, justification, glorification), this does not change the overall picture, as a significant part of the sentences under both articles relates to public denial committed by Ukrainian citizens.

When analysing the law's provisions, lawyers first try to understand the legislator's goal and intentions. However, when two laws criminalising the same behaviour with different degrees of punishment are adopted almost simultaneously, this task becomes more complicated. In this regard, it is most likely that due to the extreme conditions, the two draft laws, which had been lying in the committees of the Verkhovna Rada of Ukraine for more than a year, were accidentally adopted without their coordination. At the very least, it can be assumed that they could have been synchronised in terms of denials if there had been more time.

We consider this a serious defect that *de facto* makes a person's punishment completely dependent on which article (less or more severe) the investigator chooses, as there is no criterion for distinguishing between them. This creates high corruption risks, violates the principles of equality, and undermines the already weak arguments for criminalising denial offences.

4.3. The Option of Resolving the Collision by the Protected Object Rule

The conflict of Laws 2108-IX and 2110-IX gives rise to legal uncertainty, repeatedly noted in scientific publications. According to N. Antoniuk, in case of collision between Arts. 111-1 and 436-2 of the CCU, the latter should be given preference, given that it is placed in Chapter XX of the Special Part of the CCU and, therefore, protects the peace and security of mankind.[39]

However, the fact that a particular article is placed in a certain section cannot in itself be a decisive criterion for distinction. Firstly, it can hardly be argued that the bases of national security of the state, which are protected by the first section of the Special Part, are inferior in their importance to other values. At least in this regard, there are no legislative grounds or interpretations of judicial practice. Secondly, it would not be wrong to state that Art. 436-2 of the CCU is aimed at protecting the peace and security of mankind (the main object of protection) and indirectly at protecting the national security of Ukraine (an additional object). But at the same time, Art. 111-1, although primarily protecting national security (the main object), is indirectly aimed at protecting peaceful relations between states and

38 Judicial Statistics (n 33).

39 Natalia Antoniuk, 'Amendments of the Crimes against National Security of Ukraine: Criminalization or Differentiation of Criminal Liability' (2022) 11 Law of Ukraine 47, doi:10.33498/louu-2022-11-037.

peoples (an additional object). If there is aggression against a state and illegal occupation of its territory, this obviously leads to the intersection of the issues of national security of that state, on the one hand, and peace and international law and order, on the other.

4.4. The Rule of Temporal Collision

Another criterion was proposed by M. Khavroniuk. According to the researcher, if the collision cannot be resolved by the content of the laws, it should be resolved by the time the laws come into force (temporal collision).[40] This approach is based on the recently adopted Law of Ukraine "On Lawmaking," which formulates a rule for resolving a temporal collision: in the event of a collision between legal acts of equal legal force, provided that none of them is special in relation to the other, the rules contained in the legal acts that came into force later have priority in application. [41]

The fact that according to the official website of the Parliament, despite the simultaneous adoption, Law 2110-IX entered into force on 15 March 2022, while Law 2108-IX came into effect a day later, on 16 March 2022. This timing gives grounds to assert that the newer law – namely, Art. 436-2 of the CCU – is applicable.[42]

We cannot agree with the appropriateness of the temporal collision rule for the analysed situation. It should be noted that this rule is a reflection of a long-standing legal tradition and a generally accepted doctrinal approach, so its reasonableness is generally unquestioned. However, a separate argument could be developed about the inapplicability of this rule to cases where competing laws are adopted simultaneously because then the reasonableness of giving priority to one of them only because it came into force a day later becomes meaningless.

More importantly, a more compelling argument cancels out the rule of temporal collision in this context. The point is that, according to the final provisions, Law 2108-IX was set to enter into force "from the day of its publication," whereas Law 2110-IX was set to enter into force "from the day following the day of its publication". Since both laws were published in the official newspaper on the same day (15 March), it may seem that the former allegedly entered into force on the same day and the latter – from 00:00 the next day (16 March).

However, in the criminal law of Ukraine, a narrow approach to the interpretation of the phrase "from the date of its publication" is generally accepted. Given that citizens must have at least a certain minimum time to familiarise themselves with the law, the phrase

40 Mykola Khavroniuk, 'For Justifying the Armed Aggression of the Russian Federation against Ukraine – Criminal Responsibility' (*Center for Political and Legal Reforms*, 29 April 2022) <https://pravo.org.ua/blogs/kolaboratsijna-diyalnist-nova-stattya-kryminalnogo-kodeksu/> accessed 28 July 2024.

41 Law of Ukraine no 3354-IX of 24 August 2023 'On Law-Making Activity' (amended 18 September 2024) <https://zakon.rada.gov.ua/laws/show/3354-20> accessed 28 September 2024.

42 Khavroniuk (n 40).

"from the day of publication" means no earlier than 00:00 the next day, i.e. the legislative phrases "from the day of publication" and "from the day following the day of publication" mean the same thing.[43]

Only in this way can the presumption of knowledge of the law have a rational basis and the requirement of accessibility of the law as part of the principle of *nullum crimen sine lege* be met. Accessibility means that a citizen is given the opportunity to know the provisions contained in the law.[44] Thus, both laws came into force on the same day (16 March 2022), excluding the application of the rules for resolving temporal collision.

4.5. Nullum Crimen, Nulla Poena Sine Lege and the Principle of Equality

In this regard, the question arises of whether the apparent legal uncertainty means that none of the articles can be applied. Indeed, legal certainty requires, inter alia, "that legal rules are clear and precise, and aim to ensure that situations and legal relationships remain foreseeable".[45] In the case of criminal law, these requirements constitute the *lex certa* component of the interpretation of the fundamental principle of criminal law *nullum crimen, nulla poena sine lege*.[46] From this point of view, the intended law acts as a legal guideline when a person chooses a particular type of behaviour (negative or positive) and is always associated with the absence of gaps and contradictions.[47]

As demonstrated above, not only has no clear (unambiguous) national judicial practice been formed in more than two years, but the views of scholars do not allow for an unambiguous position. However, this does not mean that prosecution for public denial committed by a citizen of Ukraine is excluded. It can be argued that it is unclear to a citizen (even when seeking legal advice or analysing case law) under which article his or her actions will be punished. However, it is obvious to everyone what actions are prohibited by the criminal law. That is, the fact that public denial is punishable is reasonably foreseeable, as it can be read from both articles. It is only unclear whether this

43 See more in: Vyacheslav Borysov, 'Validity of the Law on Criminal Liability in Time and Space' in V Tatsii, V Tiutiuhin and V Borysov (eds), *Criminal Law of Ukraine: General Part* (Pravo 2020) 51; Yurii Ponomarenko, *Validity and Effect of Criminal Legislation Over Time* (Atika 2005) 84-6; Nazar Stetsyk, '"From the Day" or "From the Day Following the Day" of Official Publication: Concerning the Problem of Uncertainty of the Entry into Force of Legal Normative Acts' (2016) 63 Visnyk of the Lviv University: Series Law 29, doi:10.30970/vla.2016.63.5020.

44 Mykola I Panov, 'The Principle of Legal Certainty in the Practice of the European Court of Human Rights and the Quality Problems of the Criminal Legislation of Ukraine' (2015) 128 Problems of Legality 9, doi:10.21564/2414-990x.128.52082.

45 European Commission for Democracy Through Law (Venice Commission), *Report on the Rule of Law* (2011) <https://rm.coe.int/1680700a61> accessed 28 July 2024.

46 Svitlana V Khyliuk, 'Nulla Poena Sine Lege as a Part of the Legality Principle in the Practice of the European Court of Human Rights' (2013) 2 Scientific Journal of Lviv State University of Internal Affairs: Law 339.

47 Panov (n 44).

liability will be less severe (Art. 111.1(1) of the CCU) or more severe (Art. 436.2 of the CCU). *Sensu stricto*, the rules on public denial provide predictability in the context of the *nullum crimen* element, but not in the context of the *nulla poena* element.

The requirement of predictability of the law is directly related to ensuring the principles of equality and justice guaranteed by the Constitution of Ukraine. The absence of an explicit criterion for distinguishing between the two articles has resulted in some citizens being convicted of a criminal offence (Art. 111.1(1) of the CCU) and others of a minor or serious crime (Art. 436.2 of the CCU) for the same act. Being bound by the rule on the scope of the trial, according to which the court shall consider the case only within the scope of the charges brought by the prosecutor, judges ignore the question of the relationship between the two articles. Thus, the choice of the article to be applied in a particular case is entirely based on the decision of the investigation body, which is not based on any reasonable criterion. A situation where the degree of liability depends entirely on which side of the coin falls in each particular case (or, in other words, which article is preferred by a particular investigator or prosecutor) clearly indicates the arbitrary application of the law due to a violation of the *lex certa* requirement. This also undermines the constitutional provisions on equality and fairness.

It is important to note that Art. 64 of the Constitution of Ukraine does not allow for the restriction of the right to know one's rights and obligations (Art. 57 of the Constitution) and the rule of *nullum crimen, nulla poena sine lege* (Art. 58 of the Constitution), which implies the requirement of *lex certa*, even in a state of martial law or emergency.[48] Art. 15 of the ECHR also does not allow for any derogation from these rules.[49] Therefore, the extreme conditions of martial law in Ukraine cannot serve as an excuse for the violation of legal certainty.

4.6. In Dubio Pro Homine (Pro Personae)

In our opinion, *de lege lata*, the collision between Art. 111-1(1) and Art. 436-2 of the CCU should be resolved in favour of the former, which has priority due to the less severe sanction. If there are serious and insurmountable doubts as to which law should be applied, such doubts should be resolved in favour of the party against whom the law is to be applied. This approach is the basis of the argumentation of Yu. Ponomarenko who notes that the collision between these articles can be overcome by applying the rules of *in dubio pro reo* and *non bis in idem*.[50] As for the prohibition to be held liable twice for the

48 Constitution of Ukraine of 28 June 1996 (anmended 02 February 2019) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-вр> accessed 28 July 2024.

49 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) <https://rm.coe.int/1680a2353d> accessed 28 July 2024.

50 Yurii Ponomarenko, 'The Main Challenges Faced by the Criminal Law of Ukraine with the Beginning of the Large-Scale Phase of the War, and the Responses of the Legislator to Them' (Criminal Law Responses to Challenges of Martial Law in Ukraine: International scientific conference, Kharkiv, 5 May 2022) 25.

same thing, it is a good argument. Still, it is not currently relevant since we have not encountered any cases where the same individual has been convicted for the same act of public denial under both articles at the same time.

As for the principle of *in dubio pro reo*, according to Pt. 3 of Art. 62 of the Constitution of Ukraine, "the prosecution may not be based on evidence obtained illegally, as well as on assumptions. All doubts as to the proof of a person's guilt shall be interpreted in his/her favour".[51] However, the content of the second sentence is usually considered *sensu stricto* only as a procedural principle that prioritises the interests of the defence (accused) in case of reasonable doubt when evaluating evidence, as indicated by the practice of the Constitutional Court of Ukraine and the ECtHR.[52]

Even if the principle of *in dubio pro reo* is considered to be exclusively procedural (in the field of evidence), it is clearly a manifestation of the broader legal maxim *in dubio pro homine* (*pro personae*), which in controversial cases dictates that the law enforcement officer should interpret and apply the law in the manner most favourable to or in the benefit of the individual. The *pro personae* principle not only guides the application and interpretation of a statutory provision that is more favourable to the individual and his or her rights but also intends to resolve meta-interpretive disputes.[53] This principle can be seen "as a response to the horror and atrocities that occurred during the Holocaust; this principle is at the heart of post-Second World War international human rights law. Accordingly, human rights instruments, created by states themselves, establish a system centred on the human person".[54] As S. Kowalska notes, "the aim of the *pro homine* principle is to make human rights a reality to the fullest extent possible".[55]

Although the *pro personae* principle is usually not explicitly enshrined in positive law, its application in such cases has long been known in the countries of the Romano-Germanic legal system, including Ukraine. In common law countries, this principle in criminal law is also known as the *rule of lenity*. As D. Romantz states, "It is a rule of statutory construction

51 Constitution of Ukraine (n 48).

52 See: Decision no 1-p/2019 case no 1-135/2018(5846/17) (Constitutional Court of Ukraine, 26 February 2019) [2019] Official Gazette of Ukraine 36/1291; *Barberà, Messegué and Jabardo v Spain* App no 10590/83 (ECtHR, 6 December 1988) <https://hudoc.echr.coe.int/eng?i=001-57429> accessed 28 July 2024; *Lavents v Latvia* App no 58442/00 (ECtHR, 28 November 2002) <https://hudoc.echr.coe.int/eng?i=001-65362> accessed 28 July 2024; *Sievert v Germany* App no 29881/07 (ECtHR, 19 July 2012) <https://hudoc.echr.coe.int/ukr?i=001-112283> accessed 28 July 2024.

53 Gerardo Mata Quintero, 'El principio pro persona: la fórmula del mejor derecho' (2018) 1(39) Cuestiones Constitucionales: Revista Mexicana De Derecho Constitucional 204, doi:10.22201/iij.24484881e.2018.39.12654.

54 Valerio O Mazzuoli ken Dilton Ribeiro, 'The Pro Homine Principle As a Fundamental Aspect of International Human Rights Law' (2016) 17 Meridiano 47 e17003, doi:10.20889/M47e17003.

55 Samanta Kowalska, 'Pro Homine Principle: An Axiological Compass in Interpretation Norms in the Field of Human Rights' (2021) 16 The Age of Human Rights Journal 207, doi:10.17561/tahrj.v16.6175.

that requires a court to resolve a statutory ambiguity in favour of a criminal defendant, or to strictly construe the statute against the state".[56]

The principle of *pro homine* has recently been reflected in the legal opinions of the Ukrainian Supreme Court, albeit in cases of administrative jurisdiction. The Court noted:

> "*47. [...] the principle of interpreting the law in favour of the individual is one of the basic principles of the legal system, which indicates that courts should try to interpret laws and their provisions in such a way as to protect the rights and interests of the individual to the maximum extent possible.*
> *48. This principle is also often known as "in dubio pro persona" or "in dubio pro homine" (in Latin), which means "beyond a reasonable doubt in favour of the person*".[57]

In the structure of criminal law relations arising from a criminal offence, the state's position is dominant, as it has the exclusive right to adopt laws and bring justice for their violation. In contrast, the individual is in a weaker position. Therefore, if the legislature has written the law in such a way that no lawyer can predict which of the two articles will be applied, this cannot negatively affect the weaker party. The article that provides more favourable consequences for the accused shall be applied.

This approach neutralizes the violation of the requirement of clarity of the law. As long as the legislator does not synchronise the two counteraction articles, public denials of aggression and occupation committed by a citizen of Ukraine should be qualified under Pt. 1 of Art. 111-1 of the CCU, while the relevant wording of Art. 436-2 of the CCU should be rejected due to the *pro personae* principle.

5 DE LEGE FERENDA: RESOLVING OF THE COLLISION

Resolving a collision within a law by applying its most favourable provisions only treats the symptom, not the disease. Full relief is possible only by amending the CCU. The way to do this is to clarify the purpose of the laws that supplemented the CCU with the articles that gave rise to the collision. Laws 2108-IX and 2110-IX, despite their similarity, had different content and purpose.

Law 2108-IX was intended to establish criminal liability for collaborationist activities, which follows both from the title of the law itself and its content. It supplemented the CCU exclusively with Art. 111-1 on collaborationism and amended related articles necessary to

56 David S Romantz, 'Reconstructing the Rule of Lenity' (2018) 40(2) Cardozo Law Review 524.

57 Case no 240/4894/23 (Supreme Court of Ukraine, 10 January 2024) <https://reyestr.court.gov.ua/Review/116241970> accessed 28 July 2024.

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activate the former.[58] It was initiated by more than three dozen MPs representing the party that formed the parliamentary majority.

Law 2110-IX aimed to strengthen criminal liability for the production and dissemination of prohibited information products and protect information security in the context of growing Russian propaganda. This law not only supplemented the CCU with Art. 436-2 but also criminalised threats and insults to the honour and dignity of a serviceman, as well as incitement to hatred and enmity on a regional basis.[59] It was initiated by a group of MPs, mostly from opposition parliamentary factions.

While Law 2110-IX protects the information space more comprehensively, criminalising various manifestations of information acts, Law 2108-IX addresses these issues only in terms of combating collaborationism. Given the political affiliation of its initiators, it is likely that Law 2110-IX would not have been adopted under ordinary circumstances. But, the Russian invasion in 2022 and the risk of losing statehood put the contradictions between the majority and the opposition on the back burner.

It became evident that criminalising not only collaborationist activities – including public denial of aggression and occupation – but also the justification of aggression and occupation, glorification of the aggressor, and insults or threats against Ukrainian servicemen was essential. As a result, both laws were adopted without discussion and proper legal expertise on their compatibility. Delay in such extreme conditions would not be justified.

There is a certain consensus in the Ukrainian criminal law academia that collaborationist activity should be considered a privileged (mitigating) type of high treason. The ideal scenario is that, like high treason, collaboration is committed by a citizen of the state and consists of certain assistance to a foreign ("alien") entity – another state. Its separation from high treason is based on specific features of cooperation – it takes place under conditions of occupation of the territory, in favour of the occupier and to the detriment of the state whose territory is occupied. Mitigation of liability for collaborationist activity is due to the occupation conditions in which the act is committed.[60]

58 Law of Ukraine no 2108-IX of 3 March 2022 'On Amendments to Certain Legislative Acts of Ukraine on Establishing Criminal Liability for Collaborationist Activity' [2022] Official Gazette of Ukraine 32/1686.

59 Law of Ukraine no 2110-IX of 3 March 2022 'On Amendments to Certain Legislative Acts of Ukraine on Strengthening Criminal Liability for the Production and Distribution of Prohibited Information Products' [2022] Official Gazette of Ukraine 33/1719.

60 For more information, see: Mykola Rubashchenko and Nadiia Shulzhenko, 'Reflections on the Legal Features of Collaborationist Activity: Theory and Practice in Terms of the Russian Occupation of Ukrainian Territory' (2024) 7(3) Access to Justice in Eastern Europe 10, doi:10.33327/AJEE-18-7.3-a000315.

From this perspective, it seems logically justified that public denial as a type of information collaborationism under Art. 111-1(1) of the CCU is punished rather symbolically and less severely than public denial under Art. 436-2 of the CCU. The reasoning is that someone who denies under the occupier's rule should be punished less severely (if at all) than someone who is in a "free" territory. However, since the legislator did not indicate the "conditions of occupation of the territory" as a mandatory feature under Pt. 1 of Art. 111-1 of the CCU, legal practice does not take this feature into account and, as a result, both those who committed denial in the occupied territory and those who denied outside the conditions of occupation are punished under this provision of the CCU (with the latter being more numerous).

If the legislator had indicated this feature in Pt. 1 of Art. 111-1 of the CCU, then the comparable articles could have been easily distinguished. Public denials, in general, would be punishable under Art. 436-2 of the CCU (general rule), while denials committed in the context of the occupation of the territory would fall under Pt. 1 of Art. 111-1 CCU (special rule), which provides for less severe liability. The legislator's negligent mistake could have been rectified through investigative and judicial practice, which would have been sufficient to ensure legal certainty. However, this correction has yet to occur.

Therefore, resolving the collision would involve supplementing Pt. 1 of Art. 111-1 of the CCU with an indication that the denial must occur under the conditions of occupation of the territory. This would clearly differentiate between Pt. 1 of Art. 111-1 and Art. 436-2 of the CCU in terms of public denial, following the well-known rule principle *lex specialis derogat legi generali*. An alternative option, already proposed in the academic literature, would be to exclude public denials from Pt. 1 of Art. 111-1 of the CCU[61] entirely so that all cases of denials would be governed by Art. 436-2 of the CCU. An even more radical option would be to exclude Pt. 1 from Art. 111-1 of the CCU. While these options are generally better than the current version of the law, their implementation would ignore the difference between acts committed under occupation and outside of such conditions.

6 CONCLUSIONS

The idea of criminalisation of the denial of genocide and other international crimes is rooted in the bloody legacy of the Second World War. This legacy, and in particular the spectre of the Holocaust, also underlies the concept of militant democracies that protect individual and collective social values by limiting freedom, including freedom of expression. The modern history of crimes of denial dates back to the prohibition of Holocaust denial, and later criminalisation naturally covered a much more comprehensive range of denied facts: other genocides, crimes against humanity, war crimes, and crimes against peace.

61 Roman O Movchan, *Military' Novels of the Criminal Code of Ukraine: Law-Making and Law-Enforcement Problems* (Norma prava 2022) 56.

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Ukrainian's approach to the criminalisation of denial has followed a distinctive trajectory. Unlike other European countries that began by criminalising Holocaust denial, Ukraine still does not have such a provision in its criminal law. At present, Ukraine does not explicitly punish denial of genocide, crimes against humanity, or war crimes. At the same time, Art. 161 of the CCU provides for liability for hate speech, which is characterised by general and rather vague wording that is rarely used in practice.

The geographical context played a role in criminalising the denial of the Russian Federation's aggression against Ukraine and the related occupation of Ukrainian territory. Under the threat of losing statehood, the changes reflected in two articles of the CCU, which simultaneously provide for liability for public denial of Russian aggression and occupation committed by a citizen of Ukraine, were born in extraordinary circumstances. Neither scholars nor judicial practice have been able to find a unified approach to resolving the collision between the two articles, which has increased legal uncertainty and unequal application of the law in proceedings with similar circumstances. This collision should be resolved based on the principle that the law most favourable to the accused should be applied. However, this method is temporary. To resolve the collision, it is necessary to amend the criminal law in one of two ways: a) to supplement Pt. 1 of Art. 111-1 of the CCU with a feature indicating that the crime must be committed under occupation; b) to exclude Pt. 1 (or only the denial) from Art. 111-1 of the CCU.

The originality of Ukraine's approach to criminalising denial stems from at least two circumstances. Firstly, the prohibition of denial of specific crimes of aggression and illegal occupation is not typical for the criminal law of other countries, including those in Europe. Secondly, it is not just a denial of a fact that occurred decades ago but a denial of an ongoing history. This fact strengthens the ability of the original criminal ban to withstand the test of the legitimacy of interference with freedom of expression and also indicates that this prohibition is unlikely to be temporary.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАПЕРЕЧЕННЯ АГРЕСІЇ ПРОТИ УКРАЇНИ АБО ОКУПАЦІЇ ЇЇ ТЕРИТОРІЇ: НОВИЙ ВИПАДОК СЕРЕД ЗЛОЧИНІВ ЗАПЕРЕЧЕННЯ

Микола Рубащенко* та Надія Шульженко

АНОТАЦІЯ

Вступ. *Заперечення злочинів вважаються однією із найбільш дискусійних тем у сучасному кримінальному праві. Криміналізація історичного негаціонізму проблемно балансує між двома крайнощами: ефективним захистом історичної пам'яті, громадського порядку та почуттів жертв жахливих трагедій та їхніх нащадків з одного боку, і гарантуванням свободи вираження та свободи академічних дебатів з другого боку. Попри це вона набирає обертів на європейському континенті та постійно розширюється.*

Тривалий час Україна знаходилась осторонь від складних дебатів про заборону заперечень. Проте російська агресія стимулювала український парламент криміналізувати заперечення агресії проти України та окупації частини її території. Формулювання закону є нетривіальними та відрізняються від класичних європейських зразків. Одночасно було прийнято два закони, які не були синхронізовані між собою і породили колізію. Незважаючи на це, вони часто застосовуються.

Тож ця стаття демонструє тернистий шлях України до криміналізації заперечення та показує юридичні складнощі, які виникли у зв'язку з екстремальними умовами прийняття законів.

Методи. *У процесі дослідження спершу автори за допомогою історико-правового та порівняльно-правового методів коротко описують еволюцію кримінальної заборони заперечень у світі та тенденції останніх років.*

Основна частина дослідження концентрується навколо українського досвіду і містить два блоки. Перший демонструє розвиток ідеї криміналізації цих діянь в Україні за допомогою аналізу законодавчих ініціатив та результатів їхнього розгляду. Другий зосереджується на аналізі законодавчих прорахунків, на труднощах застосування прийнятих поправок і пропонує варіанти подолання колізії законів, а також рекомендує вдосконалити чинні норми. При цьому автори спираються на формально-юридичний та логіко-правовий методи пізнання.

Результати та висновки. *Європа є ядром руху криміналізації історичного негаціонізму. Більшість європейських країн передбачають кримінальну відповідальність за ті чи інші форми заперечення. Україна, як країна-кандидат на вступ до Європейського Союзу, має гармонізувати своє законодавство з правом ЄС. За останні двадцять років в українському парламенті було зареєстровано десятки проєктів, в яких було запропоновано встановити кримінальну заборону на заперечення тих чи інших історичних фактів та було здійснено юридичну оцінку цих заперечень. Однак український досвід значно відрізняється від європейських аналогів, які переважно передбачають відповідальність за заперечення Голокосту, інших геноцидів, злочинів проти людяності та воєнних злочинів.*

Наразі за кримінальним законом України заперечення російської агресії та окупації передбачено одночасно двома різними статтями Кримінального кодексу України, при цьому обидві статті застосовуються на практиці, що породжує правову невизначеність та порушує принцип рівності. У статті було запропоновано внести зміни до КК України з метою ліквідації колізії, а до цього часу вирішувати конкуренцію норм за принципом in dubio pro homine.

Ключові слова: *заперечення злочинів, історичний негаціонізм, заперечення Голокосту, колабораціонізм, кримінальне право, in dubio pro homine.*

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Research Article

COMBATANT IMMUNITY AND THE RUSSIAN-UKRAINIAN WAR: REOPENING THE DEBATE ON A LONGSTANDING DOCTRINE

Ivan Yakoviyk*, Sergiy Kharytonov and Oleksiy Zaytsev

ABSTRACT

Background: *Russia's invasion of Ukraine has resulted in the largest conflict in Europe since the Second World War, with estimates suggesting that hundreds of thousands of Russian soldiers are implementing the will of the aggressor state. It has long been believed that combatants are immune from criminal prosecution for their actions during hostilities, including the killing of military personnel defending the victim state unless they violate the laws of war. However, this immunity has naturally generated criticism in the Ukrainian legal community. In this article, the authors analyse the critical arguments made by opponents of combatant immunity and seek to clarify the legal and ethical grounds of the controversial doctrine. Furthermore, the well-known debate on the significance of citizenship (nationality) for recognising combatant or prisoner of war status and the liability of defectors is revisited from a new perspective.*

Methods: *The article is based on an analysis of IHL sources, commentaries, state practices, precedents and scientific views on combatant immunity. Additionally, the article examines the practices of law enforcement agencies in Ukraine and the perspectives of Ukrainian criminal law scholars. General scientific methods of cognition (induction, deduction, analysis, synthesis), as well as historical, empirical and systemic-structural methods, are used.*

The article is structured into three parts. The initial section provides a comprehensive overview of the status of a combatant and their associated privileges within the context of international humanitarian law (IHL), with a particular focus on the ongoing conflict between Russia and Ukraine. The second section delves into the debate surrounding Ukraine's obligation to respect the immunity of the combatant of the aggressor state and offers the authors' conclusions on this matter. The third section addresses the liability of defectors, focusing on the implications of citizenship (nationality) for combatants and prisoners of war (POW).

Results and conclusions: *Several Ukrainian scholars have expressed their unreserved disagreement with Ukraine's application of the doctrine of combatant immunity to Russian soldiers. In the absence of a direct reference to this exceptional privilege in international treaties to which Ukraine is a party and in light of the a priori unlawfulness of aggression, the critical arguments are not without merit. Nevertheless, we conclude that respect for the immunity of a combatant representing the aggressor state is part of Ukraine's international obligations and has a certain justification. Concurrently, the article acknowledges that the legal and ethical grounds for this are not entirely clear. The question of whether defectors should be recognised as combatants and/or prisoners of war is similarly unclear. Nevertheless, we are convinced that regardless of the answer to this question, the criminal prosecution of defectors for high treason cannot be considered a violation of the immunity of a combatant.*

1 INTRODUCTION

The full-scale invasion of Ukraine by the Russian Federation in February 2022, which is a continuation of the armed aggression initiated in 2014, has given rise to numerous challenges for the national criminal law of Ukraine. Amid this ongoing conflict, where Russia possesses considerable military capabilities, an effective propaganda apparatus and international influence, it is evident that Ukraine must adapt its criminal law policy in response to the aggression. This situation requires a reassessment of the social danger posed by various acts while considering the conditions imposed by martial law.[1]

The ongoing conflict between Russia and Ukraine, which began in 2014, indicates that the victim state's national legislation has had sufficient time to evolve within the context of an armed conflict and address related legal aspects. The primary challenge, however, lies in aligning the national legal framework with the standards set forth by international armed conflict law. Russia's occupation of certain districts of the Ukrainian regions of Donetsk and Luhansk, associated with an ongoing armed conflict until 2022,[2] presents a unique case. A distinctive feature of this occupation by proxy is that effective control is exercised by surrogate armed forces (typically certain local militarised groups) operating under the overall control of a foreign state.[3] Concurrently, members of the opposing parties in the armed conflict were predominantly Ukrainian citizens. Consequently, the Ukrainian investigative authorities, in their assessment of the so-called Donetsk National

1 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 139, doi:10.33327/AJEE-18-5.3-n000312c.

2 Of course, the international armed conflict began with the annexation of Crimea, but the large-scale armed confrontation with the wide involvement of the armed forces was caused by the events in Donbas.

3 Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94(885) International Review of the Red Cross 158, doi:10.1017/S181638311200063X.

Republic ('DNR') and Luhansk National Republic ('LNR') militants, focused on such criminal offences as separatism (Articles 109 and 110 of the Criminal Code of Ukraine), participation in a terrorist organisation (Article 258-3 of the Criminal Code), and involvement in illegal armed groups (Article 260 of the Criminal Code).[4]

On 24 February 2022, the international nature of the Russian-Ukrainian conflict became apparent even to those who had previously been the most sceptical. Hundreds of thousands of regular army troops entered the territory of a sovereign country openly, accompanied by hundreds of pieces of heavy equipment, while simultaneously bombing military and civilian targets. The killing and wounding of military and civilian personnel, the extensive destruction of property, the capture of individuals, and other consequences of the war gave rise to a new legal paradigm based on the principles of international humanitarian law (IHL).

Criminal law plays a pivotal role in ensuring fairness. It is not coincidental that criminal punishment is often determined through the principle of fairness, particularly in the sense of retribution. In this context, a society that is outraged by an unprovoked and brutal attack by an adversary naturally demands that the authorities activate the most severe means of influence available under criminal law. It is, therefore, understandable that the affected state desires to bring the aggressor country's military to justice as quickly and severely as possible. This desire is further reinforced by the fact that the leaders responsible for instigating the armed conflict remain inaccessible.

2 EVALUATION OF PARTICIPATION IN HOSTILITIES AGAINST UKRAINE AS A NEW CHALLENGE FOR UKRAINIAN CRIMINAL LAW

In IHL, the principle of distinguishing between lawful combatants and civilians is fundamental.[5] The purpose of this distinction is to ensure that the same person cannot occupy two chairs simultaneously. Consequently, the law of international armed conflict "can effectively protect civilians from being objects of attack in war only if and when they can be identified by the enemy as non-combatants".[6]

The legal basis for the special status of combatants is established in Articles 1-3 of the Regulations concerning the Laws and Customs of War on Land, which were annexed to the

4 Law of Ukraine no 2341-III of 5 April 2001 'Criminal Code of Ukraine' <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 14 May 2024; Mykola Rubashchenko, 'Wandering in Search of Qualification of the Actions in Crimea and in the East of Ukraine (2014–2018)' in Anita Jankovska (eds), *New Stages of Development of Modern Science in Ukraine and EU Countries* (5th edn, Baltija Publ 2019) 147-8, doi:10.30525/978-9934-588-15-0-86.

5 Lawrence Hill-Cawthorne, 'Persons Covered by International Humanitarian Law: Main Categories' in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law* (Oxford Academic 2020) 99, doi:10.1093/law/9780198855309.003.0005.

6 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004) 29, doi:10.1017/CBO9780511817182.

Hague Convention (IV) of 1907;[7] Articles 4A (1) – (3) and (6) of the Geneva Convention III;[8] Articles 13 (1) – (3) of the Geneva Conventions I and II;[9] and Articles 43 and 44 of the Protocol Additional to the Geneva Conventions I.[10] Ukraine is a party to all of these international treaties. Based on Article 43 of the Protocol Additional to the Geneva Conventions I, the following categories of combatants can be delineated:

1) members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;
2) members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the four well-known conditions, defined in Article 4A (2) of the Geneva Convention III;
3) members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power;
4) inhabitants of a non-occupied territory, who on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[11]

This article focuses on the members of the Russian Federation's armed forces (Group I). It does not analyse the problems arising from the recognition as combatants of other types of participants in hostilities, nor does it address the status of irregular armed forces, partisans, or private military companies.

Members of regular armed forces are the main group of combatants.[12] At first glance, it may seem that assessing their behaviour during the war may appear to be the least controversial and the most understandable–particularly in comparison to evaluating the actions of armed groups that do not officially recognise their affiliation with parties to the conflict. However,

7 Hague Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907) <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907> accessed 14 Ma 2024.

8 Geneva Convention (III) Relative to the Treatment of Prisoners of War (12 August 1949) <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949> accessed 14 May 2024.

9 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949> accessed 14 May 2024; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949> accessed 14 May 2024.

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977> accessed 14 May 2024.

11 ibid.

12 Emily Crawford and Alison Pert, *International Humanitarian Law* (2nd edn, CUP 2020) 99, doi:10.1017/9781108635448.

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reality shows that this is far from the case. A seemingly simple case has sparked debate among law academics and law enforcement officials in Ukraine and exposed a number of unresolved issues.

The status of a combatant can be reflected by two sides of the same coin. One is that the combatant is a legitimate participant in the hostilities. The flip side of the coin for a combatant is that he or she is a legitimate military target for the enemy. The fact that a combatant has the legal right to take direct part in hostilities, in turn, has two significant legal consequences.

First, "lawful combatants retain the "combatant's privilege", which provides immunity from prosecution for warlike acts (killing or destruction of property), as long as they comply with the laws of war".[13] This immunity means that "combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peacetime".[14]

Second, the detention of a combatant by the opposing party to the conflict renders them a prisoner of war (POW), which in turn entails a special protective status under the Geneva Convention III. This status encompasses not only the rights and guarantees afforded to POWs but also a number of obligations incumbent upon the party holding them captive. The two consequences are, with some exceptions, closely linked: "the unique protective significance of POW status is combatant immunity".[15]

The provisions of the IHL on combatant immunity were effectively dormant in the context of the Russian-Ukrainian conflict between 2014 and 2022. This was due to the rapid annexation of Crimea by Russia, which was not accompanied by significant hostilities. Furthermore, Russia strongly denied its direct involvement in the occupation of certain areas of the Donetsk and Luhansk regions and exercised overall control over the illegal military formations of the 'DNR' and 'LNR'.[16]

In the first few months after the start of the full-scale invasion, investigative bodies actively reported on the opening of criminal cases against enemy military personnel under articles of the Criminal Code of Ukraine, which mainly provide for 'general' criminal offences.[17] For example, on 28 February 2022, the Office of the Prosecutor General announced that an investigation had been initiated against three captured POWs on the grounds of

13 Geoffrey S Corn and others, *The Law of Armed Conflict: An Operational Approach* (2nd edn, Aspen Publ 2019) 143.

14 Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85(849) International Review of the Red Cross 45, doi:10.1017/S0035336100103521.

15 Derek Jinks, 'The Declining Significance of POW Status' (2004) 65 University of Chicago Public Law & Legal Theory Working Paper 42.

16 We note that with these statements we only state the reasons for the non-application of the above provisions, but we cannot unequivocally agree.

17 Law of Ukraine no 2341-III (n 4).

encroachment on the territorial integrity of Ukraine (Article 110 of the Criminal Code of Ukraine), aiding a crime of aggression (Article 437 of the Criminal Code of Ukraine) and illegal crossing of the state border of Ukraine with the use of weapons (Article 332-2 of the Criminal Code of Ukraine).[18] As of 11 November 2022, the number of cases reported under Article 110 of the Criminal Code against the Russian military has exceeded 9,000.[19] The official statistics published for 2022 indicate that 10,487 cases were opened, compared to 149 cases in 2021 (an increase of over 7,000%).[20] Such an assessment of the military's actions has highlighted the problem of reconciling the provisions of the national criminal law and the provisions of the IHL.

It is also important to note that the investigative authorities in Ukraine have generally been able to adapt their approach rapidly, with the assistance of regular contact with IHL experts. In collaboration with Ukrainian experts in criminal law and IHL, a memorandum on the legal qualification of the actions of prisoners of war was prepared and distributed among pre-trial investigation bodies. In particular, the document stated that military personnel belonging to the regular armed forces of the enemy should be recognised as POWs and that their actions should not be qualified under the Criminal Code of Ukraine: "Given the immunity (privilege) of a combatant, they are not individually liable for participation in an armed conflict if they did not violate the laws and customs of war".[21]

Subsequently, the Office of the Prosecutor General dispatched a Letter of Guidance to the heads of regional prosecutor's offices, elucidating the application of the provisions of the IHL regarding the treatment of POWs and the specifics of qualifying their actions under the Criminal Code of Ukraine. The aforementioned letter set forth the following recommendations:

1) legal relations related to armed conflict are regulated by the IHL, which is enshrined mainly in international treaties (para. 2);
2) in case of capturing persons participating in the armed conflict on the side of the aggressor state, the presumption of their status as POWs should be applied and they should be treated accordingly (para. 7);

18 Mykolaiv Regional Prosecutor's Office, 'Encroachment on the territorial integrity and inviolability of Ukraine - three Russian servicemen were notified of suspicion' (*Prosecutor General's Office*, 28 February 2022) <https://www.gp.gov.ua/ua/posts/posyagannya-na-teritorialnu-cilisnist-i-nedotorkannist-ukrayini-povidomleno-pro-pidozru-tryom-rosiiskim-viiskovim> accessed 14 May 2024.

19 Olha Guyvan, 'During the Full-Scale Invasion, the Russian Military Committed more than 43,000 Crimes – The Ministry of Internal Affairs' (*Suspilne News*, 11 November 2022) <https://suspilne.media/314850-za-cas-povnomasstabnogo-vtorgnenna-vijskovi-rosii-vcinili-ponad-43-tisaci-zlociniv-mvs/> accessed 14 May 2024.

20 *Prosecutor General's Office,* 'Consolidated Report on Persons who Committed Criminal Offenses, December 2022' (*Prosecutor General's Office, 2023*) <https://gp.gov.ua/ua/posts/pro-osib-yaki-vchinili-kriminalni-pravoporushennya-2> accessed 14 May 2024.

21 Mykola Khavroniuk and others, 'Note on the Legal Qualification of the Actions of Prisoners of War (for Pre-Trial Investigation Bodies and Prosecutor's Offices)' (*Centre of Policy and Legal Reform*, 14 March 2022) 3 <https://pravo.org.ua/books/pam-yatka-shhodo-yurydychnoyi-kvalifikatsiyi-dij-vijskovopolonenyh/> accessed 14 May 2024.

3) the actions of detained military personnel of the armed forces of the Russian Federation, in respect of which there is no evidence of their committing crimes under Article 438 of the Criminal Code of Ukraine (Violation of the laws and customs of war), do not require legal qualification under any article of the Criminal Code of Ukraine (para. 9).[22]

Subsequently, apart from a few exceptions, the investigating authorities adopted this Letter of Guidance and limited the qualification of the Russian military's actions to war crimes, taking into account their immunity.

3 DEBATES ON THE OBLIGATION TO RECOGNISE COMBATANT IMMUNITY

In Ukrainian legal literature published after 24 February 2022, the prevailing viewpoint regarding the assessment of the actions of the members of the Russian armed forces is that they cannot be held criminally liable under the Criminal Code of Ukraine for crimes committed directly within the framework of hostilities, provided that they do not violate the laws and customs of war. Accordingly, M. Khavroniuk posits that POWs from among the Russian military who have not perpetrated war crimes are not individually liable for hostilities and, in line with IHL, should be placed in prisoner-of-war camps.[23] Similarly, D. Olieinikov states that once combatants are captured, they acquire POW status and cannot be prosecuted or punished for their participation in hostilities.[24] Y. Orlov clarifies that combatants are criminally liable only for related offences, not for the very initiation and conduct of an aggressive war, which is the responsibility of the top military and political leaders of the aggressor country.[25]

Despite the general recognition of combatant immunity, this approach to qualification has been met with considerable opposition from various quarters, including politicians, members of the public, and civil society. Prominent experts in the field of criminal law have also expressed their criticism.

22 A link to the orientation letter can be found here: Alina Pavlyuk, Dmytro Koval and Yevhen Krapyvin, 'Is the Status of "Prisoner of War" a New Challenge for the Justice System in Ukraine?: Discussion Paper' (*Just talk*, 10 June 2022) <https://justtalk.com.ua/post/status-vijskovopolonenij--novij-viklik-dlya-sistemi-pravosuddya-v-ukraini-discussion-paper> accessed 14 May 2024.

23 Mykola Khavroniuk, 'Regarding the Criminal Liability of Prisoners of War Held by Ukraine' (Criminal Law Responses to Challenges of Martial Law in Ukraine: International of science conference, Kharkiv, 5 May 2022) 174.

24 Denys Olieinikov, 'Groups and Categories of Persons Participating in the Armed Aggression of the Russian Federation against Ukraine' (Retrospective of the Military Aggression of the Russian Federation in Ukraine: Crimes against Peace, Human Security and International Legal Order in the Modern Dimension: International scientific and practical round table, Kyiv, 22-23 June 2023) 85.

25 Yurii Orlov, 'The Criminal-Legal Dimension of Participation in the War in Ukraine: From a Combatant to a Prisoner of War' (2022) 2 Bulletin of the Penitentiary Association of Ukraine 21, doi:10.34015/2523-4552.2022.2.03.

Professor L. Brych was among the first to advocate for the imposition of severe penalties on the military personnel of the aggressor state. She observed that the tragedy resulting from the actions of a neighbouring hostile state exposed the inadequacies of the Criminal Code of Ukraine in terms of addressing criminal liability for engaging in aggressive war against a sovereign state. Consequently, Brych proposed criminalising the participation of the military personnel of a foreign state and its other military in an aggressive war against a sovereign state.[26] In essence, this proposed criminalisation completely denies the concept of combatant immunity, at least in cases where military personnel fight on the side of a state acting in violation of *jus ad bellum*. This proposal is based on the following reasoning:

- the conditions of captivity in Ukraine, given its commitment to European values, are often more comfortable than serving long prison terms in Russia, which potential military personnel would receive if they refused to be mobilised; this does not deter them from participating in their country's aggressive policy;
- the fear of inevitable punishment is a significant motivating factor for many individuals who choose to refuse to participate in a war;
- the criminalisation of participation in an aggressive war could be accompanied by the simultaneous introduction of an incentive norm. This norm would apply to individuals who lay down their arms at the first opportunity and voluntarily surrender, thereby releasing them from criminal liability.[27]

Professor V. Navrotskyi expands the scope of criticism in his article, directly concluding that "combatant immunity in Ukrainian criminal law has no legal, social or moral basis".[28] In his article, he proposes 16 points of critical arguments, all of which are based on the fundamental critical judgements that:

1) there is no international treaty ratified by Ukraine that establishes a legal basis for recognising combatant immunity;
2) Ukraine has not legally committed to adhere to international customs, traditions and practices, including those concerning the non-prosecution of military personnel involved in an armed attack on the country.[29]

Navrotskyi presents counterarguments that can generally be considered either based on the first one (e.g., lack of grounds in criminal and criminal procedural law of Ukraine) or related to the ethical justification of the combatant privilege (IHL is not aimed at protecting

26 L Brych, 'On the Need to Ensure the Inevitability of Criminal Liability for Participation in an Aggressive War against Ukraine' (Criminal-Legal Responses to the Challenges of Martial Law in Ukraine: International scientific conference, Kharkiv, 5 May 2022) 47.

27 ibid 44-5, 47.

28 Vyacheslav Navrotskyi, 'About the So-Called "Combatant Immunity"' (2023) 5 Law of Ukraine 39, doi:10.33498/louu-2023-05-039.

29 ibid 41-2.

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members of the aggressor army from criminal liability, it is intended to protect victims of war and guarantee humane treatment of POWs).[30]

This raises the question: is Ukraine obliged to respect the immunity of combatants of the aggressor state, and if so, on what legal basis? First of all, it should be acknowledged that neither the Hague Convention (IV) of 1907 nor the Geneva Conventions of 1949 and their Additional Protocols directly contain the wording 'immunity' or 'privilege' in relation to a combatant, nor do they contain an explicit prohibition on bringing combatants to criminal responsibility for participation in hostilities. In this regard, D. Jinks notes that "this privilege is, as a formal matter, extra-conventional in that the Geneva Conventions do not expressly accord any such privilege. It is nevertheless universally recognised".[31] In other words, the term 'immunity' is a conventional one, perhaps not entirely apposite, but generally accepted.

As noted above, Ukraine is a party to all of these international treaties. Article 43(2) of Additional Protocol I contains a key provision: "Members of the armed forces of a Party to a conflict … are combatants, *that is to say, they have the right to participate directly in hostilities*".[32] This does not mean, of course, that combatants were not considered legitimate participants in the war prior to the adoption of this provision in 1977. This rule has its roots in the Hague Conventions and even earlier sources of IHL, but it was formulated at this level and with such clarity for the first time in this context.

Thus, as a party to Additional Protocol I, Ukraine recognises that a combatant has the right to engage in hostilities. This acceptance follows a fairly simple logic: if a combatant has the right to engage in hostilities, then such participation is a legitimate realisation of his right to attack enemy combatants and military objectives. However, like any right, it has its limitations, defined by the IHL, and the violation is grounds for liability. In other words, if I possess a right and do not go beyond the limits of its realisation, why (for what) am I being held liable?

The aforementioned conclusions stem from a logical interpretation of the conventional norm surrounding combatant privilege. This general recognition can be derived from several sources, including authoritative manuals on IHL, commentaries on relevant international treaties and numerous decisions of international tribunals and other jurisdictional authorities. Ultimately, even if there is uncertainty regarding the interpretation of Article 43(2) of Additional Protocol I, it is imperative to refer to the general rules of interpretation of international treaties.

In accordance with Article 31 of the Vienna Convention on the Law of Treaties (1969), a treaty shall be interpreted in good faith, considering the ordinary meaning of its terms within their context and in light of the treaty's object and purpose. In this regard, it is necessary to consider, in conjunction with the context, any subsequent practice in the application of the treaty which

30 ibid 43-53.
31 Jinks (n 15) 7.
32 Protocol I (n 10).

establishes the parties' agreement regarding its interpretation.[33] Additionally, Article 32 allows for recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.[34]

During the formulation of the provisions of the Geneva Law, the participants of the conferences considered the immunity of combatants to be universally recognised and obvious. For example, concerning Article 43(2) of Additional Protocol I, "the Conference considered that all ambiguity should be removed and that it should be explicitly stated that all members of the armed forces […] can participate directly in hostilities, i. e., attack and be attacked".[35]

Consequently, even if the phrase "they have the right to participate directly in hostilities" is queried, the State Party is precluded from interpreting the Convention provision in a manner that contravenes the meaning that was intended during its development and which has been confirmed in numerous decisions of international judicial bodies. This constitutes the formal basis for Ukraine's recognition of the rule on combatant immunity. This is enshrined, at least in Article 43(2) of Additional Protocol I, the interpretation of which (if any) is easily dispelled.

In the case of manifestly unjustified and unprovoked armed aggression, such as the Russian invasion, the illegality of the war from the point of view of *jus ad bellum (the right to wage war)* should be self-evident to all parties, including the Russian military. This indicates the potential justification for limiting combatant immunity in such illegal cases. However, the rules of *jus in bello* (the law applicable in war) are not contingent upon the observance or violation of *jus ad bellum*. As noted by M. Sassòli, "Perhaps the most important principle for IHL is the absolute separation between *jus ad bellum* (the right to wage war) and *jus in bello* (the law applicable in war)."[36]

This fundamental distinction has its consequences: "it imposes the same legal obligations on all parties to a conflict while concurrently providing equal protection to all persons affected by the conflict, irrespective of whether the parties or individuals are fighting for a just or unjust cause".[37] In light of Ukraine's status as a victim of aggression, the aforementioned distinction is perceived as an act of injustice. However, it is evident that

33 Vienna Convention on the Law of Treaties (23 May 1969) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> accessed 14 May 2024.

34 ibid.

35 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1987) 515.

36 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publ 2019) 18, doi:10.4337/9781786438553.

37 ibid 2.

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Ukraine's adherence to the principles of a democratic and rule-of-law state is incompatible with a disregard for international law.

After clarifying the legal (formal) basis for the recognition of combatant immunity, we turn to explore the material (essential) reason for the doctrine's existence, which, according to M. Thorburn "is morally shocking to many: It holds soldiers on both sides of a war immune from criminal prosecution for their otherwise criminal acts of killing, maiming, destroying property, etc., carried out as part of their country's war effort".[38] The scholar distinguishes two approaches to justifying this 'shocking' immunity": the orthodox just war theory, which is based on the just war thesis, and the revisionist just war theory, which morally justifies soldiers on both sides in view of the goal of preventing more harm than is being done.[39]

Hostilities may be justifiable to a certain extent, for example, in the case of the liberation of peoples from colonial oppression in the process of struggle for self-determination or in the case of exercising the right to self-defence under Article 51 of the UN Charter.[40] However, in this case, combatant immunity should be granted to soldiers of only one side – the one exercising the right to self-determination or the right to self-defence – since only their military actions are subject to moral justification. In the context of Russian aggression, the privilege of a legitimate combatant should be reserved for Ukrainian soldiers, given that aggression is expressly prohibited in modern international law.

However, as previously noted, an unjust and unlawful war (from the perspective of *jus ad bellum*) does not negate the legal status of direct participants in the war, their guarantees, obligations, and rights (from the perspective of *jus in bello*). Ultimately, to recognise the hostilities initiated by one of the parties as unjust, a decision of a certain authoritative body, such as the UN Security Council or the International Criminal Court, is required. History has demonstrated that such a decision can take a considerable length of time to be reached, or it may not be reached due to a lack of consensus. In such circumstances, it is evident that each party will justify its position based on just war, even if this is not the case.

Consequently, the just war doctrine may be appropriate for justifying the combatant privilege if combatants' legal status depends on whether they belong to the aggressor state or the victim state. Nevertheless, to implement this approach, the entire IHL system needs to be revised. Furthermore, the legal definition of who the aggressor and the victim are would present practical obstacles.

In view of this, it is understandable why the prevailing view is that combatant immunity – regardless of whether the soldier belongs to the party that launched the aggression – is morally justified by the prevention of more significant harm. As noted by D. Jinks,

38 Malcolm Thorburn, 'Soldiers as Public Officials: A Moral Justification for Combatant Immunity' (2019) 32(4) Ratio Juris 395, doi:10.1111/raju.12256.

39 ibid 396.

40 United Nations Charter (26 June 1945) <https://www.un.org/en/about-us/un-charter/full-text> accessed 14 May 2024.

"protective parity (coupled with a war crimes approach to enforcement) best promotes the observance of the law of war, including the principle of distinction".[41] Jinks considers the immunity of a combatant as a tool for observing the rules of war.[42] Indeed, if a combatant does not have the incentive of not being held accountable for hostilities, he or she will thereby lose the incentive to comply with IHL.

A combatant in such a situation where, if captured, they will be equally punished regardless of whether they comply with the laws and customs of war. This can lead to a vicious cycle in which the absence of immunity not only fails to encourage observance of IHL but may also increase the combatant's cruelty. Combatants could resort to any means to avoid capture, knowing that they would face punishment either way. In view of this, we cannot agree with the above-mentioned criticism that combatant immunity contradicts the objectives of IHL. In the current coordinate system, it is an important component of the humanitarian trajectory of IHL.

The approach of M. Thorburn is of interest; the author believes that "the moral foundation of the doctrine lies in the status of soldiers as public officials in the service of their country".[43] In this context, members of the armed forces of a party to an international conflict are in the service of a particular state. Their actions conditionally reflect not their own will but the will of the sovereign state on whose behalf they act. This at least explains why, under international law, responsibility for aggression is limited to the responsibility of the state itself for violating international legal obligations, as well as the individual responsibility of the leaders of the aggressor state.[44] By their nature and seriousness, international crimes are characterised by a competition between the collective nature of the crime and individual responsibility. Still, a person should be held criminally liable for his or her own actions, not those of others.[45] In the *US Law of War Manual*, supported by references to R. Baxter and H. Kelsen, it is emphasised that "the combatant's privilege has also been viewed as an application of the immunity that international law affords States from each other's jurisdiction. In this view, the act of the soldier who conforms to the law of war and does not engage in private acts of warfare is an act of state depriving the enemy state of jurisdiction".[46]

41 Jinks (n 15) 56.

42 ibid 54.

43 Thorburn (n 38) 395.

44 See: Volodymyr A Shatilo and others, 'Prospects for State and Individual Responsibility in Cases of Aggression in the Context of Russia's Armed Aggression Against Ukraine' (2023) 23(4) International Criminal Law Review 626, doi:10.1163/15718123-bja10154.

45 O Vodiannikov, 'Crimes against Peace: The "Leadership" Element of Article 437 of the Criminal Code of Ukraine' (Justice in Ukraine During the War: Problems of Considering Corruption and War Crimes: VI Kyiv Polylogue, 1 December 2023) 106.

46 US Department of Defense, *Department of Defense Law of War Manual* (Office of General Counsel the Secretary of Defense 2023) § 4.4.3.2 <https://www.defense.gov/News/Releases/Release/Article/3477385/defense-department-updates-its-law-of-war-manual/> accessed 14 May 2024.

Y. Orlov and O. Lytvynov draw attention to an important point - the taking of a combatant's life in battle is legitimate only for another combatant, but it is not legitimate in general.[47] In the context of the Russian aggression, it can be argued that the conviction of the military and political leadership of the Russian Federation for the crime of aggression should also result in the conviction for the death of each combatant (on both sides), their injuries, property damage, etc. Consequently, the state responsible for the aggression should be held liable for the damages incurred.

In our opinion, the concept of ethical justification through the construction of 'soldier - servant of a sovereign state' looks weak within the aggression, which the UN Charter expressly prohibits. It is a well-known principle that a person who has executed a clearly illegal order cannot rely on exemption from criminal liability. In this regard, a logical question arises: why combatants following orders from their state that violate the laws and customs of war (an illegal order), are subject to individual criminal liability for serious violations of IHL (in particular, war crimes) but are not subject to punishment for following an order to participate in aggression, which is also a gross violation of international law and order (i.e., it is also an illegal order).

Nevertheless, considering military attacks on the enemy and enemy objects as actions of the state, not its officials, generally corresponds to the nature of the conflict. This is because the conflict occurs not between specific members from opposing sides but between states (in an international conflict).

Furthermore, it can be argued that two purely practical arguments underpin the concept of combatant immunity. The first argument is based on the scale of participation of soldiers from the warring parties in the conflict. The total number of POWs during the First and Second World Wars is estimated to have been in the millions. The ongoing conflict between Russia and Ukraine has involved hundreds of thousands of soldiers from both sides. One might consider the hypothetical scenario in which both parties to the conflict were to convict all of the soldiers they had captured. It is, therefore, pertinent to consider whether the judicial and penitentiary systems could handle such a situation.

The second argument, arguably more compelling, is the interest of the parties in the return of their loyal citizens held captive by the other side. V. Navrotskyi is correct in asserting that the Russian Federation demonstrates a disregard for the status of captured Ukrainian military personnel and prosecutes them, turning a blind eye to their immunity (in particular, the Azov case).[48] Moreover, the Russian side is delaying and complicating the exchange of POWs in every possible way. However, we cannot agree that these facts do not in any way affect the fate of the Ukrainian military in Russian captivity. Despite the gross

47 Oleksii M Lytvynov and Yurii V Orlov, 'Issues of Criminal-Legal Protection of Combatants's Life, or How to Overcome the Effects of Humanitarian War "Laundering" ' (2023) 30(3) Bulletin of Criminological Association of Ukraine 16, doi:10.32631/vca.2023.3.01.

48 Navrotskyi (n 28) 39.

violations, the exchange of POWs takes place, although unfortunately not as often as we would like. Would it be possible to return hundreds of Ukrainian defenders home if they were automatically convicted of participating in hostilities immediately after capture? If so, the process would be much more complicated and time-consuming.

4 THE FATE OF DEFECTORS: DO UKRAINIAN CITIZENS WHO DEFECTED TO THE ENEMY HAVE COMBATANT IMMUNITY?

Although the formal and ethical justification for combatant immunity is not without flaws, it is generally convincing. The status of combatant as defined in the IHL is largely correlated with that of POW, with the exception of those defined in Article 4A(4)-(5) of Geneva Convention III. This substantive relationship is based on the provisions of Article 44(1) of Additional Protocol I, which states that "any combatant who falls into the power of an adverse Party shall be a prisoner of war".[49] It is unsurprising that researchers mention combatant immunity when describing the principle of distinction and even more often when characterising POW status.

The vast majority of combatants (and POWs, respectively) are members of the armed forces of warring states. They consist of citizens of the relevant countries conscripted under different procedures. This is also true of the Russian-Ukrainian war. Although foreign nationals are involved on both sides, their share is generally insignificant. However, the peculiarity of this international conflict is that Russian aggression has led to the annexation of a large territory with a large local population. Consequently, the aggressor was motivated to involve residents who are citizens of Ukraine in the conflict and exploited this opportunity with cynical intent.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) reports the significant pressure exerted upon the residents of the occupied territories to obtain Russian citizenship and Russian passports.[50] Economic conditions and an environment of fear and risk of torture have forced many locals to obtain Russian citizenship.[51] In accordance with Article 19 of the Law of Ukraine "On Citizenship of Ukraine", the voluntary acquisition of foreign citizenship by an adult citizen of Ukraine or the voluntary enlistment in a foreign state's military service are considered

49 Protocol I (n 10).

50 OHCHR, *Human Rights Situation During the Russian Occupation of Territory of Ukraine and its Aftermath, 24 February 2022 to 31 December 2023* (Office of the High Commissioner for Human Rights 2024) 25-7 <https://ukraine.un.org/en/264057-human-rights-situation-during-russian-occupation-territory-ukraine-and-its-aftermath> accessed 14 May 2024.

51 Of course, we do not exclude the possibility that a number of citizens received citizenship for ideological reasons, without any pressure. However, such cases are rather exceptions and do not change the overall picture.

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independent grounds for the loss of Ukrainian citizenship.[52] However, as per Part 3 of Article 19 and Article 20 of the same law, Ukrainian citizenship is terminated on these grounds only through a decree issued by the President of Ukraine. Until the issuance of such a decree, a person is considered a citizen of Ukraine.[53]

Under Ukrainian law, a person who has obtained citizenship of another state (or states) in legal relations with Ukraine is recognised only as a citizen of Ukraine. Therefore, *de facto*, Ukrainian citizens who have obtained Russian passports in the occupied territory have become bipatrides – they have been forced to acquire duties of allegiance to the Russian Federation without severing their legal ties with Ukraine and their duty of loyalty to it.

While the acquisition of Russian Federation citizenship by a Ukrainian citizen is not *per se* a criminal offence under Ukrainian criminal law, the opposite is true of 'defectors' – citizens who have joined the enemy's armed forces. In the criminal law of almost any country in the world, defection to the enemy is considered one of the most serious crimes – high treason. Ukraine is no exception in this context: according to Article 111(2) of the Criminal Code of Ukraine, defection to the enemy under martial law is considered high treason and is punishable by imprisonment for 15 years or life imprisonment. In March 2022, the Ukrainian legislator amended the Criminal Code of Ukraine with Article 111-1 ('Collaborationist activity'), which provides for liability for military collaborationism – voluntary participation of a Ukrainian citizen in illegal armed groups created in the temporarily occupied territory or the armed groups of the aggressor state, punishable by imprisonment for a term of 12 to 15 years with deprivation of the right to hold certain positions or engage in certain activities for 10 to 15 years and with or without confiscation of property.[54]

Some Ukrainian citizens have joined the ranks of the enemy armed forces for ideological or mercenary reasons, while others have been recruited by the Russian Federation, which considers the illegally annexed territories to be its own. The aforementioned OHCHR report refers to the conscription of young male residents of the occupied territory into its armed forces by the occupier.[55] Forcing the occupied population to serve in the armed forces of the occupier is a gross violation of IHL and a war crime under Article 8 of the Rome Statute[56] and Article 438 of the Criminal Code of Ukraine. This actualises another controversial issue – the existence of such citizens in two hypostases at the same time under national criminal law – a person who has committed a crime against the national security of Ukraine and has been a victim of a violation of the laws and customs of war. However, in this article, we limit ourselves to a more straightforward case, which directly corresponds to the wording

52 Law of Ukraine no 2235-III of 18 January 2001 'On Citizenship of Ukraine' <https://zakon.rada.gov.ua/laws/show/2235-14#Text> accessed 14 May 2024.
53 ibid.
54 Law of Ukraine no 2341-III (n 4).
55 OHCHR (n 50) 27.
56 Rome Statute of the International Criminal Court (17 July 1998) <https://legal.un.org/icc/statute/romefra.htm> accessed 14 May 2024.

of Part 7 of Article 111-1 of the Criminal Code of Ukraine and concerns the *voluntary participation* of a citizen of Ukraine in the armed forces of the occupier.

In the Unified State Register of Court Decisions of Ukraine, it is easy to find judgements in which Ukrainian citizens who voluntarily joined the armed forces of the aggressor, including the military formations of the 'LNR' and 'DNR',[57] were convicted of collaborationist activity under Article 111-1(7) of the Criminal Code of Ukraine and/or high treason under Article 111-1(2). To illustrate, let us describe the circumstances of several cases.

In one verdict, a citizen of Ukraine was convicted for serving in a military unit of the aggressor state in the occupied territories. He was found to have guarded and occupied Ukrainian territories, carried out instructions and orders of commanders from among the military personnel of the armed forces of the Russian Federation, equipped and strengthened checkpoints, and carried out engineering and technical arrangement of positions. While on duty in the military uniform of the enemy armed forces with fixed identification marks that could be recognised at a distance, he openly carried firearms and actively participated in visual surveillance of air and ground space to detect and neutralise the forces and means of the Armed Forces of Ukraine.[58]

In a second judgement, a Ukrainian citizen signed a contract for military service in the occupier's military formations at the invaders' suggestion as a 'shooter' with the rank of private. In August 2023, following an assault by Ukrainian armed forces, he surrendered and gave himself up.[59]

In a third judgement, a citizen of Ukraine, as part of the armed forces of the aggressor state, in particular, strengthened checkpoints, carried out engineering and technical arrangement of positions, and protected the occupied territories of Ukraine. After the storming of his brigade's position, he was taken prisoner by the Ukrainian military.[60]

In the context of our research, the above raises at least three critical questions:

1) Do defected Ukrainian citizens have the status of combatants/POWs?;
2) Do they have combatant immunity?;
3) Are they legally liable for high treason/collaboration with the occupier?

57 At the end of 2022, the military formations of the LNR and DNR became officially subordinated to the Ministry of Defence of the Russian Federation.

58 Case no 554/6958/23 (Oktiabrskyi District Court of Poltava, 16 August 2023) <https://reyestr.court.gov.ua/Review/112886268> accessed 14 May 2024.

59 Case no 185/12394/23 (Pavlograd City and District Court of Dnipropetrovsk Region, 13 March 2024) <https://reyestr.court.gov.ua/Review/117614918> accessed 14 May 2024.

60 Case no 188/1570/23 (Petropavlivsk District Court of Dnipropetrovsk Region, 4 December 2023) <https://reyestr.court.gov.ua/Review/115364511> accessed 14 May 2024.

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Answering these questions presents significant challenges for Ukraine, as the established and universally recognised provisions of the IHL offer no clarity and consensus on the status of defectors.

The search for normative (formal) grounds to resolve this issue, as often happens, encounters different interpretations of non-obvious conventional provisions. Article 4 of Geneva Convention III states only "persons… who have fallen into the power of the *enemy*".[61] This indicates that, in the absence of any explicit mention of citizenship (or nationality) in the text, it can be assumed that this requirement is not a factor in the status of a POW. If it were otherwise, it would be explicitly stated.[62]

On the other hand, Articles 87 and 100 of the same treaty contain provisions that hint at the importance of this feature, stating "when fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, *not being a national of the Detaining Power*, is not bound to it by any duty of allegiance..."[63] and "the death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused *is not a national of the Detaining Power*, he is not bound to it by any duty of allegiance".[64]

At the same time, the cited rules set out minimum requirements for judicial procedures applicable to POWs, including sentencing. Consequently, these provisions can be interpreted to require consideration of the differing statuses of a POW who is a citizen of an enemy or other state and a POW who is a defector. This interpretation does not affect the status of the POW. Of equal importance is that these provisions are located in Chapter III, 'Penal and disciplinary sanctions', which generally relates to the actions of a POW committed after their capture. However, this interpretation is also not uncontroversial.

The Commentary to Geneva Convention III (2020) notes that if defectors fall under the authority of the state from which they fled, they still receive POW status. However, the commentators note the lack of consensus on this matter and add that "there is practice, however, indicating that some States exclude defectors from their own armed forces from prisoner-of-war status, whether they do so independently of or in line with their view of the impact of nationality on that assessment".[65]

61 Geneva Convention (III) (n 8).

62 See more in: Manuel G Martinez, 'Defection and Prisoner of War Status: Protection Under International Hu-manitarian Law for Those Who Join the Enemy?' (2020) 57 Canadian Yearbook of international Law 41, 52, doi.org:10.1017/cyl.2020.10.

63 Geneva Convention (III) (n 8).

64 ibid.

65 Lindsey Cameron and others, 'Article 4 - Prisoners of War: Commentary' *Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949: Commentary* (2020) § 996 <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020?activeTab=undefined> accessed 14 May 2024.

In analysing the general and cumulative conditions for the lawful conduct of hostilities, Y. Dinstein recognises the condition "of non-allegiance to the Detaining Power" while emphasising that it is not explicitly mentioned in the Geneva Conventions and is derived from case law, in particular the *Koi* case.[66] In this case, during the conflict between Malaysia and Indonesia, Malaysians were part of an Indonesian landing force and, under the command of the Indonesian military, landed armed in Malaysia, where they were captured. They were convicted of violating Malaysian national laws on unlawful acts with weapons. The Judicial Committee of the Privy Council (UK) reached two conclusions from the case. On the one hand, it found that a "close examination of the Third Geneva Convention and commonly accepted international law strongly indicated that a prisoner of war was not a national of the detaining power". Thus, "the Convention did not extend the protection of prisoners of war to nationals of the detaining power or to persons who, though not nationals, owed allegiance to that power". On the other hand, as for the members of the Indonesian army (lawful combatants), Malaysian national criminal law did not apply to them.[67]

As for the case *Prosecutor v. Prlić et al.,* a Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) addressed the interpretation of Article 4 of the Geneva Convention (III). The Chamber decided that "a member of the armed forces may not be considered a prisoner of war unless he is captured by that party to the conflict against which the armed forces to which he belongs are fighting". Furthermore, the Chamber ruled that "members of the armed forces of a party to the conflict may not be considered prisoners of war when they are placed into detention by their own armed forces".[68]

The *US Law of War Manual* states that "the special privileges that international law affords combatants *generally* do not apply between a national and his or her State of nationality', 'international law does not prevent a State from punishing its nationals whom it may capture among the ranks of enemy forces".[69]

Perhaps the most comprehensive justification of the importance of nationals of a detaining power is provided by W.C. Biggerstaff and M.N. Schmitt, eliminating the need to repeat the already explored 'pro' arguments in this article. By applying the traditional methods of interpretation of international treaties, the authors argue that the non-recognition of POW status for citizens of the State holding them is a long-standing dominant view of scholars of international law and State practice.[70] D. Jinks further

66 Dinstein (n 6) 40.

67 *Public Prosecutor v Oie Hee Koi* (Judicial Committee of the Privy Council (UK), 4 December 1967) <https://ihl-databases.icrc.org/en/national-practice/oie-hee-koi-case-judicial-committee-privy-council-uk-4-december-1967> accessed 14 May 2024.

68 *Prosecutor v Prlic and Others* IT-04-74 (International Criminal Tribunal for the Former Yugoslavia, 29 May 2013) vol 3, para 604 <https://ucr.irmct.org/scasedocs/case/IT-04-74#eng> accessed 14 May 2024.

69 US Department of Defense (n 46) § 4.4.4.2.

70 W Casey Biggerstaff and Michael N Schmitt, 'Prisoner of War Status and Nationals of a Detaining Power' (2023) 100 International Law Studies 527.

emphasises that "the drafting history of the POW Convention strongly suggests that it was intended to cover only enemy nationals". [71] He points out that "the drafting history of Common Article 3 provides good reason to think that states in general did not support the application of humanitarian rules to their own nationals. Debate surrounding this provision demonstrates that states struggled to make clear that the application of humanitarian law to internal matters would not, in any way, compromise the power of the state to quash rebellion and maintain public order".[72]

It is also important to consider that the status of a POW entails a number of corresponding rights and obligations for both the prisoner and the state that holds them, including in terms of repatriation. Following the cessation of hostilities, POWs are released and returned to their countries of origin. During hostilities, the parties to the conflict facilitate repatriation of the wounded and sick, and mutual exchange of prisoners occurs.

In the context of the ongoing conflict between Russia and Ukraine, the recognition of POW status for a defector would result in the transfer of Ukrainian citizens (through exchange or repatriation) into the hands of the aggressor state. It is pertinent to note that, in accordance with Article 25 of the Constitution of Ukraine, a Ukrainian citizen cannot be expelled from Ukraine or extradited to another state.[73] However, the provisions of the Constitution are norms of direct effect and are superior to any international treaty in the hierarchy of normative acts.

Consequently, the fact that a defector is unable to rely on the status of a legitimate combatant and/or POW appears to be an ambiguous but dominant position. This naturally leads to the impossibility of extending the combatant's immunity to him/her. Concurrently, while various interpretations obscure the formal rationale for this exception, its ethical rationale is based solely on extremely tenuous arguments concerning the non-interference of IHL in the internal relations between the state and its citizens. If this were the case, then a party to a conflict that uses its citizens as a shield against enemy attacks or attacks the enemy in an indiscriminate manner that causes numerous casualties among its own population in enemy-occupied territory should not be considered a violator of IHL. Nevertheless, it appears that the principle of humanity should be indifferent to nationality and citizenship.

Finally, let us recall the arguments set out in the previous section regarding the immunity of combatants and their role in preventing greater harm. A combatant functions as a kind of public servant, performing actions for which the state and its leadership are responsible. When a soldier fights for a state that is hostile to their country of citizenship, they officially occupy a military position, wear the uniform and weapons of that state, and act on its behalf (e.g., under contract). If this soldier understands their participation in hostilities, it will

71 Jinks (n 15) 41-2.

72 ibid.

73 Constitution of Ukraine of 26 June 1996 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 14 May 2024.

automatically lead to conviction upon capture. The situation becomes even more complex if such a soldier has acquired the citizenship of the state they defected to yet has not (at least formally) taken any action to renounce their original citizenship.

Currently, it is not possible to state unequivocally which interpretation Ukraine has adopted in the Russian-Ukrainian war in relation to its defectors. We have not found any official comments on this issue. The short Instruction of the Ministry of Defence of Ukraine also does not answer this question.[74] The aforementioned judgments, in which defectors were not convicted of murder and destruction of property and in which Ukrainian defectors were taken prisoner, indirectly suggest that Ukraine recognises its defectors as combatants and POWs. Conversely, this may be indicative of Ukraine's compliance with the presumption set forth in Article 5 of Geneva Convention III, which states that any individual is a POW until proven otherwise. It is possible that the individuals were not charged with murder and destruction of property due to a lack of evidence.

The Criminal Code of Ukraine was recently supplemented with Article 84-1, which provides for exemption from punishment in connection with decisions on the prisoner exchange.[75] Judicial practice demonstrates that this provision is widely applied to convicts who are Ukrainian citizens.[76] This practice suggests that Ukraine recognises its citizens as prisoners of war, including those convicted of high treason, at least during the process of prisoner exchange. However, whether this fact also implies recognition of these citizens as enemy combatants remains unclear.

The question raised in this article about the importance of citizenship for the activation of combatant immunity is an attempt to reopen a long-standing debate, and we hope that it will continue to be fruitful. While deliberately avoiding answering the first two of the three questions we have posed in this section, we argue that the answer to the third question (Are defectors liable for high treason/collaboration with the occupier?) should be unequivocally positive. The most interesting thing is that this unambiguity does not depend on the answer to the first two questions.

All sources that recognise combatant immunity stipulate that the privilege of not being prosecuted applies solely to participation in hostilities and criminal offences resulting from participation in hostilities, provided that they are in accordance with the customs and rules

74 Order of the Ministry of Defense of Ukraine no 164 of 23 March 2017 'On approval of the Instruction on the Procedure for the Implementation of Norms of International Humanitarian Law in the Armed Forces of Ukraine' <https://zakon.rada.gov.ua/laws/show/z0704-17#Text> accessed 14 May 2024.

75 See more about the analysis of Art. 84-1 in: DYe Kryklyvets, 'Exemption from Serving Punishment under Article 84-1 of the CC of Ukraine: Issues of Legal Regulation and Law Enforcement' (2023) 2 Juridical Scientific and Electronic Journal 439, doi:10.32782/2524-0374/2023-2/103.

76 See, for example: Case no 461/2647/23 (Halytskyi District Court of Lviv, 13 April 2023) <https://reyestr.court.gov.ua/Review/110222796> accessed 14 May 2024; Case no 447/346/24 (Mykolaivskyi District Court of Lviv Region, 7 February 2024) <https://reyestr.court.gov.ua/Review/116824296> accessed 14 May 2024.

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of war. Consequently, we can discuss the temporal, material and personal conditions of its activation, which act in a cumulative manner.

The *rationale temporis* immunity of a combatant does not preclude the combatant's prosecution for offences committed prior to or after direct participation in hostilities. In addition, these offences may be committed in peacetime (e.g. before the beginning of an armed conflict) or during a break in hostilities (e.g. while on military vacation). It is also for a person to commit an offence without being a combatant (e.g. a soldier disguising themselves as a civilian to commit an insidious attack on the enemy or being a member of a terrorist group), but later their status could change (e.g. by becoming a member of the regular armed forces). These offences are not covered by combatant immunity. However, in view of the provisions of Geneva Convention III and Additional Protocol I, they may have the status of a POW.

Ratione materiae, immunity is limited to crimes that meet two cumulative requirements:

a. they are the core of hostilities, stemming from the necessity of conducting hostilities. Outwardly, they may contain signs of various violations that would be considered crimes in other (non-combat) circumstances: crimes against the state (destruction of the constitutional order, violation of the sovereignty, territorial inviolability of the enemy state, its economic or information security), crimes against the person (intentional and reckless murder, bodily harm, etc.), crimes against property (destruction and damage to property; seizure of certain types of property), crimes against public safety (illegal handling of weapons, committing publicly dangerous acts, disturbance of public peace, etc.);
b. they do not violate the laws and customs of war.

Crimes that do not arise from the nature of hostilities are not covered by the shield of privilege. As O. Kaplina notes, combatants "cannot be prosecuted for participating in an armed conflict, with the exception of cases of international crimes committed, in particular, war crimes, as well as so-called general crimes, provided by the national legislation on criminal liability".[77]

The content of the *ratione personae* depends on the view of the nationality of the combatant/POW that is taken as a basis (alternatively): it can be solely a citizen of the enemy state (and possibly its allies) or any individual regardless of nationality.

Liability for high treason by a defector would never meet the *ratione materiae* criterion since the breach of a citizen's duty of loyalty to their state is clearly unrelated to the necessity of hostilities and does not constitute their content. A contrary decision would likely create the basis for extending the doctrine of combatant immunity to non-international armed

77 Oksana Kaplina, 'Prisoner of War: Special Status in the Criminal Proceedings of Ukraine and the Right to Exchange' (2022) 5(spec) Access to Justice in Eastern Europe 14, doi:10.33327/AJEE-18-5.4-a000438.

conflicts, which makes no sense. The duty of loyalty is perhaps the most sensitive component of intra-state relations, and no state is zealous about interfering with it.

Moreover, in most cases, *ratione temporis* defection to the enemy occurs even before a citizen becomes a member of the enemy's armed forces and participates in hostilities (at the very least, he/she first contacts the enemy). In these circumstances, *ratione personae* loses its significance when deciding whether to convict a defector for high treason:

a) if a combatant can only be a citizen of an enemy state, the question of evaluating the defector's actions is not even raised;
b) if a combatant can be any person, the question of immunity can only be raised in relation to crimes that comply with *ratione temporis* and *ratione materiae*, which, in view of the above, cannot include high treason.

In its report, the OHCHR recorded 81 cases of convictions by Ukrainian courts of prisoners, most of whom were Ukrainian citizens, for joining armed groups affiliated with the Russian Federation.[78] We cannot fully agree with the Rapporteur's concerns regarding the violation of combatant immunity, at least in terms of the conviction of defectors who are Ukrainian citizens under articles on high treason (Article 111 of the Criminal Code of Ukraine) and collaborationist activity (Article 111-1 of the Criminal Code of Ukraine), in view of the arguments set out above.[79] We assume that this problem was at least partly due to a misunderstanding of the purpose of supplementing the Criminal Code with an article on collaborationist activity.

As noted earlier, Part 7 of this article punishes the voluntary participation of a citizen of Ukraine in illegal armed or paramilitary groups established in the temporarily occupied territory and/or in the armed formations of the aggressor state. Outwardly, this article refers directly to the participation of Ukrainian citizens in hostilities on the side of the enemy. If we are guided by a broad approach to *ratione personae*, which seems to be followed by the OHCHR, one might conclude that the immunity of a combatant has been violated.

In reality, however, Article 111-1 of the Criminal Code of Ukraine is a special type of high treason, in this context – high treason in the form of defection to the enemy.[80] At the same time, Part 7 of Article 111-1 provides for a privileged type of high treason (less severe

78 OHCHR, *Report on the Human Rights Situation in Ukraine, 1 August to 30 November 2023* (Office of the High Commissioner for Human Rights) 17-8 <https://www.ohchr.org/en/documents/country-reports/report-human-rights-situation-ukraine-1-august-30-november-2023> accessed 14 May 2024.

79 Regarding convictions under articles on participation in a terrorist organisation (Art. 258-3 of the Criminal Code of Ukraine), participation in illegal armed groups (Art. 260 of the Criminal Code of Ukraine) and some others, it should be acknowledged that the problem existed and was related to the fact that only in December 2022 the military formations of the LNR and DNR were included in the Russian armed forces. However, until then, they were recognised by Ukraine as illegal armed groups (and the question is whether this was correct).

80 Mykola Rubashchenko and Nadiia Shulzhenko, 'Reflections on the Legal Features of Collaborationist Activity: Theory and Practice in Terms of the Russian Occupation of Ukrainian Territory' (2024) 7(3) Access to Justice in Eastern Europe 10, doi:10.33327/AJEE-18-7.3-a000315.

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punishment compared to Part 2 of Article 111), as it refers to the violation of the duty of allegiance that occurs in the conditions of occupation of the territory. If the violation of the duty of allegiance ('siding with the enemy') does not occur under the influence of the occupation of the territory, the act is punishable more severely – under the general rule of high treason.

5 CONCLUSIONS

Russia's aggression against Ukraine has not only brought immense grief to the homes of ordinary Ukrainians but also caused large-scale economic losses and significantly affected global politics. It has generated a lot of discussion in the legal field and brought dormant or long-known but unresolved legal issues to light. It would seem that given that combatant immunity is firmly rooted in the foundations of IHL, implemented in the practice of international tribunals and national courts, and reflected in all authoritative manuals and commentaries, it should not be contested. However, the cynical and undisguised aggression of the Russian Federation has caused serious criticism in the Ukrainian legal community against the doctrine, which is shocking in that it allows for killing and destruction with impunity.

In a formal sense, none of the international treaties to which Ukraine is a party mention combatant immunity or a prohibition on criminal prosecution for participation in hostilities. Consequently, the interpretation of the provisions of these treaties suggests that the combatant's privilege is indirectly derived from their content. This may be sufficient, but the absence of a direct normative statement of this important doctrine leaves room for debate. The moral aspect of the privilege is arguably even more controversial, particularly when a state aggressively conducts hostilities and represents an unjust war. In such circumstances, the prohibition of criminal prosecution of a combatant of the aggressor state because he is only a person serving his state or because of the transposition of the properties of state sovereignty to a military servant of that state appears to be poorly justified. The only arguments in favour of immunity are that it prevents greater harm (in terms of humanitarian considerations), simplifies the exchange of prisoners of war and does not overload the judicial and penitentiary systems.

The Russian Federation not only occupied but also annexed a substantial territory with a considerable population. The incorporation of the occupied territory into the aggressor state has prompted the question of the status of defectors, namely citizens of the first state who fight on the side of the second state against the first. Two distinct approaches to the status of these individuals can be identified, depending on whether citizenship (nationality) is a mandatory feature. It remains unclear which approach Ukraine has chosen with regard to the treatment of soldiers of the opposing side who are also its citizens. However, there is evidence that Ukraine does not attach any importance to this characteristic.

Regardless of whether defectors can be recognised as combatants and/or prisoners of war, they may be subject to criminal liability for high treason or collaborationist activities (as a mitigating form of high treason). This is because a citizen's breach of allegiance to their state (the act of defecting to the enemy) is not a crime that follows *ratio materiae* from the nature of hostilities between states.

A further area that requires further discussion is that of dual citizenship among defectors. This is because some defectors have not lost their citizenship of one state and have acquired the citizenship of another.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ІМУНІТЕТ КОМБАТАНТА І РОСІЙСЬКО-УКРАЇНСЬКА ВІЙНА: ПЕРЕЗАПУСК ДЕБАТІВ СТОСОВНО ДАВНО ВІДОМОЇ ДОКТРИНИ

Іван Яковюк*, Сергій Харитонов та Олексій Зайцев

АНОТАЦІЯ

Вступ. *Російське вторгнення в Україну породило наймасштабніший конфлікт у Європі після Другої світової війни. Сотні тисяч російських військових реалізують волю держави-агресора. Довгий час вважалося, що комбатанти мають імунітет до кримінального переслідування за бойові дії та їхні супутні наслідки, у тому числі за вбивство військових, що обороняють державу-жертву агресії, якщо тільки вони не порушили закони війни. Такий імунітет викликав критику в українській правничій спільноті. Тому в цій статті автори аналізують висловлені аргументи прибічників імунітету комбатанта і намагаються прояснити правові та етичні підстави суперечливої доктрини. Крім того,*

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переглядається під іншим кутом добре відома дискусія щодо значення громадянства (національності) для визнання статусу комбатанта чи військовополоненого та щодо відповідальності перебіжчиків.

Методи. *Основою статті є аналіз джерел міжнародного гуманітарного права (МГП), коментарів, практик держав, прецедентів та наукових поглядів щодо імунітету комбатанта. Також аналізуються практика правозастосовних органів України та погляди українських науковців у сфері кримінального права.*

Стаття складається з трьох частин. Перша частина містить загальний огляд статусу комбатанта та його привілеїв в МГП, а також актуалізує цю проблематику з огляду на російсько-українську війну. У другій було продемонстровано дебати щодо того, чи зобов'язана Україна, як жертва агресії, поважати імунітет комбатанта держави-агресора, та сформульовано висновки авторів. У третій частині розглядається проблема відповідальності перебіжчиків, де основою є питання про громадянство (національність) комбатанта чи військовополоненого.

Результати та висновки. *Низка українських науковців висловила категоричну незгоду з тим, щоб Україна застосовувала доктрину імунітету комбатанта стосовно російських військовослужбовців. З огляду на відсутність прямої вказівки на цей винятковий привілей у міжнародних договорах, учасницею якої є Україна, та апріорі протиправний характер агресії, критичні аргументи не безпідставні. Однак ми робимо висновок, що повага до імунітету комбатанта, який представляє державу-агресора, є частиною міжнародних зобов'язань України і має певне обґрунтування. Водночас у статті визнається, що правові та етичні підстави для цього не зовсім зрозумілі. Ще більш складним є питання того, чи визнавати перебіжчиків комбатантами та/або військовополоненими. Однак ми переконані, що незалежно від відповіді на це питання, кримінальне переслідування перебіжчиків за державну зраду не можна вважати порушенням імунітету комбатанта.*

Ключові слова: *імунітет комбатанта, військовополонений, перебіжчики, колабораціоністська діяльність, державна зрада, російсько-українська війна, кримінальне право.*

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Research Article

THE OBSTACLES TO THE RIGHT TO A FAIR TRIAL UNDER THE INTERNATIONAL LAW: A CASE STUDY OF AL-ANFAL AND SREBRENICA GENOCIDE TRIALS

Mohamad Almohawes

ABSTRACT

Background: *The right to a fair trial is a critical part of national and international human rights frameworks. To protect this right, the rule of law should be implemented. Currently, the approach to trying individuals accused of grave international crimes, including genocide, is different, which gives an impression of inequality. For instance, the person accused of the al-Anfal genocide was tried by a national court and sentenced to the death penalty, whereas the person accused of the Srebrenica genocide was sentenced to life imprisonment by an international tribunal. Not to mention the lack of respect for the defendants' rights during the al-Anfal genocide's trial, including the principle of due process and the right to a fair trial. The main reason for the differing decisions in these two identical cases involving genocide arises from their trials in different courts and under different legal frameworks. This paper addresses the significance of these challenges for equality under international law and emphasises the difficulties in securing fair trials by examining these examples.*

Methods: *This article analyses the application of the right to a fair trial for international criminals by using doctrinal methods. Specifically, it adopts a qualitative approach to examine relevant international statutes. To illustrate, the research chose to analyse and compare two case studies: the trial of Ali al-Majid, the leader of the al-Anfal genocide, and Ratko Mladic, the leader of the Srebrenica genocide. This comparison focuses on aspects such as judicial independence and overall fairness in the trials of war criminals. It involves desk-based research and data that are collected through the analysis of relevant literature from primary sources, such as international law instruments and secondary sources, including books and academic articles, about the inconsistency of fair trial standards in different judicial contexts.*

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Results and conclusions: *Different approaches in trials for similar crimes threaten global justice and the protection of individual rights and freedoms. One practical way to address this issue is to bring those accused of grave international crimes, including genocide, to appear before the International Criminal Court (ICC), providing fair trials and punishments. However, this article demonstrates that the doctrine of state sovereignty may pose challenges to creating a uniform framework for the prosecution of war criminals. Additional challenges arise with the existence of different legal and political systems across the world. The article argues that to ensure a fair trial and maintain international peace and security, it is necessary to overcome these challenges and adopt a uniform framework for the prosecution of those accused of grave international crimes. The ICC can be the solution. The international community can overcome these challenges by encouraging all countries to join the Rome Statue and give it the sole jurisdiction over grave international crimes such as genocide, war crimes, or crimes against humanity.*

1 INTRODUCTION

The right to a fair trial is recognised as a basic human right under international human rights instruments[1] and protected under the constitutions of many countries.[2] Benefits of upholding the right of a fair trial are not limited to a domestic level but also contribute to peace efforts at a global level.[3] It is essential not only for upholding justice but also for safeguarding individual rights and freedoms. Protecting the right to a fair trial upholds the rule of law, ensuring justice and equality before the law.[4] It affirms that individuals have the right to be treated as *subjects*, not *objects*, of the law. This fundamental right cannot be restricted or given an exception according to the International Human Rights instruments.[5] This right is non-derogable under international human rights law, underscoring its critical importance. People live in peaceful and secure environments in communities that apply fair treatment, including a fair trial.

1 Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), art 10 (UDHR). Other articles such as art. 6, 7, 8 and 11 of the UDHR also cover this right. Some other instruments, like International Covenant on Civil and Political Rights (ICCPR) under arts. 14 and 16; African Charter on Human and Peoples' Rights (ACHPR) under arts. 3,7 and 26; European Convention on Human Rights under arts. 5,6 and 7; and the American Convention on Human Rights under arts 3,8,9,10, protect the right to fair trial.

2 Human Rights Act 1998 art 6; US Constitution, Amendment VI; The Constitution of the Islamic Republic of Pakistan 1973 art 10-A; The Constitution of India, 1950 art 21; Canadian Charter of Rights and Freedoms 1982 s 11(d); Basic Law for the Federal Republic of Germany as last amended by the Act of 19 December 2022 art 103; Constitution of the Republic of South Africa 1996 s 35.

3 Jonathan Hafetz, *Punishing Atrocities through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism* (CUP 2018) 30.

4 Amal Clooney and Philipa Webb, *The Right to a Fair Trial in International Law* (OUP 2021) 722.

5 Curtis FJ Doebbler, *Introduction to International Human Rights Law* (Lulu.com 2006) 110.

Established in 1945, the United Nations (hereinafter, UN) aims to protect international peace and promote international collaboration in solving economic, social, cultural, and humanitarian problems.[6] The rule of law, explained further below, is an essential element to achieve peace and security. This is because without the rule of law, equal treatment cannot be ensured, and without equal treatment, people may not respect the laws. In addition, in the context of post-conflict societies, the rule of law becomes critical to maintain security and peace.[7] The UN has announced that "promoting the rule of law at the national and international level is at the heart of the UN mission".[8] The United Nations Security Council (hereinafter, UNSC), International Criminal Court (hereinafter, ICC), and other international bodies are essential to enforce international law. Indeed, the UNSC has the right to take specific cases to the Prosecutor of the International Criminal Court (ICC) if evidence of committing grave international crimes is proven.[9]

Committing serious international crimes such as genocide – defined as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,"[10] – poses a threat to global peace and security. Ensuring a fair trial, including justice and equality, for international criminals accused of committing such crimes is essential, especially in post-conflict states. An independent judiciary is the true guarantor of the right to a fair trial, ensuring that justice is administered without bias. In post-conflict societies, protecting this right becomes even more crucial as it serves as a foundation for rebuilding trust. Upholding the right to a fair trial in such contexts is not just a matter of legal obligation but also a moral imperative to restore justice for victims and ensure that perpetrators are held accountable consistently with principles of justice and fairness. While the right to a fair trial primarily focuses on individual rights and freedoms, its broader implications extend to global peace. A fair trial process helps to expect punishment and prevent impunity for serious crimes, such as genocide, which can otherwise perpetuate cycles of violence and instability. Therefore, ensuring justice through fair trials is integral to maintaining international peace, particularly in the aftermath of conflicts.

It is important to mention ensuring fairness in the international criminal process is especially challenging in cases of genocide due to the high stakes and significant political

6 Charter of the United Nations (adopted 26 June 1945) <https://www.un.org/en/about-us/un-charter> accessed 11 August 2024.

7 Bardo Fassbender (ed), *Securing Human Rights: Achievements and Challenges of the UN Security Council* (OUP 2011) 78.

8 Ulf Johansson Dahre (ed), *Predicaments in the Horn of Africa: 10 Years of SIRC Conferences in Lund on the Horn of Africa* (Media-Tryck, Lund University 2012) 332.

9 José Doria, Hans-Peter Gasser and M Cherif Bassiouni, *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko: In Memoriam Professor Igor Pavlovich Blishchenko (1930-2000)* (Martinus Nijhoff Publ 2009) 483-4.

10 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) 78 UNTS 277, art 2.

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implications. International tribunals strive to maintain fairness through strict adherence to legal standards, but the influence of state sovereignty, cultural differences, and varying legal traditions can complicate this goal.

The trials of Al-Anfal and Srebrenica cases illustrate these challenges. The trials of these crimes were conducted under different judicial mechanisms, with Al-Anfal being prosecuted under a domestic tribunal and Srebrenica under an international tribunal. This contrast offers a valuable opportunity for a comparative analysis of the effectiveness, fairness, and challenges associated with domestic versus international prosecution. By examining these differing judicial approaches, we can better understand the strengths and weaknesses of each system in delivering justice for grave international crimes. The former trial's reliance on domestic courts showcases issues related to political influence and sovereignty, whereas the later trial under the ICTY highlights the capabilities and limitations of international tribunals.

In fact, fairness refers to the right to be treated fairly, rightly, and justly. Fairness in the judicial process is fundamental. This includes both procedural fairness, which guarantees that the trial is conducted impartially and transparently, and substantive fairness, which ensures that the outcome is just.[11] This means that the due process and outcomes should reflect a commitment to integrity, impartiality, and justice.

It is true that a fair trial cannot undo the immense loss of life or reverse the horrors of genocide; it serves several vital functions within the framework of international justice. A 'fair trial' is not merely about restitution but upholding fundamental human rights and ensuring accountability. It aims to provide a measure of justice that respects due process and the rule of law, which are essential for maintaining the integrity of the international legal system and preventing impunity. A fair trial ensures that those accused of grave international crimes are judged based on established legal standards, which helps to affirm the principle that even the most heinous acts must be subject to judicial scrutiny. This process holds perpetrators accountable, deter future violations as such crimes must be suppressed, and provide a sense of justice to the victims and affected communities.

The research purpose is to explore the application of the right to have a fair trial for those committing grave international crimes, including genocide, with a focus on two cases, the trial of Ali al-Majid, the leader of the al-Anfal genocide, and Ratko Mladic, the leader of the Srebrenica genocide, as examples. The key focus of these two case studies is that they represent significant and well-documented examples of international crimes that have been prosecuted under different legal frameworks, one under a domestic tribunal and the other under an international tribunal.

11 Rachel Kerr, 'Procedure: "Justice Must Not Only Be Done, but Must Be Seen to Be Done"' in Rachel Kerr (ed), *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law Politics and Diplomacy* (OUP 2004) doi:10.1093/0199263051.003.0005.

By analysing the procedures and judgments of these two trials, this research will determine whether applying different approaches in prosecuting persons accused of committing grave international crimes, like genocide, can undermine the principles of justice and fairness. It seeks to contribute to the broader discourse on improving the efficacy and fairness of grave international crimes such as genocide prosecutions under international law. Finally, the paper will explore key challenges and obstacles to ensure fair trials for those committing international crimes, including genocide.

2 THE RULE OF LAW

The definition of the "rule of law" is often debated as there is no universal consensus on its precise elements.[12] This debate revolves around which aspects should be included in the concept.[13] According to the World Justice Project, the rule of law requires governments and their officials to be held accountable under the law. It mandates that laws be transparent, constant, fair, protecting fundamental rights, and publicly accessible.[14] A fundamental aspect of the rule of law is respecting human rights, which is crucial to its material understanding.[15]

The UN Secretary-General (hereinafter, UNSG) further defines the rule of law as follows:

> "The principle of governance demands that every individual, organisation/institution, at both public and private levels, including the government itself, are responsible for publicly declaring, uniformly applying, and impartially judging laws that align with international human rights principles and standards. It also demands the implementation of measures to ensure the observance of fundamental principles, for instance, the rule of law, equal treatment under the law, accountability to legal standards, inclusive participation in decision-making processes, division of powers, prevention of arbitrary actions, clear legal rules, and transparent legal procedures."[16]

The UN was established on three pillars: "human rights, international peace and security, and development".[17] To achieve these aims, accountability, independent adjudication, and

12 E Thomas Sullivan and Toni Marie Massaro, *The Arc of Due Process in American Constitutional Law* (OUP 2013) 3.

13 T Zoroska Kamilovska, 'Privatization of Civil Justice: Is It Undermining or Promoting the Rule of Law?' (2020) 3(1) Access to Justice in Eastern Europe 39, doi:10.33327/AJEE-18-3.1-a000027.

14 Christopher Reynolds, *Public and Environmental Health Law* (Federation Press 2011) 23.

15 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 170, doi:10.33327/AJEE-18-5.1-n000099.

16 'What Is the Rule of Law?' (*United Nations and the Rule of Law*, 8 March 2015) <https://www.un.org/ruleoflaw/what-is-the-rule-of-law-archived/> accessed 11 May 2024.

17 'The Three Pillars' (*United Nations and the Rule of Law*, 7 October 2019) <https://www.un.org/ruleoflaw/the-three-pillars/> accessed 11 May 2024.

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equal enforcement align with international human rights standards. These requirements are central to the rule of law; thus, for the UN to realise its goals, it must uphold the rule of law. This means fair and equal treatment under the law, ensuring that everyone is subject to the law and that no one is above it.[18]

Currently, the rule of law on an international level plays a vital role in addressing modern society's complex challenges and opportunities. Complying with the principles and regulations of the rule of law has advantageous effects on many aspects, including maintaining peace and stability.[19] It is critical to prevent the misuse of power, combat corruption, ensure access to public services, and develop a social contract between the citizens and the government. The rule of law is intertwined with development and strong links with the Sustainable Development Goals (SDGs) outlined in the 2030 Agenda.[20] Goal number 16 of the SDG primarily allows member states to endorse policy reforms that promote progress in other SGDs.[21] This goal can be achieved by prioritising an inclusive and accountable justice system and facilitating meaningful participation of marginalised groups. It also aims to prevent human rights violations by ensuring accountability and empowering individuals and communities to protect their rights. The rule of law is crucial for sustaining peace and requires a comprehensive approach across the UN system. It includes respecting international norms, forming the foundation of humanitarian protection regimes, and addressing displacement and statelessness. Furthermore, emerging issues, such as cybercrime, artificial intelligence and climate change, also fall within the scope of the rule of law considerations.[22]

Protecting the rule of law in post-conflict states is a primary challenge due to chaotic conditions in such societies. Therefore, the UN Office of the High Commissioner for Human Rights (OHCHR) has enacted the Rule of Law Tools for Post-Conflict States on National Consultations on Transitional, establishing the rule of law as a part of international justice efforts of the UN in post-conflict states.[23] The UNSG defines international/transnational justice as "the full range of processes and mechanisms associated with a society's attempts

18 Robert L Nelson and Lee Cabatingan, *Global Perspectives on the Rule of Law* (James J Heckman ed, Routledge-Cavendish 2010) 20.

19 Adnan Mahmutovic and Abdulaziz Alhamoudi, 'Understanding the Relationship between the Rule of Law and Sustainable Development' (2023) 7(1) Access to Justice in Eastern Europe 171, doi:10.33327/AJEE-18-7.1-a000102.

20 Transforming our World: The 2030 Agenda for Sustainable Development (adopted 25 September 2015 UNGA Res 70/1) <https://sdgs.un.org/2030agenda> accessed 29 June 2023.

21 'Goal 16: Peace, Justice and Strong Institutions' (*United Nations Sustainable Development Goals*, 2023) <https://www.un.org/sustainabledevelopment/peace-justice/> accessed 29 June 2023.

22 'Emerging Challenges' (*United Nations and the Rule of Law*, 3 September 2019) <https://www.un.org/ruleoflaw/thematic-areas/emerging-threats/> accessed 11 May 2024.

23 OHCHR, *Rule of Law Tools for Post-Conflict States on National Consultations on Transitional Justice: National Consultations on Transitional Justice* (UN Publ 2009).

to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation."[24]

The tools provided by the OHCHR to achieve international justice include prosecution initiatives and truth commissions. These truth commissions are designed to be temporary, focusing on investigating patterns of abuse over time and concluding with a formally authorised public report.[25] Vetting is considered significant in post-conflict or post-authoritarian contexts by helping exclude those responsible for past abuses who have not been criminally prosecuted from public service.[26] Reparations programs aim to achieve justice from victims' perspective due to human rights abuse.[27] Additionally, amnesty is a significant tool in transitional justice and supports the rule of law in post-conflict states.[28] It involves a sovereign power granting a general pardon for past offences to individuals or groups.[29]

In pursuit of international justice, monitoring the legal system is to conduct an all-inclusive assessment of institutions and the overall system. This analysis aims to identify and reinforce effective practices while addressing the limitations. Moreover, valuable insights can be gained by mapping the justice sector and monitoring the legal system to seek improvement in the working and quality of the whole legal system.[30]

These tools for establishing the rule of law in post-conflict states are grounded in international human rights.[31] The rule of law, in addition, is essential as "it implies a law based on constitutional principles and which the governors and the governed must both obey".[32] The reconstruction of security is thought to be the basis of rebuilding post-conflict societies and is a *sine qua non* in a post-conflict environment.[33] It is believed that there is a consensus on the significance of the rule of law in peacebuilding as it aims to establish stability and security by providing a mechanism for the settlement of conflicts, including

24 UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* (S/2004/616, UN 2004) para 8 <https://digitallibrary.un.org/record/527647> accessed 13 May 2024.

25 Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2010) 11.

26 Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007) 484.

27 Sabine C Carey, Mark Gibney and Steven C Poe, *The Politics of Human Rights: The Quest for Dignity* (CUP 2010) 204.

28 Charles Villa-Vicencio and others (eds), *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice* (Institute for Justice and Reconciliation 2004) 44.

29 Austin Sarat and Nasser Hussain (eds), *Forgiveness, Mercy, and Clemency* (Stanford UP 2007) 209.

30 Hakeem Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge 2010) 65.

31 Daniel Terris, Cesare Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis UP 2007) 101.

32 Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (University of Chicago Press 2012) 73.

33 Peter Davis, *Corporations, Global Governance, and Post-Conflict Reconstruction* (Routledge 2013) 26.

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governance mechanisms, addressing underlying conflict grievances, and preventing the re-emergence of violent conflicts.[34]

The absence of the rule of law can lead disenfranchised groups to resort to strategies to seek justice, which results in armed struggles and violent conflicts.[35] Without the rule of law to provide a framework for conflict resolution, conflicts can arise within such societies. This can have devastating consequences for both the communities involved in the conflict and the broader society. The UN report focuses on the fact that peacebuilding cannot be achieved unless the population has confidence in obtaining a fair resolution of grievances through genuine structures for dispute settlement in a peaceful way and for the administration of justice.

Furthermore, in conflict and post-conflict situations, numerous vulnerable groups, such as displaced persons, detainees, prisoners, children, women, minorities, and refugees, face heightened vulnerability. This necessitates urgent actions to reinstate the rule of law.[36] Upholding the rule of law is essential to peacebuilding efforts as it promotes accountabilities for all individuals, maintains that no one is above the law, and protects human rights. By safeguarding the rule of law, societies can establish the conditions necessary for sustainable peace and justice. Peacebuilding aims to transform societies affected by conflict and manage economic, political, and social disputes in a non-violent way.[37] Thus, the rule of law becomes a critical element in facilitating effective peacebuilding efforts.

2.1. The right to have a fair trial under international law

Every individual has the right to a fair trial in civil and criminal courts, and access to competent and independent courts of law is essential to protect this human right.[38] Courts must be equipped and committed to conducting fair trials, as this pillar of justice contributes to the preservation of equitable societies and limits the abuse of power. The state's ability to capture, bring to justice, and penalise an individual is the most forceful exertion of state authority, and this authority must be exercised carefully, with necessary measures in place to safeguard the rights of the persons accused throughout the legal proceedings. Those suspected of committing an international war crime deserve to be

34 Timothy Donais, *Peacebuilding, and Local Ownership Post-Conflict Consensus-Building* (Routledge 2013) 26.

35 Jane Stromseth, David Wippman and Rosa Brooks, *Can Make Rights? Building the Rule of Law after Military Interventions* (CUP 2006) 60.

36 Eric de Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Martinus Nijhoff Publ 2009) 190.

37 Matthijs van Leeuwen, *Partners in Peace: Discourses and Practices of Civil-Society Peacebuilding* (Ashgate Publ 2013) 31.

38 OHCHR, 'The Right to a Fair Trial: Part 1 – From Investigation to Trial' in OHCHR, *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Persecutors and Lawyers* (UN Publ 2003) ch 6, 215.

treated empathically and respectfully, and their convictions should not overshadow their fundamental entire identity as human beings with inherent rights.

As discussed earlier, the international legal framework, like the UDHR, underscores the importance of the right to a fair trial. For a fair trial, the UDHR provides several provisions, including equality before law (Article 7), trial by a competent tribunal (Article 8), and freedom from arbitrary arrest and trial (Article 9).[39] Inspired by the UDHR, ver eighty human rights treaties are now in force on a global and regional scale.[40]

Furthermore, Article 10 of the UDHR states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal".[41] This mandates establishing international standards which provide public hearings irrespective of the background of the accused. Article 11 of the UDHR asserts that everyone must have the right to a fair trial, which includes adequate legal protections and the right to counsel.[42]

As stated above, several international instruments on fair trials have been enacted to protect the right to a fair trial. A legal system based on equal and just values can foster long-lasting peace and help prevent the emergence of new conflicts. To achieve this, the rule of law must be respected.

3 CASE STUDIES

3.1. The international criminal court for the former Yugoslavia (ICTY)

The International Criminal Court for the former Yugoslavia (ICTY) was established to try persons accused of committing the Srebrenica genocide. The Srebrenica genocide, known as Bosnia's genocide, was committed in July 1995 and is considered the "worst massacre in Europe since World War II".[43] The estimated number of Bosnian individuals killed by the Serb forces surpassed the figure of 8,000 in Srebrenica.[44] Mladic, the former Bosnian Serb military chief, is believed to be one of the responsible persons for the Srebrenica genocide.[45] Mladic famously declared, "We present this city to the Serbian people as a gift, and the time has come to take revenge on the Turks in this region,"[46] referring to the suppression of

39 Universal Declaration on Human Rights (n 1) arts 6, 7, 8, 9.
40 OHCHR (n 38) 215.
41 Universal Declaration on Human Rights (n 1) art 10.
42 ibid, art 11.
43 Frida Ghitis, *The End of Revolution: A Changing World in the Age of Live Television* (Algora Publ 2001) 168.
44 Alexander Mikaberidze (ed), *Atrocities, Massacres, and War Crimes: An Encyclopaedia* (ABC-CLIO 2013) 727.
45 Tony Taylor, *Denial: History Betrayed* (Melbourne Univ Publ 2008) 137.
46 David L Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (OUP 2009) 193.

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Serbian-uprising by the Turks during the Ottoman Empire in 1804.[47] It is estimated that more than 200,000 Muslims were killed in the war of Bosnian, including 17,000 children.[48]

On 22 February 1993, the UNSC first enacted Resolution 808, stating that an international tribunal should be established to try those accountable for grave breaches of international humanitarian law committed in the former Yugoslavia since 1991.[49] The Regulation was based on Chapter VII of the UN Charter. Article 39 states the following:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[50]

The International Criminal Tribunal for the Former Yugoslavia (hereafter, ICTY) was fully established on 25 May 1993 in the Hague, Netherlands, by the UNSC Resolution 827.[51] The court's main purpose was to prosecute individuals responsible for grave violations of the Geneva Conventions in the region of former Yugoslavia since 1991.[52] Establishing the ICTY was a prominent milestone as it was the first international tribunal after the Nuremberg Tribunal of 1945-46 to try crimes, including acts of genocide.[53] In terms of jurisdiction, the ICTY was granted primacy over national courts, meaning it could request national authorities to defer cases to its jurisdiction.

The establishment and operation of the ICTY were not unilateral processes but involved extensive consultation and scrutiny to ensure its rules met international legal standards. Although its establishment lacked the direct backing of the United National General Assembly (UNGA), it was authorised by the UNSC and is responsible for maintaining global peace by all means, including the establishment of a tribunal.

After more than 15 years, General Mladic was found and captured in Serbia in May 2011.[54] Mladic and Radovan Karadzic, former President of Republika Srpska, were charged for their role in the 1995 Srebrenica genocide.[55] Despite being found guilty of genocide, the ICTY

47 Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity Press 2001) 246.
48 Robert Bideleux and Ian Jeffries, *The Balkans: A Post-Communist History* (Routledge 2007) 353.
49 UN Security Council Resolution 808 (1993) of 22 February 1993 <https://digitallibrary.un.org/record/243008?ln=en> accessed 15 June 2024.
50 Charter of the United Nations (n 6) art 39.
51 UN Security Council Resolution 827 (1993) of 25 May 1993 <https://digitallibrary.un.org/record/166567?ln=en> accessed 15 June 2024.
52 Christopher C Joyner, *International Law in the 21st Century: Rules for Global Governance* (Rowman & Littlefield 2005) 153.
53 Robert Stallaerts, *Historical Dictionary of Croatia* (3rd ed, Scarecrow Press 2010) 168.
54 Nigel D White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (2nd edn, Manchester UP 1997) 101.
55 Michael P Scharf, *Slobodan Milošević and William Schabas, Slobodan Milosevic on Trial: A Companion* (Continuum 2002) 83.

statute limits the maximum sentence to life imprisonment.[56] Mladic's trial commenced on 3 June 2011, with a range of charges presented against him. The verdict was delivered on 2 November 2017, where he was sentenced to lifetime imprisonment.[57]

3.2. The Iraqi High Tribunal (IHT)

The Iraqi High Tribunal (hereafter, IHT) was established to try persons accused of committing the Kurdish genocide. The al-Anfal campaign, known as the Kurdish genocide, is a military campaign committed by the Baathist regime, led by Saddam Hussein, the former president of Iraq, against the rebellious Kurdish population, demanding independence from Iraq between 1987 and 1988.[58] Ali al-Majid, also known as Chemical Ali, was the first cousin of Hussein and served as defence minister and intelligence chief. In 1987, he launched aggressive offensives against Kurdish villages, destroying settlements to force the Kurds to leave their home. However, the Kurds resisted this forcible relocation; consequently, the regime killed anyone refusing to leave their village. Between 23 February 1998 and 6 September 1998, there were eight major phases to the al-Anfal operation, which included shooting squads, aerial assaults and extensive use of chemical weapons. One of the campaign's goals was to Arabize the northern region of Iraq. It is estimated that this campaign caused the deaths of almost 150,000 Kurds, many of whom were gassed.[59] As per a directive issued by al-Majid in January 1987, individuals captured were to be interrogated, and if they were between 15 and 70 years old, they were to be executed after the extraction of valuable information.[60] For these crimes, al-Majid was tried in a domestic tribunal along with other perpetrators.[61]

When the United States (US) entered Iraq and ousted Hussein from power, the question of the utmost importance was how to hold the perpetrators of grave international crimes accountable. There were four options. Four options were considered:

1. Holding the trial outside Iraq but under Iraqi jurisdiction, asserting universal jurisdiction for crimes of this magnitude.
2. Establishing a hybrid court, consisting of both national and international judges, like the Special Court for Sierra Leone or the Kosovo Specialist Chambers.[62]

56 Lilian Manka Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (Pretoria University Law Press 2007) 35.

57 Aryeh Neier, *The International Human Rights Movement: A History* (Princeton UP 2020) 269.

58 Alexander Mikaberidze (ed), *Conflict and Conquest in the Islamic World: A Historical Encyclopedia* (ABC-CLIO 2011) 66.

59 ibid.

60 George Black, *Genocide in Iraq: The Anfal Campaign against the Kurds* (Human Rights Watch 1993) 60.

61 Michael J Kelly, *Ghosts of Halabja: Saddam Hussein and the Kurdish Genocide* (Praeger 2008) 96.

62 Kiran Satish, 'The Trial of the Tribunal: An Evaluation of the History of Iraq and the Iraqi Special Tribunal' (2022) 5(1) International Journal of Law Management & Humanities 1660-1, doi:10.10000/IJLMH.112677.

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3. Creating an international court created by treaty, pooling jurisdiction from multiple states, similar to the Nuremberg Trials.
4. Setting up a national tribunal in Iraq with significant international assistance in terms of resources and expertise.[63]

Ultimately, the fourth option was chosen as a viable option. The IHT was established to prosecute Iraqi nationals for crimes against humanity, genocide, and violators of Iraqi laws between 17 July 1968 and 1 May 2003.[64]

The IHT charged all the defendants with crimes against humanity, and only two of them, Saddam Hussein and Ali Hassan al-Majid, were particularly accused of genocide.[65] The first trial concluded in November 2006 against Hussein; seven additional individuals were convicted of offences related to a genocide that occurred in *Dujail* in 1982. Among the defendants, three, including Hussein, received death sentences, while four were sentenced to imprisonment.[66] On 21 August 2003, al-Majid was captured alive by the US forces and was held in custody to face a series of cases against him before the IHT.[67] In the trial of the al-Anfal campaign, beginning on 21 August 2006, al-Majid was one of Hussein's co-defendants and one of the most responsible leaders of the al-Anfal campaign.[68] Al-Majid justified the campaign by saying that there was internal rebellion and the region was filled with Iranian agents. He argued that based on history, what Iran had done with Iraq, considering these, he carried no guilt nor considered his actions a mistake.[69]

The Defence Office under the IHT was underfunded and lacked the necessary resources, leading to inadequate defence preparations. The IHT operated under the traditional Iraqi Penal Code, which did not align with international judicial procedures. Iraq's unstable state, marked by conflicts and threats, further exacerbated the situation. Three defence counsels were murdered, highlighting the tribunal's failure to provide adequate security.[70] Statements from absent witnesses and complainants were admitted without the defence having the opportunity to cross-examine them, as these were recorded by the investigative judge without defence counsel present. Prosecutorial gaps were evident, with reliance on assumptions rather than actual evidence. For instance, the trial of Awwad al-Bandar was deemed a show trial without considering the role of the Revolutionary Court during

63 ibid.
64 L Tabassi and E van der Borght, 'Chemical Warfare as Genocide and Crimes Against Humanity' (2007) 2(1) Hague Justice Journal 5.
65 Michael J Kelly, 'The Anfal Trial against Saddam Hussein' (2007) 9(2) Journal of Genocide Research 237, doi:10.1080/14623520701368628.
66 Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 399.
67 Samuel Totten, *Paul R Bartrop, and Steven L Jacobs, Dictionary of Genocide* (Greenwood Press 2008) 10.
68 ibid.
69 '"Chemical Ali" Admits Ordered Kurd Villages Cleared' (*Reuters*, 9 August 2007) <https://www.reuters.com/article/economy/quotchemical-aliquot-admits-ordered-kurd-villages-cleared-idUSPAR850014/> accessed 13 May 2024.
70 Satish (n 62) 1666.

Saddam's regime. This disregard for proper judicial procedures and heavy reliance on assumptions indicated systemic flaws and potential bias, suggesting that judges may have been selected for their political leanings.[71]

Despite having charges of war crime, war against humanity, and genocide, deviating from international norms of due process, al-Majid was tried and sentenced to death by IHT on 24 June 2007.[72] Nevertheless, his execution was delayed until 25 January 2010 due to various political and judicial factors.[73] It is worth noting that he had received five death sentences at the time of his death as a punishment for his crimes against humanity, war crimes, and genocide attempts.[74] While the IHT aimed to provide justice and accountability, its effectiveness was significantly constrained by its operational context and procedural shortcomings. The tribunal's challenges reflect broader issues in establishing fair trials in complex political settings. It emphasises the need for a robust framework that ensures justice and accountability.

4 INTERNATIONAL LAW AND COMPARISON OF ALI AL-MAJID AND MLADIC

Al-Anfal and the Srebrenica genocides were committed before 2002, i.e., before the establishment of the ICC. The UNSC members, led by the US, met and agreed to create an international tribunal based on Chapter VII of the UN Charter to try the criminals of the Srebrenica genocide.[75] Nevertheless, they did not do so with the case of the al-Anfal genocide, which was tried in a domestic court. This raises questions about the consistency and fairness of handling such severe international crimes. In both cases, the crimes were acknowledged as international crimes having the capacity to jeopardise international peace and security. This recognition granted the UNSC the authority to undertake measures to maintain international peace and security, according to Article 39 of Chapter VII of the UN Charter.[76] The UNSC drew jurisdiction from this provision to enact the ICTY, unlike the creation of the IHT.

The different approaches to these cases have implications for the rule of law. The establishment of the ICTY underscores the international community's commitment to justice. It set a precedent for future tribunals, demonstrating that the international community can unite to hold perpetrators accountable, thus reinforcing the rule of law.

71 ibid.

72 M Cherif Bassiouni (ed), *International Criminal Law* (2nd edn, Transnational Publishers 1999) 315.

73 Spencer Tucker and Priscilla Mary Roberts (eds), *The Encyclopedia of Middle East Wars: The United States in the Persian Gulf, Afghanistan, and Iraq Conflicts* (ABC-CLIO 2010) 764.

74 Paul R Bartrop, *A Biographical Encyclopedia of Contemporary Genocide Portraits of Evil and Good* (ABC-CLIO 2012) 12.

75 Stallaerts (n 53) 168.

76 Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development* (Routledge 2013) 28.

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In contrast, the domestic trial of Ali al-Majid illustrated the limitations of national courts in addressing international crimes. If there had been an international tribunal with a clear mandate to try those responsible for the al-Anfal genocide, there might have been no questions on fairness. The differing outcomes of these trials for similar offences highlight ongoing debates about varying standards in the international criminal system, which can violate the rule of law.

The al-Anfal trial's perceived lack of fairness and transparency not only undermined the judicial process but also highlighted the potential for political interference. This inconsistency suggests that accountability for international crimes can be selective and politically driven, eroding public trust and weakening the rule of law. Many scholars argue that trials for crimes like those committed in the al-Anfal and Srebrenica genocides should have been before an international court to ensure fair trial and prevent such crimes.[77]

Enforcing the rule of law on an international level is crucial, and powerful countries such as the US play a significant role in achieving this. Former US President Barak Obama has declared, "The US Government is committed to the rule of law is not questioned".[78] Upholding the rule of law and preventing impunity for perpetrators of heinous crimes requires concerted international efforts.

Comparing these two cases of genocide, the al-Anfal campaign, conducted by the Iraqi government under Saddam Hussein, involved the systematic targeting and extermination of the Kurdish population. This genocide was perpetrated by the state's own authorities against its ethnic minority based on ethnic grounds. This internal conflict highlights the complexities of state responsibility and the challenges of addressing human rights abuses when the perpetrators are state actors. It raises questions about the role of international intervention and accountability mechanisms when the genocide is committed by the government itself.

In contrast, the Srebrenica genocide was carried out by Bosnian Serb forces during the Bosnian War. It involved not only local actors but also the military support of neighbouring Serbia. The genocide was directed at Bosnian Muslims and involved external regional actors in addition to internal dynamics. This case underscores the international dimensions of genocide, including the role of external state actors and the implications for international law and intervention. The involvement of neighbouring states complicates the legal and political responses to genocide, highlighting issues of sovereignty and international responsibility.

Comparing these two cases reveals how the nature of the perpetrators and the context of the genocides shape the legal and procedural challenges faced in international trials. While both cases involve severe human rights violations, including genocide, the differences in

77 Kelly (n 61) 62.

78 Katja LH Samuel, *Counter-Terrorism and International Law* (Routledge 2017) 338.

perpetrators, state versus regional actors, and the complexities of their interactions with international mechanisms are crucial for understanding the broader implications for fairness in international criminal justice. Regardless of whether domestic or foreign forces commit grave international crimes, those accused of such crimes should face justice and have the right to a fair trial.

4.1. The weakness of the international rule of law in the Ukraine war

Since the onset of the Russian war against Ukraine in 2022, Ukrainian cities like Mariupol, Kharkiv, and Kyiv, along with numerous other strategic cities and villages, have endured severe bombardment that has resulted in extensive civilian casualties. The total number of civilian casualties has surpassed 28,711.[79] The conflict has also caused significant destruction to vital key infrastructure and places of historical and cultural significance.

Investigations have revealed that the torture inflicted by the Russian military and its attacks on the critical energy infrastructure amount to crimes against humanity.[80] Allegedly, the Russian authorities have been executing and torturing prisoners of war. A UN Special Rapporteur concluded that torture is "orchestrated" and "part of a state policy to intimidate, instil fear, punish, or extract information and confessions".[81]

Besides that, there have been ongoing attacks on residential buildings, hospitals, and schools. Human Rights Watch has called for a war crime investigation following the Russian forces' deployment of a guided munition with a high-explosive payload on an apartment complex in a civilian.[82] Another investigation revealed that Russian soldiers raped and sexually assaulted women, ages 19 to 83, in the same area.[83]

79 Amnesty International, 'Ukraine 2023: Report' (*Amnesty International*, 2024) <https://www.amnesty.org/en/location/europe-and-central-asia/eastern-europe-and-central-asia/ukraine/report-ukraine/> accessed 15 June 2024.

80 OHCHR, 'Report of the Independent International Commission of Inquiry on Ukraine' (25 September 2023) A/HRC/52/62 <https://undocs.org/A/HRC/52/62> accessed 19 June 2024.

81 UN Special Rapporteur on Torture and other Cruel, 'Inhuman or Degrading Treatment or Punishmen, Statement of Preliminary Findings and Recommendations: Official Visit to Ukraine, Kyiv, 4-10 September 2023' (10 September 2023) 2 <https://www.ohchr.org/sites/default/files/documents/issues/srtorture/statements/20230908-eom-visit-ukraine-sr-torture.pdf> accessed 19 June 2024.

82 Human Rights Watch, 'Ukraine: Events of 2023: World Report 2024' (*Human Rights Watch*, 2024) <https://www.hrw.org/world-report/2024/country-chapters/ukraine> accessed 19 June 2024.

83 OHCHR, 'UN Commission of Inquiry on Ukraine Finds Continued Systematic and Widespread Use of Torture and Indiscriminate Attacks Harming Civilians: Press-Releases' (*Office of the High Commissioner for Human Rights (United Nations Human Rights)*, 25 September 2023) <https://www.ohchr.org/en/press-releases/2023/09/un-commission-inquiry-ukraine-finds-continued-systematic-and-widespread-use> accessed 19 June 2024.

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These acts by Russia constitute grave international crimes. To hold the responsible accountable, there have been many attempts at the international level. In March 2023, the judges of the ICC issued arrest warrants for Russia's children's rights commissioner and Putin in connection with the illegitimate expulsion and transfer of Ukrainian children from seized territories into Russia.[84] With the lack of rule of law, it remains unlikely that persons accused of committing grave international crimes, including genocide and war crimes in Ukraine, may ever face a fair trial.

It is important to mention that one of the main reasons why unifying the approaches to trying international criminals is needed is that countries such as Russia may resort to trying perpetrators of international crimes locally. Without ensuring integrity and a fair trial, the trial may end with light sentences or even an acquittal for one reason or another. This does not encourage the rule of international law to maintain global security.

5 CHALLENGES AND THE SOLUTION TO UNIFY THE RULES GOVERNING THE TRIAL OF GRAVE INTERNATIONAL CRIMES

Unifying the trial of war criminals presents numerous challenges. Judicial challenges arise due to the involvement of multiple countries and their diverse legal systems, each with its own legal framework, definitions, procedures, and penalties for grave international crimes.[85] These variations in standards of evidence and legal procedures complicate the establishment of a uniform judicial approach. Political factors, such as conflicting geopolitical interests, power dynamics, and diplomatic ties, further hinder efforts to create a unified system.[86] Furthermore, logistic challenges such as locating and apprehending war criminals and ensuring the safety of witnesses can impede the process. The lack of resources and security risks in places affected by conflicts pose a serious danger to the unification of serious international crime proceedings.[87] Finally, the legal practices and cultural norms challenge the establishment of a single judicial system for war offenders.[88] However, these challenges could be mitigated if countries agree to refer the cases of grave international crimes, including genocide, to the ICC instead of relying on domestic courts. Such an approach could help standardise legal proceedings and ensure a more consistent application of justice across jurisdictions.

84 'What Is a War Crime and Could Putin Be Prosecuted over Ukraine?' (*BBC*, 20 July 2023) <https://www.bbc.com/news/world-60690688> accessed 17 June 2024.

85 Charles Anthony Smith, *The Rise and Fall of War Crimes Trials: From Charles I to Bush II* (CUP 2012) 111, doi:10.1017/CBO9781139151733.

86 Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials* (Stanford UP 2008) 98.

87 ibid 93.

88 Smith (n 85) 54.

5.1. The ICC Statute and its challenges

The ICC was created on 17 July 1998 and did not come into force until 1 July 2002.[89] It has jurisdiction over cases committed after this date.[90] The ICC is "an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes."[91] The creation of the ICC represents a significant step forward in the international enforcement of the rule of law.[92] Its primary objective is to remain the prosecution of those accused of committing the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.[93]

According to Paragraph 3, Article 17 of the Rome Statute, the ICC does not have the authority to replace domestic prosecutions unless the domestic state is unwilling to handle the cases within its jurisdiction.[94] It develops the criteria to determine whether a case can be admissible before the court. The aim of designing this provision is to grant the primary jurisdiction of states to prosecute crimes committed within their territories. The ICC admits that the states are responsible for addressing crimes committed within their borders and ensures that the ICC does not undermine the domestic legal system unless they fail to meet certain standards. For instance, if an unjustified delay challenges the intention to ensure the person accused faces justice, or if the proceedings lack impartiality and independence or are carried out in a way inconsistent with the objective of prosecuting the accused, then it may indicate unwillingness of incapacity. The ICC, in addition, considers the principles of due process to be in line with international law.[95]

Though the ICC is an important step in achieving justice and maintaining international peace and security, its system is not binding on all countries as the ICC Statute only applies to states that have ratified or acceded to the Rome Statute.[96] In addition, the ICC Statute grants member states the right to prosecute their own criminals, which sometimes can limit access to justice. For instance, it is essential to consider the challenges associated with domestic prosecutions, especially in post-conflict states. In this regard, one major concern is political impartiality and lack of fairness, especially when the accused holds significant political power or influence. Such cases risk being used for political persecution or revenge

89 Rome Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 3 <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court> accessed 11 August 2024.

90 Adam Gearey, *Globalization and Law: Trade, Rights, War* (Rowman & Littlefield Publ 2005) 143.

91 ibid.

92 W Wesley Pue, *Pepper in Our Eyes: The APEC Affair* (UBC Press 2011) 61.

93 Dawn Rothe and Christopher W Mullins, *Symbolic Gestures and the Generation of Global Social Control: The International Criminal Court* (Lexington Books 2006) 89.

94 Rome Statute (n 89) art 17.

95 ibid, art 20.

96 Toshio Suzuki, *Soul Federation* (Xlibris Corporation 2010) 43.

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rather than delivering genuine justice.[97] The capacity of domestic courts to handle complex international crimes is also adding to the problem because prosecution and investigation of crimes such as genocide, war crimes, and crimes against humanity require special knowledge and resources.[98] Limitations in resources, knowledge, and infrastructure limitations often lead to inadequate investigations, flawed prosecution, and difficulties in securing necessary evidence and testimony. Therefore, to guarantee a fair trial for grave international crimes, it is important to refer such cases to the ICC. This independent court has the capacity to conduct a fair trial.

It can be argued that the main challenge to obligating all countries to refer international criminals to the ICC is that states have sovereignty over all crimes committed within their territories. This argument is accurate, but it should not be an absolute sovereignty. The sovereignty of each state presents a significant challenge to the unified prosecution of war criminals. It is predicated on the non-interference concept, which upholds each state's autonomy in running its own affairs,[99] including the trial of war criminals. A major challenge with state sovereignty lies in its potential infringement by external factions.[100] Each state has its own legal framework, which is enacted under its specific cultural values and legal traditions.[101] The non-intervention concept is commonly applied in this context to protect these distinctive legal systems and avoid outside influence on their functioning. The state may contend that the prosecution of war criminals ought to be conducted in accordance with their domestic legal system.[102] However, such prosecution may not be held fairly, especially in post-conflict states.

However, the principle of non-intervention or the state's sovereignty should not contradict the concept of international criminal jurisdiction. The ICC has been founded to address the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. All states are members of the UN, and the jurisdiction of the ICC can be legally justified by the referral of the UNSC according to the UN Charter.[103] Therefore, the intervention cannot violate the principle of non-interference or state sovereignty if it is legally justified under international law.

Until the remaining states become members of the ICC, the UNSC should take all possible actions to refer all criminal cases that fall within the jurisdiction of the ICC to the ICC. In addition, the Rome Statue needs to be amended to limit the right of the state to try international criminals domestically. Such changes would guarantee a fair trial and uphold

97 Eric A Posner, 'Political Trials in Domestic and International Law' (2005) 55 Duke Law Journal 81-8.
98 Mark S Ellis, 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002) 15(2) Florida Journal of International Law 237-40.
99 Carl Q Christol, *International Law and US Foreign Policy* (2nd rev edn, UP of America 2007) 92.
100 Hafetz (n 3).
101 Samuel (n 78).
102 ibid.
103 ibid.

the principle that no one is above the law. Though such suggestions may face challenges, these challenges need to be addressed as the suggestions aim to help achieve the UN's main goal of maintaining international peace and security.

6 CONCLUSIONS

It can be stated that the comparison of the al-Anfal and Srebrenica genocide trials reveals significant disparities in the prosecution of these cases, underscoring the challenges of achieving consistent justice on an international scale. One effort to defend international law was performed by developing the ICTY in 1993, initiated by the UNSC and led by the US under Chapter VII of the UN Charter.[104] This demonstrated a commitment to international justice under Western legal tradition with a focus on international standards of justice. The ICTY's adherence to procedural norms, such as the right to a fair trial and impartiality, led to comprehensive and lengthy proceedings, which resulted in a life sentence. This approach reflects Western principles of justice, emphasising detailed procedural fairness and extensive legal scrutiny.

On the other hand, during the Iraq war from 2003 to 2011, the domestic trial of Ali al-Majid for the al-Anfal genocide, conducted under the IHT, raised concerns about fairness, impartiality, and political influence. Unlike the ICTY, which was established to try cases of genocide in the former Yugoslavia, no international tribunal was established for the al-Anfal genocide. The IHT, influenced by local and Islamic legal principles, operated under a different legal tradition. The trial of al-Majid was completed in less than two years, while the trial of Mladic by the ICTY spanned a much longer period. Moreover, for similar crimes, the trial by the ICTY resulted in the life imprisonment of Mladic,[105] but the accused of al-Anfal Campaign, Ali al-Majid, was given capital punishment.[106] The dissimilar sentencing raises great concerns about equal treatment, a fair trial and the rule of international law. These variations draw attention to the unequal administration of justice. They also highlight the possibility that national legal systems may fail to fulfil global standards of fair trials. The procedural and substantive differences between the Western, local and Islamic legal frameworks highlight tensions between international and domestic legal standards. In fact, this opens questions not only about the possibility of trying war criminals who have committed and are still committing crimes in Ukraine but also about the extent of the integrity and justice of the trials if they were held locally in Russia.

One solution to address this issue is to bring all international offenders for trial before the ICC. This solution aims to establish a single international court system where uniform prosecution can be conducted. This will meet the criteria of equality before the law and help

104 UN Security Council Resolution 827 (1993) (n 51).
105 Neier (n 57).
106 Bassiouni (n 72).

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to respect the rule of law. However, several challenges arise. The doctrine of state sovereignty, which provides the states with the exclusive authority to assert ultimate control over domestic affairs, is one of the main challenges. This includes a state's authority to prosecute its own war criminals. Therefore, many countries are reluctant to relinquish their sovereignty to the ICC. To overcome these challenges, states should collaborate globally, join the Rome Statute, and refer all international offenders for trial before the ICC. This would ultimately help to establish a criminal justice system that is just, fair, and uniform. These efforts can uphold the rule of law in the modern world.

A fair trial cannot undo the devastation of mass atrocities, but it plays a crucial role in international justice. It upholds human rights, ensures accountability, and reinforces the rule of law, which is essential for preventing impunity. While fair trials cannot restore lost lives, they are vital for holding perpetrators accountable, serving justice to victims and deterring future crimes. The cases of al-Anfal and Srebrenica illustrate that while fair trials are critical, they must be part of a broader strategy that includes prevention, suppression, and international cooperation to address and mitigate the impact of such atrocities effectively.

Finaly, the historical context, indeed, reveals that both the Yugoslav and Iraqi conflicts were addressed through substantial military intervention and the application of force. The use of powerful weapons and military capabilities by international actors was instrumental in halting severe crimes such as genocide and capturing perpetrators. This emphasises a critical reality: the ability to enforce international law effectively often depends on the availability and strategic use of military and financial resources.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПЕРЕШКОДИ НА ШЛЯХУ ДО СПРАВЕДЛИВОГО СУДОВОГО РОЗГЛЯДУ ЗГІДНО З МІЖНАРОДНИМ ПРАВОМ: НА ПРИКЛАДІ СУДОВИХ ПРОЦЕСІВ ЩОДО ГЕНОЦИДУ В АЛЬ-АНФАЛІ ТА СРЕБРЕНИЦІ

Могамад Альмогавес

АНОТАЦІЯ

Вступ. *Право на справедливий судовий розгляд є важливою частиною національних і міжнародних правозахисних систем. Для захисту цього права є необхідним впровадження верховенства права. Наразі підхід до судового переслідування осіб, звинувачених у серйозних міжнародних злочинах, зокрема у геноциді, є різним, що створює враження нерівності. Наприклад, особу, звинувачену у геноциді в Аль-Анфалі, судили в національному суді та засудили до смертної кари, тоді як особу, звинувачену у геноциді в Сребрениці, засудили до довічного ув'язнення міжнародним трибуналом. Не кажучи вже про недотримання прав обвинувачених під час судового процесу у справі про геноцид в Аль-Анфалі, включно з принципом належної правової процедури та правом на справедливий суд. Основна причина різних рішень у цих двох однотипних випадках геноциду полягає в тому, що вони розглядалися в різних судах і в різних правових межах. Шляхом дослідження цих прикладів у статті розглядається значення таких викликів для рівності згідно з міжнародним правом і наголошується на труднощах у забезпеченні справедливого судового розгляду.*

Методи. *У цій статті аналізується застосування права на справедливий судовий розгляд для міжнародних злочинців за допомогою доктринальних методів. Зокрема, використовується якісний підхід для вивчення відповідних міжнародних статутів. Для ілюстрації дослідження було вирішено проаналізувати і порівняти два приклади: судовий процес над Алі Аль-Маджидом, лідером геноциду в Аль-Анфалі, та Ратко Младичем, лідером геноциду в Сребрениці. Це порівняння зосереджується на таких аспектах, як незалежність судової влади та загальна справедливість у судових процесах над воєнними злочинцями. Дослідження було здійснене на основі аналізу відповідної літератури з*

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першоджерел, таких як інструменти міжнародного права, та вторинних джерел, зокрема з книг та академічних статей, щодо непослідовності стандартів справедливого судового розгляду в різних судових контекстах.

Результати та висновки. *Різні підходи до судових процесів за однотипні злочини глобально загрожують правосуддю та захисту прав і свобод людини. Одним із практичних способів вирішення цієї проблеми є притягнення всіх воєнних злочинців до Міжнародного кримінального суду (МКС), що забезпечить справедливий судовий рогляд і покарання. Однак у статті показано, що доктрина державного суверенітету може спричинити перешкоди для створення єдиної основи для судового переслідування воєнних злочинців. Додаткові труднощі виникають через існування різних правових і політичних систем у всьому світі. У статті зазначено, що для забезпечення справедливого судового розгляду та підтримання міжнародного миру та безпеки необхідно подолати ці виклики та прийняти єдину основу для судового переслідування воєнних злочинців. МКС може стати рішенням. Міжнародна спільнота може подолати ці труднощі, якщо спонукатиме всі країни приєднатися до Римського статуту та надати йому виняткову юрисдикцію щодо серйозних міжнародних злочинів, таких як геноцид, воєнні злочини чи злочини проти людства.*

Ключові слова: *геноцид, злочин проти людства, воєнні злочини, верховенство права, право на справедливий судовий розгляд, міжнародний мир, державний суверенітет, Міжнародний кримінальний суд (МКС).*

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Research Article

PROPOSING RESTORATIVE JUSTICE MODELS AS ALTERNATIVE APPROACHES TO ADDRESSING CRIMINAL MATTERS: A CASE STUDY OF JUDICIAL SYSTEMS IN CIVIL AND COMMON LAW COUNTRIES

Oanh Thi Cao* and Tuan Van Vu

ABSTRACT

Background: *In recent years, restorative justice has emerged as a mechanism to enhance the involvement of victims in criminal proceedings. Its primary objective is to repair the damage caused by the offence, acknowledging it as a genuine injury in need of healing. While criminal proceedings might vary across jurisdictions based on fundamental principles of human rights, the broader aim is to offer a more comprehensive response to crime, aiming not only to punish but also to reform offenders and reduce future criminal behaviour.*

Methods: *This qualitative study employed a descriptive, analytical method, utilising case studies and comparative analysis to explore restorative justice models in established judicial systems and their applicability to unestablished framework countries. By analysing and synchronising secondary materials, the research aimed to provide in-depth insights into successful practices and potential adaptations.*

Results and conclusions: *The results reveal that several restorative justice models have been developed all over the world to align with the legal, socio-political, and cultural contexts of different regions and jurisdictions, such as Canada, New Zealand, and Norway. Despite the variety of restorative justice models, this exploratory study scrutinised four non-adversarial decision-making models: victim-offender mediation, community reparative boards, family group conferencing, and circle sentencing. These four models illustrate an alternative approach to community involvement in crime response, emphasising the diversity and shared themes of community engagement in sanctioning processes. The results offer resourceful guidelines for unestablished judicial systems like Vietnam to choose models best suited to specific needs.*

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1 INTRODUCTION

Restorative justice is an alternative approach to addressing criminal behaviour that not only violates legal regulations but also causes harm to victims and the community.[1] It aims to address the lack of comprehensive and empathetic perspectives experienced by those affected by a crime, which often leads to feelings of exclusion from proceedings and lack of compensation.[2] The UNODC encourages its State Members to adopt restorative justice by introducing basic principles on the use of restorative justice programmes in criminal matters.[3] Restorative justice promotes dialogue between victims and offenders, allowing all individuals involved in a crime or conflict to actively participate in repairing the damage and pursuing a favourable resolution. This approach falls under the broader scope of restorative practice, a flexible method to actively address problems, promote strong relationships, and resolve harm by facilitating effective and positive communication between persons.[4] Restorative justice is becoming increasingly used in schools, children's services, corporations, hospitals, communities, and the criminal justice system.[5] It encompasses preemptive strategies to mitigate harm and conflict, as well as interventions designed to rectify damage in cases where disputes have already occurred. If necessary, mediated restorative gatherings can be organised to foster collaboration among individuals and organisations, improving their collective understanding of a subject and working together to obtain the most effective solution.[6] Restorative practice emphasises the

1 Yvon Dandurand, Annette Vogt and Jee Aei (Jamie) Lee, *Handbook on Restorative Justice Programmes* (Criminal Justice Handbook Series, 2nd edn, UNODC 2020) 4.

2 Michele R Decker and others, 'Defining Justice: Restorative and Retributive Justice Goals Among Intimate Partner Violence Survivors' (2022) 37(5-6) Journal of Interpersonal Violence 2844, doi:10.1177/0886260520943728; Alana Saulnier and Diane Sivasubramaniam, 'Restorative Justice: Underlying Mechanisms and Future Directions' (2015) 18(4) New Criminal Law Review 510, doi:10.1525/nclr.2015.18.4.510; Masahiro Suzuki and Xiaoyu Yuan, 'How Does Restorative Justice Work? A Qualitative Metasynthesis' (2021) 48(10) Criminal Justice and Behavior 1347, doi:10.1177/0093854821994622.

3 UNODC draft resolution E/CN.15/2002/L.2/Rev.1 of 18 April 2002 'Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters: revised' <https://digitallibrary.un.org/record/469889?ln=en&v=pdf> accessed 10 June 2024.

4 Jane Bolitho and Jasmine Bruce, 'Science, Art and Alchemy: Best Practice in Facilitating Restorative Justice' (2017) 20(3) Contemporary Justice Review 336, doi:10.1080/10282580.2017.1348896.

5 Daniela Bolívar, *Restoring Harm: A Psychosocial Approach to Victims and Restorative Justice* (Routledge 2019); Avery Calhoun and William Pelech, 'Responding to Young People Responsible for Harm: A Comparative Study of Restorative and Conventional Approaches' (2010) 13(3) Contemporary Justice Review 287, doi:10.1080/10282580.2010.498238; Daniel W Van Ness and others, *Restoring Justice: An Introduction to Restorative Justice* (6th edn, Routledge 2022) doi:10.4324/9781003159773.

6 Jane Bolitho, 'Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice' (2015) 3(2) Restorative Justice 256, doi:10.1080/20504721.2015.1069531; Ian M Borton and Gregory D Paul, 'Problematizing the Healing Metaphor of Restorative Justice' (2015) 18(3) Contemporary Justice Review 257, doi:10.1080/10282580.2015.1057704; Jennifer L Lanterman, 'Models Versus Mechanisms: The Need to Crack the Black Box of Restorative Justice' (2021) 17(1) British Journal of Community Justice 60.

importance of personal responsibility and accountability for one's choices and conduct, enabling individuals to reflect on their interpersonal relationships and carefully consider the most efficient methods to prevent harm and discord.[7]

Another perspective relating to restorative justice, as stated by Wallis,[8] is that it represents a paradigm shift in the criminal justice system, emphasising healing, rehabilitation, and the reintegration of offenders into society. It is based on the idea that crime causes harm to individuals and communities, and justice should focus on repairing that harm rather than punishing the offender.[9] Restorative justice involves various practices, such as victim-offender mediation, community reparative boards, family group conferencing, and circle sentencing, which aim to bring together victims, offenders, and community members to address the aftermath of crime, promote healing, and agree on steps to make amends.[10]

In this framework, a criminal act is seen as an irregular action that causes damage to an individual or community rather than merely a violation of the law warranting punishment. This innovative interpretation of crime promotes accountability and the moral responsibility of offenders to rectify the harm caused by their actions and pursue the restoration of the affected relationship.[11] To achieve this, restorative justice promotes restorative dialogue, where victims, offenders, and community members come together to discuss the incident.[12] Common formats for these encounters include victim-offender

7 Masahiro Suzuki, 'From 'What Works' to 'How It Works' in Research on Restorative Justice Conferencing: The Concept of Readiness' (2020) 3(3) The International Journal of Restorative Justice 356, doi:10.5553/ijrj.000049; Lode Walgrave and others, 'Why Restorative Justice Matters for Criminology' (2013) 1(2) Restorative Justice 159, doi:10.5235/20504721.1.2.159.

8 Pete Wallis, *Understanding Restorative Justice: How Empathy Can Close the Gap Created by Crime* (Bristol UP 2014) doi:10.2307/j.ctt1t89gbn.

9 Geoffrey C Barnes and others, 'Are Restorative Justice Conferences More Fair than Criminal Courts? Comparing Levels of Observed Procedural Justice in the Reintegrative Shaming Experiments (RISE)' (2015) 26(2) Criminal Justice Policy Review 103, doi:10.1177/0887403413512671; Nick Burnett, Nicholas Burnett and Margaret Thorsborne, *Restorative Practice and Special Needs: A Practical Guide to Working Restoratively with Young People* (Jessica Kingsley Publ 2015); Mary Hallam, *Victim Initiated Restorative Justice: Restoring the Balance:* Final Report of the UK Pilot Project (Restorative Justice at the Post Sentencing Level Supporting and Protecting Victims, Thames Valley Probation; Victim Support June 2015).

10 Cao Thị Oanh, 'International Standards and Experience of Some Countries on Restorative Justice' (2019) 7 Jurisprudence Journal Hanoi Law University 68; Gerry Johnstone, 'Towards a "Justice Agenda" for Restorative Justice' (2014) 2(2) Restorative Justice 115, doi:10.5235/20504721.2.2.115; Lanterman (n 6).

11 Gregory D Paul and Emily C Swan, 'Receptivity to Restorative Justice: A Survey of Goal Importance, Process Effectiveness, and Support for Victim-Offender Conferencing' (2018) 36(2) Conflict Resolution Quarterly 145, doi:10.1002/crq.21238.

12 Giuseppe Maglione, 'Restorative Justice and the State. Untimely Objections Against the Institutionalization of Restorative Justice' (2021) 17(1) British Journal of Community Justice 4; Estelle Zinsstag and Inge Vanfraechem (eds), *Conferencing and Restorative Justice: International Practices and Perspectives* (OUP 2012).

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mediation and victim-offender conferences, both widely employed models in restorative justice programmes and report higher satisfaction levels among participants.

In recent decades, there has been a growing recognition of the limitations of conventional justice systems, which often fail to address the root causes of criminal behaviour and do little to support victims.[13] Restorative justice offers an alternative to reduce recidivism, promote victim satisfaction, and strengthen community ties.[14] It aligns with broader societal shifts towards more humane and rehabilitative approaches to justice.[15]

The successful implementation of restorative justice relies heavily on a supportive legal framework. Legal structures provide the necessary authority, guidelines, and resources to integrate restorative practices into the broader justice system.[16] Such frameworks ensure that restorative justice processes are standardised, transparent, and accountable, thus enhancing their legitimacy and effectiveness.

Well-established judicial systems, such as those in Canada, New Zealand, and Norway, have successfully integrated restorative justice practices, demonstrating significant benefits in reduced reoffending rates and improved community relations.[17] These systems provide valuable models that can influence the development of restorative justice frameworks in other contexts, including unestablished countries such as Vietnam.

This research, utilising secondary sources, explored the potential of restorative justice as a transformative tool for unestablished judicial systems. By examining well-established frameworks and identifying key success factors, the study sought to propose referential frameworks that could be adapted and implemented in these contexts. The following questions underscore the necessity and relevance of restorative justice in the current situation:

1. What benefits does restorative justice offer to unestablished judicial systems?
2. What requirements are necessary for restorative justice to become effective?
3. How can unestablished judicial systems identify the best-suited models of restorative justice frameworks?

13 Johnstone (n 10); Catherine S Kimbrell, David B Wilson and Ajima Olaghere, 'Restorative Justice Programs and Practices in Juvenile Justice: An Updated Systematic Review and Meta-Analysis for Effectiveness' (2023) 22(1) Criminology & Public Policy 161, doi:10.1111/1745-9133.12613; Elizabeth Tiarks, 'Restorative Justice, Consistency and Proportionality: Examining the Trade-off' (2019) 38(2) Criminal Justice Ethics 103, doi:10.1080/0731129X.2019.1638597.

14 Ellie Piggott and William Wood, 'Does Restorative Justice Reduce Recidivism? Assessing Evidence and Claims about Restorative Justice and Reoffending' in Theo Gavrielides (ed), *Routledge International Handbook of Restorative Justice* (Routledge 2019) 359.

15 Lanterman (n 6).

16 Maglione (n 12); Saulnier and Sivasubramaniam (n 2).

17 Cao (n 10); Samantha Jeffries, William R Wood and Tristan Russell, 'Adult Restorative Justice and Gendered Violence: Practitioner and Service Provider Viewpoints from Queensland, Australia' (2021) 10(1) Laws 13, doi:10.3390/laws10010013; Tran Tuan Minh, 'Restorative Justice and Some Restorative Justice Programs Around the World' (2023) 23 Vietnam trade and industry review <https://tapchicongthuong.vn/tu-phap-phuc-hoi-va-mot-so-chuong-trinh-tu-phap-phuc-hoi-tren-the-gioi-115433.htm> accessed 10 June 2024.

2 METHODS AND MATERIALS

The qualitative research mainly employed a descriptive and systematic approach, utilising case studies and comparative analysis to provide in-depth insights into restorative justice models in established judicial systems and international instruments as well as their applicability to unestablished framework countries. It systemised, analysed, examined, and synchronised secondary materials, following a theoretical research approach given by Long-Sutehall et al.[18] By overviewing some crucial international instruments, such as ECOSOC Resolution 2002/12, UNGA Resolution 67/187, UNODC restorative justice programmes, values and standards of restorative justice EFRJ,[19] and other secondary source studies on restorative justice initiatives, this exploratory and descriptive study aims to propose a potential restorative justice framework tailored to meet the evolving needs of unestablished judicial systems in the context of the 4.0 era.

3 DISCUSSION

3.1. Critical theories and principles influencing the legal foundations of restorative justice

Restorative justice is guided by key legal principles that ensure its alignment with broader legal frameworks and fair implementation. These principles provide the foundation for restorative practices, ensuring they are legally sound and ethically robust.[20] Restorative justice can create a more holistic, empathetic, and effective approach to justice, focusing on healing and positive outcomes for all parties involved.[21]

Three crucial theories underpinning restorative justice include reintegrative shaming theory, procedural justice theory, and peacemaking criminology. Braithwaite's reintegrative shaming theory,[22] in particular, highlights the importance of cultural commitments to

18 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.

19 ECOSOC Resolution 2002/12 of 24 July 2002 'Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters' <https://www.refworld.org/legal/resolution/ecosoc/2002/en/27056> accessed 10 June 2024; UNGA Resolution 67/187 of 20 December 2012 'United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' <https://www.refworld.org/legal/resolution/unga/2013/en/94967> accessed 10 June 2024; Dandurand, Vogt and Lee (n 1); Tim Chapman, Malini Laxminarayan and Kris Vanspauwen (eds), *Manual on Restorative Justice Values and Standards for Practice* (EFRJ 2021).

20 Bolitho (n 6); Decker and others (n 2); Saulnier and Sivasubramaniam (n 2).

21 Borton and Paul (n 6); Lawrence W Sherman and others, 'Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review' (2015) 31 Journal of Quantitative Criminology 1, doi:10.1007/s10940-014-9222-9.

22 John Braithwaite, *Crime, Shame and Reintegration* (CUP 1989) doi:10.1017/CBO9780511804618.

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reintegration methods as a key factor in crime control. The theory identifies specific types of humiliation that contribute to crime rather than prevent it. Reintegrative shaming theory comprises three components: shaming, reintegration, and communitarianism.

Shaming is a social process where disapproval is expressed towards an individual's actions, aiming to invoke a sense of guilt or remorse. Reintegration involves restoring an individual to their community after being shamed, encouraging positive connections with family, friends, and community. Communitarianism emphasises the connection between the individual and the community, with communities playing a crucial role in facilitating their reintegration.[23] Thus, restorative justice provides a robust framework for understanding and implementing restorative justice. By focusing on the reintegration of offenders and active community involvement, this approach promotes healing, reduces recidivism, and strengthens social bonds. Implementing these principles requires education, policy development, community engagement, and continuous evaluation.[24]

Concerning the procedural justice theory, many researchers define procedural justice,[25] also known as procedural equity, as the equitable nature of the procedures employed by individuals in positions of authority to achieve particular outcomes or decisions. This theory emphasises that when citizens evaluate the legitimacy of authority figures (or power holders), they often prioritise procedural equity – how they are treated – over the outcome of their encounters.[26] In other ways, it is a concept in the field of justice and criminology that emphasises the fairness of the decision-making processes, particularly within legal and organisational contexts.

This theory posits that people's perceptions of justice and compliance with laws and regulations are significantly influenced by the fairness of the procedures used to make decisions and resolve disputes. Its core components encompass fairness, transparency, consistency, and correctability.[27]

23 Canadian Intergovernmental Conference Secretariat, 'Principles and Guidelines for Restorative Justice Practice in Criminal Matters' (Federal Provincial Territorial Meeting of Ministers Responsible for Justice and Public Safety (831-221), St John's, Newfoundland and Labrador, 15–16 November 2018) <https://scics.ca/en/product-produit/principles-and-guidelines-for-restorative-justice-practice-in-criminal-matters-2018/> accessed 10 June 2024.

24 Paul and Swan (n 11); Piggott and Wood (n 14); Tran (n 17).

25 Sarah Bennett, Lorelei Hine and Lorraine Mazerolle, 'Procedural Justice' in *Oxford Bibliographies* (OUP 2018) doi:10.1093/OBO/9780195396607-0241; Chirstopher Donner and others, 'Policing and Procedural Justice: A State-of-the-art review' (2015) 38(1), Policing: An International Journal 153, doi:10.1108/PIJPSM-12-2014-0129; Daniel S Nagin and Cody W Telep, 'Procedural Justice and Legal Compliance' (2017) 13 Annual Review of Law and Social Science 5, doi:10.1146/annurev-lawsocsci-110316-113310; Tom Tyler, 'Procedural Justice and Policing: A Rush to Judgment?' (2017) 13 Annual Review of Law and Social Science 29, doi:10.1146/annurev-lawsocsci-110316-113318.

26 Barnes and others (n 9).

27 Chapman, Laxminarayan and Vanspauwen (n 19).

Hence, fairness emphasises the role of individual involvement, allowing them to express their views and concerns during the decision-making process and ensuring that decisions are made in an unbiased and impartial manner.[28] Procedural justice theory emphasises the importance of fair and transparent decision-making processes.[29] It requires decision-makers to be perceived as sincere and benevolent, with genuine concern for the well-being of individuals involved. Transparency is crucial, ensuring procedures and reasons are clearly explained and accessible to the public.

Similarly, consistency is also essential, requiring uniform application across similar cases to avoid discrimination. Correctability allows individuals to challenge and appeal decisions they perceive as unfair, improving and refining procedures over time.[30] This theory enhances legitimacy, compliance, and satisfaction among individuals by ensuring fair, consistent, and respectful decision-making procedures.

Peacemaking criminology is a theoretical perspective within the field of criminology that emphasises peace, justice, and conflict resolution as key elements in addressing crime and social harm. This approach challenges the traditional punitive and adversarial methods of criminal justice and advocates for more compassionate and non-violent responses to crime. Pepinsky and Quinney officially presented peacemaking criminology to the discipline,[31] providing nine propositions in their foundational work that offer philosophical insight into the foundations of this approach, laying the groundwork for comprehending it.

Pepinsky addresses the potential for peacemaking criminology via the application of restorative justice programmes and practices,[32] whereas Joseph emphasises the influences and history behind the creation of peacemaking and provides the reader with a highly instructive picture.[33] Wozniak evaluates the work of C. Wright Mills and the potential for an integration of the propositions to successfully address social structural problems on a broad basis, all the while considering the possible influence that criminology as peacemaking may have.[34] In addition to addressing concerns of societal structural damage, Caulfield highlights the disparities in race, class, and gender. However, she also proposes - as peacemaking implies - that an emphasis be placed on individual reforms.[35]

28 UK Ministry of justice, *Government response to the Justice Committee's Fourth Report of Session 2016–17: Restorative Justice* (Williams Lea Group 2016).

29 Nagin and Telep (n 25).

30 Tyler (n 25).

31 Harold E Pepinsky and Richard Quinney, *Criminology as Peacemaking* (Indiana UP 1991).

32 Hal Pepinsky, 'Peacemaking Criminology' (2013) 21 Critical Criminology 319, doi:10.1007/s10612-013-9193-4.

33 Joseph Moloney, 'Peacemaking Criminology' (2009) 5 Undergraduate Review 78.

34 John F Wozniak, 'C Wright Mills and Higher Immorality: Implications for Corporate Crime, Ethics, and Peacemaking Criminology' (2009) 51(1) Crime, Law and Social Change 189, doi:10.1007/s10611-008-9151-3.

35 Susan L Caulfield, 'Peacemaking Criminology: Introduction and Implications for the Intersection of Race, Class, and Gender' in Dragan Milovanovic and Martin D Schwartz (eds), *Race, Gender, and Class in Criminology: The Intersections* (Routledge 1997) 91, doi:10.4324/9781315864259.

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By outlining the debate over whether peacemaking is more of a philosophical idea for individual life or a more comprehensive conceptual understanding of the causes and correlates of criminal conduct, Klenowski contributes to this conversation.[36] Peacemaking criminology offers a transformative approach to understanding and addressing crime by emphasising non-violence, social justice, humanism, community engagement, and restorative justice. In particular, it advocates for non-violent responses to crime, emphasising reconciliation over retribution by encouraging restorative justice practices, community mediation, and conflict resolution that do not rely on violence or coercion.[37] Besides, it addresses the root causes of crime by promoting social justice and equality and eradicating social inequalities, and it implements policies that deal with poverty, discrimination, and other social injustices that contribute to criminal behaviour.[38]

For the issue of humanism, peacemaking criminology is a humanistic approach that acknowledges the humanity of all individuals involved in the criminal justice process, including offenders, victims, and community members. It prioritises rehabilitation and reintegration over punishment, involving communities and empowering them to resolve conflicts.[39]

Restorative justice is another key feature, focusing on repairing the harm caused by criminal behaviour through inclusive processes like victim-offender mediation, family group conferencing, and peacemaking circles. This approach advocates for addressing the crime's underlying social and structural causes through restorative and reconciliatory approaches.

Restorative justice is guided by several key legal principles that ensure its alignment with broader legal frameworks and its fair and just implementation. These principles form the foundation for restorative practices, ensuring they are legally sound and ethically robust. Based on previous legal normative documents,[40] prominent legal principles relating to restorative justice are regulated.

Restorative justice practices must operate within the law to ensure legal recognition, legitimacy, and enforceable actions. All participants in restorative justice processes must be afforded legal rights and protections, which provide transparency and ensure

36 Paul M Klenowski, 'Peacemaking Criminology: Etiology of Crime or Philosophy of Life?' (2009) 12(2) Contemporary Justice Review 207, doi:10.1080/10282580902879344.

37 Restorative Justice Council, *Restorative Justice in the Magistrates Court: An introduction to restorative justice in cases involving defendants / offenders aged 18 and over in courts in England and Wales* (RJC 2023).

38 Gregory D Paul, 'The Influence of Belief in Offender Redeemability and Decision-Making Competence on Receptivity to Restorative Justice' (2021) 14(1) Negotiation and Conflict Management Research 1, doi:10.1111/ncmr.12176; Pepinsky (n 32).

39 William R Wood, Masahiro Suzuki and Hennessey Hayes, 'Restorative Justice in Youth and Adult Criminal Justice' in *Oxford Research Encyclopedia of Criminology* (OUP 2022) doi:10.1093/acrefore/9780190264079.013.658.

40 ECOSOC Resolution 2002/12 (n 19); UNGA Resolution 67/187 (n 19); Canadian Intergovernmental Conference Secretariat (n 23).

voluntary participation. Responses to crime in restorative justice must be proportionate to the harm caused and the offender's circumstances, avoiding excessive or insufficient responses. Participation in restorative justice processes must be voluntary, with informed consent and withdrawal allowances.

Confidentiality of information shared during restorative justice processes is crucial to protect participants' privacy and encourage open dialogue. Restorative justice processes must be conducted without discrimination, ensuring equal respect for all participants. Facilitators must remain neutral and unbiased throughout the process to ensure fair treatment and outcomes. Offenders must take responsibility for their actions and the harm caused, promoting genuine accountability and actions that repair harm.

Transparency and openness to scrutiny are essential to build trust in the restorative justice system and ensure its legitimacy. Restorative outcomes should be acknowledged through reparative actions, community service, and efforts to rebuild trust and harmony.

The Restorative Justice Council (restorativejustice.org.uk) is the official organisation in the UK that oversees and represents the area of restorative practice. It is an independent membership group with a national scope. The primary goal is to advance restorative justice in all its manifestations for the betterment of society as a method of settling disputes and fostering reconciliation. Restorative justice is a highly efficient approach to addressing crime, allowing victims to communicate with their perpetrators and understand the consequences of their actions. It ensures offenders are held accountable and aids in acknowledging their wrongdoing and making reparations. This approach is applicable to both adult and juvenile offenders, regardless of the offence.

Restorative justice and restorative practice, while related, are distinct concepts. Restorative justice is a comprehensive ideology that encourages individuals most impacted by injury and conflict to discuss the reasons and outcomes, while restorative practice focuses on effective communication among those affected by harm and conflict. This includes discussing the impact of behaviour, examining relationships, and collaboratively determining actions to acknowledge and rectify the harm.

The Restorative Justice Council occurs in various contexts, including restorative discussion, restorative leadership strategies, and direct and indirect restorative processes. Besides, the operation of the Restorative Justice Council is subject to six principles of restorative practice, namely restoration, voluntarism, impartiality, safety, accessibility, and empowerment.[41] Particularly, restorative practice aims to address participants' needs without causing harm, focusing on helping, exploring relationships, and building resilience. Participation is voluntary, based on open, informed choice and consent. Practitioners must remain impartial, respectful, non-discriminatory, and unbiased towards all participants, recognising potential conflicts of interest. Safety is a top priority,

41 Restorative Justice Council, 'RJC Principles of Restorative Practice' <https://restorativejustice.org.uk/sites/default/files/The%20RJC%27s%20Principles%20of%20Restorative%20Practice.pdf> accessed 10 June 2024.

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creating a safe space for expressing feelings and views without causing further harm. Restorative practice must be respectful and inclusive of diversity needs, such as mental health conditions, disability, culture, religion, race, gender, or sexual identity.[42] Finally, restorative practice should empower individuals to make informed choices and find solutions that best meet their needs.[43]

Restorative justice, part of Canada's Restorative Justice Council[44] for over 40 years, is highly regarded as an efficient method for reforming the criminal justice system and ensuring the safety of communities. Rooted in Indigenous principles and processes, restorative justice in Canada is guided by core principles that emphasise collaboration across systems, with community partners, and within the community. These principles highlight the importance of cultural responsiveness and consider histories, contexts, causes, and circumstances of harm.

The Canadian justice system values transparency, accountability, and transformation, which are forward-focused, problem-solving, preventative, and proactive approaches to restore just relations between individuals, groups, and communities.[45] By embedding these legal principles into restorative justice practices, jurisdictions can ensure that restorative justice is implemented fairly, democratically, and effectively, promoting healing, accountability, and community cohesion. These principles are set out to align restorative justice with human rights standards, ensuring that the rights of victims, offenders, and communities are respected and upheld.

3.2. Essential legal instruments for establishing a restorative justice framework

Many international instruments impact the formulation of a restorative justice framework for unestablished judicial systems. One of the most influential legislative documents is E/CN.15/2002/L.2/Rev.1. promulgated by UNODC and adopted by ECOSOC Resolution 2002/12, which prescribes some basic principles on the use of restorative justice programmes in criminal matters.[46]

According to Articles 6-11, restorative justice programmes can be implemented at any point in the criminal justice system, provided they comply with national laws. They should only be utilised when substantial proof exists, and the victim and offender provide

42 Heather L Scheuerman and Shelley Keith, 'Experiencing Shame: How Does Gender Affect the Interpersonal Dynamics of Restorative Justice?' (2022) 17(1) Feminist Criminology 116, doi:10.1177/15570851211034556.

43 Restorative Justice Council (n 37) 14.

44 Canadian Intergovernmental Conference Secretariat (n 23).

45 Tinneke Van Camp and Jo-Anne Wemmers, 'Victims' Reflections on the Protective and Proactive Approaches to the Offer of Restorative Justice: The Importance of Information' (2016) 58(3) Canadian Journal of Criminology and Criminal Justice 415, doi:10.3138/cjccj.2015.E03.

46 UNODC draft resolution E/CN.15/2002/L.2/Rev.1 (n 3); ECOSOC Resolution 2002/12 (n 19).

their voluntary consent while imposing appropriate obligations. The victim and offender should mutually establish the fundamental details of the case, and their involvement should not be utilised as proof of guilt in subsequent legal processes. If restorative processes are deemed unsuitable, cases should be promptly forwarded to criminal justice authorities for decisive action.

Concerning the operation of restorative justice programmes (Articles 12-19, therein), this legal normative document suggests that Member States should establish guidelines for restorative justice programmes, including referral conditions, case handling, facilitator qualifications, administration, competence standards, and rules of conduct. It emphasises procedural safeguards for fairness, including consultation with legal counsel, informed consent, and no coercion. Confidentiality is required; agreements should be judicially supervised or incorporated into decisions. If no agreement is reached, cases should be referred back to the criminal justice process. Facilitators should perform their duties impartially, respecting parties' dignity and understanding local cultures and communities. Initial training is required for facilitators.

In terms of the continuing development of restorative justice programmes (Articles 20-22, therewith), the Resolution sets out that each member state should work to establish restorative justice policies and programmes at the federal, state, and regional levels and to encourage their adoption by the judicial, social, and municipal sectors. Criminal justice authorities and programme administrators must regularly consult for restorative justice programmes to be more effective and widely used. Member states must prioritise restorative justice programme evaluation and research to guide future policy and programme development and encourage frequent adjustments.

Another well-known legal normative document which is widely consulted is Recommendation No. R(99)19 by the Council of Europe (1999).[47] In particular, the general principles (Articles 1-5) emphasise the importance of consent, confidentiality, availability, and autonomy in penal matters mediation, which should be voluntary, available at all stages of the criminal justice process, and given sufficient autonomy within the criminal justice system. The legal basis of the Recommendation (Articles 6-8) states that the legislation should facilitate penal case mediation, with guidelines defining its use and addressing referral and handling conditions. Fundamental procedural safeguards should be applied, including legal assistance, translation/interpretation, and parental assistance. For the operation of criminal justice in relation to mediation (Articles 9-18), the Recommendation prescribes that it is the responsibility of the criminal judicial system to decide whether or not to send a criminal matter to mediation. Each party should know their rights, the mediation procedure, and potential outcomes. There should be no pressure on victims or offenders to participate in mediation. Also, in criminal cases, minors should be protected. If the parties involved in the mediation need help to grasp

47 Council of Europe Recommendation no R(99)19 of the Committee of Ministers to Member States concerning Mediation in Penal Matters (adopted 15 September 1999) <https://rm.coe.int/0900001680910dbb> accessed 10 June 2024.

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how it works, then it should not go further. Recognising the fundamental facts of a case is essential, and involvement should not be construed as proof of guilt in later judicial processes. Mediated settlements should have the same weight as final court rulings regarding dismissals. Furthermore, the operation of mediation services (Articles 19-32) is laid out as follows: mediation services should be governed by recognised standards, have sufficient autonomy, and be monitored by a competent body.

Mediators should be recruited from all societal sections, understand local cultures well, and demonstrate sound judgment and interpersonal skills. They should receive initial and in-service training to ensure competence. Mediation should be impartial, respectful of parties' needs, and provided in a safe environment. It should be carried out efficiently, on camera, and confidentially. Agreements should be reached voluntarily by parties, with reasonable and proportionate obligations. The mediator should report to the criminal justice authorities on the mediation's steps and outcome without revealing the contents of sessions or judgment on parties' behaviour. As for the continuing development of mediation, Articles 33 and 34 declare that authorities in the criminal justice system and mediation services should meet frequently to establish ground rules. The Member States should also push for more research into and assessments of criminal mediation.

RJC asserts that restorative techniques can be conceptualised as a continuum, which is beneficial for understanding their nature. The term "restorative justice" is occasionally used broadly to encompass several interventions. However, clarifying the differences between different restorative approaches illustrated in Figure 1[48] below is crucial.

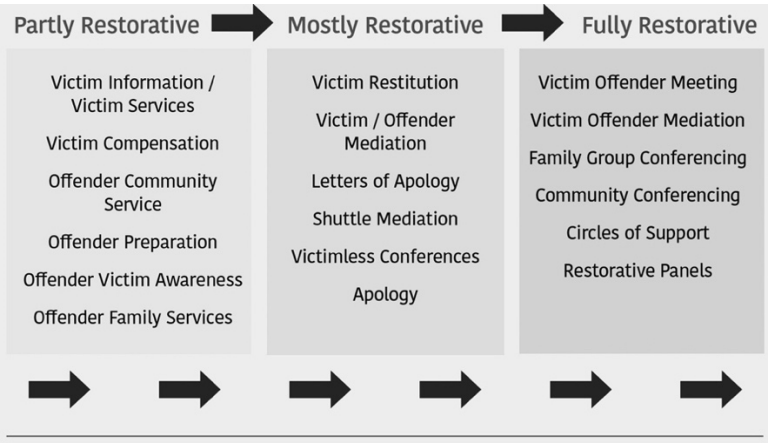

Figure 1. Victim/Offender Restorative Continuum

48 Northern Ireland Department of Justice, *Adult Restorative Justice Strategy for Northern Ireland: Restoring Relationships, Redressing Harm 2022–2027* (*Department of Justice*, 15 March 2022) 2 <https://www.justice-ni.gov.uk/publications/adult-restorative-justice-strategy-ni> accessed 10 June 2024.

The Northern Ireland Department of Justice initiated an Adult Restorative Justice Strategy[49] to formalise and increase the use of restorative justice approaches across the criminal justice system, from prevention/diversion to community settings and custody and reintegration. This strategy outlines how statutory, voluntary, and community providers can creatively work together to repair offenders' harm and meet their needs. Figure 2[50] below illustrates the different stages where the opportunity to implement restorative justice arises.

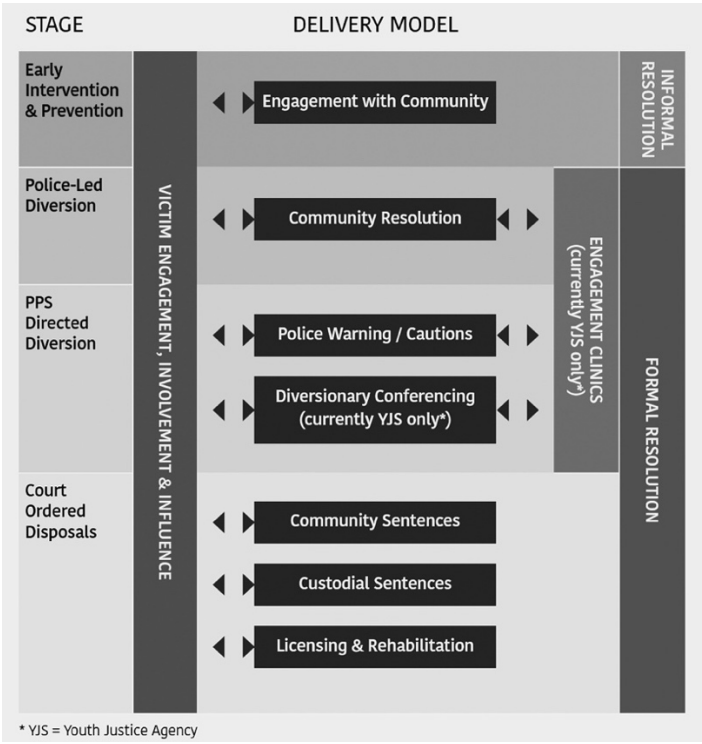

Figure 2. Stages of restorative justice approaches along the criminal justice continuum

A further approach to determining the formation of an effective restorative framework is to consider CICS.[51] CICS offers a comprehensive strategy for meeting the specific requirements of different groups, which in turn reduces the disproportionate representation and improves

49 ibid.

50 ibid 28.

51 Canadian Intergovernmental Conference Secretariat, 'Restorative Justice – Key Elements of Success' (Federal Provincial Territorial Meeting of Ministers Responsible for Justice and Public Safety (831-221), St John's, Newfoundland and Labrador, 15–16 November 2018) <https://scics.ca/en/product-produit/restorative-justice-key-elements-of-success/#fn1> accessed 10 June 2024.

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the availability of justice. Canadian restorative approach follows the *Key Elements of Success*, which encompasses four recommendations as follows:

> *Recommendation 1: Recognise restorative justice as a strategic investment in a highly successful and efficient Criminal Justice System;*
>
> *Recommendation 2: Support for the implementation of the guiding principles and goals on a national level to initiate the change of the criminal justice system towards greater effectiveness and fairness through a restorative approach;*
>
> *Recommendation 3: Establish a structured framework in each jurisdiction to unite stakeholders involved in restorative justice;*
>
> *Recommendation 4: Emphasise a methodical and ethical approach to teaching, training, and evaluation.*

By taking a more comprehensive view of each community's needs, restorative justice helps alleviate overrepresentation and expands access to justice, according to the *Key Elements of Success*.[52]

Armed with the necessary understanding of restorative justice approaches in essential legal components from international legal instruments, a restorative justice framework can be effectively established and maintained. This ensures that it serves the needs of victims, offenders, and the community while upholding justice and fairness.

3.3. Proposing restorative justice models for unestablished judicial systems

Restorative justice models might vary but share common restorative conferencing elements such as inclusive dialogue, consensus-based decision-making, and reparative actions. Prominent models include four models of restorative conferencing, namely victim-offender mediation, community reparative boards, family group conferencing, and circle sentencing. In this context, the term "restorative conferencing" refers to a variety of strategies that aim to bring together victims, offenders, and community members in community-based processes that are non-adversarial.[53] The goal of these strategies is to respond to crime by holding offenders accountable and repairing the harm caused to victims and communities.

While these four models do not cover all the potential approaches for community engagement in addressing youth crime, they illustrate the diverse options and shared principles that reflect a fresh perspective on involving citizens in the decision-making

52 ibid.

53 Barnes and others (n 9); Sherman and others (n 21); Suzuki (n 7).

process for imposing penalties.[54] Countries like Vietnam, which have not applied restorative justice models in criminal proceedings, might select the following approaches instead of using sanctioning processes.

3.3.1. Victim-offender mediation

Victim-offender mediation programmes, or reconciliation or dialogue programmes, are a proposed model in unestablished legal systems.[55] These programmes allow victims to meet offenders in a secure environment and engage in a facilitated dialogue about the crime. The victim can communicate the crime's physical, psychological, and financial consequences, obtain clarification on any remaining questions, and actively participate in formulating a plan for the offender to repay any financial obligations owed. This method differs from mediation as it is often performed in civil or commercial disputes, where parties are in consensus over their responsibilities.[56] The primary objective of the process should not only be achieving a settlement but also developing a mutually acceptable plan to address the harm caused by the crime. The terms "victim-offender meeting," "conferencing," and "dialogue" are gaining popularity as alternative words to express deviations from conventional mediation methods.[57]

A victim-offender mediation programme should prioritise the victim's needs, ensuring their safety and well-being. The victim's involvement should be voluntary, while the offender's involvement should be based on their free will.[58] Offenders are often allowed to engage in mediation or dialogue but should never be compelled or forced to participate. Victims should be able to decide about the processes involved, including timing, location, and speaking order. The preparedness of both the victim and the perpetrator should be thoroughly evaluated. The mediator should arrange face-to-face pre-mediation meetings to clarify matters and establish further communication. The mediator should also oversee the implementation of any agreements made. Overall, the mediator's role is to ensure a successful and respectful mediation process.[59]

This model is suitable for criminal situations where the parties involved can benefit from a facilitated dialogue, focusing on healing, accountability, and restorative outcomes such as non-violent crimes, juvenile offences, first-time offenders, crimes involving familiar relationships, minor assaults and domestic disputes, hate crimes and bias-motivated incidents, or community-based offences. Thus, the key factors for the applicability of this

54 Barnes and others (n 9); Do HY, 'Restorative Justice in Dealing with Juveniles Committed the Crime' (2008) 20(136) Vietnamese Journal of Legislative Research 23; Kimbrell, Wilson and Olaghere (n 13).

55 Hallam (n 9); Paul and Swan (n 11); Paul (n 38).

56 Paul and Swan (n 11).

57 ibid.

58 William R Wood and Masahiro Suzuki, 'Getting to Accountability in Restorative Justice' [2024] Victims & Offenders doi:10.1080/15564886.2024.2333304.

59 Paul and Swan (n 11)

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model include the willingness of both the victim and the offender to participate in the mediation process and the suitability of the case for a restorative rather than purely punitive approach.

3.3.2. Community reparative boards model

The community reparative board is a form of community-based punishment for youth offenders, also known as youth panels, neighbourhood boards, or community diversion boards. These boards consist of trained citizens who hold public meetings with offenders as ordered by the court.[60] During these meetings, the boards work with the offenders to develop sanction agreements and ensure compliance, subsequently reporting the offenders' progress to the court.

The boards aim to involve citizens directly in the justice process and promote their ownership of the criminal and juvenile justice systems. They provide a platform for victims and community members to confront offenders constructively, allowing them to address the offender's behaviour.[61] Additionally, these boards offer opportunities for offenders to take personal responsibility and be held accountable for the harm they cause to victims and communities by generating community-driven consequences for criminals and delinquents.

Effective implementation of community-driven reparative board programmes requires effective marketing to the justice system, well-trained staff, and collaboration with victim organisations. It also necessitates expeditious case processing, a positive board experience, quality training, adequate resources, and a focus on successful outcomes for offenders, victims, and community participants.[62] Judges should support limiting the offender's time in the programme and on probation, ensuring a positive experience for board members and successful outcomes for offenders, victims, and community participants.

In general, this model is most applicable in situations where the crime has a tangible impact on the community, where the offender shows a willingness to take responsibility, and where the community is interested in participating in the process of accountability and restoration. It focuses on repairing harm, promoting rehabilitation, and strengthening community ties. Some situations might be implemented, such as low-level, non-violent offences, i.e., petty theft, vandalism, disorderly conduct, minor drug offences, first-time offenders, juvenile offenders, offences with a community impact like acts of vandalism affecting public property

60 Gale Burford and Joan Pennell, 'Family Group Decision Making and Family Violence' in Gale Burford and Joe Hudson (eds), *Family Group Conferencing: New Directions in Community-Centered Child and Family Practice* (Aldine de Gruyter 2000) 171, doi:10.4324/9780203792186-20; Lanterman (n 6); Maglione (n 12).

61 Gordon Bazemore and Mara Schiff, *Juvenile Justice Reform and Restorative Justice* (Routledge 2013).

62 Kimbrell, Wilson and Olaghere (n 13).

or community spaces, quality of life crimes, i.e., noise violations, public disturbances, or minor environmental infractions, and community disputes and conflict.

3.3.3. Family group conferencing model

Family group conferencing, also known as Family Group Decision Making, is a New Zealand model widely adopted for resolving conflicts and making decisions. It was incorporated into national legislation in 1989 and has successfully resolved various offences, including theft, arson, minor assaults, drug offences, vandalism, and child maltreatment.[63] Family group conferencing involves the participation of the most impacted individuals, including the victim, offender, family members, friends, and allies. A skilled mediator works with the affected individuals to discuss the harm caused by the offence and potential solutions. The goal of family group conferencing is to involve the victim in discussions about the offence and decisions regarding punishment, ensuring their needs are considered.[64] It also aims to increase the offender's understanding of the impact of their actions on others and provide them with an opportunity to take responsibility for their behaviour.

Family group conferencing has been adopted in various settings, including schools, police departments, probation offices, residential programmes, community mediation programmes, and neighbourhood groups.[65] Conferencing is primarily employed as a diversionary measure for juveniles during the court process. However, it can also be utilised post-adjudication and disposition to tackle unresolved matters or establish precise conditions for restitution. Conferencing programmes have been introduced within individual agencies and jointly developed by multiple agencies. In practice, family group conferencing does not adhere to a single delivery model. As cited in The Right To Know (2016),[66] the four discrete stages below might be implemented in some circumstances.

> *Stage 1. Family group conferencing coordinators who are independent spend time conversing with the child and their caregivers to determine the identities of significant individuals in their immediate family, extended network, and other relevant parties who may be included in the process. The coordinator provides a comprehensive explanation of the process to all parties involved, prepares them for the meeting, and subsequently distributes the invitations;*

63 Burford and Pennell (n 60).

64 Paul (n 38).

65 Paul and Swan (n 11).

66 Leeds City Council, 'An Evidence Review of the Impact Family Group Conferencing (FGC) and Restorative Practices (RP) have on Positive Outcomes for Children and Families' (*The RTK Ltd*, 26 July 2016) <https://www.education.ox.ac.uk/wp-content/uploads/2019/06/Family-Group-Conferencing-Background-to-Review-Leeds.pdf> accessed 10 June 2024.

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Stage 2. The starting point of the family group conferencing meeting commences with an exchange of information between the family and the professionals, presided over by the impartial coordinator. Professionals ensure that all parties comprehend their respective roles, obligations, and resources by sharing their concerns. Any participant is permitted to request clarification regarding the procedure;

Stage 3. The next stage of the family group conferencing meeting, known as "private family time," involves the coordinator and professionals leaving the room to allow the family to get involved in an exchange regarding a plan of action, contingency plans, and the review of arrangements and resource requests; and

Stage 4. The coordinator and professionals re-enter the meeting to reach a consensus on the proposed plan during the final step of the family group conferencing meeting. Whenever possible, the accessibility of necessary resources is discussed, and a plan is established as an acceptable approach that meets the child's need for safety and protection. The agreement includes any arrangements for monitoring and evaluating the plan's implementation.

The goal of family group conferencing is to create a support system around the offender, hold them accountable in a constructive way, and work towards a solution that benefits both the victim and the community. As such, this model is particularly applicable in criminal situations involving juveniles or young offenders, minor to moderate offences like property crimes, vandalism, minor assaults, or other non-violent crimes, first-time offenders or minor crimes, and victim willingness.

3.3.4. Circle sentencing model

Circle sentencing is a reintegrative approach that addresses the criminal and delinquent actions of offenders while considering the needs of victims, families, and communities.[67] Within the "circle," individuals affected by crime, including victims, offenders, their families, justice professionals, and community members, engage in open dialogue to collectively understand the incident. Together, they determine the necessary actions to facilitate recovery and deter future offences.

The circle holds significant significance beyond symbolism; it involves various individuals, such as police officers, lawyers, judges, victims, offenders, and community residents.[68] They work together to reach a consensus on a sentencing plan that considers all parties involved. Circle sentencing promotes healing for all parties involved in a crime, including the victim, offender, community members, and families, so that offenders can make amends and take responsibility.[69]

67 Barnes and others (n 9).
68 Bazemore and Schiff (n 61).
69 Borton and Paul (n 6).

The circle sentencing process relies on a healthy partnership between the formal juvenile justice system and the community. Participants need training and skill building in the process, as well as peacemaking and consensus building.[70] The community's planning process should allow time for strong relationships to develop, necessitating a flexible circle process that evolves based on the community's knowledge and experience. Community justice committees lead this process, with a trained community member known as a keeper facilitating the circle.[71]

Circle sentencing is not suitable for all offences, as factors such as the offender's character, connection to the community, victim input, and support groups' dedication are crucial. Circles are labour-intensive and should not be used extensively for first offenders or minor crimes.[72] Barnes et al. claim that the circle's capacity to improve participants' lives and the community's well-being depends on the effectiveness of participating volunteers. [73]

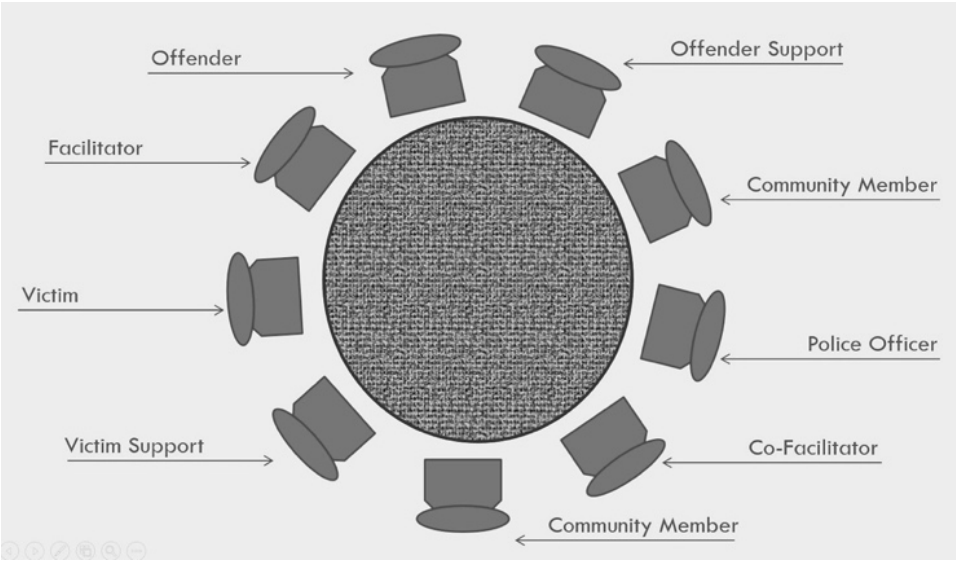

Figure 3. Circling Sentencing Process[74]

70 Pepinsky (n 32); Wozniak (n 34).

71 Lanterman (n 6).

72 Ana M Nascimento, Joana Andrade and Andreia de Castro Rodrigues, 'The Psychological Impact of Restorative Justice Practices on Victims of Crimes-a Systematic Review' (2023) 24(3) Trauma, Violence, & Abuse 1929, doi:10.1177/15248380221082085.

73 Barnes and others (n 9).

74 UNODC, 'Module 8: Restorative Justice: Topic two - Overview of Restorative Justice Processes' in *E4J University Module Series: Crime Prevention and Criminal Justice* (*United Nations Office on Drugs and Crime*, 2018) <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-8/key-issues/2--overview-of-restorative-justice-processes.html> accessed 10 June 2024.

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This model is especially suited for cases where the offence has deeply impacted the community and the offender is a community member. It focuses on restorative justice, aiming to repair the harm caused by the crime through a process that includes the victim, the offender, their families, and community members. This model is often applied in cases involving non-violent offences such as theft, property damage, or minor assaults, repeat offenders whose traditional punitive measures have not been effective, crimes impacting Indigenous communities, juvenile offences, and cases with a focus on rehabilitation. Notably, this model is less likely to be used in cases involving severe violence or sexual offences or where the safety of the community cannot be ensured through the Circle process.

On the whole, restorative justice is a dynamic and culturally sensitive approach that involves constructive dialogue to facilitate positive transformation. Various practice models have gained prominence, reflecting legal, socio-political, and cultural contexts. Restorative justice programmes can be classified in various ways, with some situations being fully restorative and others only partly restorative. The outcome of the restorative process depends on factors like the involvement of individuals affected, accountability, and achieved results. This section outlines four non-adversarial decision-making models that can alter the current dynamic in juvenile justice processes. These prominent restoration models can be incorporated into justice systems, serve as a part of diversion programmes, or be utilised independently from the justice system.

4 CONCLUSIONS

One way that society expresses its disapproval of actions that violate its shared norms is through the use of punishment. The moral imbalance that has been created requires that punishments be commensurate with the seriousness of the crime. There are many protections built into the criminal justice system because punishment, which can involve physical harm or the withholding of certain liberties, requires a fair and careful application of the law. What constitutes a "just" sentence is one that is commensurate with the seriousness of the offence. Rehabilitation aims to divert individuals from formal legal proceedings and utilise alternative measures when suitable in criminal cases. Over the past few decades, there have been efforts to enhance the involvement of victims in criminal proceedings through the implementation of different mechanisms that allow victims to provide the court with information regarding the harm caused by the offence. One of the most favourable solutions in criminal proceedings is to choose some forms of restorative justice when applicable.

Restorative justice is a method of addressing crime, wrongdoing, injustice, or conflict that aims to repair the damage caused by illegal actions and restore the welfare of all affected parties. Grounded in a relational theory of justice, it prioritises the restoration of respect, equality, and dignity in relationships affected by wrongdoing. This approach empowers

those directly affected by the incident – victims, offenders, their advocates, and society as a whole – to regain agency, ownership, and decision-making power. Restorative justice is characterised by its values of collaboration and consensus-based procedures over adjudicative and adversarial forms in traditional criminal justice processes. By allowing those who have inflicted harm to honestly own their fault, listen to those they have harmed, and fulfil their responsibility to rectify the situation, restorative justice fosters dignity and addresses the needs of all involved parties.

Criminal offences and other forms of injustice are fundamentally perceived as acts of contempt, characterised by a disregard for an individual's inherent dignity, identity, rights, and emotions. The only way to address this lack of respect is with respect itself, where the offender clearly acknowledges that the victim did not deserve to be treated in such a manner and that their rights, emotions, and interests are just as important as those of the perpetrator. Restorative justice presents a different perspective on the criminal justice system and appropriately prioritises the needs and concerns of crime victims.

In traditional criminal justice systems, accountability often means ensuring the appropriate sentence is given, regardless of the offender's personal responsibility for their actions. Within the context of restorative justice, accountability has a much more rigorous nature. Offenders must demonstrate three essential qualities: acknowledging personal culpability for the harm caused, being open to directly seeing the impact of their actions on the lives of others, and proactively taking steps to rectify the situation.

Implementing restorative justice should go beyond introducing new programmes and personnel roles; it requires a comprehensive systemic transformation. The judicial process must include new principles that clearly define the responsibilities of victims, offenders, and communities as important participants. Therefore, this reform must establish and sustain novel decision-making frameworks that effectively address stakeholders' requirements for significant participation. The potential of these new stakeholders lies in their ability to exert influence and bring about changes in decision-making and intervention within the juvenile justice system.

For victims, offenders, and other citizens to be actively involved in significant decision-making processes, there has to be a significant transformation in the responsibilities of juvenile justice professionals. The job must transition from being the single decision-maker to being a facilitator of community engagement and a resource for the community. In general, restorative justice has the potential to transform legal systems worldwide by promoting a more humane, equitable, and effective approach to justice. Countries like Vietnam, which have not integrated restorative justice models into their judicial systems, should consider implementing judicial reforms by legalising restorative justice in criminal proceedings. Such implementation should be flexible and aligned with the legal foundations of criminal law.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРОПОЗИЦІЯ МОДЕЛЕЙ ВІДНОВНОГО ПРАВОСУДДЯ ЯК АЛЬТЕРНАТИВНИХ ПІДХОДІВ ДО ВИРІШЕННЯ КРИМІНАЛЬНИХ СПРАВ: ДОСЛІДЖЕННЯ СУДОВИХ СИСТЕМ У КРАЇНАХ КОНТИНЕНТАЛЬНОГО ТА ЗАГАЛЬНОГО ПРАВА

Оань Ті Као* та Туан Ван Ву

АНОТАЦІЯ

Вступ. *Останніми роками відновне правосуддя стало механізмом для залучення потерпілих до кримінального процесу. Його головною метою є відшкодування шкоди, що була заподіяна правопорушенням та яка визнається справжньою травмою і потребує лікування. Хоча кримінальне провадження може відрізнятися залежно від юрисдикцій та базових принципів прав людини, загальна мета полягає в тому, щоб надати більш комплексну реакцію на злочин, спрямовану не лише на покарання, але й на виправлення правопорушників і зменшення злочинної поведінки в майбутньому.*

Методи. *Це якісне дослідження було проведене за допомогою описово-аналітичного методу із використанням тематичних досліджень і порівняльного аналізу для вивчення моделей відновного правосуддя в усталених судових системах та їхньої застосовності в країнах, в яких відсутня відповідна правова база. Проаналізувавши та синхронізувавши вторинні матеріали, у дослідженні було надано поглиблене розуміння успішних практик та можливих адаптацій.*

Результати та висновки. *Результати дослідження показують, що в усьому світі було розроблено кілька моделей відновного правосуддя, які відповідають правовому, соціально-політичному та культурному контекстам різних регіонів і юрисдикцій, зокрема Канади, Нової Зеландії та Норвегії. Незважаючи на різноманітність моделей відновного правосуддя, у цьому дослідженні було розглянуто чотири неконкурентні моделі прийняття рішень: посередництво між потерпілим і правопорушником, комісії з відшкодування шкоди, сімейні конференції та кругове винесення вироку. Ці чотири моделі ілюструють альтернативний підхід до залучення громади до боротьби зі злочинністю, а також наголошують на різноманітності та спільних темах для участі громади в процесах застосування санкцій. У результатах були запропоновані нестандартні судові системи, такі як в'єтнамська, корисні рекомендації щодо вибору моделей, які найкраще відповідають конкретним потребам.*

Ключові слова: *відновне правосуддя, судова система, кримінальний процес, моделі відновної конференції, процеси застосування санкцій.*

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Research Article

LEGAL ANALYSIS OF EU ARTIFICIAL INTELLIGENCE ACT (2024): INSIGHTS FROM PERSONAL DATA GOVERNANCE AND HEALTH POLICY

Anca Parmena Olimid*, Cătălina Maria Georgescu and Daniel Alin Olimid

ABSTRACT

Background: *This study correlates the up-to-date ethical, functional and legal evaluations related to the management and governance of artificial intelligence (AI) under European Union (EU) law, particularly impacting the health data sector and medical standards as provided by the Artificial Intelligence Act within the Regulation adopted by the European Council in May 2024. The initial proposal for the management and governance of the AI sector was submitted in April 2021. Three years later, on 13 March 2024, the European Union Artificial Intelligence Act (EU AIA) was adopted by the European Parliament. Subsequently, on 21 May 2024, the Council adopted an innovative legislative framework that harmonises the standards and rules for AI regulation. This framework is set to take effect in May 2026, with the central objective of stimulating and motivating a fair, safe, legal single market that respects the principles of ethics and the fundamental rights of the human person.*

Methods: *The current legal analysis focuses on the European Union's new institutional governance involving a multistage approach to managing health data, ethical artificial intelligence, generative artificial intelligence and classification of types of AI by considering the degree of risk (e.g. artificial intelligence systems with limited risk and systems with high risk) and medical devices. It outlines the legal framework for AI regulation and governance in the EU by focusing on compliance with the previously adopted legislation in the Medical Devices Regulation (2017) and the In-Vitro Diagnostic Regulation (2017). The paper also examines the application of the newly adopted EU Artificial Intelligence Act in relation to national justice systems, previous EU regulations on medical devices and personal data protection regulation, and its correlation with the European Court of Human Rights jurisprudence. This opens up complex discussions related to judicial reform and access to justice. For this purpose, as a research objective, the legal analysis includes an innovative perspective following an integrative*

discussion on the latest legal reforms and regulations of the AI sector in Eastern Europe launched in 2024 with a special focus on the latest developments in the EU Candidate Countries namely Ukraine and the Republic of Moldova.

Results and conclusions: *The present research facilitates the exploration of the real benefits of managing innovative AI systems for medical data, research, and development, as well as within the medical technology industry.*

1 INTRODUCTION

The regulation of the artificial intelligence (AI) sector by the European Parliament on 13 March 2024, along with the approval of the Act on Artificial Intelligence by the Council of the European Union (EU), laid the groundwork for the harmonisation of legal provisions regarding the EU's unitary regulation of AI sector.[1] The Act was adopted on 21 May 2024, with plans for its publication in the Official Journal of the EU, to enter into force twenty days from the moment of publication (Figure 1).[2] Recently, in July 2024, the final version of the EU Artificial Intelligence Act was published in the Official Journal, solidifying the harmonised provisions for the AI sector.[3]

The new legal framework outlines the key definitions applied to AI systems in the European Union in Article 3. Specifically, the first paragraph of Article 3 defines an "AI system" from two functional and operational perspectives, namely (1) as "a machine-based system" characterised by autonomy and (2) "the exercise of adaptiveness of such system".[4]

Moreover, the act adopted in May 2024 legally regulates the framework of the EU institutional governance and data in the AI sector and aims to delineate a uniform framework for the AI application at the level of the community market. This framework is centred on the human person, aiming to safeguard individual health, ensure the safety of citizens, and protect fundamental rights and freedoms. However, recent debates among

1 European Parliament Legislative Resolution of 13 March 2024 on the Proposal for a Regulation of the European Parliament and of the Council on Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)) <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.html> accessed 20 June 2024.

2 European Council and Council of the EU, 'Timeline - Artificial Intelligence' (*European Council and Council of the European Union*, 21 May 2024)' <https://www.consilium.europa.eu/en/policies/artificial-intelligence/timeline-artificial-intelligence/> accessed 22 June 2024.

3 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance), PE/24/2024/REV/1 [2024] OJ L 1689/1 <http://data.europa.eu/eli/reg/2024/1689/oj> accessed 12 July 2024.

4 ibid, art 3, para 1.

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experts and in specialised literature have emerged regarding the ethical framework of the Artificial Intelligence Act. This new evidence-based legislation encompasses a new management system in the health sector, procedures, health data, standards and tools of assurance and quality assurance.[5]

The EU Artificial Intelligence Act is the first globally adopted legal framework regulating the field of AI in the EU. For the medical sector, the regulation applies in all areas: manufacturers of medical devices and developers' sector of consumer applications, concerning both AI systems and their results.[6] In addition to these provisions, Recital 51 deduces the structural-functional framework of Artificial Intelligence systems based on previous legislation provided by the Medical Devices Regulation and In-Vitro Diagnostic Regulation concerning medical devices incorporating an AI system.

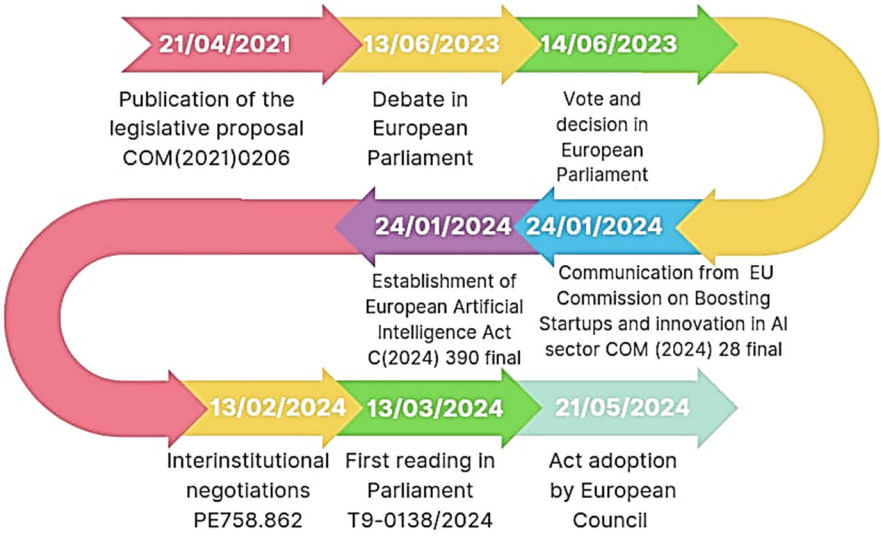

Figure 1. Timeline of the adoption of the EU Artificial Intelligence Act (2021–2024)[7]

The new regulation sets mandatory deadlines for application and implementation as follows: 12 months for providers of AI systems of general purpose,[8] 24 months for member states to ensure the institutional mechanisms to establish a regulatory sandbox,[9] and 36 months for high-risk AI systems.[10]

5 Arian Ranjbar and others, 'Managing Risk and Quality of AI in Healthcare: Are Hospitals Ready for Implementation?' (2024) 17 Risk Manag Healthc Policy 877, doi:10.2147/RMHP.S452337.
6 Artificial Intelligence Act (n 3) recital 50.
7 Systematized by the authors based on: European Council and Council of the EU (n 2).
8 Artificial Intelligence Act (n 3) recital 179.
9 ibid, recitals 57, 60.
10 ibid, art 111(1).

2 LITERATURE REVIEW ON EU POLICY REGARDING PERSONAL DATA AND HEALTH POLICY IN ARTIFICIAL INTELLIGENCE (AI) MANAGEMENT AND GOVERNANCE

The literature on AI management and governance has acclaimed EU policy-making momentum while also acknowledging the definitions, obstacles, loopholes and limitations in regulating AI systems. These concerns are especially significant as professionals, industry holders, and academics have expressed their concerns regarding the misuse of AI across different fields of activity, including the economy, finances, entrepreneurship and marketing,[11] rule of law,[12] democracy and elections,[13] healthcare, social innovation, and professional life.[14]

Though developed to provide the security and control of AI development, the operationalisation of concepts like "human oversight"[15] and "human-centred"[16] in the EU Artificial Intelligence Act and AI governance has raised several questions and complexities adjudged in the literature.[17] Researchers have thus discussed how well the recitals of the EU Artificial Intelligence Act[18] align with the development and construction of machine learning[19] and AI systems.[20]

Through its scope and complexity, establishing "regulatory sandboxes"[21] through the EU Artificial Intelligence Act has also raised questions surrounding innovation and safety in

11 Alejo Jose G Sison and others, 'ChatGPT: More Than a "Weapon of Mass Deception" Ethical Challenges and Responses from the Human-Centered Artificial Intelligence (HCAI) Perspective' [2023] International Journal of Human-Computer Interaction 1, doi:10.1080/10447318.2023.2225931.

12 Roger Brownsword, 'Law, Authority, and Respect: Three Waves of Technological Disruption' (2022) 14(1) Law Innovation and Technology 5, doi:10.1080/17579961.2022.2047517.

13 Jelena Cupać and Mitja Sienknecht, 'Regulate Against the Machine: How the EU Mitigates AI Harm to Democracy' (2024) 31(5) Democratization 1067, doi:10.1080/13510347.2024.2353706.

14 Marta Cantero Gamito, 'The Role of ETSI in the EU's Regulation and Governance of Artificial Intelligence' [2024] Innovation: The European Journal of Social Science Research 1, doi:10.1080/13511610.2024.2349627.

15 Lena Enqvist, '"Human Oversight" in the EU Artificial Intelligence Act: What, When and by Whom?' (2023) 15(2) Law, Innovation and Technology 508, doi:10.1080/17579961.2023.2245683.

16 Ozlem Ozmen Garibay and others, 'Six Human-Centered Artificial Intelligence Grand Challenges' (2023) 39(3) Journal of Human-Computer Interaction 391, doi:10.1080/10447318.2022.2153320.

17 Araz Taeihagh, 'Governance of Artificial Intelligence' (2021) 40(2) Policy and Society 137, doi:10.1080/14494035.2021.1928377.

18 Nicola Fabiano, 'AI Act and Large Language Models (LLMs): When Critical Issues and Privacy Impact Require Human and Ethical Oversight' (31 March 2024) arXiv preprint arXiv:2404.00600 [cs.CY] <https://arxiv.org/html/2404.00600v1> accessed 05 July 2024.

19 Raphaële Xenidis, 'Beyond Bias: Algorithmic Machines, Discrimination Law and the Analogy Trap' (2023) 14(4) Transnational Legal Theory 378, doi:10.1080/20414005.2024.2307200.

20 Paul Friedl, 'Dis/similarities in the Design and Development of Legal and Algorithmic Normative Systems: The Case of Perspective API' (2023) 15(1) Law, Innovation and Technology 25, doi:10.1080/17579961.2023.2184134.

21 Thomas Buocz, Sebastian Pfotenhauer and Iris Eisenberger, 'Regulatory Sandboxes in the AI Act: Reconciling Innovation and Safety?' (2023) 15(2) Law, Innovation and Technology 357, doi:10.1080/17579961.2023.2245678.

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different industries and EU markets, health policy and medical technologies and devices.[22] In line with these issues, the literature raises the issue of "explainability in artificial intelligence" and the concerns induced by EU legislation[23] focusing on medical diagnostic technologies and the issues surrounding patients' rights.[24]

Moreover, the literature connects the EU Artificial Intelligence Act, the European Convention on Human Rights (ECHR) and the General Data Protection Regulation (GDPR) in a complex discussion on the issues raised by anti-deep fake legislation,[25] democratic values and human rights.[26]

3 METHODOLOGY AND RESEARCH METHODS

The current legal analysis centres on the European Union's new institutional governance. The methodology involves a multistage legal approach and content analysis of EU regulation of the management of health data, ethical artificial intelligence, generative artificial intelligence and classification of types of artificial intelligence by considering the degree of risk (e.g. artificial intelligence systems with limited risk and systems with high risk) and medical devices.

This analysis considers the current framework for European Union artificial intelligence regulation and governance by focusing on compliance with the previously adopted legislation, such as the Medical Devices Regulation (2017) and the In-Vitro Diagnostic Regulation (2017). The hypothesis posits that aligning the new legal framework within EU AI regulations with these previously adopted regulations in the Medical Devices Regulation (2017) and the In-Vitro Diagnostic Regulation (2017) enhances the protection of human rights and safety within the healthcare system, with particular emphasis on safeguarding patients' rights.

22 Jonathan McCarthy, 'From Childish Things: The Evolving Sandbox Approach in the EU's Regulation of Financial Technology' (2023) 15(1) Law, Innovation and Technology 1, doi:10.1080/17579961.2023.2184131.

23 George Pavlidis, 'Unlocking the Black Box: Analysing the EU Artificial Intelligence Act's Framework for Explainability in AI Law' (2024) 16(1) Innovation and Technology 293, doi:10.1080/17579961.2024.2313795.

24 Daria Onitiu, 'The Limits of Explainability & Human Oversight in the EU Commission's Proposal for the Regulation on AI- a Critical Approach Focusing on Medical Diagnostic Systems' (2022) 32(2) Information & Communications Technology Law 170, doi:10.1080/13600834.2022.2116354.

25 Felipe Romero-Moreno, 'Generative AI and Deepfakes: A Human Rights Approach to Tackling Harmful Content' [2024] International Review of Law, Computers & Technology 1, doi:10.1080/13600869.2024.2324540.

26 Hendrik Schopmans and Irem Tuncer Ebeturk, 'Techno-Authoritarian Imaginaries and the Politics of Resistance against Facial Recognition Technology in the US and European Union' (2023) 31(1) Democratization 1, doi:10.1080/13510347.2023.2258803.

4 RESULTS AND DISCUSSIONS

4.1. EU new legal trilogue (2024): Generative AI, European Artificial Intelligence Office (EU AIO) and Council Regulation (EU) 2024/1732

In early 2024, the EU Commission launched three new provisions for the health sector and the implementation framework of the Artificial Intelligence Act:

(i) Communication COM(2024) 28 final: This legislative act regulates new forms and models of content known as "Generative AI". It encompasses a wide range of technologies associated with the health sector, such as the use of health data, health services, personalised services and facilities, and regulatory frameworks for biotechnologies.[27] It also integrates the framework of applications based on an AI system in areas such as support services and personalised health. Additionally, it incorporates the common European data space for AI start-ups, covering sectors such as health, research and innovation.

(ii) Commission Decision C(2024) 390 final: Adopted on 24 January 2024, this decision establishes the European Artificial Intelligence Office (EU AIO). The EU AIO is tasked with applying and implementing EU regulations in the AI sector through collaboration with public and private partners, as well as professionals from the scientific community, developers and experts in the AI sector.[28]

(iii) Council Regulation (EU) 2024/1732: Adopted on 17 June 2024, this regulation focuses on innovative European start-ups in the AI sector.[29] For the health sector, it introduces new legal provisions based on ethical AI, confirming the character of strategic sectors for the health sector and healthcare domains. The new regulation aims to support and facilitate the development of AI-based models and applications in strategic areas,[30] such as health[31] and support services.[32]

27 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on Boosting Startups and Innovation in Trustworthy Artificial Intelligence, COM/2024/28 final of 24 January 2024 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024DC0028 > accessed 10 July 2024.

28 Commission Decision of 24 January 2024 Establishing the European Artificial Intelligence Office, C/2024/390 [2024] OJ C 1459/1 <http://data.europa.eu/eli/C/2024/1459/oj> accessed 10 July 2024.

29 Council Regulation (EU) 2024/1732 of 17 June 2024 amending Regulation (EU) 2021/1173 as Regards a EuroHPC Initiative for Start-Ups in Order to Boost European leadership in Trustworthy Artificial Intelligence, ST/10109/2024/INIT [2024] OJ L 1732/1 <http://data.europa.eu/eli/reg/2024/1732/oj> accessed 10 July 2024.

30 Liubov Maidanyk, 'Artificial Intelligence and Sui Generis Right: A Perspective for Copyright of Ukraine?' (2021) 4(3) Access to Justice in Eastern Europe 144, doi:10.33327/AJEE-18-4.3-n000076.

31 Urs Gasser, 'An EU Landmark for AI Governance' (2023) 380(6651) Science 1203, doi:10.1126/science.adj1627.

32 Laura Ervo, 'Debtors Protection and Enforcement Efficiency According to Finnish Law' (2020) 3(4) Access to Justice in Eastern Europe 265, doi:10.33327/AJEE-18-3.4-a000039.

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4.2. General Overview of the Artificial Intelligence Act

The regulatory framework of the Artificial Intelligence Act encompasses three fundamental characteristics:[33] legality, convergence and flexibility to adapt to processes and developments in the technological spectrum.[34] It defines AI models for general use, distinguishing them from AI systems (AIS)[35] based on their functional nature, generality and the typology of their assigned tasks.[36]

The Artificial Intelligence Act, therefore, sets three objectives through which the new regulation ensures the correct and safe development and use of AI systems: (*a*) the classification of AI systems based on the risk and the associated typology: minimal, limited, high and unacceptable; (*b*) the financial sanctions in case of non-compliance with the legal framework; (*c*) from the perspective of institutional governance, the creation of an artificial intelligence office at the EU level to order, supervise and to harmonise the legislative framework at the level of the member states.

The approach to ethical principles within the Artificial Intelligence Act brings a consistent contribution to the regulation of the AI and personal data protection sector at the EU level considering the case law retrieved from the European Court of Human Rights (ECtHR) in the following areas: (*a*) human rights and private life;[37] (*b*) protection of personal data and data collection in professional activities;[38] (*c*) health care and protection of health data[39] and (*d*) respect of health record and human rights.[40] This type of multi-principle approach is consistently related to (*i*) social existence and functioning;[41] protection of the fundamental rights and freedoms of the natural person;[42] (*ii*) protection of private life and guaranteeing the confidentiality of the information and communication space;[43] (*iii*) supporting the innovation framework, respecting and guaranteeing freedom of science, concerning the

33 Stephen Gilbert and others, 'Learning From Experience and Finding the Right Balance in the Governance of Artificial Intelligence and Digital Health Technologies' (2023) 25 Journal of Medical Internet Research e43682, doi:10.2196/43682.

34 Stephen Gilbert, 'The EU Passes the AI Act and its Implications for Digital Medicine are Unclear' (2024) 7(1) NPJ Digital Medicine 135, doi:10.1038/s41746-024-01116-6.

35 Artificial Intelligence Act (n 3) recital 12.

36 ibid, recital 97.

37 *S and Marper v the United Kingdom* App nos 30562/04, 30566/04 (ECtHR, 4 December 2008) paras 30, 31 <https://hudoc.echr.coe.int/eng?i=001-90051> accessed 24 June 2024.

38 *Bărbulescu v Romania* App no 61496/08 (ECtHR, 12 January 2016) paras 70–72 <https://hudoc.echr.coe.int/eng?i=001-159906> accessed 24 June 2024.

39 *LH v Latvia* App no 52019/07 (ECtHR, 29 April 2014) paras 28–30 <https://hudoc.echr.coe.int/fre?i=001-142673> accessed 24 June 2024.

40 *KH and Others v Slovakia* App 32881/04 (ECtHR, 28 April 2009) paras 35, 36, 46, 49 <https://hudoc.echr.coe.int/eng?i=001-92418> accessed 24 June 2024.

41 Artificial Intelligence Act (n 3) recital 4, 9, 16.

42 ibid, recital 22.

43 ibid, recital 10.

need to ensure development, as well as supporting research activity and the development of the scientific activity.[44]

This approach objectively appeals to the legal processing of personal data, considering both personal information and data and the non-personal data processing framework.[45]

Being the first regulatory legal act with horizontal mandatory character,[46] the Artificial Intelligence Act establishes a system of guarantees by adhering to a set of principles of social and biomedical ethics. Although expressly mentioned by Recital 27, a fair analysis of the ethical and principled framework is necessary, starting from the consistent and common application of these principles in the new regulation and AI legal safety and safety regulation.[47]

4.3. Ethical AI

In a first acceptance of the principle related to the human-centred approach, the content of Recital 8 states "ethical AI" and "protection of ethical principles". Recital 25 further defines and operationalises important distinctions regarding scientific reality, highlighting the need for research and development activity to conform to ethical and professional standards and principles relevant to scientific research. In this context, the relevant interpretations of the ECtHR regarding the protection of biometric data and ethical principles explore legal and conceptual developments focusing on (*a*) retention and processing of DNA samples and biometric data;[48] (*b*) risk of data and regulation of respect of fundamental freedoms[49] and (*c*) ethical norms and standards for protection of health, rights and freedoms.[50]

Recital 27 reflects on the ethical principle of technical robustness and the safety assurance framework, focusing on the development and resilience of AI systems to ensure protection against illegal use by third parties.

44 ibid, recital 25.

45 ibid, recital 10.

46 Tambiama Madiega, 'Artificial Intelligence Act: Briefing EU Legislation in Process' (*EPRS European Parliamentary Research Service*, June 2023) <https://superintelligenz.eu/wp-content/uploads/2023/07/EPRS_BRI2021698792_EN.pdf> accessed 24 June 2024.

47 Sofia Palmieri and Tom Goffin, 'A Blanket That Leaves the Feet Cold: Exploring the AI Act Safety Framework for Medical AI' (2023) 30(4) European Journal of Health Law 406, doi:10.1163/15718093-bja10104.

48 *Gaughran v The United Kingdom* App no 45245/15 (ECtHR, 13 February 2020) paras 19–21 <https://hudoc.echr.coe.int/eng?i=001-200817> accessed 24 July 2024.

49 ***Wilhelmus Paulus Willems v the Netherlands*** App no 57294/16 (ECtHR, 9 November 2021) paras 55–57 <https://hudoc.echr.coe.int/eng?i=001-214169> accessed 24 July 2024.

50 *Tuleya v Poland* App nos 21181/19, 51751/20 (ECtHR, 6 July 2023) paras 366, 456 <https://hudoc.echr.coe.int/eng?i=001-225672> accessed 24 July 2024.

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According to the third principle of the Artificial Intelligence Act, data protection, confidentiality and governance are established as systematised principles within the new legal framework.[51] This principle addresses the condition of the human being while also considering the broader social context. It encompasses a constative-causal perspective that outlines the conditions for the development and use of AI systems in compliance with norms and rules designed to maintain confidentiality, ensure proper data processing, and protect data quality and integrity throughout its handling.[52]

The fourth principle of transparency, as outlined in Recital 9, emphasises distinct concepts and the the complex legal operationalisation of technical documentation and requirements related to the status of AI systems records. Deriving from the initial provisions of Recital 9, other mentions refer strictly to high-risks AI systems for which the EU Artificial Intelligence Act requests transparency and clear instructions regarding the system's capacities and capabilities, as well as precise mentions regarding its limitations and other categories of potentially associated risks.[53]

In Article 13, the creation of terminology to approach ethical principles is based on rigour, with a specific inventory of terms and an empirical approach centred on transparency, access, and the provision of information. From a second perspective, the mechanism and process of designing, using, and deploying AI systems are designed to ensure a transparent operation and a transparent analysis and evaluation of the results of high-risk AI systems. A third consideration regarding the transparency of high-risks AI systems engages compliance with the obligations set forth by the EU Artificial Intelligence Act for providers and deployers.[54] On the other hand, we must note a degree of generality for the mentions in Section 3, only the minimum mentions for the instructions for use being specified, namely the criteria and status of operation and use, identification and contact data of the high risks AI systems supplier, characteristics and capabilities of high risks AI systems. Article 13 also comes with a limiting-descriptive exploration of the performance limitations of high risks AI systems considering the forms of use, the role of internal factors or external factors, the dynamic realities of activities and the evolutionary dynamics of the level of accuracy, the security of high risks AI systems, the robustness and the purpose of using the high risks AI systems, any known or potentially anticipated uses of the high risks AI systems.

The principle of diversity is widely exposed in the EU Artificial Intelligence Act, the initial focus being initially highlighted in Recital 27. Starting from the principle of diversity, we distinguish in the same recital the associated principle of non-discrimination, but also of fairness, which operates as a complex of associations and criteria perceived at the level of development and use of an AI system. Thus, Recital 27 describes and characterises the

51 Artificial Intelligence Act (n 3) recital 27.
52 ibid, recital 27.
53 ibid, recitals 17, 59, 60, 68, 72, 74, 94.
54 ibid, s 3, arts 16–25, 27.

development and use of AI systems, operationalises the role of various factors and promotes the principle in the sphere of gender equality and equal access by excluding any discriminatory consequences contrary to the previously adopted EU legislation.

The last principle focuses on a structural-functional approach based on social well-being and environmental sustainability as elements associated with the development and use of AI systems. In this framework, this principle allows clear observation of the principled and functional variety of EU legislation oriented towards social life, protection of rights, health or environment.[55]

4.4. Legal Areas and High-Risk AI Systems

The Artificial Intelligence Act establishes a stricter regulation system in critical areas for the life of the citizen, as well as that of the community. Thus, the new provisions regulate defining sectors such as health, transport and public safety, areas for which six fundamental compliance requirements are provided for: (*1*) the management, assessment and risk management framework of high-risk AI systems; (*2*) data management and governance; (*3*) regulations and provisions regarding the documentation and the technical framework; (*4*) system functionality and compliance with EU requirements; (*5*) compliance and transparency regarding the operating framework, capacity and functionality of the AI system; (*6*) a set of criteria and obligations necessary to be admitted to the EU market. These criteria are centred on the management associated with the risk, being prohibited systems that employ cognitive-behavioural manipulation.[56] The same set of restrictions also includes AI systems that employ social scores that generate discriminatory effects of excluding certain social groups, but also unfavourable consequences related to personal characteristics or some social groups.[57]

4.5. Medical Devices Regulation and Artificial Intelligence Act: Legal and Policy Considerations

In this innovative context of harmonisation of rules in the AI sector at the European level, the legislator followed a framework of rules intended to encourage the functioning of internal markets, the common and uniform legal and regulatory spectrum and the principles and values of the EU respecting the rights and freedoms of the individual.[58] The new legislation facilitates and guarantees the protection of the rights and data of natural persons and the protection of health by requiring a common and functional legal framework for the use of AI systems,[59] as well as compliance with the previously adopted legislation of

55 ***Wilhelmus Paulus Willems v the Netherlands*** (n 49) paras 58, 59.

56 Ranjbar and others (n 5).

57 Artificial Intelligence Act (n 3) recital 31.

58 *Gaughran v The United Kingdom* (n 48) paras 22, 23.

59 Artificial Intelligence Act (n 3) recital 1.

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the European Union regarding the Medical Devices Regulation (2017)[60] and In Vitro Diagnostic Medical Devices Regulation (2017).[61] In this context, it is important to mention that the Artificial Intelligence Act does not limit the regulatory framework only to the medical devices sector but regulates a wider framework referring to any product or result that meets the definition of AI systems.

Concerning the AI systems classified and categorised by the Medical Devices Regulation and the In Vitro Diagnostic Medical Devices Regulation, the legal provisions of the new regulation refer to the conformity assessment ordered by a third party. The AI systems approach from the regulatory scope of the two previous provisions indicates that the EU Artificial Intelligence Act envisages a double regulation opposing the AI system, namely compliance with the requirements of the previous legislation as well as the new legal requirements provided by the Artificial Intelligence Act. The Artificial Intelligence Act's approach to previous European legislation (the Medical Devices Regulation and the In Vitro Diagnostic Medical Devices Regulation) brings necessary clarifications regarding compliance with the previously adopted regulations. A close examination of Recital 64 illustrates the linkage between the newly adopted legislation and the previous regulations of the Medical Devices Regulation and the In Vitro Diagnostic Medical Devices Regulation, observing the clear formulation of the references to medical devices, the health risks of these products and the typology of security requirements.

(a) Risk Classes and Assessment

The Medical Devices Regulation primarily governs operational and technical standards in the scope of risk assessments related to physical safety rather than addressing potential malfunctions in the operation and use of medical devices. In contrast, the Artificial Intelligence Act regulates and guarantees better protection of patients' rights in a special section in Annex III of measures specific to the health sector. However, it does not include details about specific measures. Moreover, Annex III does not have a particular list of measures for the healthcare sector. Thus, the Medical Devices Regulation classifies medical devices into four class categories based on varying levels of risk and intended use: Class I – low-risk devices; Class IIa and Class IIb – medium-risk devices; and Class III - all high-risk devices. Similarly, the Artificial Intelligence Act regulates four categories of risks: unacceptable risk,[62] high risk,[63] limited risk,[64] and minimal or no risk.[65]

60 Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on Medical Devices, Amending Directive 2001/83/EC, Regulation (EC) no 178/2002 and Regulation (EC) no 1223/2009 and Repealing Council Directives 90/385/EEC and 93/42/EEC (Text with EEA relevance) [2017] OJ L 117/1 <http://data.europa.eu/eli/reg/2017/745/oj> accessed 10 July 2024.

61 Regulation (EU) 2017/746 of the European Parliament and of the Council of 5 April 2017 on in Vitro Diagnostic Medical Devices and Repealing Directive 98/79/EC and Commission Decision 2010/227/EU [2017] OJ L 117/176 <http://data.europa.eu/eli/reg/2017/746/oj> accessed 10 July 2024.

62 Artificial Intelligence Act (n 3) recitals 26, 31, 46, 179.

63 ibid, recitals 48, 52, 58; art 59(c).

64 ibid, recital 53.

65 ibid, art 36.

(b) Criteria for Classifying Medical Devices

The first observation highlights that under the Medical Devices Regulation, many AI applications in the healthcare sphere are not legally regulated. This regulatory gap in the Artificial Intelligence Act particularly concerns high-risk AI systems. In this context, the regulatory deficit is compensated by the legislative framework of the Medical Devices Regulation that classifies medical devices according to the following criteria: (*a*) Chapter I, Annex VIII of the Medical Devices Regulation - duration of use which categorises three levels: transitory (with use for less than 60 minutes); in the short term - use between 60 hands and 30 days and in the long term - for extended use that exceeds 30 days, as well as invasive and active devices; (*b*) Chapter II, Annex VIII of the Medical Devices Regulation - implementation rules; (*c*) Chapter III – classification rules (non-invasive devices, invasive devices and active devices).[66] The Artificial Intelligence Act specifies in Article 6 a double condition for classifying and evaluating high-risk medical devices. The first condition aims to be used as a safe component or is already a product. In this case, it is necessary to operationalise the conformity assessment procedure of a third party.

A recent analysis of the scientific literature in the field reveals explorations of the regulatory framework of medical AI, as well as data confidentiality, health data governance,[67] risk management and AI sector, ethical aspects and risk assessment,[68] regulation of medical devices, healthcare generative AI and AI cycle.[69]

(c) Conformity Assessment and Certification Requirements

In accordance with the final adopted version, the Artificial Intelligence Act states that medical devices regulated by the Medical Devices Regulation are high-risk medical devices. Considering this regulation, the Artificial Intelligence Act has two preconditions in the evaluation procedure for high-risk medical devices. The first condition refers to the use and use as a safety component of a product, or even a product; according to the new legal provisions of the Artificial Intelligence Act, a third-party evaluation is needed within the Medical Devices Regulation. Within the regulations provided by the Medical Devices Regulation, an important regulatory differentiation is provided for medium and high-risk devices, as the Medical Devices Regulation requests a conformity assessment from the manufacturers. Conformity assessment is an audit procedure that requires an audit of a

66 Regulation (EU) 2017/745 (n 60) annex VIII.

67 Hannah van Kolfschooten, 'The AI Cycle of Health Inequity and Digital Ageism: Mitigating Biases Through the EU Regulatory Framework on Medical Devices' (2023) 10(2) Journal of Law and the Biosciences lsad031, doi:10.1093/jlb/lsad031.

68 Johann Laux, Sandra Wachter and Brent Mittelstadt, 'Trustworthy Artificial Intelligence and the European Union AI Act: On the Conflation of Trustworthiness and Acceptability of Risk' (2024) 18(1) Regulation & Governance 3, doi:10.1111/rego.12512.

69 Sandeep Reddy, 'Generative AI in Healthcare: An Implementation Science Informed Translational Path on Application, Integration and Governance' (2024) 19(1) Implementation Science 27, doi:10.1186/s13012-024-01357-9.

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notified institution or body. Thus, Chapter 4, Article 30 and subsequent articles perform the conformity assessment procedure with the express mention that only conformity assessment bodies that meet the legality criteria provided for in Article 31 can be notified.

The Artificial Intelligence Act also provides for conformity assessment, which includes three procedural stages: examination, training, testing and validation mechanisms and procedures.[70] The most relevant regulatory differentiation concerns the periods in which conformity assessment is carried out. In the new regulatory context provided by the Artificial Intelligence Act, all the periods before, during and after the development of a high-risk AI system are available.

(d) Human Supervision

Under the Medical Devices Regulation, human oversight is not a legal requirement, and legal mentions regarding data quality control are limited to the post-market clinical phase. Unlike the Medical Devices Regulation, the EU Artificial Intelligence Act explicitly mandates human oversight within the risk management procedure, as outlined in Article 14. The Artificial Intelligence Act further operationalises data quality management by acknowledging three principles of assurance: data relevance, data representativeness, lack of errors and completeness. In such a regulation, we observe EU legal provisions becoming the referential subject for data management and governance.[71]

A similar approach to fundamental rights is reflected in the decisions of the Inter-American Court of Human Rights (IACtHR), which emphasises the protection of rights such as freedom of expression[72], the right to informed decision-making,[73] access to information and data,[74] freedom of speech, and freedom of information and communication.[75]

4.6. Research and Development (R&D) in the Artificial Intelligence Act

Regarding the ethical principles and standards, the Artificial Intelligence Act has seven particular references to the ethical framework of AI systems in Recital 27 and Recital 7 (ethical guidelines), Recital 8 (ethical AI in the regulations of the European Council), Article 95 and Recital 165 (the need to implement a framework just, correct and transparent in the field of AI systems), Recital 25 (provisions regarding ethical, legal and professional

70 Artificial Intelligence Act (n 3) recitals 67, 68, 71, art 10.

71 *Tuleya v Poland* (n 50) para 457.

72 *Ivcher-Bronstein v* Peru Ser C no 75 (IACtHR, 14 March 2001) paras 146–148 <https://www.corteidh.or.cr/tablas/fichas/ivcherbronstein.pdf>accessed 22 June 2024.

73 *Ricardo Canese v Paraguay* Ser C no 111 (IACtHR, 31 August 2004) paras 95–98 <https://www.corteidh.or.cr/tablas/fichas/ricardocanese.pdf> accessed 22 June 2024.

74 *Claude-Reyes et al v Chile* Ser C no 151 (IACtHR, 19 September 2006) paras 77, 86–92 <https://www.corteidh.or.cr/tablas/fichas/claudereyes.pdf> accessed 22 June 2024.

75 *Rios et al v Venezuela* Ser C no 194 (IACtHR, 28 January 2009) paras 105–108 <https://www.corteidh.or.cr/tablas/fichas/rios.pdf> accessed 22 June 2024.

standards and regulations in the field of scientific research), and Article 60 (ethical guidelines and the testing of high risks AI systems).

The Artificial Intelligence Act regulates, with exception, the AI systems whose exclusive purpose focuses on scientific research and development, as specified in Article 2(6)(8). Under a strict interpretation of Article 2, AI systems or AI models, including their results, are exempt from the regulations if their primary purpose is scientific research and development.[76]

4.7. Latest Legal Reform and Regulations of the AI sector: Case-Law in Ukraine (2024) and Republic of Moldova (2024)

The legislative reform of the AI sector was centred both at the level of the EU internal market space and at the level of the Candidate Countries, namely the Republic of Moldova and Ukraine. In this sense, two documents with major legal relevance were recently adopted by the Government of the Republic of Moldova[77] and the Government of Ukraine[78] to establish a framework for the compatibility of national legislation with legal regulation at the EU level.

4.7.1. Legal Provisions of Non-Original Objects and Sui Generis Right in Law of Ukraine "On Copyright and Related Rights" (2022)

In this context, it is important to note that on 1 December 2022, Ukraine adopted the Law of Ukraine "On Copyright and Related Rights," which addresses the legal regulation of non-original objects, including those generated by AI.[79] The innovative Ukrainian legal framework first adopted two years ago engages two important perspectives related to the legal regulation of non-original objects generated by computer programs, which includes objects or products produced by AI.

The 2022 Ukrainian legal framework also introduces in its first paragraph the regulation of "sui generis right", referring to "non-original objects generated by a computer program"[80] and stating the "non-direct participation of a person in the creation of the object".[81] The new legal context further addresses the holders (persons) of this sui generis right, the scope and

76 ibid, art 2 para 6.

77 Government of Republic of Moldova, *White Book on Data Governance and Artificial Intelligence* (Ministry of Economic Development and Digitalization of Republic of Moldova 2024) <https://particip.gov.md/ro/download_attachment/22059> accessed 28 July 2024.

78 Government of Ukraine, *White Paper on Artificial Intelligence Regulation in Ukraine: Vision of the Ministry of Digital Transformation of Ukraine: Version for Consultation* (Ministry of Digital Transformation of Ukraine 2024) <https://www.kmu.gov.ua/en/news/rehuliuvannia-shtuchnoho-intelektu-v-ukraini-mintsyfry-prezentuie-bilu-knyhu> accessed 28 July 2024.

79 Law of Ukraine no 2811-IX of 1 December 2022 "On Copyright and Related Rights" [2023] Official Gazette of Ukraine 3/196 <https://zakon.rada.gov.ua/laws/show/2811-20#Text> accessed 28 July 2024.

80 ibid, art 33.

81 ibid, art 33 para 1.

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aims of their property rights, and the validity of these rights, which is capped at 25 years from the year following the creation of the non-original object.[82]

In this context, two legal provisions address (1) the moment when the sui generis right is generated and operates[83] and (2) the level of effectiveness of the special type of sui generis right.[84] The Ukrainian legal framework is harmonised with the EU's main legal provisions adopted in the intellectual property field, referring to both the "exercise of intellectual property rights"[85] and the "agreement on the transfer of intellectual property rights."[86]

4.7.2. Scope of Application and Regulation of AI in the Republic of Moldova (2024)

The document adopted by the Government of the Republic of Moldova in 2024 centres on two important dimensions of regulation of the AI sector: engaging a performant digital sector and management of data governance by focusing on a policy framework to promote and guarantee human rights and international cooperation.[87]

Considering the reform and regulatory framework of the AI sector at international and European levels, the document recently launched by the Government of Moldova in 2024 frames a functional and structural point of view by presenting a set of twelve recommendations regarding the implementation of a uniform legislative framework. The first three recommendations include protecting personal data and guaranteeing human rights and decision-making transparency in the artificial intelligence sector.[88] The following four recommendations provide a framework for legal reforms and sectoral policies to facilitate access to data and technological development. The document focuses on the institutional role of the government authority, as well as the beneficiaries from the public and private sectors.[89]

A defining element of the document adopted by the Government of the Republic of Moldova focuses on the need to identify and implement national standards to ensure and guarantee data interoperability.[90] A concrete reform initiative in this regard is MCloud, aimed to administer AI models at the national level and align the country's legislation with international standards in AI.

The last five recommendations employ a triple dimension of legal regulation of the AI field: (1) the need to create a meta-data catalogue including data sets from the public and private

82 ibid, art 33 para 6.
83 ibid, art 33 para 5.
84 ibid, art 33 para 6.
85 ibid, art 453.
86 ibid, art 1113.
87 Government of the Republic of Moldova (n 77) 6-9.
88 ibid.
89 ibid.
90 ibid.

sectors to facilitate the access of companies as well as the educational and research environment; (2) implementing a mechanism for monitoring and evaluating AI projects at the national level; (3) promoting and respecting a set of ethical principles in the process of creating, developing and implementing AI projects focusing on human rights, democratic norms, the non-discriminatory approach.[91]

4.7.3. Scope of Application and Regulation of AI in Ukraine (2024)

In Ukraine this year, an important regulation in a consultative version was adopted at the governmental level.[92] The new document in the consultative version integrates a trivalent framework for the assumption of goals and legislative implementation as follows: (1) promoting a competitive space in the business sector; (2) promoting, guaranteeing and protecting human rights; (3) accessing European integration and adopting of a national legislative framework compatible and harmonised with European and international norms and values.[93]

The document sets four dimensions of reform of the Ukrainian institutional system focusing on the collective functionality at the organisational level by introducing and implementing AI as follows: (1) attracting investments through the use of mechanisms, products and services based on AI; (2) new opportunities for the labour market using AI systems; (3) improving organisational management in the public and private sector; (4) competitive, structural and professional advantages for the domestic market sector and the educational space.[94]

Another relevant aspect of the document focuses on the stages of development and implementation of the future regulation regarding AI in Ukraine, underpinning both the objective of international cooperation and compliance and compatibility with the European legislative framework. The document reflects the role of the regulatory sandboxes, pointing to the relevance of a national legal advisory platform aimed at monitoring the respect and protection of human rights and the impact of engaging and implementing AI products and services.[95]

In this context, the document developed by the Ukrainian authorities this year conceptualises and operationalises a broader framework to manage functional and institutional needs. Also, the document highlights the role of financial resources and the human factor, as well as the importance of social relations and public relations in future AI regulation. In this context, the authorities reflect several sectoral recommendations regarding the system labelling concerning AI systems engaging data

91 ibid 11-2.
92 Government of Ukraine (n 78).
93 ibid 23-5.
94 ibid 4-8.
95 ibid 19-20.

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governance, algorithms, personal data and data privacy, organisational decisions, evaluation and monitoring.[96]

5 CONCLUSIONS

The current research explored the new regulatory framework proposed by the European Commission, focusing on its ethical and professional implications for the healthcare sector. The analysis of this European-level legal framework reveals that it is built on standardised variables (e.g. conformity assessment) while also emphasising the importance of harmonising with previous legislation, including the Medical Devices Regulation and the In-Vitro Diagnostic Regulation. Additionally, the study considered the recent legal developments, such as the generative AI framework, the establishment of the European Artificial Intelligence Office (EU AIO), and the Council Regulation (EU) 2024/1732.

The paper discussed the correlation of the newly adopted EU Artificial Intelligence Act to previous EU regulations on medical devices and personal data protection, as well as with the European Court of Human Rights jurisprudence. This alignment raises complex issues regarding implementing the Artificial Intelligence Act within the national justice systems, referring to judicial reform and access to justice considerations.

The paper was methodologically centred on the hypothesis that questions whether the legal framework embedded in the European Union's artificial intelligence regulations is consistent with the previously adopted legislation, specifically the Medical Devices Regulation (2017) and the In-Vitro Diagnostic Regulation (2017). The analysis aimed to determine whether the EU's Artificial Intelligence Act enhances the protection of human rights and safety within the healthcare system in general and, specifically, whether it strengthens the safeguarding of patients' rights. Additionally, the research explored whether the legislator intended to align the Artificial Intelligence Act with the aforementioned regulations.

Consequently, we can appreciate that although the Artificial Intelligence Act engages, protects and guarantees the exercise and security of fundamental human rights, the devices mentioned in Annex III do not include precise references or regulations for all areas of public health. In this context, criteria and principles such as transparency and data accuracy are necessary for medical devices based on AI due to their direct interaction with individuals. Another criterion that validates the regulation and the improved protection offered by the EU Artificial Intelligence Act is the responsibility of various entities and institutions at the national or European level, such as the EU and Member States (Recital 24 and Article 100), providers of AI models for general use (Recital 101), authorities (Article 59), importers (Article 23). Respect for public order and the role of national

96 ibid 21-2.

authorities represent two other important criteria revealed and focused on by the Artificial Intelligence Act to protect personal data.

Prior to the adoption of this regulation, the Ukrainian legislator adopted the "Law on Ukraine on Copyright and Related Rights" on 1 December 2024. These legislative reforms have enhanced the possibility of solving technology litigation, including disputes related to AI use. Thus, the analysis envisaged the interpretation of EU regulations managing innovative Artificial Intelligence systems for medical data, research and development, and the medical technology industry. Thus, the Medical Devices Regulation and the In-Vitro Diagnostic Regulation will continue to apply once the EU Artificial Intelligence Act is adopted. Our research validates the legislative progress proposed by the new EU Artificial Intelligence Act regulations, illustrating the need for the horizontal regulation assumed by the new legal framework to be accompanied by a subsequent sectoral approach and regulation. Moreover, we can conclude that medical devices and technology need a new management and quality control system. This system, already regulated by the previous legal order provided by the Medical Devices Regulation, must complement the rules and provisions related to the use of AI within the application of the Artificial Intelligence Act, especially in the management and governance of the data used in the previous stage, but also to introduce it to the market.

In conclusion, while the Medical Devices Regulation primarily addresses risks associated with safety, the Artificial Intelligence Act provides a more complex and extensive level of safeguarding human rights and safety. The paper explored the latest legal reforms and regulations of the AI sector in Eastern European countries, with a special focus on Ukraine (2024) and the Republic of Moldova (2024). An innovative aspect of this research is its interpretation of the legal perspective brought by the documents released by the two governments of these candidate countries.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОВИЙ АНАЛІЗ ЗАКОНУ ЄС ПРО ШТУЧНИЙ ІНТЕЛЕКТ (2024): ПЕРЕВАГИ В СФЕРІ УПРАВЛІННЯ ПЕРСОНАЛЬНИМИ ДАНИМИ ТА ПОЛІТИКИ ОХОРОНИ ЗДОРОВ'Я

Анка Пармена Олімід*, Кетеліна Маріа Джеорджеску та Даніель Алін Олімід

АНОТАЦІЯ

Вступ. *Це дослідження зіставляє сучасні етичні, функціональні та правові оцінки, пов'язані з управлінням і регулюванням штучного інтелекту (ШІ) відповідно до законодавства Європейського Союзу (ЄС), зокрема з впливом на медичні стандарти та сектор медичних даних, як це передбачено Законом про штучний інтелект в межах Регламенту, прийнятого Європейською Радою в травні 2024 року. Початкову пропозицію щодо управління та керування сектором штучного інтелекту було подано в квітні 2021 року. Через три роки, 13 березня 2024 року, Європейський парламент ухвалив Закон Європейського Союзу про штучний інтелект (EU AIA). Згодом, 21 травня 2024 року, Рада прийняла інноваційну законодавчу базу, яка гармонізує стандарти і правила регулювання ШІ. Вона має набути чинності в травні 2026 року, головною метою якої є стимулювання та мотивація чесного, безпечного, законного єдиного ринку, який поважає принципи етики та фундаментальні права людини.*

Методи. *Здійснений правовий аналіз зосереджується на новому інституційному управлінні Європейського Союзу, що передбачає багатоступеневий підхід до керування даними про стан здоров'я, етичний штучний інтелект, генеративний штучний інтелект, класифікацію типів штучного інтелекту з урахуванням ступеня ризику (наприклад, системи штучного інтелекту з обмеженим ризиком і системи з високим ризиком) і медичне обладнання. У ньому окреслено законодавчу базу щодо регулювання та управління штучним інтелектом у ЄС, зокрема зосереджено увагу на дотриманні раніше прийнятих нормативно-правових актів у Регламенті MDR (The Medical Devices Regulation) (2017) та Регламенті IVDR (The In Vitro Diagnostic Medical Devices Regulation) (2017). У статті також досліджується застосування нещодавно ухваленого Закону ЄС про штучний інтелект щодо національних систем правосуддя, попередні нормативні акти ЄС щодо медичних пристроїв і регулювання захисту персональних даних, а також здійснюється їх зіставлення з практикою Європейського суду з прав людини. Це відкриває складні дискусії щодо судової реформи та доступу до правосуддя. Відповідно до мети дослідження, правовий аналіз містить інноваційну перспективу, що ґрунтується на інтегративному обговоренні останніх правових реформ і нормативно-правових актів у сфері штучного інтелекту в Східній Європі, які були впроваджені у 2024 році, з особливим акцентом на останні події в країнах-кандидатах на вступ до ЄС, а саме в Україні та Республіці Молдова.*

Результати та висновки. *Ця стаття сприяє вивченню реальних переваг управління інноваційними системами ШІ для медичних даних, досліджень і розробок, а також у галузі медичних технологій.*

Ключові слова: *штучний інтелект, ШІ, етичний ШІ, законодавство ЄС, генеративний ШІ, медичні дані.*

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Research Article

HOW NOT TO DO EUROPEAN INTEGRATIONS: BOSNIA AND HERZEGOVINA AND LEGAL CHALLENGES IN ACCESSION PROCESS TO EUROPEAN UNION

Harun Halilovic

ABSTRACT

Background: *Bosnia and Herzegovina, with its complex constitutional and legal system, is facing many difficulties in its progress toward European Union membership. These challenges have been worsened by political instability, exacerbated by geopolitical shifts in Europe following Russian aggression on Ukraine. Legal complexities in the constitutional order of Bosnia and Herzegovina are often used to halt the country's progress and divert it from its European trajectory. This article analyses the specific instances of very unfavourable legal solutions that are hindering the EU accession process, as well as the recommendations put forth by the EU Commission aimed at removing these legal obstacles. There is an urgent need for reform of constitutional and legal rules to enable the country to effectively continue its EU accession path. The importance of the EU membership perspective for Bosnia and Herzegovina extends beyond simply joining a desirable club of prosperous countries; the reforms required during the EU accession process are needed to strengthen the efficiency of state institutions and secure lasting peace in the country and region. As such, the urgency and potential impact of these proposed legislative changes cannot be overstated.*

Methods: *The research primarily employs a combination of analytical, normative, and comparative methods to examine the legal system and chronology of the integration process. The legal historical method is also used where appropriate. The research focuses on the content of constitutional norms, relevant legislative acts in Bosnia and Herzegovina, and legislative acts of the European Union and other countries. These legislative acts are compared with EU recommendations and legislation from other EU member states to identify the discrepancies. The article provides an overview of the legal framework governing EU integrations in Bosnia and Herzegovina, including norms of international law, constitutional law, national legislation, and EU law that are negatively impacting the EU accession process, and offers certain recommendations for their improvement.*

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Results and conclusions: *The research has identified certain norms of constitutional and legislative origin in the legal system of Bosnia and Herzegovina that are harming the country's ability to effectively engage in the EU accession process. Through a normative approach, the article gives recommendations for their improvement, which are in line with the standards set by the institutions of the EU. Amending these problematic legal frameworks would remove their use as political tools aimed at halting the country's progress in the EU integrations.*

1 INTRODUCTION

Bosnia and Herzegovina (hereafter: BiH) is showing a high degree of difficulty moving forward on the integration path to become a member of the European Union (hereafter: EU). The reasons for that can be identified as legal and political. The constitutional setup of BiH can be described as probably one of the most complex in the world.

In the aftermath of the brutal war of 1992-1995, the Dayton Peace Agreement (hereafter: DPA) established a much-needed peace but resulted in a fragile and inefficient state. The DPA foresees the continuity of the state of Bosnia and Herzegovina as a sovereign and independent country and ensures its territorial integrity. On the other hand, the country is internally divided between the "entities" of the Federation of BiH, the Republic of Srpska, with the later addition of a District Brčko as a separate administrative unit. Furthermore, the entity of the Federation of BiH is divided into ten cantons.

At the state level, powers are narrowly defined, with most competencies given to the entities. With this complex territorial division and fragmented division of competencies, the decision-making process in state institutions, such as the Presidency, Parliament, and the Government, is ripe with possibilities of use of veto powers in the form of specific ethnic quotas, the necessary number of votes from every ethnic group and every entity.[1]

In addition to the complex constitutional setup, the DPA foresees a specific role of High Representative, tasked with the interpretation and application of the peace agreement. This position is granted sweeping powers – known as the "Bonn powers" – allowing for legislative intervention and removal of officials from office.[2]

The primary ethnic groups in BiH, referred to as the "constituent peoples" (i.e. Bosniaks, Serbs, and Croats), are awarded a set of group rights in the form of necessary quotas for state positions and during the decision-making process, or process of adoption of laws, exemplified by the existence of "House of Peoples" in the state parliament.[3] However, these special rights have been deemed by the European Court of Human Rights

1 Edin Šarčević, *Dejtonski Ustav: Karakteristike i Karakteristični Problemi* (Konrad Adenauer Stiftung 2009) 200.

2 David Chandler, *Bosnia: Faking Democracy after Dayton* (2nd edn, Pluto Press 2000) 125.

3 Lada Sadiković, 'Ustavna Diskriminacija Građana' (2015) 2 Pregled 1.

(hereafter: ECtHR) in its landmark *Sejdic-Finci* case, as well as several other cases, as discriminatory against the "others" – minorities or persons not declaring as members of one of the constituent peoples.[4]

The ECtHR itself sees the current constitutional setup of BiH as one created in the necessity to stop the brutal war but urges the country to adopt necessary constitutional reforms. As a result, these constitutional and legal complexities are often rendering the reforms very difficult, and there is an urgent need for a move from the "Dayton era" towards the "Brussels era" and the adoption of changes needed in the EU integration process.[5]

The importance of EU integration and the BiH's membership perspective cannot be understated. For BiH, joining a club of developed countries is not just a question of joining but also implementing crucial reforms needed to create a democratic society and efficient state institutions and preserve peace and stability within the country and region of the Western Balkans.

The changed geo-political landscape in Europe, following the aggression of the Russian Federation on Ukraine, has had profound repercussions for BiH. Legislative complexities are additionally aggravated by the political difficulties, primarily instigated by the leaders of the entity of the Republic of Srpska, who have a pro-Russian and separatist agenda. Their actions are often intended to slow or even stop the progress of the country on the path towards the EU and NATO membership.[6]

That is not to say that other political leaders are not showing negative tendencies and lack enthusiasm towards the reforms needed for EU accession, but the activities of the leaders of the entity of the Republic of Srpska are carrying additional security and geopolitical overtones. The legal deficiencies are used as a tool to achieve those geopolitical goals. Hence, the removal of legal deficiencies would prevent the possibility of them being misused for political purposes, especially when instigated by external actors.[7]

The current status of the BiH integration process to the EU is at a perilous crossroads. The EU has granted the candidate status to BiH; however, there are no signals regarding the opening of the first chapters of the negotiation process. On the other hand, the retrograde

4 Dženeta Omerdić and Harun Halilović, 'Discrimination Based on Place of Residence in Recent Jurisprudence of the European Court of Human Rights with Emphasis on Bosnia and Herzegovina' (2022) 1 IUS Law Journal 60, doi:10.21533/iuslawjournal.v1i1.10.

5 Nicola Sibona, 'Bosnia and Herzegovina from Dayton to the European Union' (2010) 1 International Journal on Rule of Law, Transitional Justice and Human Rights 146.

6 'Bosnian Serb Leader Awards Russian President Putin Medal in Absentia' (*Reuters*, 8 January 2023) <https://www.reuters.com/world/europe/bosnian-serb-leader-awards-russian-president-putin-medal-absentia-2023-01-08/> accessed 15 July 2024; 'High Representative's Address to UN Security Council' (*Office of the High Representative (OHR)*, 15 May 2024) <https://www.ohr.int/high-representatives-address-to-the-united-nations-security-council/> accessed 15 July 2024.

7 In a similar fashion, legal mechanisms are used to block important decisions within the EU itself, as in the case of Hungary's leader Viktor Orban.

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pull of disrupting geopolitical factors is using this "vacuum" to slow down or halt the integration process altogether. As said, the EU integrations and the implementation of EU law and standards, primarily related to the rule of law in BiH, are not only a question of joining the EU but need to be seen in the context of two ongoing processes. The first one is the state-building process that started after the conclusion of the Dayton Peace Agreement, which aimed primarily to halt the bloody conflict of the 1990s and ensure a dysfunctional yet peaceful status quo, thus not leaving many mechanisms that would enable the country to progress in the EU integration path fully. The second process is a regional process of reconciliation and normalisation of relationships between the nations and peoples in the Western Balkans region, with the ultimate goal of making the countries and societies of the Western Balkans ready for EU membership. The harmonisation of national legislations and the implementation of EU standards, especially related to the rule of law and other related principles such as the protection of minority rights and anti-corruption policies, all part of the EU integration process, is, therefore, a quintessential tool not only in terms of potential accession but in terms of state-building and regional cooperation and stabilisation.

The focus of this article is on the legal analysis of the constitutional and legislative solutions in the current legal system of Bosnia and Herzegovina, which are serving as a contributing factor to the difficulties in legal approximation and implementation of standards related to the rule of law and access to justice, as the necessary elements of the not only the EU integration process but a state-building and, in a broader context, process of regional stabilisation.

The article aims to give an overview of legal difficulties and deficiencies in BiH's EU integration process by analysing the relevant legislation and the recommendations provided by the European Commission. When appropriate, it employs methods of legal analysis, content analysis, historical insight, and comparative overview, offering recommendations through a normative approach.

The first section presents an overview of BiH's integration path, followed by an analysis of the country's obligations in the EU integration process, primarily the obligation of adoption and, subsequently, of implementation of EU law (*acquis*) and activities of BiH (or lack thereof) in their fulfilment. The article then examines certain deficiencies in BiH's constitutional and legislative system, such as the System of the European Integration Process (the so-called Coordination Mechanism) and the constitutional division of competencies between different levels of government. These issues are compared with the recommendations and requirements defined by the European Commission and standards applied in some EU countries with federal constitutional systems. Finally, suggestions for improvements are given, followed by concluding remarks.

2 METHODOLOGY

The primary goal of this research is to establish certain legislative challenges present in the legal system of BiH that harm the country's ability to fulfil its obligations in the EU integration process, as well as other obligations related to issues of access to justice. The sources used in the research are primarily related to the relevant legislation in BiH and the case law of national and international courts, as well as academic writings written on the subject. These sources are adequate and necessary in establishing BiH's obligations of BiH, identifying certain solutions in the legal system that have negative effects, and providing recommendations.

The research employs several methods, including content analysis of legal sources, such as relevant legislation and case law. This method is used to ascertain the norms having a negative effect on the country's ability to fulfil the obligation of the EU integration process. The norms are analysed separately as well as in connection with other relevant norms regulating the area in question. Case law analysis includes the analysis of relevant sections of national and international court decisions.

The comparative method is used in conjunction with other methods, such as the normative method, to compare previously identified norms of the legal system of BiH with relevant norms found in other legal systems of European countries, which also have complex constitutional structures with elements of federalism. The comparison aims to establish how certain matters are regulated in other countries, primarily certain Member States of the EU, that, notwithstanding the fact of their federal structure, can successfully fulfil obligations under EU law.

Legal historical analysis and case study describe the trajectory of BiH's EU integration process and the specific issues it has faced along the way. The methods provide a contextual background of EU integration issues in BiH and the Western Balkans region.

The normative method offers certain solutions and changes in BiH's legal system, concluding the legal analysis and comparative method. The changes *de lege ferenda* are provided in the form of proposed constitutional/legislative amendments or legal adaptation of certain solutions found in comparative law and in the form of different approaches in the interpretation and application of current legal solutions. Normative change aims to propose solutions to the obstacles the country faces in the EU integration process, which is one of the primary goals of this research.

3 LITERATURE REVIEW

The existing literature related to the legal system of Bosnia and Herzegovina and its EU integration is primarily written by authors and researchers from Bosnia and Herzegovina who have an immediate interest in the topic. Regarding the constitutional legal system of Bosnia and Herzegovina, Imamović Mustafa and Ibrahimagić Omer provide accounts of the

historical development of the legal and political system in Bosnia and Herzegovina, providing the context and background necessary for understanding the legal setup as a result of negotiated solutions in the DPA.[8]

Kasim Trnka analyses the concept of the "constituent peoples" and its significant position in the constitutional order of BiH.[9] His research and presentation of the decision-making process in the Parliamentary Assembly of BiH is particularly significant, pointing to systemic deficiencies arising from the conception of the Dayton constitutional system of BiH and its implications on the decision-making process.[10] Significant research is carried out by Dzeneta Omerdić, providing important interpretations about the peculiarities of the constitutional system of Bosnia and Herzegovina and its society, and about the (in)compatibility of constitutional solutions with legal standards of EU, and the implementation of reform processes, as well as the problems that complicate them.[11]

Faris Vehabović's work addressed the position of the European Convention on Human Rights and Basic Freedoms (ECHR) in the constitutional and legal system of BiH, identifying the special features of that position, as well as problematic phenomena and incompatibilities of the constitutional and legal arrangements with ECHR legal standards and the principles of rule of law and access to justice.[12] Sofia Sebastian Aparicio conducted an exceptional analysis of activities undertaken in the direction of capacity building and elements of statehood, the so-called "state-building" process, especially in the context of a deeply divided society in Bosnia and Herzegovina.[13] Edin Šarčević provided an analysis of the Dayton constitutional system of BiH, offering a commentary on the issue regarding the compatibility of the Dayton conception with the principles of constitutional and international law and readiness to comply with EU standards.[14]

Christian Steiner and Nedim Ademović presented various aspects of the constitutional system of BiH, analysis of components, characteristics, problems, functional deficiencies, and inconsistencies with human rights and EU standards.[15] Saša Gavrić, Damir Banović and

8 Mustafa Imamović, *Historija države i prava Bosne i Hercegovine* (Magistrat 2003); Omer Ibrahimagic, 'Državnopravni kontinuitet Bosne i Hercegovine i pitanje nacije' (2015) 2 Zbornik radova Pravnog fakulteta u Tuzli 148.

9 Kasim Trnka, *Konstitutivnost Naroda: povodom odluke Ustavnog suda Bosne i Hercegovine o konstitutivnosti Bošnjaka, Hrvata i Srba i na nivou entiteta* (Kongres bošnjačkih intelektualaca 2000).

10 Kasim Trnka i dr, *Proces odlučivanja u Parlamentarnoj skupštini Bosne i Hercegovine: stanje, komparativna rješenja, prijedlozi* (Konrad Adenauer Stiftung 2009).

11 Dzeneta Omerdic, 'Bosna i Hercegovina u procesu ispunjavanja političkih kriterija iz Kopenhagena: napredak ili stagnacija?' (2015) 2 Društveni ogledi 27.

12 Faris Vehabović, *Odnos Ustava Bosne i Hercegovine i Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda* (ACIPS 2006).

13 Sofia Sebastia Aparicio, *State Building in Deeply Divided Societies, Beyond Dayton in Bosnia* (ProQuest Publ 2014).

14 Šarčević (n 1).

15 Nedim Ademović (ed), *Constitution of Bosnia and Herzegovina: Commentary* (Konrad Adenauer Stiftung 2010).

Christina Krause in the collection on the political system of BiH, which offers an account of the implications of the constitutional and legal system of BiH on its political system as well as the necessary changes (and lack thereof), especially in the context of EU integrations.[16] David, Chandler, with a realistic presentation and analysis of the state of democracy in Bosnia and Herzegovina, talks about the phenomenon of "quasi-democracy" and fictitious adherence to international legal standards and reforms in the EU accession process, which takes place with the full awareness of certain international institutions.[17] Francine Friedman analysed Bosnia and Herzegovina as a political entity and the negative implications of the constitutional and legal system as well as the insufficient progress towards overcoming the disparity between international and EU standards, and the political and legal reality of Bosnian society, highlighting the importance of EU related constitutional and legal reform.[18]

The literature related to the context of Bosnia and Herzegovina and EU integrations can provide insight into the shortcomings of the constitutional system of Bosnia and Herzegovina and its inconsistencies with the standards of international law, primarily the standards of ECHR. However, there is a lack of analysis of the influence of the constitutional and legal system of Bosnia and Herzegovina and its ability to fulfil international legal obligations, primarily those resulting from European integration. Insight and clarification of the mutual conditionality of the rule of law with the EU integration process, as well as an analysis of the implications of the adoption and application of the *acquis*, are also lacking.

4 OVERVIEW OF THE EUROPEAN INTEGRATION PATH OF BIH

Like other countries of the Western Balkans, the process of European integration of BiH began at the end of 1996, with the adoption of a new initiative of the EU, which aimed to stabilise, democratise, and start the integration process for the countries of the Western Balkans. Among those countries, BiH had a particularly unfavourable starting position as it was just beginning to recover from a brutal war that lasted from 1992 to 1995, during which many war crimes were committed, including genocide in Srebrenica[19]. During the French presidency of the EU Council in December 1996, the so-called "*Royamont initiative*" to stabilise and build peaceful relations in the region was initiated.[20] As part of the initiative, in 1997, the humanitarian and financial programs "PHARE" and "*Obnova*" were launched, the realisation of which was conditioned by a certain level of respect for human rights and the principles of democracy and the rule of law. In 1998, a consultative BiH-EU Working

16 Damir Banovic i Saša Gavrić (ur), *Država, politika i društvo u Bosni i Hercegovini Analiza postdejtonskog političkog sistema* (Magistrat 2011).

17 Chandler (n 2).

18 Francine Friedman, *Bosnia and Herzegovina: A Polity on the Brink* (Routledge 2004).

19 Further information available: <https://www.irmct.org/specials/srebrenica20/> Accessed 15 July 2024

20 Nataša Beširević i Ivana Cujzek, 'Regionalna politika Europske unije prema Zapadnom Balkanu: dosezi i ograničenja' (2013) 50(1) Politička misao 161.

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Group was established to provide expert assistance in implementing EU standards in the fields of economy, education, judiciary, media, and administration. This can be marked as the first step taken in approximating the legislation of BiH to the acquis and sort of a step towards a "quasi-approximation" to the *acquis*. [21] In the same year, officials of BiH and the EU signed the Declaration on Special Relations between BiH and the EU.

In 1999, the EU launched the Stabilization and Association Process (hereafter: SAP) intended for the countries of the Western Balkans, combining a regional and individual approach. The SAP's medium-term goal is to conclude the Stabilization and Association Agreement (hereafter: SAA), which establishes a formal international legal framework for relations between the countries of the Western Balkans and the EU, particularly regarding EU integration. The SAP has several goals: developing economic and trade relations within the region itself and between the region and the EU as well; providing economic and financial support; increasing support for democratisation, development of civil society, education, and institution building; promoting cooperation in matters of justice and security; advancing political dialogue and, as an important milestone in the process, negotiating and concluding the SAA.

With the initiation of the SAP, the European Council in Fiera determined that all countries participating in the SAP, including BiH, were potential candidates for EU membership. As a first step in concretising the plans, in March 2000, an individual program for BiH called the "Roadmap" was launched. The Roadmap outlined 18 steps required to initiate a feasibility study for the conclusion of the SAA with the EU.[22]

After a more extended period of fulfilling the Roadmap requirements in 2008, the SAA between BiH and the EU (and its Member States) was signed. However, its application was soon suspended due to BiH's failure to fulfil several obligations, particularly those related to the principles of human rights and the rule of law. Central to this was the non-implementation of the judgment of the ECtHR in the notable *Sejdić-Finci* case.[23] Thus, it can be said that the conditionality principle has followed the European integration path of BiH from the very beginning.

While the SAA itself was largely suspended, certain parts, primarily related to customs regulations, were temporarily enforced. Since there was a complete standstill in the execution of the ECtHR judgments after the signing of the SAA – a standstill that continues to this day – the so-called "British-German initiative for BiH" was created in 2014. This initiative called on authorities and elected political leaders and representatives in BiH to accept and commit, in a written statement, to the implementation of institutional reforms

21 Bedrudin Brljavac, 'Europeanisation Process of Bosnia and Herzegovina : Responsibility of the European Union?' (2011) 13(1-2) Balkanologie 4, doi:10.4000/balkanologie.2328.

22 ibid 5.

23 European Parliament resolution of 6 February 2014 on the 2013 progress report on Bosnia and Herzegovina (2013/2884(RSP)) [2017] OJ C 93/122.

at all levels and the development of a comprehensive reform plan, known as the "Reform Agenda," in cooperation with the EU. Based on these activities, the EU Council decided in 2015 that the SAA with BiH could enter into force.[24]

As the next significant step in EU integration, BiH submitted an Application for membership in the EU on 15 February 2016. After a long process of collecting and submitting the answers to the European Commission's questionnaire, on 29 May 2019, the Commission adopted an Opinion on the candidacy of BiH for membership in the EU. The Opinion has a legal basis in Article 49 of the TEU[25] and is significant for the institutions of the EU who take it as a point of reference in the further integration process. Meanwhile, BiH, during the application process, did not carry out any unique diplomatic activities to speed up or facilitate the process of EU integrations.[26]

The content of the Opinion itself is essentially very critical of BiH. BiH may eventually become a member of the EU, but it "*... does not yet sufficiently fulfil the criteria related to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, set by the Copenhagen European Council in 1993.*"[27] And as such, it is unable to fulfil the obligations arising from membership in the EU. Significant reforms are needed to get to the point where the country can implement the EU obligations.

It should be borne in mind that the Commission is also guided by its interests and the interests of the EU because, as the Commission states, there is a fear that BiH, with its current constitutional framework and a complicated decision-making process, which contains many possibilities of use of veto powers by representatives of one of the constituent peoples, would threaten the very functioning of the EU and its decision-making process.[28]

Consequently, the European Commission has determined 14 priorities and recommendations for the authorities in BiH that need to be fulfilled. Recommendation

24 Council of the EU, 'Bosnia and Herzegovina: Conclusion of Stabilisation and Association Agreement' (*Council of the EU, the European Council*, 21 April 2015) <https://www.consilium.europa.eu/en/press/press-releases/2015/04/21/bih-conclusion-stabilisation-association-agreement/> accessed 15 July 2024.

25 Article 49 of the TEU reads: *'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account....'* See, Treaty on European Union (Consolidated version) [2016] OJ C 202/43.

26 Miljenko Musa, 'Uloga kulture kao meke moći: Bosna i Hercegovina na putu prema europskim integracijama' (2020) 2(2) South Eastern European Journal of Communication 83, doi:10.47960/2712-0457.2020.2.2.77.

27 Communication from the Commission to the European Parliament and the Council: Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, COM (2019) 261 final (29 May 2019) 14 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0261> accessed 15 July 2024.

28 ibid 13.

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No. 4 is among the most important, where the Commission considers that BiH "... Bosnia and Herzegovina needs to bring in line its constitutional framework with European standards and ensure the functionality of its institutions to take over EU obligation. While a decentralised state structure is compatible with EU membership, Bosnia and Herzegovina will need to reform its institutions to be able to participate in EU decision-making effectively and to fully implement and enforce the acquis."[29] In order to "ensure legal certainty on the distribution of competences across levels of government" and "…introduce a substitution clause to allow the State upon accession to temporarily exercise competences of other levels of government to prevent and remedy breaches of EU law."[30]

In its Opinion, the Commission requested BiH to amend its constitutional legal framework to "…ensure equality and non-discrimination of citizens, notably by addressing the Sejdić-Finci ECtHR case law" and to "…ensure that all administrative bodies entrusted with implementing the acquis are based only upon professionalism and eliminate veto rights in their decision-making, in compliance with the acquis."[31] Both aforementioned problems can be traced to the constitutional principle of constituent peoples, the implementation of which leads to discriminatory situations towards the citizens of BiH who are designated as members of the constituent peoples or as "others". This framework creates dysfunction in the decision-making process, especially within legislative bodies.

Following the adoption of the Opinion and determination of priorities by the Commission, BiH's political landscape faced new difficulties and blockades, particularly with the rise of secessionist policies from pro-Russian political leaders in the entity of the Republic of Srpska. These developments were fueled by shifting geopolitical relations in Europe, triggered by Russia's aggression against Ukraine. As a result, BiH's European integration process is losing momentum, and its power to stimulate internal social reforms is declining.[32] At the same time, these circumstances were also seen as an opportunity to shift the focus of the integration criteria and to use the momentum following the granting of the candidate status to Ukraine and Moldova.[33]

In the context of the changed geopolitical circumstances in Europe, the EU Council granted candidate status to BiH on 15 December 2022. That decision was primarily made with the interests of the citizens of BiH in mind and not by merit of the results of the government of BiH and its political representatives in fulfilling the defined priorities.[34]

29 ibid 14.
30 ibid 15.
31 ibid 16.
32 Aparicio (n 13) 293.
33 Nathalie Tocci, 'Why Ukraine (and Moldova) Must Become EU Candidates' (2022) 22(15) Istituto Affair International Papers 7.
34 Josep Borrell, 'EU Candidate Status for Bosnia and Herzegovina: A Message to the People and a Tasking for Politicians' (*European Union External Action*, 16 December 2022) <https://www.eeas.europa.eu/eeas/eu-candidate-status-bosnia-and-herzegovina-message-people-and-tasking-politicians_en> accessed 15 July 2024.

5 THE OBLIGATION TO COMPLY WITH THE ACQUIS

The SAA between BiH and the EU (and its member states)[35] represents a legally binding framework for relations between BiH and the EU.[36] As such, it contains many important provisions that have the potential to produce major repercussions within the legal order of BiH. The obligation to harmonise the candidate country's legal system with the *acquis* is one of the fundamental and inevitable obligations that has existed since the first enlargement process. Without it, membership in the EU is practically unthinkable.

Accordingly, this represents one of the basic obligations that BiH has in its European integration process and is defined by the SAA. Under Article 70 of the SAA, BiH undertook an international legal obligation to gradually harmonise its legislation, past and future, with the *acquis*. Namely, Article 70 of the SAA states: "... Bosnia and Herzegovina shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community acquis. Bosnia and Herzegovina shall ensure that existing and future legislation will be properly implemented and enforced… The SAA further states that: "… This approximation shall start on the date of signing of this Agreement and shall gradually extend to all the elements of the Community acquis referred to in this Agreement by the end of the transitional period defined in Article 8 of this Agreement... Approximation shall, at an early stage, focus on fundamental elements of the Internal Market acquis as well as on other trade-related areas. At a further stage, Bosnia and Herzegovina shall focus on the remaining parts of the acquis.."[37]

The SAA also contains obligations related to certain segments, where specific deadlines are provided. Such provisions are contained in Articles 71-77 of the SAA, which refer to the harmonisation of rules related to competition, public enterprises, public procurement, intellectual property rights, standardisation, metrology and accreditation, labour and occupational safety, and consumer protection.

As stated, Article 70 of the SAA represents the central norm that defines the obligation to harmonise national regulations with *the acquis* and prescribes the general obligation of BiH to harmonise its legislation with *the acquis*, while the other articles of Chapter VI of SAA prescribe special obligations that refer to certain segments. Thus, Article 71 of the SAA focuses on prohibited practices and rules of conduct related to competition rules, and Article 72 on special rules related to public companies. Article 73 guarantees intellectual property rights, while Article 74 relates to the special mutual rights of companies concerning public procurement. Article 75 concerns the necessary compliance in standardisation, metrology, and accreditation.

35 The SAA itself was concluded as a 'mixed agreement' in which the EU and its member states participate together.

36 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L 164/2 <http://data.europa.eu/eli/agree_internation/2015/997/oj> accessed 15 July 2024.

37 ibid, art 70.

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These aforementioned articles focus primarily on the mutual rights and obligations of the SAA parties in specific areas while reaffirming BiH's established obligation to harmonise its entire legislation with the provisions *of the acquis*. This is especially emphasised in Articles 76 and 77, which prescribe that BiH will harmonise its legislation and standards in the segments of consumer protection and the field of labour, occupational safety, and equal opportunities.

As a form of realisation of the obligation to harmonise the legislation of BiH with *the acquis*, Article 70 of the SAA foresees the adoption of a National Program to enable the implementation of obligations in a systematic manner. Thus, Article 70 provides: "*Approximation shall be carried out on the basis of a programme to be agreed between the European Commission and Bosnia and Herzegovina..*".[38] The obligation to establish this national program is a fundamental step towards the successful implementation of the *acquis adoption process*, and the same obligation is provided for in all agreements on stabilisation and association of neighbouring states.

The obligation to develop a program for legislative harmonisation was also the basic obligation for other countries that underwent the integration process (e.g. countries of Central and Eastern Europe whose integration was based on the so-called European treaties). The program is adopted by each candidate country separately, which is why it is also called the "national" program for adoption/alignment with *the acquis*. While the program's title can bear a different name, its content must correspond to the requirements and past experiences of integration processes.[39]

A national program for the adoption *of the acquis communautaire* is a comprehensive long-term document that defines elements such as the dynamics of the adoption of *the acquis*, the strategic guidelines, policies, reforms, structures, resources, and deadlines that should be implemented by a country. The national program follows the criteria of Copenhagen and Madrid. It includes political and economic criteria, with a special emphasis on the ability of the country to assume obligations arising from membership in the EU and the ability of the administration to respond to the requirements of the European integration process and the adaptation of national legislation. Further, the national program represents an important source of information for the business and economic sector, which can be used when planning future activities in terms of announcements of anticipated legal changes. From that aspect, the national program represents an important instrument for transparency in the work of the candidate country.

38 ibid.

39 Uroš Ćemalović, 'Framework for the Approximation of National Legal Systems with the EU's Acquis: From a Vague Definition to Jurisprudential Implementation' (2015) 11(1) Croatian Yearbook of European Law and Policy 245, doi:10.3935/cyelp.11.2015.200.

6 HARMONISATION OF NATIONAL LEGISLATION AND RESPECT OF RULE OF LAW PRINCIPLE IN THE MEMBER STATES OF THE EUROPEAN UNION – COMPARATIVE EXPERIENCE

The harmonisation of national legislation and subsequent implementation of the EU *acquis* represents one of the fundamental issues of the existence and functioning of the EU in general. On the other hand, respect for the principle of the rule of law, the implementation of the ECHR standards, and the execution of the judgments of the ECtHR represent some of the fundamental values of the EU, which are defined by its founding acts, i.e. in the Treaty on the European Union (TEU) itself, but also in the General Principles of EU law, as well as in other primary and secondary sources of EU law. The EU institutions have singled out the principle of the rule of law as a fundamental value, a *conditio sine qua non*, both in terms of internal relations and regarding the accession of new members.

When it comes to the application of the *acquis* in the Member states of the EU, the basic legal framework is set by fundamental doctrines, where the role of the EU Court of Justice is extremely important. Several significant judgments, such as the C-26/62 Van Gend en Loos and C-6/64 Costa v ENEL, in which the court developed the central principles of direct application and effect (direct effect) and supremacy (primacy) of EU law, are among the most significant cases.[40] The influence of those judgments, as well as the positions taken in them and subsequent case law, represent the foundations of the legal order of the EU and are of crucial importance. However, debates surrounding these principles are still visible today, as seen in the examples of positions taken in Poland that call into question the principle of supremacy of EU law.[41] Consequently, the EU Commission initiated proceedings against Poland for violating obligations from the TEU, as well as proceedings for violation of the rule of law principles that potentially can result in the denial of money from EU funds.[42] That issue is still unfolding, but it is significant as a signal not only of stagnation in the integration process but also of the appearance of signs of its regression.

In the context of previous episodes of EU enlargements, most candidate countries did not show great difficulties when it came to the adoption of regulations. The only candidate country that did not accept changes to its national legislation and ultimately gave up on EU integration is Iceland. Namely, for Iceland, the prospect of accepting the EU's common

40 Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2003) 17, doi:10.1093/acprof:oso/9780199260997.001.0001.

41 Marta Lasek-Markey, 'Poland's Constitutional Tribunal on the Status of EU law: The Polish Government Got all the Answers it Needed from a Court it Controls' (*European Law Blog*, 21 October 2021) <https://www.europeanlawblog.eu/pub/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/release/1?readingCollection=9160a7ae> accessed 15 July 2024.

42 European Commission, 'European Commission, Measures taken by the Commission against Poland, more information' (*European Commission*, 22 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070> accessed 15 July 2024.

policy on fisheries – an area of significant economic activity for Iceland – was a critical point of contention. The refusal to harmonise regulations in the fisheries policy segment, which is regulated jointly at the level of the EU, was a key factor in Iceland's decision to abandon its candidacy and withdraw from the EU accession process.[43]

Some other countries, however, had difficulties ensuring the effective application of the newly adopted regulations. Following the great Eastern enlargement, the institutions of the EU observed that several newly admitted states had serious systemic deficiencies in terms of the rule of law, minority protection and the fight against corruption. For instance, Romania and Bulgaria are often mentioned in the Commission's reports in the context of serious deficiencies in the fight against corruption.[44] While Hungary,[45] led by political representatives who propagate the ideas of "illiberal democracy," is identified in the Commission's reports as a state with worrying deficiencies in terms of the respect for the principle of rule of law and the rights of minorities.[46]

Experience from previous enlargements shows that some countries have demonstrated regressive trends, prompting the reaction of the EU institutions, who have initiated various procedures and even threatened sanctions.[47]

The core admission criteria for EU membership are designed to ensure that future Member States can effectively participate in the EU's economic, legal, and political life. The premise is that the Member States of the EU themselves meet the same criteria; however, doubts can be expressed as to whether certain members, at this moment, actually meet the criteria required.[48]

The goal of EU integration is to strengthen the rule of law and ensure the adoption of the EU *acquis* while effective mechanisms, such as the aforementioned conditionality mechanisms, remain available to EU institutions. Although these mechanisms do not always produce the desired results during the candidacy phase, they still represent much more effective "tools" than those that the institutions of the EU have at their disposal after the entry of a new Member State in the EU.

43 András Jakab end Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 397, doi:10.1093/acprof:oso/9780198746560.001.0001.

44 Franco Peirone, 'The Rule of Law in the EU: Between Union and Unity' (2019) 15 Croatian Yearbook of European Law & Policy 71.

45 Astrid Lorenz and Lisa H Anders (eds), *Illiberal Trends and Anti-EU Politics in East Central Europe* (Palgrave Studies in European Union Politics, Palgrave Macmillan Cham 2020) 113, doi:10.1007/978-3-030-54674-8.

46 Sophie Hinger and Reinhard Schweitzer (eds), *Politics of (Dis)Integration* (IMISCOE Research Series, Springer Cham 2019) 197, doi:10.1007/978-3-030-25089-8.

47 Jakab and Kochenov (n 42) 75.

48 Ilina Cenevska, 'The Rule of Law as a Pivotal Concept of the EU's Politico-Legal Order' (2020) 11(1) Iustinianus Primus Law Review 3.

7 SYSTEM OF COORDINATION OF THE PROCESS OF EUROPEAN INTEGRATION IN BOSNIA AND HERZEGOVINA (COORDINATION MECHANISM)

Aiming to facilitate the fulfilment of requirements of the EU integration process, the political representatives in BiH drafted and agreed on the creation of the Coordination System of the European Integration Process in BiH, also known as the Coordination Mechanism. However, its functionality, as well as its constitutional validity, is questionable.

Coordination can generally be classified into two types: horizontal coordination, which refers to the harmonisation of activities between authorities at one level of government, and vertical coordination, which involves the coordination of activities between different levels. Coordination can be binding, i.e. when the involved authorities must implement the decisions made, or non-binding, in which case, it is more akin to consultation rather than coordination. In the constitutional order of BiH, an example of binding horizontal coordination is defined in the work of the Council of Ministers of BiH, where institutions at the level of BiH are obliged to implement the decisions of the Council of Ministers of BiH.[49]

Activities related to fulfilling obligations in the EU integration process fall within the competence of different levels of government in BiH (state, entity, and canton level). Consequently, the Coordination Mechanism in BiH was established. It defines the institutional and operational system of coordination between institutions of different levels in BiH during the implementation of activities related to the EU integration process. It defines joint bodies, composition, competencies, and mutual relations.

The Coordination Mechanism was established by the Decision of the Council of Ministers of BiH (hereafter: Decision).[50] This reflects the first weakness of the Mechanism, which lies in its constitutional and legal basis. Namely, a question such as the implementation of European integration obligations is of high priority and constitutional importance. In this case, such an important issue was not legislated by the Constitution, nor by Law, but by a Decision as a by-law.

According to the Decision on the establishment of the Coordination Mechanism itself, coordination is defined as a set of activities carried out to ensure "*the greatest degree of coordination and coherence in the work of institutions at all levels of government in BiH*" related to the fulfilment of obligations from the SAA and "other obligations" in the EU integration process.[51] Immediately in the definition, an acceptance of the existence and

49 Enver Ajanovic, 'Mehanizam koordinacije u upravnim institucijama Bosne i Hercegovine' (2017) 2 Pregled 86.

50 In this case, the BiH Council of Ministers refers to Articles 17 and 23 of the Law on the Council of Ministers, which refer to the types of decisions adopted by the Council 'in the exercise of its rights and duties' and which regulate issues of the Directorate for European Integration.

51 Decision of the Council of Ministers of Bosnia and Herzegovina no 197/16 of 23 August 2016 'On the Coordination System of the European Integration Process in Bosnia and Herzegovina' [2016] Official Gazette of BiH 72/16.

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tolerance of inconsistencies and incoherence in the work of institutions is visible because the goal is not the harmonisation and uniform implementation of activities. The very foundations of the Coordination Mechanism are not defined and set on the values of the EU but on the "*principles of respecting the existing internal legal and political structure and the protection of certain jurisdictions by the Constitution*" and "*ensuring the visibility*" of different levels in fulfilling obligations from the EU integration process within their jurisdiction.[52]

Coordination is divided into vertical (between different levels) and horizontal (within levels of government), with each level of government independently regulating the structure and way of achieving horizontal coordination. This points to a major weakness in the Coordination Mechanism: decisions made within the Coordination Mechanism must be implemented through horizontal coordination at each individual level, but there is no mandatory vertical coordination.

Regarding vertical coordination, the Decision on Coordination Mechanism establishes joint bodies for facilitating cooperation,[53] namely: a) college for European integration, b) ministerial conferences, c) commission for European integration, and d) working groups for European integration.[54]

As the Coordination Mechanism primarily oversees the implementation of the provisions of the SAA, it also defines the participation of representatives of BiH in bodies composed of representatives of the EU and BiH in the form of permanent delegations within the Stabilization and Association Council, Committee and Sub-committee for Stabilization and Association, and other bodies.[55]

The most significant issue with the Coordination Mechanism lies in Article 3 of the decision establishing it, which defines that the method of decision-making in all bodies created within the Coordination Mechanism is consensus.[56] The quorum includes representatives

52 ibid.

53 Using the term 'joint' in the context of state bodies is unconstitutional. This was also confirmed by the judgment of the Constitutional Court BiH from January 20, 2023, which declared the phrase 'joint institution' unconstitutional. See, Case U-23/22 (Constitutional Court of BiH, 20 January 2023) <https://www.ustavnisud.ba/uploads/odluke/_bs/U-23-22-1358652.pdf> accessed 15 July 2024.

54 Decision of the Council of Ministers of Bosnia and Herzegovina no 197/16 (n 50).

55 ibid.

56 Adopting decisions by consensus in the Coordination Mechanism is a particularly difficult task, given the large number of parties involved. Making harmonized decisions in the Coordination Mechanism practically requires the unanimity of a larger number of actors than the constitutional changes themselves. In addition, this solution is even below the standards and framework of the Dayton Peace Agreement and is reminiscent of some solutions from the negotiations that preceded the DPA, such as the Vance-Owen and Owen-Stoltenberg plans, which implied the existence of 'joint' or 'union' bodies that coordinate and make decisions by consensus.

of all levels.[57] This means that when decisions are made in matters under the jurisdiction of the cantons,[58] all ten cantons must consent. In addition, any decision adopted by one of the bodies can be reviewed (and annulled) by a "higher body" within ten days.

In the event that a body does not agree on a point of view, the issue will be referred to a higher level within the Coordination Mechanism, including the College for European Integration, which makes decisions by consensus and is defined as the highest political body in the Coordination Mechanism.

The College for European Integration consists of the chairman of the Council of Ministers, the deputy chairman, the president, and two members of the Government of the Federation of BiH and the Government of the entity of the Republic of Srpska, the mayor of Brčko District, and the presidents of cantonal governments. The function of the chairman of the College is held by the chairman of the Council of Ministers of BiH, and the same can be extended to certain relevant ministers, although they do not have the right to vote. The function of the College's secretariat is performed by the Directorate for European Integration.[59]

8 COORDINATION MECHANISM AND FULFILLMENT OF OBLIGATIONS FROM EUROPEAN INTEGRATION

In its Opinion on the application of BiH for membership in the EU (Opinion), the EU Commission referred to issues related to the Coordination Mechanism on several occasions, especially in the Analytical Report. The Commission refers, in one of the fourteen priority recommendations for BiH, to the inefficiency and unsatisfactory results of the Coordination Mechanism. Analysing the Coordination Mechanism and its complexity, the Commission includes "*…over 1400 civil servants from 14 governments at all levels.*"[60] The Coordination Mechanism consists of 36 working groups covering chapters *of the acquis*. The Commission

57 Article 3, paragraph (2) of the Decision on the Coordination Mechanism reads: *'The quorum for holding meetings and adopting decisions in the bodies referred to in Article 2, paragraph (4) of this decision must be composed of the authorized: a) representative of the Council of Ministers of BiH, b) representative of the Government Republika Srpska, c) a representative of the Government of the Federation of BiH, d) representatives of all 10 cantonal governments, e) a representative of the Government of the Brčko District of BiH, and in accordance with the constitutional competences for the matter considered at the session, that is, which is the subject of the decision.*

58 Due to extensive number of competences of entities and cantons, this turns out to be almost every question.

59 Decision of the Council of Ministers of Bosnia and Herzegovina no 197/16 (n 50).

60 Commission Staff Working Document, Analytical Report Accompanying the document Communication from the Commission to the European Parliament and the Council: Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, SWD(2019) 222 final (29 May 2019) 19 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2019%3A222%3AFIN> accessed 15 July 2024.

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notes that the decisions made within the Coordination Mechanism are not legally binding, and when an agreement is reached through the Coordination Mechanism, it needs to be confirmed and implemented by the authorities of all 14 executive authorities. Analysing the functionality of the Coordination Mechanism, the Commission references its testing in 2017 and 2018 during the process of formulating responses to the Commission's Questionnaire, a necessary step before the creation of an Opinion on BiH's application for EU membership. The Commission states that, despite establishing a Coordination Mechanism, authorities of BiH could not agree on answers to 22 questions.[61]

The Commission's recommendations regarding the Coordination Mechanism referred primarily to a need for clearer distribution of responsibilities between levels and enhanced cooperation of all levels. In its second recommendation, as one of the key priorities that BiH should fulfil in its EU integration path, the Commission states the need to ensure visible results when it comes to the functioning of the Coordination Mechanism, particularly on issues related to EU integration. This entails, first and foremost, the adoption of the National Program for the adoption *of the acquis*.[62]

As noted, the Coordination Mechanism has several shortcomings, the first of which lies in its constitutional foundation. The Mechanism was established in the form of a Decision adopted by the Council of Ministers of BiH. Namely, the role and significance of the Coordination Mechanism is a segment that touches on constitutional issues and refers to the fulfilment of international legal obligations. Accordingly, the issue must be resolved at a higher normative level, i.e. by the Constitution itself or the law at least. Instead, it has been established as a by-law, which undermines its legal basis.

The inadequacy of this normative act and legal basis is especially evident when considering that the BiH Constitution itself allows for coordination to be led by the Presidency. This avenue provides a more suitable constitutional legal basis for initiating coordination processes than the Council of Ministers. Namely, in Article III, Paragraph 4 of the Constitution of BiH, it is stated that " *...4. The Presidency may decide to encourage inter-entity coordination in matters that are not within the jurisdiction of BiH provided for by this Constitution, unless in a specific case one entity opposes it.*"[63]

This provision suggests that the Coordination Mechanism could – and perhaps, should – have been led by the Presidency as a body competent for "*encouraging inter-entity coordination*" on issues that are not within the express competence of the state level. However, the effectiveness of this aforementioned constitutional provision is impaired by the possibility of entity opposition.

61 ibid 19.

62 The opinion of the Commission states: *'Ensure visible results when it comes to the functioning of the coordination mechanism on issues related to the EU at all levels, including the preparation and adoption of the national program for the adoption of the acquis.'*

63 Constitution of Bosnia and Herzegovina no 327/09 of 26 March 2009 <https://www.ustavnisud.ba/en/constitution-of-bosnia-and-hercegovina> accessed 15 July 2024.

If the aforementioned article is taken into account in the context of Article IV, Paragraph 4, Point a), which refers to the scope of work of the Parliamentary Assembly of BiH and states that it is responsible for *"a) Passing laws that are necessary for the implementation of the decisions of the Presidency or for the performance of the functions of the Assembly according to this Constitution."* This implies that there is a constitutional basis for the Parliamentary Assembly to adopt the laws necessary to implement the decisions of the Presidency.

It is also evident from the comparative practice of the Member States of the EU that the aforementioned question of the fulfilment of obligations stemming from the EU integrations (or, later, membership) is resolved by constitutional and legal provisions. Namely, in the example of the Federal Republic of Germany, as an EU member state with a highly developed federal system, a kind of coordination involving extensive consultations is carried out on a constitutional and legal basis, led by the federal level.

In Germany, the questions of mutual relations and consultations in matters of the EU were carried out on the basis of the Law on the Cooperation of the Federal Government and the German Federal Council,[64] as well as Article 23 of the Constitution of the Federal Republic of Germany. This article outlines the obligation of consultations with Länders (federal states) but determines that the Federal Government retains the authority to make decisions. It highlights that these decisions are guided primarily by the need to fulfil the international obligations on behalf of the nation as a whole, stating that ".. *this process shall be consistent with the responsibility of the Federation for the nation as a whole.*" [65]

In addition to the above example, the Kingdom of Belgium, another EU member state with a highly federal constitutional order, offers a similar coordinating body. This body, known as the Concertation Committee, has general competence and coordinates the activities of authorities at both the federal level and the level of federal units. Unlike BiH's system, it not only deals with issues of EU law but functions as a general mechanism of cooperation between representatives of various levels through non-binding vertical coordination, which, has proven effective. It was established by a special law and based on Constitutional provisions.

Since the Coordination Mechanism in BiH was, from the very beginning, established on "*the foundations of the protection of the constitutional distribution of competencies*" and "*visibility*" of different levels and not on the values that imply effective European integration, the solution is inconsistent with the principles of the EU and the process of European integration, which requires efficiency, unambiguity, and uniform performance of EU obligations.

64 Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union of 4 July 2013 ' Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union - EUZBBG' <https://www.gesetze-im-internet.de/englisch_euzbbg/> accessed 15 July 2024.

65 Basic Law for the Federal Republic of Germany of 23 May 1949 'Grundgesetz für die Bundesrepublik Deutschland' <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> accessed 15 July 2024.

The introduction of a consensual decision-making requirement within the Coordination Mechanism, involving a large number of representatives from different levels of government, creates an extremely unfavourable solution that will have repercussions on BiH's ability to fulfil its obligations in the European integration process. In practice, decision-making in the Coordination Mechanism, in some respects, is brought to the level and the "weight" of the adoption of constitutional changes. The recommendation of the Commission to abolish the possibility of veto in the bodies responsible for European integration issues refers primarily to the Coordination Mechanism.[66]

This situation is further aggravated by the practically "non-binding" nature of the Coordination Mechanism's decisions, meaning that adopted decisions have yet to be implemented by the authorities at each level.[67] Further, the Coordination Mechanism lacks any provision for central oversight or enforcement of these decisions. This could lead to a situation where one decision adopted (consensually) in the Coordination Mechanism can be implemented in several (14) different ways without central oversight.[68]

According to the above, it can be concluded that the Coordination Mechanism represents an extremely unfavourable solution that does not align with the standards of EU Member States. Its lack of efficiency and prompt fulfilment of obligations arising from EU law is not in accordance with the recommendations of the European Commission. It is reasonable to expect that, in its current form, the Coordination Mechanism will pose a major challenge to BiH's progress to EU integration.

9 ACTIVITIES OF BOSNIA AND HERZEGOVINA IN FULFILLING THE OBLIGATION TO HARMONIZE NATIONAL LEGISLATION WITH THE ACQUIS AND LEGAL ISSUES

It can be said that BiH is not fulfilling the obligation of harmonisation of its national legislation with the *acquis*, as defined in the SAA. Certain activities that are carried out are uncoordinated and are carried out without central monitoring or quality control of the implemented legislative changes, so it can be said that such an uncoordinated approach can only contribute to an even greater disharmony of the regulations adopted at different levels within the national legislation. The main reason for the non-fulfilment

66 Thus, the Commission states in the Opinion that in order to *' ...ensure that all administrative bodies in charge of implementing the acquis are based solely on professionalism and to remove the right of veto in the decision-making process, in accordance with the acquis. '*

67 Practically, it means that even a 'harmonized' decision can be applied in 14 ways.

68 The Decision on the Coordination Mechanism reads: *'Article 2 (3) coordination of the process of European integration in BiH is achieved at the horizontal (coordination within one level of government organization) and vertical level (coordination between different levels of government organization), In accordance with paragraph (2) of this article, the structures and modalities of achieving horizontal coordination are regulated by each level of government independently, in accordance with its constitutional order and administrative-legal specificities, capacities and needs, and they are not the subject of this decision.*

of the obligation to align with *the acquis* and an uncoordinated approach is the non-fulfilment of the primary obligation, which is the failure to adopt the National Program to harmonise legislation with *the acquis*.

BiH still has not adopted the National Program, although this obligation has existed since the entry into force of the SAA. Moreover, no serious activities are being carried out to create such a program. The Commission, in its Analytical Report with the Opinion on BiH's request for membership in the EU, determined that BiH has not undertaken activities towards the adoption of the National Program or any similar document. BiH adopted the document "Strategy of European Integration of BiH", which, among other things, envisages undertaking activities on the creation of the National Program. However, these activities have not been implemented.[69] Meanwhile, different levels of government adopt certain documents, regulations, and instructions for harmonising legislation with the *acquis*, but this only results in even greater fragmentation and diversity in the "adopted" and "harmonised" *acquis*.[70]

The Commission notes that the activities carried out at different levels in the direction of harmonising legislation with *the acquis* are uncoordinated. Different levels of government are establishing certain bodies (such as committees and offices) for this purpose, mainly tied to the respective legislative bodies of the entities or cantons responsible for harmonising activities with the *acquis*. However, the quality of those activities in some cases is lacking, and the Commission has raised concerns about the capacity of the aforementioned bodies to carry out these tasks, particularly at the cantonal level.

On the other hand, there is no coordination between different levels of government, especially between the entities, in the implementation of activities to harmonise legislation with the *acquis*.[71] The Commission concludes that BiH cannot guarantee compliance with the *acquis* at all levels due to the "problematic" shared competence[72] and the absence of provisions that would ensure the competence of the state level for the implementation of EU law.

According to the Commission's opinion, it is also problematic that the bodies coordinating EU issues differ within the entities. As mentioned, within the Federation of BiH, each cantonal government has its own coordinator for the EU, although their capability is often questionable. The Directorate for European Integration (DEI) is responsible for evaluating whether the regulations adopted are compatible with the *acquis,* but only at the state level (and not the level of entities or canton). Moreover, their evaluation does not oblige the authorities to change the law, while the governments of the two entities and Brčko District have their own compliance evaluation offices. According

69 Commission Staff Working Document (59) 19.

70 ibid.

71 Saša Leskovac, 'Državno uređenje Bosne i Hercegovine i upravni kapaciteti za implementaciju zakonodavstva EU' (2013) 2 Sarajevski žurnal za društvena pitanja 45.

72 ibid.

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to the Commission's opinion, "...*This highly fragmented system may lead to discrepancies between the various levels of government and it is likely to prevent the country from adequately meeting its EU membership obligations, thus risking to significantly slow down the EU integration process of Bosnia and Herzegovina. The country should ensure that approximation with the EU acquis is done in a systematic and coherent manner in order to guarantee consistent application and enforcement of EU law*." [73]

BiH needs to ensure alignment with *the acquis* in a "systematic and coherent" way, and as the first step in this direction, the adoption of the National Program is needed. In addition to the primary obligation to adopt the National Program,, the Commission concludes that BiH also does not fulfil other obligations related to the sectoral harmonisation of regulations, defined in chapter VI of the SAA.[74]

According to Article 70 of the SAA, in addition to the obligation to harmonise, BiH also undertakes the obligation to adequately apply the adopted regulations. That provision has a special meaning if it is seen in the context of preparing the country for the later application *of the acquis* after the end of the European integration process and the case of (improbable but possible) full membership in the EU.

It can be said that BiH does not fulfil the international legal obligation to harmonise its legislation with *the acquis*, as per the SAA, especially its Article 70 and other provisions of Chapter VI of the SAA. The obligation to adopt and later implement *the acquis* is a fundamental legal obligation arising from the European integration process contained in the Copenhagen criteria and a basic obligation arising from membership in the EU. BiH, as a state and a subject of international law, undertook the aforementioned obligations of harmonisation with the *acquis* by its sovereign decision, and their fulfilment is primarily the responsibility of the state. The causes for certain difficulties in the (future) application of the adopted regulations can be identified in the shortcomings of the Coordination Mechanism and the distribution of competencies.

10 ISSUES OF NON-PERFORMANCE OF COURT DECISIONS AND ACCESS TO JUSTICE

There are several issues related to the rule of law and access to justice in BiH. One of the most significant problems related to access to justice is the pervasive practice of non-performance of court decisions. This practice is present even in the case of judgments adopted by the Constitutional Court of BiH and ECtHR. Such practice leaves the citizens of BiH without adequate judicial recourse and, in the structural sense, undermines the very notions of the rule of law, division of powers, and judicial review.

73 Commission Staff Working Document (59) 20.

74 European Commission, 'Key Findings of the 2022 Report on Bosnia and Herzegovina' (12 October 2022) <https://ec.europa.eu/commission/presscorner/detail/en/country_22_6093 > accessed 15 July 2024.

In the context of EU integrations, the issues of non-execution of court decisions and the overall state of the rule of law became problematic in the early stages of the integration process. The entering into force of the SAA with BiH was suspended due to non-implementation of the judgment of the ECtHR in the *Sejdic-Finci* Case.[75] The judgment has still not been implemented, and since the ECtHR adopted the landmark *Sejdic-Finci* case, many other cases have followed, similarly related to the discriminating features of the BiH Constitution.

Respect for the principle of the rule of law and implementation of obligations under the ECHR are marked as highly important in the SAA with BiH. The SAA puts special emphasis on the efficiency of the judiciary and the implementation of court decisions. The respect of the obligations under the ECHR is defined as one of the essential elements of the SAA.[76] Defined as such, the breaches of essential elements can lead to the suspension or revocation of the SAA.

The non-implementation of the decisions of the Constitutional Court of BiH gained special visibility in the ECtHR case of *Baralija*.[77] The case's background shows gross abuse of the rule of law, the right to free and fair elections, and the possibility of access to justice. The background of the case was such that certain provisions of the Statute of the City of Mostar were deemed discriminatory by the Constitutional Court of BiH, which ordered amendments to the Statute of Mostar and the Election Law. However, due to the non-implementation of the decision of the Constitutional Court of BiH, the residents of Mostar were left without the possibility to vote in the local elections for several election cycles.

The applicant (Ms. Baralija) claimed a violation of human rights, and the ECtHR found violations and discriminatory treatment of the citizens of Mostar in general and the applicant specifically. In its judgment, the ECtHR stated that the failure to implement court judgments undermines the principle of the rule of law and jeopardises access to courts. The Court described the issue as systemic, rejecting the justifications for the political stalemate and the inability to find political solutions in a difficult climate as insufficient.[78]

The issues of non-implementation of the decisions of the Constitutional Court of BiH can also be related to certain politically motivated activities, primarily those of the leadership of the entity of the Republic of Srpska (RS). The Constitution of BiH and the Rules of the Constitutional Court of BiH foresee that the composition of the Constitutional Court of BiH includes international judges who cannot originate from neighbouring countries and

75 *Sejdić and Finci v Bosnia and Herzegovina* App nos 27996/06 and 34836/06 (ECtHR, 22 December 2010) <https://hudoc.echr.coe.int/fre?i=001-96491> accessed 15 July 2024.

76 Stabilisation and Association Agreement (n 35).

77 *Baralija v Bosnia and Herzegovina* App no 30100/18 (ECtHR, 29 October 2019) <https://hudoc.echr.coe.int/eng?i=001-197215> accessed 15 July 2024.

78 ibid.

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are selected by the President of the ECtHR in consultation with the BiH Presidency.[79] The work of those judges has proven essential in bringing balance between the locally elected judges who are coming from one of the constituent peoples of BiH. However, in recent political actions, the leadership of RS is accusing "foreign judges" of anti-Serb bias, requesting their removal.[80] Those are some of the reasons cited for the decision of the RS not to implement the judgments of the Constitutional Court of BiH. That decision has even been turned into a law.[81] Such activities are seriously undermining the effectiveness of the Constitutional Court of BiH and the sovereignty of the state institutions, jeopardising the very notion of the rule of law and the ability of the citizens of BiH to access justice.

The non-implementation of court decisions represents a significant problem; as per the Constitutional Court of BiH report, the practice is becoming systemic.[82] This practice undermines the authority of the courts, weakens the sovereignty of the state, undermines the rule of law and the division of powers, and deprives citizens of access to justice and judicial review.

The non-implementation of court decisions, including the ones of the ECtHR, is also defined as a crime under the legislation of Bosnia and Herzegovina. However, the practice of the prosecutors' offices is either to dismiss criminal reports against the responsible persons or to accept the justifications of political stalemate as a legitimate justification for the non-implementation of judicial decisions.[83]

The ECtHR, in the *Baralija case*, considering the difficulties of the political climate, concluded that, under the BiH Constitution and national legislation, the Constitutional Court BiH could itself order interim provisional measures that would be temporary until the legislature or executive government found a permanent solution.[84] However, the Constitutional Court BiH rarely uses those powers. An example of the use of those powers is seen in the case related to the names of illegal cities. The background of that case was

79 Article 6, Paragraph 1 of the Constitution of BiH reads: *"The Constitutional Court of Bosnia and Herzegovina shall have nine members. a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency"*. See, Constitution of Bosnia and Herzegovina (n 62).

80 Majda Ruge, 'Time to Act on Bosnia's Existential Threat' (*Foreign Policy*, 3 November 2021) <https://foreignpolicy.com/2021/11/03/bosnia-serbia-russia-secession-milorad-dodik-eu-us-nato/> accessed 15 July 2024.

81 Daria Sito-sucic, 'Bosnian Serb Lawmakers Vote to Suspend Rulings of Bosnia's Top Court' (*Reuters*, 27 June 2023) <https://www.reuters.com/world/europe/bosnian-serb-lawmakers-vote-suspend-rulings-bosnias-top-court-2023-06-27/> accessed 15 July 2024.

82 'Conclusions and Recommendations' (Enforcement of Decisions of the Constitutional Court of Bosnia and Herzegovina: Conference, Jahorina, 13–14 June 2023) <https://www.ustavnisud.ba/uploads/documents/conclusions-and-recommendations-of-the-conference-enforcement-of-decisions-of-the-ccbh_1686903839.pdf > accessed 15 July 2024.

83 ibid.

84 *Baralija v Bosnia and Herzegovina* (n 76).

such that some cities in BiH changed their names, mostly reflecting the ethnic changes during the war. The Constitutional Court BiH found those changes discriminatory and ordered the return of pre-war names or the selection of ethnically neutral ones. That decision was also not implemented, and the Constitutional Court BiH, by its own decision, changed the names of several cities.[85] The decision was intended to be temporary; however, it turned out to be a permanent solution.

Strengthening the judiciary is needed to ensure citizens have access to judicial review. The adoption of interim measures by the Constitutional Court BiH can be seen as one way to remedy the inaction of the legislative and executive government. However, the Court's reluctance to use such an option may stem from concerns that temporary solutions could become permanent due to the ongoing inaction and political stalemate of other branches of government, leading to another kind of imbalance.[86]

11 RECOMMENDATIONS FOR ACTIVITIES AIMED AT FULFILLING THE OBLIGATION TO HARMONIZE NATIONAL LEGISLATION WITH THE ACQUIS AND ACCESS TO JUSTICE

The shortcomings in BiH's EU integration process must be viewed in the context of the broader systemic factors. The unfinished process of state-building following the entering into force of the DPA has left the country without effective mechanisms to remove deadlocks. Rather than encouraging speedy reforms, the DPA incentivises the ethnic-centric status quo, hindering progress towards EU membership. Implementing necessary standards, primarily related to the rule of law and harmonisation of national legislation, would enable that "paradigm shift" from the Dayton era to the Brussels era. However, mechanisms contained in the current constitutional and legal order, as analysed, are a major contributing factor to the stalemate and can be misused for blockades, especially given the perilous geopolitical situation. These deficiencies risk not only stalling but also potentially halting the EU integration process, which could lead to further deterioration of the constitutional and legal order, threatening the very processes of state-building and regional stabilisation. Therefore, the fulfilment of the obligations of adopting the *acquis* is important not only for EU integration but also for the further development of the state of BiH and the region of Western Balkans.

As a first step in fulfilling the obligation of adoption of the *acquis*, BiH must adopt the National Program for Harmonization of Legislation with the *acquis*. However, BiH has not undertaken activities in the direction of adopting this program. Furthermore, the activities

85 ibid.

86 Dženeta Omerdić and Harun Halilović, 'The case of Baralija v Bosnia and Herzegovina: A New Challenge for the State Authorities of Bosnia and Herzegovina?' (2020) 13(4) 13 DHS-Social Sciences and Humanities 238.

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carried out at different levels of government, aimed at harmonising the legislation with *the acquis*, in addition to the questionable capability of certain levels, are carried out uncoordinated. This disorganisation only deepens the fragmentation of BiH's legal order.

As one of the main causes of the non-adoption of the National Program and the non-implementation of the obligation to harmonise legislation with the *acquis,* the Commission cites the shortcomings of the Coordination Mechanism. To address this, substantial amendments are necessary, particularly regarding removing the possibility of a veto, i.e. significant changes will have to be made in the decision-making process, as recommended by the Commission.

Given all the shortcomings of the Coordination Mechanism mentioned in the previous section, it is reasonable to anticipate great difficulties in fulfilling the EU integration obligations. These shortcomings, primarily visible in the consensual decision-making and the involvement of all levels of government, are also visible in the Commission's Opinion. The Commission's priority recommendations for BiH emphasise the need to ensure "*... that all administrative bodies entrusted with implementing the acquis are based only upon professionalism and eliminate veto rights in their decision-making, in compliance with the acquis.*"[87]

Once laws are adopted and harmonised with *the acquis*, ensuring proper application is necessary. Accordingly, the EU establishes that it is the state's primary duty to organise its system of government and the distribution of competencies to ensure the effective and prompt execution of the obligation to apply the law of the EU. In light of this, the Commission, in its Opinion on several occasions, cites fragmentation in the division of competencies as one of the basic problems in BiH's ability to fulfil international legal obligations, especially obligations arising from membership in the EU, in accordance with the Copenhagen criteria.

With the aim of future application of *acquis*, the Commission recommends amending the constitutional provisions on the distribution of competencies to facilitate the efficient and prompt implementation of EU law, particularly after BiH's potential accession as a member. Specifically, the Commission suggests introducing a clear and precise "clause" in the Constitution of BiH, as stated in its priority recommendations, which would allow the state level to temporarily assume the duties of implementing the mandate of the EU until a more permanent solution is established within the legal order of the state.

For this reason, the Commission states in its priority recommendations for BiH that it is necessary to introduce "*... a substitution clause to allow the State upon accession to temporarily exercise competences of other levels of government to prevent and remedy breaches of EU law.*"[88]

87 Communication from the Commission to the European Parliament and the Council (n 26) 15.
88 ibid 14.

In this way, the Commission points to the necessity of changing the very Constitutional rules on competencies, which is explicitly stated in priority No. 4 of the Opinion, where it states how to: "*Fundamentally improve the institutional framework, including at constitutional level, in order to: a) Ensure legal certainty on the distribution of competences across levels of government.*"[89]

A potential model for such a clause can be found in comparative law, such as Article 169 of the Constitution of the Kingdom of Belgium. This provision allows authorities at the federal (national) level to take over ("replace") the authorities of the federal units (in the case of Belgium, the communities and regions) in fulfilling the obligations that arise from the application of the EU law, until, or unless, the issue is eventually regulated differently within the constitutional legal order, as stated in the previous part.[90] This replacement clause could be introduced in BiH through constitutional amendments. However, given the political complexities in BiH, such constitutional changes would be particularly difficult.

Certainly, constitutional amendments are the ideal solution for implementing this change; a similar effect could potentially be achieved with a different approach in the interpretation of the existing norms of the Constitution of BiH. Namely, under Article 1, Paragraph 4 of the Constitution of BiH,[91] the state level has the obligation to establish a single market on the entire territory of BiH. In addition, as stated in the provisions of Paragraphs 1 and 6 of Article 2 of the Constitution, BiH is responsible for guaranteeing the "highest level" of human rights and freedoms, with the entities required to assist the state in fulfilling these obligations.[92] Both of these norms already provide a legal basis and authority for the state level to carry out activities related to the application of EU law.

While the state level shares these obligations and the necessary competencies with the entities, as stated in the judgment of the Constitutional Court of BiH regarding the issue of old foreign currency savings,[93] the division of competencies does not limit the state from carrying out the activities of adopting legislative solutions that regulate a certain

89 ibid.

90 Article 169 of the Belgian Constitution reads: *'In order to ensure the observance of international or supranational obligations, the authorities mentioned in Articles 36 and 37 can, provided that the conditions stipulated by the law are met, temporarily replace the bodies mentioned in Articles 115 and 121. This law must be adopted by a majority as described in Article 4, last paragraph.'* See, Belgium's Constitution of 1831 with Amendments through 2014 <https://www.constituteproject.org/constitution/Belgium_2014.pdf?lang=en> accessed 15 July 2024.

91 Article 1 paragraph 4 of the Constitution of BiH reads: *'4. Movement of goods, services, capital and persons There is freedom of movement throughout BiH. BiH and the entities will not hinder the full freedom of movement of persons, goods, services and capital throughout BiH. No entity shall exercise any control at the border between the entities'*. See, Constitution of Bosnia and Herzegovina (n 62).

92 Article 2 paragraph 6 of the Constitution of BiH reads: *'BiH and both entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms.' For this purpose, there is a Human Rights Commission for Bosnia and Herzegovina, as provided for in Annex 6 of the General Framework Agreement.'*

93 Case U-14/05 (Constitutional Court of BiH, 2 December 2005).

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area in a general way. This enables the entities to treat and implement the same matter legislatively and administratively.

In addition to that, there is a Constitutional possibility to "assume" competencies without requiring prior consent from the entities, as outlined in Article 3, Paragraph 5. This mechanism can be invoked when necessary to preserve the state's sovereignty, territorial integrity, political independence, and international subjectivity. However, the Constitution of BiH does not precisely define the content of the mentioned situations nor specify the conditions when their "protection" is required. In the absence of such clarity, the interpretations and understandings offered by the Constitutional Court of BiH are of great importance.

In its decision related to the constitutionality of the establishment of the Court of BiH,[94] the Constitutional Court of BiH gave an interpretation that broadens the understanding of this constitutional basis. It stated that this provision could be used both in situations when "the sovereignty, territorial integrity, political independence, and international subjectivity of the state" is directly threatened, as well as in situations when the takeover of certain competencies is undertaken to improve the "the sovereignty, territorial integrity, political independence, and international subjectivity of the state", i.e. in the situations without the existence of a direct and imminent threat, but with a goal of enhancing the state's capabilities.

12 CONCLUSIONS

BiH is showing higher-than-usual difficulties in the implementation of reforms necessary for the accession to the EU. The country is struggling to undertake basic necessary steps in the direction of EU integration, such as the adoption of a National Program for the adoption of the *acquis*. Reasons for that are of a legal and political nature. The very constitutional setup of the country is making it difficult to manage. The Constitution was adopted as a part of the Dayton Peace Agreement compromise, with the primary goal of stopping the war and preserving peace between the warring ethnic groups. Still, it is making any reforms very difficult, if not practically impossible. The competencies are divided between the state level, entities, and Brčko district, and in the entity of Federation of BiH, between the cantons. The narrow scope of competencies at the state level leaves lower levels of government in positions of power, especially concerning laws and activities necessary for EU integrations. Furthermore, the decision-making process is ripe, with the possibility of veto and blockade on ethnic and territorial grounds. Specifically, in the case of legislation related to EU integrations, relevant solutions such as the Coordination Mechanism have extremely negative repercussions.

94 Nedim Ademović, Joseph Marko i Goran Marković, *Ustavno pravo Bosne i Hercegovine* (Konrad Adenauer Stiftung 2012) 117.

The Coordination Mechanism was established to ensure cooperation between different levels of government in the process of adopting and applying legislation and decisions necessary for the adoption of the *acquis* and other reforms necessary in EU integrations. However, in its Opinion on the BiH's application for EU membership, the European Commission was especially critical of the Coordination Mechanism. The main criticism centres on the decision-making process within the Coordination Mechanism, which requires consensus of all the levels involved. Furthermore, the decisions, if adopted, are left to lower levels to implement without any central oversight of such implementation. That practically gives the possibility of divergent implementation of the decisions adopted through the Coordination Mechanism. The Commission has called for significant changes to the decision-making rules within the Coordination Mechanism to ensure its efficacy.

Furthermore, the Commission has requested the adoption of changes within the Constitution of BiH to ensure that the state level can assume the competencies necessary for the implementation of EU legislation, at least until the issue is resolved permanently within the country. These recommendations primarily reflect the EU's interest in ensuring that BiH's complex decision-making system and division of competencies do not hinder the uniform application of EU law or disrupt the EU's decision-making process after BiH's potential accession to the EU.

On the other hand, constitutional and legal possibilities of blockades are amply used, primarily by the leadership of the entity of the Republic of Srpska, which has a pro-Russian political agenda and harbours secessionist goals. This has notably slowed down the BiH's progress towards EU (and NATO) integration. These anti-EU policies have become more evident since the Russian Federation's aggression on Ukraine, further complicating the geopolitical landscape in Europe.

Another issue, especially highlighted in the SAA itself, is the non-implementation of judicial decisions. The non-implementation of the judicial decisions is especially worrying in the case of judgments adopted by the Constitutional Court of BiH and the ECtHR. Such practice is deteriorating the state of the rule of law, the authority of state institutions, and the ability of the citizens to access justice.

The identified deficiencies of the BiH's constitutional and legal framework – evident in the Coordination Mechanism, the division of competencies, and the practice of non-implementation of the court decisions – pose a serious threat to slow down or halt the EU integration process. Such development not only risks delaying BiH's accession but jeopardises the broader state-building reforms required following the entry into force of the DPA. More broadly, it could hinder the stabilisation of the Western Balkans region.

To secure BiH's stability, preserve its EU integration path, and prevent malicious influence of actors with opposite agendas, it is of utmost importance to implement the recommendations of the European Commission related to the changes in the Coordination Mechanism and the Constitution of BiH. The EU's persistent support is necessary, as

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alternative scenarios could destabilise BiH and a somewhat peaceful Balkans region. Removing these legal deficiencies would take away the tools currently used by actors who ultimately oppose BiH's progress toward EU membership.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЯК НЕ ВІДПОВІДАТИ ЄВРОІНТЕГРАЦІЇ: БОСНІЯ ТА ГЕРЦЕГОВИНА ТА ПРАВОВІ ВИКЛИКИ В ПРОЦЕСІ ВСТУПУ ДО ЄВРОПЕЙСЬКОГО СОЮЗУ

Гарун Галілович

АНОТАЦІЯ

Вступ. *Боснія та Герцеговина зі своєю складною конституційною та правовою системою стикається з багатьма труднощами на шляху до членства в Європейському Союзі (ЄС). Ці виклики посилилися через політичну нестабільність, що виникла внаслідок геополітичних змін в Європі після російської агресії проти України. Правові труднощі в конституційному порядку Боснії та Герцеговини часто використовуються, щоб зупинити прогрес країни та відвернути її від європейського курсу. У цій статті аналізуються конкретні випадки несприятливих правових рішень, які перешкоджають процесу вступу до ЄС, а також рекомендації, надані Комісією ЄС, що спрямовані на*

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подолання цих правових перешкод. Існує нагальна потреба в реформуванні конституційних і правових норм, щоб дати можливість країні ефективно продовжити шлях вступу до ЄС. Важливість перспективи членства в ЄС для Боснії та Герцеговини виходить за межі простого приєднання до бажаного «клубу успішних країн»; реформи, які необхідні під час процесу вступу до ЄС, потрібні для посилення ефективності державних інституцій і забезпечення тривалого миру в країні та регіоні. Таким чином, нагальність і потенційний вплив цих запропонованих законодавчих змін неможливо переоцінити.

Методи. *Дослідження насамперед використовує комбінацію аналітичних, нормативних і порівняльних методів для вивчення правової системи та хронології процесу інтеграції. Історико-правовий метод також використовується там, де це доречно. Дослідження зосереджено на змісті конституційних норм, відповідних законодавчих актів Боснії та Герцеговини, законодавчих актів Європейського Союзу та інших країн. Ці законодавчі акти порівнюються з рекомендаціями ЄС та законодавством інших держав-членів ЄС для виявлення розбіжностей. У статті подано огляд нормативно-правової бази, що регулює євроінтеграційні процеси Боснії та Герцеговини, зокрема норми міжнародного права, конституційного права, національного законодавства та права ЄС, які негативно впливають на процес вступу до Європейського Союзу, а також запропоновано певні рекомендації щодо їх удосконалення.*

Результати та висновки. *У дослідженні було виявлено певні норми конституційного та законодавчого походження в правовій системі Боснії та Герцеговини, які шкодять здатності країни ефективно брати участь у процесі вступу до ЄС. За допомогою нормативного підходу у статті було надано рекомендації, які відповідають стандартам, встановленим інституціями ЄС, щодо вдосконалення цих норм. Зміни в цих проблемних правових питаннях дозволять усунути їхнє використання як політичних інструментів, що зупиняють прогрес країни в євроінтеграції.*

Ключові слова: *Боснія і Герцеговина, приєднання до ЄС, євроінтеграції, правова гармонізація, acquis.*

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Research Article

LEGAL CONTROVERSIES IN CROSS-BORDER SURROGACY: A CENTRAL EUROPEAN PERSPECTIVE ON THE RECOGNITION OF LEGAL PARENTHOOD THROUGH SURROGACY ESTABLISHED ABROAD

Elmar Buchstätter* and Marianne Roth

ABSTRACT

Background: *This paper explores the legal field of surrogacy from a Central European perspective, focusing on how countries such as Austria, Germany, and Switzerland address the recognition of parental status established abroad. While the prevailing attitude among Central European states is to prohibit surrogacy within their national laws, there is an increasing tendency to bypass these bans by seeking surrogacy services abroad. This phenomenon, termed reproductive tourism, raises complex legal questions about the recognition of foreign parental status determinations.*

Methods: *The methods used include a comprehensive review of international and autonomous national legal rules as well as a comparative analysis of case law from Central European courts regarding cross-border surrogacy and parenthood recognition. The study examines legal controversies employing Austrian family law as an example to assess highly topical issues arising from surrogacy. It incorporates data from various legal sources, including the Austrian Constitutional Court, the German Federal Court of Justice, the Swiss Federal Supreme Court, and the European Court of Human Rights.*

Results and conclusions: *The findings reveal significant differences between Austria, Germany, and Switzerland regarding the recognition of parental status established by way of surrogacy abroad. While supreme court decisions in these countries tend to prioritise the best interests of the child – often recognising foreign surrogacy arrangements to avoid leaving children without legal parents – their judicial approaches differ considerably.*

The Austrian Constitutional Court adopts a more inclusive approach by accepting foreign determinations from any authority, such as birth certificates, under the concept of automatic recognition. In contrast, the German and Swiss supreme courts acknowledge only formal court

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decisions. For cross-border surrogacy cases that do not fulfil this requirement, these countries apply the national law of the child's habitual residence or, as a fallback, the law of the intended parents' country of origin. Since both German and Swiss law categorically forbid surrogacy, only the genetic father is typically recognised, while the intended mother is directed to adoption. This aligns with the opinion of the ECtHR, which still considers the method of establishing parenthood to be within the sovereignty of a state. This article advocates for a balanced approach that respects both the legal principles of national states and the fundamental rights of children born through an arrangement with a surrogate mother in another country.

1 INTRODUCTION

When a woman agrees to give birth under the explicit understanding that she will not be the child's legal mother, we enter the complex field of surrogacy.[1] To gain a more in-depth understanding of surrogacy, it is essential to consider it from various perspectives.

From a medical standpoint, surrogacy can be classified into two types: gestational surrogacy and traditional surrogacy. Gestational surrogacy involves implanting a fertilised ovum, typically derived from the intended mother, potentially involving gametes from third parties, into the surrogate. In this case, the surrogate carries the embryo but has no genetic link to the child, assuming the embryo is created with the intended parents or donors' genetic material.[2] In contrast, traditional surrogacy uses the surrogate's egg, fertilised by sperm from the intended father or a third party, thus maintaining a genetic connection between the surrogate and the child.[3]

From a legal point of view, surrogacy must be categorised based on its motivation: altruistic surrogacy involves no compensation to the surrogate beyond the necessary pregnancy-related expenses, such as medical treatments or maternity clothes, which the intended parents pay. This type of surrogacy is primarily driven by the surrogate's desire to help childless couples. Controversially, commercial surrogacy involves compensating the

1 Austrian literature on surrogacy (by publication date), i.a.: Lukas Klever, 'Die grenzüberschreitende Leihmutterschaft im österreichischen Recht – Kollisionsrecht und verfahrensrechtliche Anerkennung' in Edwin Gitschthaler, Joachim Pierer und Brigitta Zöchling-Jud (hrsg), *Festschrift Constanze Fischer-Czermak* (Manz 2024) 317; Thomas Schoditsch, 'Leihmutterschaft in Österreich? Über die Möglichkeit dessen, was nicht sein darf' [2024] EF-Z 3; Elmar Buchstätter, *Kindeswohl und Elternschaft: Schwerpunkt Eltern-Kind-Zuordnung in alternativen und grenzüberschreitenden Familien* (Jan Sramek Verlag 2023) 72-89; Bea Verschraegen, 'Leihmutterschaft - Zum Recht auf Elternschaft' (2019) 4 iFamZ 266; Fraunlob, 'Mater semper certa est? Eine Untersuchung des österreichischen Leihmutterschaftsrechts de lege lata et ferenda' (diss, Universität Salzburg 2018); Philip Czech, *Fortpflanzungsfreiheit: Das Recht auf selbstbestimmte Reproduktion in der Europäischen Menschenrechtskonvention* (Jan Sramek Verlag 2015).

2 Michelle Cottier, 'Die instrumentalisierte Frau: Rechtliche Konstruktionen der Leihmutterschaft' (2016) 2 Juridikum 190.

3 Alexandra Goeldel, *Leihmutterschaft – eine rechtsvergleichende Studie* (Peter Lang Verlag 1994) 1 et seq.

surrogate for her time and efforts, including any suffering or pain endured during pregnancy. Here, the surrogate acts as a reproductive service provider, with her primary focus often being on her monetary gain rather than the alleviation of the intended parents' childlessness. The financial costs of the medical process are typically covered by the intended parents in both scenarios.[4]

Surrogacy is a widely debated and controversial procedure from an international perspective. Most EU member states,[5] along with Switzerland,[6] hold conservative positions and prohibit all forms of surrogacy.[7] However, some countries explicitly permit or at least tolerate surrogacy arrangements, with motivations ranging from altruistic to commercial. Inter alia, surrogacy is available in parts of the US, Canada, Brazil, Argentina, Hong Kong, select Australian states, South Africa, Israel, Georgia, Ukraine, Russia, India, Greece, Romania, and the United Kingdom.[8]

National prohibitions on surrogacy have contributed to a rising phenomenon known as reproductive tourism.[9] Parents who are intending to have a child, but are excluded from reproductive medicine under their national law, often circumvent these restrictions by pursuing surrogacy abroad. When they return home with a child born through this arrangement, the situation is referred to as "cross-border surrogacy". This raises a second question: how should children stemming from a surrogacy arrangement be treated in terms of their status in a country that prohibits surrogacy if the parenthood of the intended parents is already legally recognised in another country?[10]

4 Buchstätter (n 1) 76.

5 Amalia Rigon and Céline Chateau, 'Regulation of International Surrogacy Arrangements - State of Play' (*European Parliament*, 30 August 2016) <https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI(2016)571368> accessed 26 April 2024. For Germany, e.g., see the prohibition of surrogacy in: German Act for Protection of Embryos of 13 December 1990 'Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz - ESchG)' [1990] BGBI I 69/2746, s 1(1); German Adoption Mediation Act of 2 July 1976 'Gesetz über die Vermittlung und Begleitung der Adoption und über das Verbot der Vermittlung von Ersatzmüttern (Adoptionsvermittlungsgesetz - AdVermiG)' [2021] BGBI I 36/2019, s 14(b).

6 Switzerland has anchored the prohibition of surrogacy even at constitutional level, see: Federal Constitution of the Swiss Confederation of 18 April 1999 'Bundesverfassung der Schweizerischen Eidgenossenschaft' art 119(2)(d) <https://www.fedlex.admin.ch/eli/cc/1999/404/de> accessed 26 April 2024; Swiss Federal Law on Medically Assisted Reproduction of 18 December 1998 'Bundesgesetz über die medizinisch unterstützte Fortpflanzung (Fortpflanzungsmedizingesetz, FMedG)' art 31 <https://www.fedlex.admin.ch/eli/cc/2000/554/de> accessed 26 April 2024.

7 Stefan Arnold, 'Fortpflanzungstourismus und Leihmutterschaft im Spiegel des deutschen und österreichischen internationalen Privat- und Verfahrensrechts' in Stefan Arnold, Erwin Bernat und Christian Kopetzki (hrsg), *Das Recht der Fortpflanzungsmedizin 2015: Analyse und Kritik* (Manz 2016) 130.

8 A comprehensive international overview of key surrogacy laws can be found in Verschraegen (n 1) 267; for insights into recent developments in Portuguese law, refer to Ana Conde and others, 'Surrogacy in Portugal: Drawing Insights from International Practices' (2024) 35 Revista Jurídica Portucalense 175, doi:10.34625/issn.2183-2705(35)2024.ic-09.

9 See below V.

10 In detail: Buchstätter (n 1) 124-58.

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It is important to note that EU member states, particularly those with conservative values, are increasingly adopting restrictive positions on cross-border surrogacy. For example, the Spanish Supreme Court recently noted a contradiction in Spanish surrogacy laws: although surrogacy is banned, it is freely advertised, and surrogacy-born children are routinely accepted into families. The court clarified that such children would only be legally recognised by way of adoption.[11] In right-wing conservative Italy, there are even proposals to criminalise the use of surrogate motherhood abroad.[12]

2 SURROGACY ARRANGEMENTS UNDER AUSTRIAN LAW

After extensive political and ethical debates, the 1992 Austrian Reproductive Medicine Act[13] was enacted. At that time, the regulations were particularly severe, prohibiting even procedures such as egg donation and in vitro fertilisation using donor sperm. The utilisation of the few approved methods was tightly controlled by several restrictive conditions, including the explicit exclusion of homosexual couples.[14]

In a landmark decision, the Austrian Constitutional Court[15] lifted the prohibition on reproductive medicine for female same-sex partners in 2013, triggering a comprehensive revision of the legislation. The 2015 amendment of the Reproductive Medicine Act[16] significantly liberalised and broadened access to reproductive medicine, permitting the same-sex partner of the biological mother to establish legal parenthood by descent.[17] However, access remained restricted for male homosexual couples and women unable to give birth due to physical dysfunction, as these cases still necessitate the biological

11 Case 907/2021 Judgment 277/2022 (Spanish Supreme Court, First Chamber (Civil), 31 March 2022) <https://vlex.es/vid/899711887> accessed 26 April 2024.

12 Christian Network Europe, 'Italian Surrogacy Debate Turns Heated with International Ban Coming Closer' (*CNE.news*, 22 March 2023) <https://cne.news/article/2770-italian-surrogacy-debate-turns-heated-with-international-ban-coming-closer> accessed 26 April 2024.

13 Austrian Reproductive Medicine Act of 1 July 1992 'Fortpflanzungsmedizingesetz (FMedG)' [1992] BGBI 105/275; Federal law consolidated: Complete legal provision for the Reproductive Medicine Act (version 14 August 2018) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003046> accessed 26 April 2024.

14 Martina Erlebach, '§ 1 FMedG' in Magdalena Flatscher-Thöni und Caroline Voithofer (hrsg), *FMedG und IVF-Fonds-Gesetz: Fortpflanzungsmedizingesetz und In-vitro-Fertilisation-Fonds-Gesetz* (Verlag Österreich 2019) mn 2; Monika Hinteregger, *Familienrecht* (9 aufl, Verlag Österreich 2019) 191.

15 Decision G 16/2013, G 44/2013 (Austrian Constitutional Court, 10 December 2013) <https://www.vfgh.gv.at/downloads/VfGH_G_16-2013_G_44-2013_Fortpflanzungsmedizing.pdf> accessed 26 April 2024.

16 Austrian Reproductive Medicine Act - Amendment 2015 'Fortpflanzungsmedizinrechts-Änderungsgesetz 2015 – FMedRÄG 2015' [2015] BGBI I 35/1.

17 Marianne Roth, *Außerstreitverfahrensrecht* (7 aufl, Jan Sramek Verlag 2023) 60; Constanze Fischer-Czermak, '§ 144 ABGB' in Andreas Kletečka und Martin Schauer (hrsg), *ABGB-ON Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (vers 1.05, Manz 2018) mn 4/1.

involvement of a surrogate mother.[18] Despite intense political debate, the surrogacy ban was maintained in the 2015 amendment[19] due to the societal need to protect the physical integrity of potential surrogate mothers and to prevent the exploitation of women, particularly those in financial need or under psychological stress.[20] The Bioethics Commission endorsed these restrictions, highlighting the risk of women being coerced into agreements contrary to their best interests.[21]

In addition to mitigating the risk of exploitation faced by potential surrogate mothers, the Austrian ban on surrogacy is highly motivated by considerations concerning the rights of the child involved. First and foremost, the child's right to ascertain his/her biological lineage is fundamental. This right is protected by Article 8 of the ECHR, as well as Article 7 of the UN CRC, and is recognised under Section 16 of the General Civil Code at the national level.[22] Moreover, every child has the right to consistent personal contact with both parents. This is another fundamental aspect of the parent-child relationship, protected by Article 8 of the ECHR and Article 2(1) of the Austrian Federal Constitutional Law on Children's Rights.[23] Also, the right to contact constitutes a significant element of the child's best interests as defined under Section 138 no. 9 of the General Civil Code. It is considered essential for the child's health and psychological development. However, this right cannot be fully realised in surrogacy arrangements: the surrogate mother usually does not have an

18 Michael Mayrhofer, '§ 2 FMedG' in Matthias Neumayr, Reinhard Resch und Felix Wallner (hrsg), *Gmundner Kommentar zum Gesundheitsrecht* (Manz 2016) mn 6; Christiane Wendehorst, 'Neuerungen im österreichischen Fortpflanzungsmedizinrecht durch das FMedRÄG 2015' (2015) 1 iFamZ 2015 4; Explanatory notes to the Governmental Proposals, 445 of the Addenda to the Stenographic Protocol of the National Council, XXV GP.

19 I.a., see: Arnold (n 7) 145 et seq; Joachim Pierer, 'Abstammung' in Astrid Deixler-Hübner (hrsg), *Handbuch Familienrecht* (2 aufl, Linde 2020) 237; Caroline Voithofer und Magdalena Flatscher-Thöni, 'VfGH vereinfacht Zugang zur Fortpflanzungsmedizin: Was passiert, wenn nichts passiert?' (2014) 2 iFamZ 55; Maria Eder-Rieder, 'Medizinisch unterstützte Fortpflanzung nach dem FMedRÄG 2015 Neuerungen und Erweiterungen' (2016) 58 EF-Z 130.

20 Explanatory notes to the Governmental Proposals, 216 of the Addenda to the Stenographic Protocol of the National Council, XXVIII GP, 11.

21 Austrian Bioethics Commission, 'Statement on the draft of a federal law that amends the Reproductive Medicine Act, the General Civil Code and the Genetic Engineering Act (Reproductive Medicine Law Amendment Act 2015 - FMedRÄG 2015)' 3 <https://www.bundeskanzleramt.gv.at/dam/jcr:ecbae513-5ea7-4c76-867e-6316bff33baf/FMedRAEG_2015.pdf> accessed 26 April 2024.

22 Council of Europe, *European Convention on Human Rights* (ECHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 26 April 2024; Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> accessed 26 April 2024; Austrian General Civil Code of 1 June 1811 'Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie' [1811] JGS 946; Federal law consolidated: Complete legal provisions for the General Civil Code (version 17 April 2024) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622> accessed 26 April 2024.

23 Austrian Federal Constitutional Law on Children's Rights of 20 January 2011 'Bundesverfassungsgesetz über die Rechte von Kindern' [2011] BGBl I 4/1.

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interest in maintaining a personal relationship with the child, and the intended parents may similarly be disinclined to facilitate such contact. Ethical and moral considerations, particularly regarding the developing bond between the mother and child during pregnancy, further underscore the rationale for upholding the ban.[24]

The Austrian prohibition of surrogacy originates from an overall view of several laws addressing the involved complex bioethical issues:[25]

- Firstly, Austrian law of descent traditionally adheres to the Roman legal principle *"mater semper certa est"* ("the mother is always certain").[26] This principle asserts that maternity is legally established by the act of birth alone, making a genetic link between the mother and child unnecessary for legal recognition.[27] The regulation provides an early, clear, and securely determinable legal assignment of the child, thus supporting both the welfare of the vulnerable newborn and the protection of the psychosocial relationship that develops during pregnancy. By anchoring legal motherhood in the act of birth, the law ensures that legal motherhood cannot be contested, even if the child was conceived through medically assisted fertilisation using a donated egg.[28] Unlike fatherhood, the status of the mother is generally not open to negotiation, and the biological mother cannot relinquish her legal parenthood in favour of another person.[29]
- Secondly, surrogacy is prohibited under Section 3(1) of the Reproductive Medicine Act, which stipulates that primarily the oocytes of the intended parents must be used. Gametes from a third party may only be used ultima ratio, specifically when the woman for whom pregnancy is intended is reproductively incapable. This is typically not the case with a surrogate mother.[30]

24 Buchstätter (n 1) 164 et seq.

25 Martina Erlebach, 'Die Samen- und Eizellspende im FMedG', in Peter Barth und Martina Erlebach (hrsg), *Handbuch des neuen Fortpflanzungsmedizinrechts* (Linde 2015) 228; Brigitta Lurger, 'Das Internationale Privatrecht der medizinisch unterstützten Fortpflanzung' in Magdalena Flatscher-Thöni und Caroline Voithofer (hrsg), *FMedG und IVF-Fonds-Gesetz: Fortpflanzungsmedizingesetz und In-vitro-Fertilisation-Fonds-Gesetz* (Verlag Österreich 2019) mn 26; Constanze Fischer-Czermak, '§ 143 ABGB' in Andreas Kletečka und Martin Schauer (hrsg), *ABGB-ON Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (vers 1.05, Manz 2018); Gerhard Hopf, 'Fortpflanzungsmedizinrecht neu' (2014) 23/24 ÖJZ 1037.

26 Austrian General Civil Code (n 22) s 143.

27 Roth (n 17) 60; Susanne Beck, *Kindschaftsrecht* (EF-Buch, 3 aufl, Manz 2021) mn 22; Michael Stormann, '§ 143 b) ABGB' in Michael Schwimann und Georg E Kodek (hrsg), *ABGB Praxiskommentar*, bd 1: §§ 1–284 ABGB (5 aufl, LexisNexis 2020) mn 2; Rudolf Welser und Andreas Kletečka, *Bürgerliches Recht,* 1 bd: Allgemeiner Teil, Sachenrecht, Familienrecht (15 aufl, Manz 2018) mn 1684.

28 Pierer (n 19) 253; Stormann (n 27) mn 3.

29 Anchoring legal motherhood in the act of childbirth particularly serves as a status-legal safeguard for the Austrian ban on surrogacy. This ensures that the woman who gives birth is legally recognized as the mother, regardless of any genetic relation to the child, reinforcing the prohibition against surrogacy arrangements in Austria. See: Beck (n 27) mn 22.

30 Austrian Reproductive Medicine Act (n 13) s 3(3).

- Furthermore, the Austrian Reproductive Medicine Act contains a comprehensive prohibition of commercialisation: the transfer of semen or oocytes for medically assisted reproduction in the context of a remunerated transaction is prohibited, whereby the term "remunerated" is defined by an expense allowance that exceeds the proven cash expenses in connection with the medical treatment.[31] Violating Section 16(2)(3) of the Reproductive Medicine Act, which includes engaging in surrogacy, commits an administrative offence punishable by a fine of up to EUR 50,000 or, in the event of uncollectibility, imprisonment of up to 14 days (Section 22[1][4] of the Reproductive Medicine Act).
- Finally, the procurement of surrogacy is deemed immoral and, therefore, renders the underlying contract null and void pursuant to Section 879(2)(1a) of the General Civil Code.[32]

If a surrogacy arrangement occurs in Austria, the legal situation is the following: The treating physician faces administrative penalties under Section 3(1) in conjunction with Section 23(1)(1) of the Reproductive Medicine Act for violating the surrogacy ban. According to Section 879(1) of the General Civil Code, the surrogacy contract is null and void. Despite the invalidity of the surrogacy contract, the birth will still be recorded in the Austrian civil status register, as mandated by Section 35(1) of the Austrian Civil Status Act[33], which requires the registration of every child born in Austria.

In such a scenario, the surrogate mother, as the biological mother, is recorded as the legal mother in the civil status documents. Consequently, the intended mother has no legal relationship with the child. Any attempt to transfer legal parenthood from the surrogate to the intended mother would require adoption or foster care proceedings. However, these legal instruments would not completely sever the surrogate mother's legal ties to the child, which is typically the goal in surrogacy cases.[34]

31 ibid, s 16(1).

32 Wolfgang Kolmasch, '§ 879 ABGB', in Michael Schwimann und Matthias Neumayr (hrsg), *ABGB Taschenkommentar: mit EheG, EPG, KSchG, ASVG, EKHG und IPRG* (5 aufl, LexisNexis 2020) mn 7; Eder-Rieder (n 19) 130.

33 Austrian Civil Status Act of 11 January 2013 'Bundesgesetz über die Regelung des Personenstandswesens (Personenstandsgesetz 2013 - PStG 2013)' [2013] BGBl I 16/1; Federal law consolidated: Complete legal provisions for the Civil Status Act 2013 (version 30 December 2023) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008228> accessed 26 April 2024.

34 In the event of adoption, some property-relations between a child and their biological parent are maintained, see: Austrian General Civil Code (n 22) s 197[2]. In the literature, e.g., see: Johann Höllwerth, '§ 197 ABGB', in Michael Schwimann und Georg E Kodek (hrsg), *ABGB Praxiskommentar*, bd 1: §§ 1–284 ABGB (5 aufl, LexisNexis 2020) mn 6; Thomas Schoditsch, *Gleichheit und Diversität im Familienrecht* (Manz 2020) 25.

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3 LEGAL PARENTHOOD THROUGH CROSS-BORDER SURROGACY

3.1. Recognition of foreign status decisions in Austria

Few international treaties address status law, and those that do have no significant impact on determining legal cross-border parent-child relationships.[35] Similarly, at the European level, status questions are explicitly excluded from the scope of the Brussels IIb Regulation.[36] Although the European Commission has recently proposed a regulation to harmonise the legal aspects of parenthood across member states,[37] it remains uncertain whether this regulation will gain the necessary approval.[38] Thus, for the time being, the procedure for establishing and contesting parenthood involving a foreign element must be assessed under autonomous national law, which requires the clarification of international jurisdiction and applicable substantive law.

If, however, a foreign final decision already exists, the focus shifts to whether this decision has legal effect at home, requiring an assessment of its compatibility with domestic law. This situation frequently arises in cross-border surrogacy cases. When the intended parents return to their home country, they often present a foreign birth certificate or a foreign court decision that has already established their parental status.

Under Austrian civil procedure law, the recognition of foreign legal decisions, including those related to surrogacy and parental rights, is subject to specific conditions. These conditions aim to ensure that the foreign decision meets the necessary standards of legality, fairness, and consistency with public policy in Austria. The decision must not

35 From an Austrian perspective, there are relevant treaties: Convention on Legitimation by Subsequent Marriage of 23 March 1976 'Übereinkommen über die Legitimation durch nachfolgende Ehe' [1976] BGBl 29/102; State Treaty between the Republic of Austria and the Republic of Poland on Mutual Relations in Civil Matters and on Documents of 25 January 1973 'Vertrag zwischen der Republik Österreich und der Volksrepublik Polen über die wechselseitigen Beziehung in bürgerlichen Rechtssachen und über Urkundenwesen' [1974] BGBl 30/79; Treaty of Friendship and Residence between the Republic of Austria and the Empire of Iran of 9 September 1959 'Freundschafts- und Niederlassungsvertrag zwischen der Republik Österreich und dem Kaiserreich Iran' [1966] BGBl 18/45. Article 10(3) leg cit refers to the entirety of private international law in matrimonial and parentage matters, thereby encompassing status questions.

36 Council Regulation (EU) 2019/1111 of 25 June 2019 on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast) [2019] OJ L 178/1, art 1, para 4.

37 See: Proposal for a Council Regulation of 7 December 2022 on Jurisdiction, Applicable Law, Recognition of Decisions and Acceptance of Authentic Instruments in Matters of Parenthood and on the Creation of a European Certificate of Parenthood, COM (2022) 695 final <https://eur-lex.europa.eu/
legal-content/EN/TXT/?uri=CELEX:52022PC0695> accessed 26 April 2024.

38 Claudia Rudolf, 'Vorschlag einer EU-Verordnung für das Internationale Abstammungsrecht' [2023] EF-Z 153; Buchstätter (n 1) 130.

contradict fundamental principles of Austrian law, especially those concerning the rights and welfare of the child.[39]

The term "decision" in Section 91a(1) of the Austrian Non-Contentious Proceedings Act is interpreted broadly; it does not refer exclusively to sovereign decisions by courts but includes any document prepared with the participation of an authority.[40] Hence, a certification or authentication is sufficient to recognise a foreign birth certificate or an extract from the civil status register conducted under the rules of Section 91a of the Non-Contentious Proceedings Act. Austrian case law[41] has even recognised the incidental determination of paternity in a foreign court order as a valid decision on parentage.[42] However, the foreign administrative document must be legally binding and valid in its country of origin to be recognised in Austria.[43]

The recognition process relies on the "extension of effects theory", which states that the effects of a foreign decision in its original country shall be mirrored in the country where recognition is sought.[44] According to the Austrian autonomous interpretation, the extension of effects is limited in two ways: firstly, a recognised foreign decision cannot exert greater effects than it would in the issuing state; secondly, it cannot have more effects than a domestic decision in the recognising state. Additionally, the effects of the decision recognised must be comprehensible within the framework of Austrian law.[45]

The foreign decision thus has the same effect in Austria as it does in the country of origin. The contents of the decision must be entered into the civil status register. If a person meets

39 See: Austrian Non-Contentious Proceedings Act of 'Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Außerstreitgesetz – AußStrG)' [2003] BGBl I 111/1551, s 91a(2)(1); Federal law consolidated: Complete legal provision for Non-Contentious Law (version 19 July 2023) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20003047> accessed 26 April 2024.

40 Explanatory notes to the Individual Request, 673/A of the addenda to the stenographic protocol of the national council, XXIV GP, 31.

41 E.g., Decision 2 Ob 238/13h (Austrian Supreme Court, 27 November 2014) <https://rdb.manz.at/document/ris.just.JJT_20141127_OGH0002_0020OB00238_13H0000_000> accessed 26 April 2024.

42 Astrid Deixler-Hübner, '§ 97 AußStrG', in Walter H Rechberger und Thomas Klicka (hrsg), *AußStrG Außerstreitgesetz* (3 aufl, Verlag Österreich 2020) mn 2; Wolfgang Kolmasch, 'Anerkennung einer ausländischen Abstammungsentscheidung' (2017) 7 Zak 132; Lydia Fuchs, '§ 97–100 AußStrG', in Edwin Gitschthaler und Johann Höllwerth (hrsg), *AußStrG Kommentar zum Außerstreitgesetz,* bd 1: JN & AußStrG (2 aufl, Manz 2019) mn 4; Decision 6 Ob 142/18b (Austrian Supreme Court, 20 December 2018) <https://rdb.manz.at/document/ris.just.JJT_20181220_OGH0002_0060OB00142_18B0000_000> accessed 26 April 2024.

43 Michael Vidmar, '§ 91a AußStrG' in Birgit Schneider und Stephan Verweijen (hrsg), *AußStrG Kommentar* (Linde 2018) mn 6.

44 Marco Nademleinsky und Matthias Neumayr, *Internationales Familienrecht* (EF-Buch, 3 aufl, Manz 2022) mn 06.34; Matthias Neumayr, '§ 97 AußStrG' in Alfred Burgstaller und andere (hrsg), *Internationales Zivilverfahrensrecht* (LexisNexis 2020) mn 17.

45 Bettina Nunner-Krautgasser, 'Die Anerkennung ausländischer Entscheidungen - Dogmatische Grundfragen' (2009) 18 ÖJZ 800; Fuchs (n 42) mn 11.

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the criteria set out in Section 35(2) of the Civil Status Act, he or she has the claim that his or her status be recorded without having to prove legal interest in the case.[46]

Recognition of a decision can only be refused under the strict conditions outlined in Section 91a(2) of the Non-Contentious Proceedings Act, specifically if the decision contradicts the public policy of the Austrian legal system, particularly concerning the best interests of the child or if one of the parties was not given the right to be heard in the origin state, or if the decision conflicts with a national or previously recognised decision, or if the deciding authority in the state of origin lacked international jurisdiction.[47] Further review of the content of the foreign decision is excluded.[48]

In summary, for a foreign surrogacy-related decision to be recognised in Austria, it must be legally valid in the country where it was issued and must have been made by a competent authority according to the legal procedures of that country. Moreover, it must be ensured that all parties involved had a fair opportunity to be heard during the proceedings, and the child's best interests were a primary consideration. If these criteria are met, the foreign decision may be recognised in Austria, thus allowing the intended parents to be recognised as the legal parents.

3.2. Surrogacy cases before Central European Supreme Courts

1. Austrian Constitutional Court

The Austrian Constitutional Court has addressed cross-border surrogacy in two pivotal cases. In each instance, the legal parenthood of the intended parents was initially recognised under the jurisdiction of the country where the child was born. However, Austrian authorities initially refused to acknowledge this status. The lower courts, assuming a violation of Austrian *ordre public,* noted that this was a circumvention of the national prohibition on surrogacy. As a result, they ruled that, according to Austrian law, the surrogate mother must be considered the legal mother of the child.

In 2011, the Austrian Constitutional Court examined a case involving a child born in the State of Georgia (US) by way of surrogacy. This child was initially granted Austrian citizenship, listing an Austrian woman and her Italian husband as the legal parents. However, the Federal Ministry of the Interior challenged this decision, arguing that the American court's determination of legal parenthood contravened Austrian *ordre public* because Austrian law does not recognise the intended mother as the legal mother if she did not physically give birth to the child.

46 Norbert Kutscher und Thomas Wildpert, *PStG Personenstandsrecht* (2 aufl, Manz 2019) § 35, mn 2.
47 Nademleinsky und Neumayr (n 44) mn 01.65.
48 Susanne Beck, 'Prüfung der Anerkennungsfähigkeit ausländischer Abstammungsentscheidungen - ein Leitfaden' (2018) 2 iFamZ 93; Astrid Deixler-Hübner, '§ 91a AußStrG', in Walter H Rechberger und Thomas Klicka (hrsg), *AußStrG Außerstreitgesetz* (3 aufl, Verlag Österreich 2020) mn 3.

The Constitutional Court, however, ruled that the parentage laws of the child's birthplace hold international validity, overriding any conflicts of law. The Court affirmed that Georgia's surrogacy regulations apply universally within Georgian jurisdiction, irrespective of the parties' nationality and that Austrian domestic laws are confined to Austrian territory. Additionally, the Court examined the application of the *ordre public* exception under Section 91a(2)(1) of the Austrian Non-Contentious Proceedings Act. It determined that the prohibition of surrogacy does not constitute a core principle of the Austrian legal system.

The Court argued that denying legal recognition to the intended parents would contravene the child's best interests by effectively leaving the child without a legally recognised mother. Ultimately, the Constitutional Court underscored that the paramount consideration of the child's best interests is a cornerstone of constitutional law and a fundamental value within the Austrian legal framework. Therefore, it concluded that the intended parents should be legally acknowledged as the child's parents under Austrian law.[49]

One year later, the Austrian Constitutional Court dealt with a similar case involving an Austrian couple listed as the legal parents of twins on a Ukrainian birth certificate despite the children being biologically descended from the surrogate mother. Austrian authorities denied citizenship to the twins, arguing that the documents lacked the necessary details for determining parentage domestically and that the surrogacy contract violated Austrian *ordre public*. It held that if the parenthood of the intended parents was established by a legal act involving official or judicial actions, such parenthood should be recognised by the authorities according to Section 91a of the Austrian Non-Contentious Proceedings Act, based on the principle of effect extension. Thus, the documents issued in Ukraine in accordance with Ukrainian law were deemed authoritative. The court argued that questioning the parentage certified by Ukrainian authorities would be detrimental to the child's best interests.[50]

These decisions indicate that the Constitutional Court recognises the legal situation created by foreign legal acts concerning children born by foreign surrogate mothers rather than determining the applicable substantive law through conflict-of-law connections. Moreover, the court's decision was influenced by Article 8 of the ECHR, which prioritises the child's best interests, stating that non-recognition would unlawfully restrict the child's right to private life and identity.

2. German Federal Court of Justice

The German Federal Court of Justice addresses surrogacy cases based on the intended parents' proof of legal parenthood through a recognisable foreign decision. If such proof exists, legal parenthood is affirmed; otherwise, it is denied.

49 Decision B 13/11 (Austrian Constitutional Court, 14 December 2011) <https://www.vfgh.gv.at/downloads/VfGH_B_13-11_Staatsbuergerschaft_Leihmutter.pdf> accessed 26 April 2024.

50 Decision B 99/12 (Austrian Constitutional Court, 11 October 2012) <https://rdb.manz.at/document/ris.vfght.JFT_09878989_12B00099_00> accessed 26 April 2024.

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In Germany, foreign decisions are generally recognised by extension of effects without a special procedure.[51] However, the Federal Court of Justice strongly prefers that primarily "judicial" decisions undergo this procedural recognition, emphasising the necessity of a formal judicial basis for recognising foreign rulings. Unlike in Austria, where the mere involvement of an authority is sufficient for recognition, the German interpretation requires that the decision "functionally" correspond to a judicial decision. This means it must be based on a binding clarification of a legal issue after thoroughly examining the facts. Moreover, some German legal experts call for the deciding authority to have jurisdiction over judicial tasks, emphasising the importance of the judicial character in the decision-making process. Hence, there is no automatic recognition of a foreign birth certificate in Germany, and the assessment of legal parenthood remains the prerogative of the German courts.[52]

Under conflict-of-law rules, the determination of parentage is based on the child's habitual residence or, secondarily, on the personal statute of the parents, typically making German substantive law applicable in cross-border surrogacy cases.[53] As per Section 1591 of the German Civil Code,[54] only the biological mother is recognised as the legal mother. Thus, in cases of surrogacy involving a foreign surrogate mother, the surrogate continues to be regarded as the legal mother in Germany. The Federal Court of Justice has affirmed this view in several decisions, including a recent case involving Ukrainian surrogacy. While the genetic father was recognised as the legal father, the intended German mother was directed to the adoption process for legal recognition.[55] This position also raises questions regarding compatibility with the case law of the ECtHR,[56] which deems the rejection of a legal parent-child relationship – especially when there is a genetic link to at least the father – as an unjustified interference with Article 8 of the ECHR. German courts, however, justify their opinion by arguing that establishing legal motherhood by way of adoption is sufficient when

51 German Law on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction of 17 December 2008 'Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG)' [2008] BGBl I 61/2586, s 108(1), in the version of 21 February 2024, BGBl I 2024/54 <https://www.gesetze-im-internet.de/famfg/BJNR258700008.html?BJNR258700008BJNG000900000> accessed 26 April 2024.

52 Kai Schulte-Bunert und Gerd Weinreich (hrsg), FamFG: Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit: Kommentar (7 aufl, Hermann Luchterhand Verlag 2023) § 108, mn 22.

53 Introductory Act to the German Civil Code of 18 August 1896 'Einführungsgesetz zum Bürgerlichen Gesetzbuche' [1994] BGBl I 63/2494, art 19(1), in the version of 11 December 2023, BGBl I 2023/354 <https://www.gesetze-im-internet.de/bgbeg/BJNR006049896.html> accessed 26 April 2024.

54 German Civil Code of 18 August 1896 'Bürgerliches Gesetzbuch (BGB)' [2003] BGBl I 21/738, in the version of 22 December 2023, BGBl I 2023/411 <https://www.gesetze-im-internet.de/bgb/BJNR001950896.html> accessed 26 April 2024.

55 Decision XII ZB 530/17 (German Federal Court of Justice, 20 March 2019) <https://openjur.de/u/2171543.html> accessed 26 April 2024.

56 See below, especially the comments on: *Labassee v France* App no 65941/11 (ECtHR, 26 June 2014) <https://hudoc.echr.coe.int/eng?i=001-145180> accessed 26 April 2024.

legal paternity is recognised, ensuring the child's clear legal identity and entitlement to claims against the father.[57]

Contrasting with the aforementioned decisions, the Federal Court of Justice ruled differently in two cases involving surrogacy in the US, where American courts had determined the legal parenthood of the children to the intended parents before their birth.[58] In these instances, the Federal Court of Justice recognised the foreign court decisions as valid, obviating the need for a conflict-of-law connection and substantive examination under German law. Non-recognition could only be considered under strict refusal grounds. In alignment with the Austrian Constitutional Court, the Federal Supreme Court did not view the German prohibition of surrogacy as a matter relevant to *ordre public,*[59] thus allowing both intended parents to be registered as legal parents.[60]

3. Swiss Federal Supreme Court

In a recent decision, the Swiss Federal Supreme Court addressed a cross-border surrogacy case involving a Swiss citizen (the intended mother) and her Turkish spouse who had used surrogacy services in Georgia. Following the surrogacy, they sought to register the Swiss citizen as the legal mother in Switzerland. The Swiss Federal Supreme Court's ruling paralleled the approach taken by the German Federal Court. In its judgment, the court determined that the certification of legal parenthood issued by the Georgian registry office did not constitute a recognisable decision capable of extending its effects to Switzerland through automatic recognition. Instead, the court held that the substantive assessment of legal parenthood should be conducted according to Swiss law due to the relevant conflict-of-law connections. Under Swiss law, the father was recognised as the legal parent because of his biological connection to the child. However, the intended mother, who had no biological link to the child, was not recognised as the legal parent. Consequently, she was directed to pursue the legal route of adoption to establish her parental rights.[61]

57 Decision XII ZB 530/17 (n 55), confirming the opinion of the previous instance, Decision 15 W 413/16 (Higher Regional Court of Hamm, 26 September 2017) <https://openjur.de/u/2172508.html> accessed 26 April 2024.

58 In the first case (2014), the intended parents were homosexual life partners with German citizenship who claimed surrogacy in California using the sperm of one partne, see: Decision XII ZB 463/13 (German Federal Court of Justice, 10 December 2014) <https://openjur.de/u/752745.html> accessed 26 April 2024. In the second case (2018), the intended parents were an opposite-sex German couple who attended surrogacy in Colorado using the sperm of the man, see: Decision XII ZB 231/18 (German Federal Court of Justice, 10 October 2018) <https://openjur.de/u/2115372.html> accessed 26 April 2024.

59 But see: Decision B 13/11 (n 49).

60 For a different view, Ursula Rölke, 'Leihmutterschaft und Kinderrechte – eine Bestandsaufnahme' (2021) 7 NDV 357.

61 Decision 5A_545/2020 (Swiss Federal Supreme Court, 7 February 2022) <https://www.servat.unibe.ch/dfr/bger/2022/220207_5A_545-2020.html> accessed 26 April 2024.

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3.3. Case law of the European Court of Human Rights

According to the case law of the ECtHR concerning the recognition of parent-child relationships established abroad through surrogacy, the parental status acquired abroad – whether through a court judgment or an administrative act – falls under the protection of Article 8 of the ECHR.[62] This protection applies particularly when the intended father is biologically related to the child through sperm donation, and the parenthood of the intended parents has been lawfully and in good faith established under a foreign legal system.[63] If the surrogacy occurs in a foreign jurisdiction and the child is legally handed over to the intended parents, the recognising state should not deny recognition of the parent-child relationship with the biologically connected intended father.[64]

There must also be a way for the genetically unrelated intended mother to legally establish a parent-child relationship. In this case, however, it is sufficient if the option of adoption is available. The inability to acquire parental status under the legal system or public policy of the recognising state does not justify its denial.[65] Article 8 of the ECHR aims to modify the application of international private law by recognising the state to the extent that non-recognition would constitute an unlawful infringement on the child's right to respect for his or her private life. Nevertheless, the ECtHR acknowledges the sovereignty of states in continuing to prohibit surrogacy in their domestic laws.[66]

62 *Labassee v France* (n 56); *Mennesson v France* App no 65192/11 (ECtHR, 26 June 2014) <https://hudoc.echr.coe.int/eng?i=001-145389> accessed 26 April 2024; *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 24 January 2017) <https://hudoc.echr.coe.int/fre?i=001-170359> accessed 26 April 2024.

63 In contrast to the cases against France, the criterion of genetic paternity was not satisfied in the case against Italy, which led the ECtHR to issue a negative decision.

64 However, according to the opinion of the German Federal Court of Justice and Swiss Federal Supreme Court, this does not apply to a biologically unrelated mother.

65 Most recently: *DB and Others v Switzerland* App nos 58817/15, 58252/15 (ECtHR, 22 November 2022) <https://hudoc.echr.coe.int/eng?i=001-220955> accessed 26 April 2024; *KK and Others v Denmark* App no 25212/21 (ECtHR, 6 December 2022) <https://hudoc.echr.coe.int/fre?i=001-221261> accessed 26 April 2024.

66 Further literature on the aforementioned ECtHR cases, e.g. Philip Czech, 'Verweigerung der Adoption von im Ausland von Leihmutter geborenen Kindern durch die Wunschmutter' (2022) 542 NLMR 221; Erwin Bernat, 'Zur Reichweite des Art 8 EMRK betreffend die Anerkennungsfähigkeit ausländischer Statusentscheidungen nach Leihmutterschaft' (2023) 2 RdM 71; Rudolf Thienel, 'Ausgewählte Rechtsprechung des EGMR 2022' (2023) 37 ÖJZ 783; Katarina Trimmings, 'Surrogacy Arrangements and the Best Interests of the Child: The Case Law of the European Court of Human Rights' in Elisabetta Bergamini and Chiara Ragni (eds), *Fundamental Rights and Best Interests of the Child in Transnational Families* (Intersentia 2019) 207 et seq; Pietro Franzina, 'Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad' (2011) 5 Diritti Umani e Diritto Internazionale 609 et seq.

3.4. The current situation in Austria

For the time being, there are no statistics on personal status cases differentiating by the ground for registration.[67] Moreover, the principle of publicity requires that only second and higher-instance court decisions be made publicly available. The publication of first-instance court decisions depends on available staffing. Hence, accessibility to court decisions in parentage cases is very limited.[68] However, one judgment from a Tyrolean district court has aligned with the Constitutional Court's decisions on cross-border surrogacy. The court recognised a Ukrainian birth certificate that established legal parenthood by identifying an Austrian couple as the legal parents of a child born by a surrogate mother in Ukraine.[69]

Despite the limited availability of official records, there is a significant interest among Austrians in pursuing surrogacy abroad. Specialised Austrian law firms report that they legally assist and represent between 60 and 80 couples each year in arrangements with foreign surrogate mothers. Given the existing possibilities for circumvention, it is expected that individuals will continue to utilise these options to navigate domestic restrictions.

The 2013 Citizenship Amendment Act[70] potentially impacts surrogacy tourism. The revised Section 7 of the Citizenship Act[71] stipulates that a child can only receive Austrian citizenship by birth if the mother is an Austrian citizen as defined in Section 143 of the General Civil Code, emphasising biological motherhood over intended motherhood for citizenship eligibility. However, Section 7(3) of the Citizenship Act offers a provision for granting Austrian citizenship to children born abroad if the legal mother or father, as recognised by the birth country's law, are Austrian citizens. This clause primarily addresses situations where the child would otherwise be stateless, which is not the case in most cross-border

67 Former Ministry of the Interior Nehammer, Response to a parliamentary inquiry (Ecker and others no 7603/J), in Correspondence of the National Council no 7464, 28 September 2021; Former Ministry of Labor, Family and Youth Aschbacher, Response to a parliamentary inquiry (Ecker and others), in Correspondence of the National Council no 547, 10 March 2020.

68 The Austrian online case law database currently contains only a handful of decisions issued by district courts. Wolfgang Fellner und Gerhard Nogratnig, *RStDG, GOG und StAG II5* (Manz 2021) § 48a GOG, mn 3.

69 Decision 2 FAM 54/19z (District Court of Tyrol, 21 November 2019) [2020] EF-Z 22 <http://www.nademleinsky.at/pdf/news-18.pdf> accessed 26 April 2024. Also see: Marco Nademleinsky, Anerkennung ukrainischer Leihmutterschaft' [2020] EF-Z 45; Marco Nademleinsky, Mythos ukrainische Geburtsurkunde' [2021] EF-Z 47.

70 Amendment to the Austrian Citizenship Act 1985 of 2013 'Änderung des Staatsbürgerschaftsgesetzes 1985' [2013] BGBl I 136/1.

71 Austrian Citizenship Act of 19 July 1985 'Bundesgesetz über die österreichische Staatsbürgerschaft (Staatsbürgerschaftsgesetz 1985 - StbG)' [1985] BGBl 134/311; Federal law consolidated: Complete legislation for the Citizenship Act 1985 (version of 30 December 2022) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005579&FassungVom=2013-03-31> accessed 26 April 2024.

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surrogacy cases.[72] Children of foreign surrogate mothers might face challenges obtaining Austrian citizenship by birth if born in countries that adhere to the principle of birthplace citizenship *(ius soli)*. If the genetic father is absent or does not acknowledge paternity within eight weeks of birth, and only the intended mother is an Austrian citizen, the child may not be eligible for Austrian citizenship.[73] Given the Austrian Constitutional Court's acknowledgement of the child's right to citizenship as part of family life protection, as supported by ECtHR case law, a strict interpretation of Austrian citizenship laws that results in denying citizenship to such children could be deemed unconstitutional.[74]

Although the Austrian Constitutional Court does not see a constitutional mandate to maintain the prohibition of surrogacy on a domestic level,[75] the Austrian political approach appears restrained. The current government's legislative program suggests only selective modifications in family law.[76] Despite calls from the Ministry of Justice for stronger legislative action against the commercialisation of surrogacy, current parliamentary reports reveal no immediate plans to enshrine a surrogacy ban at the constitutional level, emphasising its importance in public policy discussions.[77]

4 CONCLUSION

The Austrian legal framework continues to define legal motherhood strictly in biological terms, thereby effectively excluding women unable to conceive due to medical conditions and male homosexual couples from accessing reproductive medicine and establishing legal parenthood. This situation arises because both scenarios necessitate surrogacy, which is prohibited under national law. The rationale for this prohibition includes preventing children from becoming subjects of compulsory surrender and protecting women from the exploitation of their reproductive capabilities.

The Bioethics Commission supports the ban on surrogacy primarily to protect women who might otherwise agree to surrogacy in financial need or psychological stress. This concern holds especially for commercial surrogacy arrangements where the surrogate mother

72 Explanatory notes to the Governmental Proposals, 2303 of the addenda to the stenographic protocol of the national council, XXIV GP.

73 Cf the facts of Austrian Constitutional Court, Decision B 13/11 (n 49): the intended father was an Italian citizen.

74 See: *Genovese v Malta* App no 53124/09 (ECtHR, 11 October 2011) <https://hudoc.echr.coe.int/eng?i=001-106785> accessed 26 April 2024.

75 Decision B 13/11 (n 49) para 24.

76 See: Republik Österreich, *Aus Verantwortung für Österreich: Regierungsprogramm 2020–2024* (Bundeskanzleramt Österreich 2020) 24 <https://www.bundeskanzleramt.gv.at/bundeskanzleramt/die-bundesregierung/regierungsdokumente.html> accessed 26 April 2024.

77 Ministry of Justice Zadić, Response to a parliamentary inquiry (Ecker and others no 547/J-NR/2020), in Correspondence of the National Council no 573, 10 March 2020.

receives compensation beyond actual expenses. However, altruistic surrogacy – where the surrogate is reimbursed only for pregnancy-related expenses and acts from a purely intrinsic motivation to help childless couples – might be considered. In this model, the surrogate retains the right to decide on the surrender of the child, ensuring that her decision is free from coercion and the child is not treated as an object of transaction.

Nonetheless, a comprehensive evaluation must also consider the child's best interests. Developmental psychology suggests that the prenatal mother-child bond is crucial, and its disruption post-birth could lead to adverse developmental outcomes. Moreover, surrogacy might infringe upon a child's right to know their biological origins. Surrogacy inherently involves the separation of the child from the biological mother, affecting both the surrogate and the intended parents.

While Austria strictly controls surrogacy within its borders, it generally recognises parental rights established abroad without necessitating a formal procedure, provided that foreign legal decisions do not contravene significant procedural principles or Austrian public order. According to the Austrian Constitutional Court, the best interests of the child should override the national prohibition against surrogacy in cases involving international elements. Thus, legal parenthood established abroad through surrogacy can be acknowledged in Austria if foreign documentation, such as a birth certificate, identifies the intended parents as the legal parents. Nevertheless, the ruling of both the German Federal Court of Justice and the Swiss Federal Supreme Court contrast sharply with Austrian case law, as they deny recognition of legal parenthood for surrogacy conducted in jurisdictions like Ukraine and Georgia, where the official documentation does not meet the required standards of a decisive legal ruling. These courts require a substantive legal assessment based on the child's habitual residence or the personal status of the intended parents, leading to recognition of the genetic father but requiring the intended mother to pursue adoption.

While Austria's liberal view on recognising foreign parental rights is commendable for its efficiency and child-centric focus, it also inadvertently promotes reproductive tourism by allowing circumvention of domestic legal restrictions by resorting to more permissive legal systems abroad. This phenomenon underlines the complexity of integrating international reproductive rights into national legal frameworks and the ongoing challenges in balancing ethical, legal, and social considerations.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЮРИДИЧНІ КОЛІЗІЇ В СФЕРІ ТРАНСКОРДОННОГО СУРОГАТНОГО МАТЕРИНСТВА: ЦЕНТРАЛЬНОЄВРОПЕЙСЬКИЙ ПОГЛЯД НА ВИЗНАННЯ ЗАКОННОГО БАТЬКІВСТВА ЧЕРЕЗ СУРОГАТНЕ МАТЕРИНСТВО

Ельмар Бухштеттер* та Маріанна Рот

АНОТАЦІЯ

Вступ. *У цій статті досліджується правове поле сурогатного материнства з погляду Центральної Європи, зокрема розглядається те, яким чином такі країни, як Австрія, Німеччина та Швейцарія, вирішують питання визнання батьківства, встановленого за кордоном. Хоча в більшості центральноєвропейських держав сурогатне материнство заборонено на національному рівні, спостерігається зростання тенденції обходити ці заборони, звертаючись до послуг сурогатного материнства за кордоном. Це явище, відоме як репродуктивний туризм, піднімає складні правові питання щодо визнання статусу батьків за кордоном.*

Методи. *Методи дослідження налічують всебічний огляд міжнародних та автономних національних правових норм, а також порівняльний аналіз судової практики центральноєвропейських судів щодо транскордонного сурогатного материнства та визнання батьківства. У дослідженні розглядаються правові колізії на прикладі австрійського сімейного права для оцінки актуальних питань, що виникають у зв'язку із сурогатним материнством. У роботі використано дані з різних правових джерел, зокрема з Конституційного суду Австрії, Федерального суду Німеччини, Федерального Верховного суду Швейцарії та Європейського суду з прав людини.*

Результати та висновки. *У результаті було виявлено значні відмінності між позиціями Австрії, Німеччини та Швейцарії щодо визнання батьківства, набутого шляхом сурогатного материнства за кордоном. Хоча рішення верховних судів в цих країнах, як правило, ухвалюють з огляду на інтереси дитини – часто визнаючи іноземні домовленості про сурогатне материнство, щоб діти не залишилися без законних батьків – їхні судові підходи значно відрізняються. Конституційний суд Австрії дотримується більш інклюзивного підходу, він зважає на іноземні рішення будь-яких органів, наприклад, свідоцтва про народження, на основі концепції автоматичного визнання. Натомість верховні суди Німеччини та Швейцарії визнають лише офіційні судові рішення. Для випадків транскордонного сурогатного материнства, які не відповідають цій вимозі, ці країни застосовують національне законодавство постійного місця проживання дитини або, як запасний варіант, законодавство країни походження передбачуваних батьків. Оскільки закони Німеччини та Швейцарії категорично забороняють сурогатне материнство, зазвичай визнається лише генетичний батько, тоді як біологічна мати має пройти процедуру усиновлення.*

Це збігається з думкою ЄСПЛ, який все ще надає перевагу способу встановлення батьківства в межах суверенітету держави. У цій статті розглядається збалансований підхід, який поважає як правові принципи національних держав, так і основні права дітей, народжених через домовленості із сурогатною матір'ю в іншій країні.

Ключові слова: *сурогатне материнство, іноземний статус, транскордонне батьківство, процедура визнання.*

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Research Article

CRIMINAL, CIVIL AND SOCIO-ECONOMIC ASPECTS OF THE PROTECTION OF UNBORN LIFE IN THE REPUBLIC OF KOSOVO

Fatmire Krasniqi* and Gëzim Jusufi

ABSTRACT

Background: *Human life is a natural right, and as a fundamental right, its loss entails the loss of all other rights. Consequently, human life is protected by international and national legal acts. This study will approach the chosen topic from a critical thinking angle. Its purpose is to present the basic notions of life, tackle the protection of life through positive legal norms, examine the legal treatment of the unauthorised termination of pregnancy, and provide an overview of data related to such terminations. Furthermore, we will examine whether current legal provisions in Republic of Kosovo effectively safeguard life or, instead, permit the termination of unborn life.*

The topic will be approached from the perspectives of civil law and the socioeconomic aspect of this phenomenon. Given that Kosovo was once an Autonomous Region of the Socialist Federal Republic of Yugoslavia, we will draw a comparative parallel in terms of legal reforms. The importance of this study will be evident based on the fact that studies of this interrelated nature of such a topic are lacking. Consequently, such a study will be relevant to legislation and legal practice.

Methods: *The selected topic will be treated by applying the historical-legal method, the normative method, the comparative method, the method of analysis and the synthesis method. Through the application of these study methods, an effort will be made to achieve the goal and the study objective, always with the aim of providing concrete answers to the research questions and validating the raised hypotheses.*

Results and Conclusions*: While it must be accepted that termination of pregnancy is not murder, it is crucial to recognise that if it occurs at advanced stages of fetal development, it cannot be called anything other than murder. In addition to the legal fragility facing Kosovar society, there is also a notable weakness in the punitive policy. This policy, in its effort to be humane towards the perpetrators of criminal offences, may fail to achieve its intended objectives. Consequently, there is an urgent need for a shift in legislative policy concerning certain anti-social phenomena. Such a change would inherently lead to a reevaluation of punitive measures, especially considering that the criminal offence of unauthorised termination of pregnancy continues to be present in our society.*

1 INTRODUCTION

Human life is undeniably an absolute and natural right, foundational to all other rights. The right to life takes precedence as the most important right, for with the loss of life, all other rights and human existence are lost.[1] In this context, the right to life is ranked first because it is the most fundamental human right of all: if someone is arbitrarily deprived of his right to life, all other rights will become unrealistic. This primacy is underscored by the fact that it is not "derogable"; it cannot be denied even in "time of war or other public emergency that threatens the life of the nation" – although, as discussed later, "deaths caused by legal acts of war" do not constitute a violation of the right to life (Article 15 (2)). This principle was reinforced by the European Court of Human Rights in the Grand Chamber decision of *McCann and Others v. the United Kingdom*.[2]

Meanwhile, given that women's sexual and reproductive rights and health care are integral to human rights,[3] a pressing question arises: how can health and legal protection for both a potential mother and future life be achieved? In seeking to legally protect a mother and an unborn life, the Kosovar legislature establishes legal limits on the permissible period of termination of pregnancy and the conditions under which termination may be allowed. This raises concerns about whether, in regulating these terms, the Kosovar legislator, in a conscious way, legitimises dangerous actions, especially in cases where the mother's circumstances or the risks involved are not fully understood, potentially endangering both the mother and the unborn life inside her.

While the possibility of termination of pregnancy is influenced by different factors and viewed differently across countries, this study will examine several aspects. It will cover the basic notions that are related to the topic, particularly the notion of life, protection of life through positive legal-penal "criminal" norms, the legal treatment of unauthorised termination of pregnancy, present reflective data on unauthorised termination of pregnancy, and address whether current legal provisions effectively protect or inadvertently extinguish unborn life.

Furthermore, it will explore the legal-civil impact of unauthorised termination of pregnancy, the legal reforms in Kosovar society due to the shift from a socialist to a democratic legal system, and the approximating tendencies with European Union law. The study will also present an independent critical position on the chosen topic and offer recommendations based on the analysis conducted.

1 Ismet Salihu, *E drejta penale: Pjesa e posaçme* (Kolegji Fama, Fakulteti Juridik 2014).

2 Douwe Korff, *The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights* (Human Rights Handbooks no 8, Council of Europe 2006) 6 <https://www.refworld.org/reference/research/coe/2006/en/92032> accessed 15 July 2024.

3 Daniela Antonovska, 'The Right to Abortion in North Macedonia' (2021) 7(1) Women's Health Open Journal 1, doi:10.17140/whoj-7-139.

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2 METHODOLOGY OF THE STUDY

Various study methods have been applied to address the chosen topic. The substantive features of the study, as well as the most realistic and meaningful presentation of the data, have made it necessary to apply a diverse methodology. In fact, beyond the methods used, this study combines both qualitative and quantitative approaches. On the qualitative side, the study includes analysis and interpretation of the data of documents and concrete materials related to the topic. On the quantitative side, it incorporates processed and analysed data, aiming to validate hypotheses and provide answers to the research questions.

The historical-legal method was also directly applied to examine how unborn life has evolved from earlier periods to the present day. *The normative method* was primarily used to monitor the legal treatment of unauthorised pregnancy termination according to the incriminations from the current legal framework in the country. *The comparative method* enabled the presentation and comparison of statistical data across time periods where official data was available. *The method of analysis* was applied throughout, enabling the systematic breakdown and detailed exploration of each aspect of the subject. Also, *the synthesis method* facilitated the collecting and handling of all study-related information, ultimately allowing for a general and concrete conclusion on the treated topic.

3 RESEARCH QUESTIONS

Through the treatment of the topic chosen for study, we will try to answer the following:

1. With the current legal framework, is the unborn life being adequately protected?
2. Are appropriate measures being taken to protect both the life of the unborn and the health of the potential mother?
3. Is the phenomenon of unauthorised termination of pregnancy present in our society, and in what proportion is it present?
4. What are the legal-civil impacts of an unauthorised termination of pregnancy?
5. How does post-socialist doctrine address the issue of unauthorized termination of pregnancy?
6. What is Kosovo's current legal status as it pursues EU membership and seeks alignment with EU law?

Consequently, answering the questions posed above, we consider that the topic treated is even more interesting, comprehensive, and, of course, of special importance, given that studies of this nature are currently extremely few in our country.

4 HYPOTHESES

From the treatment of the topic chosen for study, we argue that:

1. The life of the unborn and its rights, in principle, are specified according to the legal framework;
2. The unborn life must be protected even in the special circumstances according to which, currently and at a more advanced stage of its development, its termination is allowed;
3. The unborn life has its implications in the criminal, civil and socio-economic fields;
4. The unborn life had protection even when Kosovo was the *Autonomous Region of the Socialist Republic of the Former Yugoslavia* and
5. In the current period, the number of people convicted for the unauthorised termination of pregnancy is rapidly increasing, which manifests a rise in awareness and social and legal reaction when such a future life is threatened or extinguished.

5 LITERATURE REVIEW

5.1. General Aspects of the Notion of Life

Referring to the notion of life, when it is considered that life begins when a child is born, opinions differ. According to the oldest concept, a child is considered born once the umbilical cord is cut, fully separating the child from the mother's body. Others believe that birth occurs when part of the child emerges from the mother's body. A further perspective holds that the child is born from the moment when the breathing of the placenta stops. However, a third group of authors argue that life begins from the onset of the birth process itself, namely the duration of the birth. This third opinion is generally considered the most accurate.[4]

However, one fact remains clear: the embryo represents the beginning of a new human being,[5] which we consider the beginning of life itself and the indispensability of legal protection and its respect.

Consequently, the protection of the right to life compels states not only to refrain from the intentional causation of the death of a person but also to fulfil a positive obligation to take appropriate measures to ensure the effective protection of the life of every human being.[6] In this context, beyond the institutional obligation to protect the life of the person, it is

4 Ismet Salihu, Hilmi Zhitija dhe Fejzullah Hasani, *Komentari i Kodit Penal të Republikës së Kosovës* (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH 2014).

5 Keith L Moore, TVN Persaud and Mark G Torchia, *The Developing Human: Clinically Oriented Embryology* (Elsevier 2015).

6 Luminita Dragne, 'The Right to Life: A Fundamental Human Right' (2013) 2(2) Social Economic Debates doi:10.2139/ssrn.2408937.

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precisely the state that, through the legal framework and in the circumstances of the protection of life, sets behavioural limits in the interest of protecting life. However, in certain situations, the elasticity, fragility or lack of severity of these legal provisions can put at risk precisely this fundamental right – the right to life – including that of the potential mother and the unborn.

Moreover, although it is really difficult to balance the right of the woman to terminate a pregnancy within certain legally permitted periods and the obligation to respect the concrete legal provisions, the vital aim should be to prevent this legal framework from inadvertently legitimising the actions by the potential mother or even health personnel who, by utilising the elastic legal framework, can justify actions that cause damage to future life.

5.2. Protection of Unborn Life and Women's Rights

Under the Criminal Code of Kosovo (2018),[7] the protection of unborn life is tackled in the chapter on criminal offences against life and body. Specifically, unborn life is protected by incriminating illegal actions that constitute the criminal offence named the *Unauthorised Termination Of Pregnancy*. This offence is of a blanket nature and applies in cases where the committed violates the *Law on Termination of Pregnancy*.[8] According to the relevant legal provisions, any individual who, contrary to the law on the termination of pregnancy and with the consent of the pregnant woman, terminates the pregnancy, initiates the termination of the pregnancy or helps her to terminate the pregnancy, shall be punished with imprisonment from six (6) months to three (3) years.[9]

Consequently, from the highlighted provision, it is observed that the commission of the criminal offence can be realised by undertaking any of the alternative actions for the commission of this offence. These actions are manifested as *termination of pregnancy, initiation of termination of pregnancy, or even providing assistance in termination of pregnancy*. Moreover, within this legal definition, emphasis should be placed on two important issues. Initially, *acting knowingly and contrary to the legal provisions*, which is clearly an illegal action, and on the other hand, the existence of the *pregnant woman's consent,* which is also illegal.

From the legal provision and its interpretation, it becomes clear that any person can be a perpetrator of this criminal offence – be a doctor, midwife, any other health worker, or any other person. However, this criminal offence cannot be committed solely by a pregnant woman, even in cases where she terminates the pregnancy by herself or in collaboration with another person.[10] However, the lack of consent from the pregnant woman significantly

7 Code no 06/L-074 of 23 November 2018 'Criminal Code of the Republic of Kosovo' [2019] Official Gazette of the Republic of Kosovo 2/71, ch 16.
8 Salihu (n 1).
9 Code no 06/L-074 (n 7) art 178, para 1.
10 Salihu (n 1).

intensifies the severity of this criminal offence, leading to a stricter penal policy. Thus, anyone who terminates or begins to terminate a pregnancy without the consent of the pregnant woman shall be sentenced to imprisonment from one (1) to eight (8) years.[11]

On the other hand, the law explicitly upholds every woman's right to freely decide on the termination of pregnancy according to the criteria defined by the law. Women are entitled to counselling and information regarding pregnancy termination, and legally capable women are not subject to termination of pregnancy without their consent.[12]

Furthermore, women over the age of eighteen (18) have the right to request an elective termination of pregnancy. Minors aged sixteen (16) or older may request termination of pregnancy, providing they have obtained the consent of the parent or legal guardian.[13] Elective termination of pregnancy can be done until the end of the tenth (10) week of pregnancy, calculated from the first day of the last menstrual cycle. Any termination beyond the tenth (10) week is against the *Law on Health* and requires the approval of a health commission professional.[14]

Beyond the highlighted legal provisions, the protection of unborn life and the well-being of the potential mother are prioritised, particularly through specific legal provisions that permit termination for medical reasons. In cases where it is determined that the continuation of the pregnancy or the birth of the child endangers the life or health of the woman, it can be done at any period of the pregnancy, provided that the Medical Commission authorises it. The pregnant woman gives informed consent if she is capable. Similarly, termination is permitted at any point if severe fetal malformations incompatible with life, diseases, serious untreatable conditions, or disabilities are confirmed, with the Medical Commission's approval and the patient's consent as long as she is aware.[15]

Although it should always be borne in mind that abortion is not good for health, it affects not only the woman's health but also future pregnancies.[16] Furthermore, unsafe abortion is one of the causes of maternal mortality and morbidity, particularly in developing countries.[17]

11 Code no 06/L-074 (n 7) art 178, para 2.

12 Law no 03/L-110 of 6 November 2008 'On Termination of Pregnancy' [2009] Official Gazette of the Republic of Kosovo 48/2, art 4, paras 1, 2, 3.

13 ibid, art 5, paras 1, 2.

14 ibid, arts 6, 7.

15 ibid, art 15, para 1, 2.

16 Rajeev Shukla, 'An Abortion: A Bless or a Sin for a Society' (2020) 8 International Journal of Research in Humanities, Arts and Literature 61.

17 Jasmina Begum, Sunita Samal and Seetesh Ghose, 'Unusual Complication of Surgical Abortion with Pelvic Extrusion of Fetal Head: A Case Report' (2015) 9(11) Journal of Clinical and Diagnostic Research QD11, doi:10.7860/JCDR/2015/15759.6780.

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5.3. Analytical Thoughts about the Unauthorised Termination of Pregnancy According to the Legal-Penal Provisions of the Criminal Code

Based on the legal-penal (criminal) provisions, it can rightly be concluded that legally, both the future life and the life and health of the potential mother are fully protected under the law. However, beyond this legal protection, the critical focus lies in the permissible grounds for pregnancy termination, as outlined in specific legal provisions. These provisions establish ***the permitted period*** (in special cases of termination of pregnancy) where future life can only be terminated if the potential mother faces severe physical or psychological challenges, and only with her informed consent.

Asserted even more clearly, expressly defined by legal provisions, it is emphasised that termination of pregnancy for criminological reasons can be carried out in the 22nd week of pregnancy, with induced labour permitted even later upon medical recommendation and confirmation by competent institutions. These authorities are authorised to determine if the pregnancy is a consequence of one of the following criminal acts: rape, forced sexual relations involving trafficked and exploited women, sexual relations with minors or cases of incest.[18]

Consequently, the criminological grounds for the termination of pregnancy are justified even though legal provisions are very reasonable, without dispute. However, termination at an advanced stage of pregnancy, regardless of the circumstances in which it began, remains a serious matter. Moreover, we must make it clear that the legislator, within the framework of the legal provision, has emphasised that even after the 22nd week of pregnancy, a so-called induced birth can take place involving the extraction of the foetus under the influence of drugs or with surgical intervention.[19]

Such an action, in the context of allowing termination of pregnancy even after the 22nd week, effectively legitimises a harmful and potentially dangerous action because, above all, it places both the coming life and the life and health of the potential mother at risk. The mother, facing serious physical, health and psychological challenges, may undergo severe strain where the loss of a future life, which, regardless of how it began (it can be a healthy life that is above all innocent), is legitimised by creating a legal space for the possibility of terminating this life and putting the potential mother in a dangerous situation.

However, we consider that in such a situation, the mother must be helped, protected, and offered care and any support that contributes to her psychological and physical well-being. However, looking for alternative solutions is crucial instead of resorting to termination.

18 Law no 03/L-110 (n 12) art 16, para 1, subss 1.1, 1.2, 1.3.
19 ibid, art 2.

Moreover, looking at the human dimension, future life originated in circumstances that have already victimised the mother; she, too, is a victim in this context. Thus, we must prioritise and care for both lives when making any decisions that could lead to further victimisation of either the mother or the unborn child.

5.4. Protecting, Harming or Extinguishing of Unborn Life

Until now, legal provisions indicate that it is possible to terminate a pregnancy without incurring criminal liability, provided that specific legal situations are met. Beyond such a legal definition, even in a general context, there are several broader arguments in support of a right to abortion, which often focus on three different sets of circumstances.

The first is when the mother invokes her right to life over that of her unborn child. The second set of circumstances occurs when a mother invokes her abortion rights for the preservation of her health. In such situations, the mother's interest in her well-being competes with the unborn child's right to life. The third situation in which abortion rights have their strongest hold in international law is when the woman seeks an abortion for a pregnancy resulting from rape or incest. In such cases, the focus is on voluntary motherhood and the mother's right to reproductive health,[20] and consequently, the tendency and focus is the protection of the mother, both psychologically and physically.

Abortion, often perceived as the termination of a pregnancy of a child who is incapable of living,[21] is not limited to such cases in the legal framework. Current legal provisions include an even broader dimension of the possible situations in which termination of pregnancy may be legally permitted, even when the foetus is fully capable of life. In such cases, termination may be carried out without imposing criminal liability for extinguishing the potential life of a future child.

In this regard, while the right to terminate a pregnancy exists everywhere[22] in our society and is generally governed by legal provisions, these laws aim to protect the life, health and general physical and emotional state of the potential mother. The legal flexibility provided for these purposes allows for a range of actions that may directly or indirectly impact potential future life.

In such a situation, the dilemma is inevitably raised as to whether we are consciously protecting future life or legally legitimising actions that violate it. This question is particularly pressing when laws permit ***induced labour*** after the 22nd week under special circumstances. Moreover, beyond such legal frameworks, instances of so-called *criminal*

20 Tom Venzor, 'Protecting the Unborn Child: The Current State of Law Concerning the So-Called Right to Abortion and Intervention by the Holy See' (2010) 89(4) Nebraska Law Review 1132.

21 Nedzad Korajlic, Driton Muharremi dhe Xhemajl Ademaj, *Fjalori terminologjia kriminalistike* (Ministria e Punëve të Brendshme 2016).

22 Fejzulla Berisha, *Hyrje në të drejtën: (Fillet e së drejtës)* (Universiteti "Haxhi Zeka", Fakulteti Juridik 2015).

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failures – where pregnancies are terminated outside or inside health institutions, beyond legal criteria and without medical indications[23] – further place the future (unborn life) in constant jeopardy, despite efforts to protect it. We consider that future (unborn) life remains in permanent danger.

5.5. Criminal, Civil and Socio-Economic Aspects of the Protection of Unborn Life

Unborn or future children require wider legal protection than they do today. Basic human rights, starting with the right to life, dignity, health protection, and protection from all forms of violence, are tied to the concept of legal subjectivity, which, by carefully reading international and regional documents, today has a different dimension than before.[24] So, it is considered that today, unborn life enjoys even more precise legal protection than before.

Consequently, although we have already made it clear that the protection of unborn life in the country is done exclusively by legal-criminal provisions, unborn life is also protected by legal-civil provisions. In other words, the unauthorised termination of pregnancy has its own implications in the legal-civil sphere, with which unborn life is also protected.

Although criminal law clearly states that unauthorised termination of pregnancy is a criminal offence, legal-civil provisions also protect issues directly related to unborn life. These include the rights and obligations of parents, compensation for the damages caused, and other legal-civil obligations and responsibilities.[25] Furthermore, civil law addresses the fundamental rights of children, starting from the determination of fundamental principles of their protection.[26] This includes matters directly related to the family as an institution, the civil rights and obligations of spouses, and the protection and care of children.

In some cases, civil law even restricts certain actions, such as the prohibition of divorce until the child reaches the age of at least one year.[27] These provisions ensure comprehensive legal-civil and socio-economic care and protection for both the unborn life and the mother.

Beyond the legal definitions highlighted above, it is important to clarify that the protection of unborn life was established even during the period when Kosovo was the *Autonomous Province of the Socialist Republic of the Former Yugoslavia*. At that time, legal protection was explicitly defined by legal-penal (criminal) provisions. According to these legal provisions, termination of pregnancy was permitted for almost the same reasons for

23 Flamur Blakaj dhe Sokrat Meksi, *Mjekësia Ligjore* (Universiteti i Prishtinës, Fakulteti i Mjekësisë 2019).

24 Zoran Pavlović, 'Protecting the Rights of the Unborn Child' (2022) 5 Yearbook Human Rights Protection: From Childhood to the Right to a Dignified Old age Human Rights and Institutions 257.

25 For more, see: Law no 2004/32 of 20 January 2006 'Family Law of Kosovo' [2006] Official Gazette of the Provisional Institutions of Self-Government in Kosovo 4/1.

26 For more, see: Law no 06/L-084 of 'On Child Protection' [2019] Official Gazette of the Republic of Kosovo 14/1.

27 For more, see: Civil Code of the Republic of Kosovo <https://md.rks-gov.net/desk/inc/media/CA329C18-55CA-4A85-8233-947C48FEDF38.docx> accessed 15 July 2024.

which such termination is still allowed today. However, the time aspect of such a termination was given great importance, and the supervision of this situation was strictly required in terms of legal and medical.[28]

However, compared to the previous period, the contemporary legal framework is more relaxed and likely to support women's rights and autonomy in making decisions about their pregnancies. Today, there is also a strong trend of harmonising the current legislation with the *acquis communautaire*.

6 RESULTS AND CONCLUSIONS

The abortion debate is an emotional, sensitive and complicated issue that interests society and religion.[29] However, when examining statistical data related to the phenomenon of unauthorised termination of pregnancy, we must first emphasise that, on the eve of the changes and the difficulties that have come from the impact of the COVID-19 pandemic, Kosovo has been experiencing a degree high level of uncertainty in different dimensions such as health, economy, education.[30] In this regard, there is a lack of basic data on the presence and impact of unauthorised terminations of pregnancy from 2020 onwards.

The first two confirmed cases of COVID-19 in Kosovo were reported on 13 March 2020.[31] Typically, statistical data on antisocial phenomena, including unauthorised abortions, are published in September each year. However, the disruptions caused by the pandemic are considered to be the main factor in the non-publication of concrete data from 2020 onwards.[32]

Despite this data gap, an analytical perspective – based on the available statistics, currently considered the clearest, safest and most reliable statistics in our country – reveals that even the recorded data on this issue arouse distrust and uncertainty regarding the numerical trends.[33]

28 For more, see: Decree PS no 011-25/77 of 28 June 1977 'Criminal Law of the Socialist Autonomous Province of Kosovo' <https://www.yumpu.com/en/document/read/42192773/criminal-law-of-the-socialist-autonomous-eulex> accessed 15 July 2024.

29 Oktay Kadayifçi, Orellana Kadayifçi and Ibrahim Ferhat Ürünsak, 'Ethical and legal aspects of abortion' (2007) 14(1) Reproductive BioMedicine Online 61, doi:10.1016/S1472-6483(10)60729-8.

30 Friedrich Ebert Stiftung, *The Effect of Covid-19 Pandemic in Kosovo: Outlook of Municipal Budgets* (Kosovo Local Government Institute 2020) 4.

31 ibid 5.

32 Muharrem Bunjaku, Roberta Bajrami and Gezim Jusufi, 'ARIMA Modelling of Economic Variables in the COVID-19 Era: A Study of the Consumer Price Index' (2023) 4(2s) Corporate & Business Strategy Review 296, doi:10.22495/cbsrv4i2siart9.

33 Fatmire Krasniqi and Gezim Jusufi, 'Tax Evasion as a Criminal Offense in Developing Countries: Some Perception from Business Organizations' (2022) 6(4s) Corporate Governance and Organizational Behavior Review 314, doi:10.22495/cgobrv6i4sip12.

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Viewed from a phenomenological point of view, during the period from 2017 to 2019, a total of 81 individuals were convicted for the criminal offence called *Unauthorised termination of pregnancy*. This number represents a percentage of about 0.1% of the total of 55,789 persons convicted of various criminal offences during the same period. Further details are presented below in Table 1 and Figure 1.[34]

Table 1. Unauthorised termination of pregnancy during the period 2017-2019

Time Period:	The number of persons accused of all types of criminal offences	The number of persons convicted for all types of criminal offences	Expressed in %	Number of persons convicted of the criminal offense: Unauthorised termination of	Expressed in %	Complicity	Expressed in %
2017	26.706	18.753	70.2	1	0.005	-	-
2018	28.696	19.721	68.7	1	0.005	2	0.01
2019	29.405	17.315	58.8	79	0.4	31	0.17
Total:	84.807	55.789	65.7	81	0.1	33	0.05

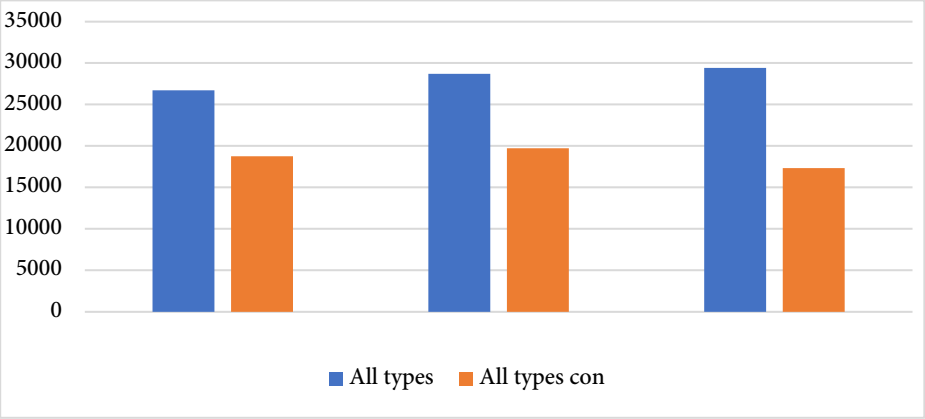

Figure 1. The number of persons accused and convicted of all types of criminal offences 2017-2019

34 Kosovo Statistics Agency, Prime Minister's Office, Social statistics, Jurisprudence statistics for adults, 2018-2020, see: *Agjencia e Statistikave të Kosovës (ASK)* <https://ask.rks-gov.net/> accessed 15 July 2024; *Zyra e Kryeministrit* <https://kryeministri.rks-gov.net/> accessed 15 July 2024.

Examining the analytical tabular data with a critical eye, we observe a notably high numerical disproportion of persons convicted for the specified criminal offence. More specifically, in 2017, only one person was convicted for this offence, with no cases in the form of complicity – a more serious form of cooperation in committing the offence. In the following year, namely 2018, the data reveal a similar trend, with just one person convicted for unauthorised termination and two others convicted for committing the offence in the form of cooperation, namely co-perpetration.

A different situation compared to the previous two years is seen in 2019. From the data found, it appears that a total of 79 people were convicted for the criminal offence of *Unauthorised termination of pregnancy,* while 31 people were convicted for committing the criminal offence highlighted in the most severe form of cooperation, namely in the form of co-perpetration. Consequently, if we make a logical comparison of the numerical data reflected in the table presented above, we clearly observe a situation that cannot correspond with the social reality of the phenomenon of unauthorised termination of pregnancy in our society. Although the data suggest a growing awareness of the need for punishment and criminal prosecution of the perpetrators, they do not accurately reflect the true prevalence of this issue in our country.

In this regard, these statistical figures may not fully capture the ***dark number*** of illegal cases directly or indirectly related to the studied criminal offence, especially given the insufficient awareness surrounding this topic. This lack of awareness hampers efforts to prevent and combat such illegal actions. Thus, we can conclude that discussions regarding unauthorised terminations are treated vulnerably, both from a legal and social perspective.

Beyond such a situation, there is generally little factual information in Kosovo regarding this topic, even though abortion has been legal and has never been politically contested since the time of Yugoslavia.[35] Although numbers reported by the *University Clinical Center of Kosovo* (UCCK) may show a decrease in induced abortions, this does not accurately reflect the reality. Many women seek abortions at private clinics or resort to self-induced methods by buying medications in pharmacies. Reports suggest that over the years, private clinics have illegally performed abortions without proper permits and often after the tenth week of pregnancy.

The outcomes of unintended pregnancies are influenced by many factors[36] outside the realm of the health sector. As mentioned, many women in Kosovo engage in self-induced abortions in various forms, from using traditional methods to purchasing *contraceptive pills*

35 Fatmire Krasniqi, Saranda Leka and Gezim Jusufi, 'Crime and Firm Performance: Empirical Evidence from the Balkan Region' (2022) 3(2s) Corporate & Business Strategy Review 230, doi:10.22495/cbsrv3i2siart4.

36 David L Eisenberg and others, 'Factors Associated With Unintended Pregnancy Outcome Among CHOICE Participants [243]' (2015) 125(1) Obstetrics & Gynecology 78S, doi:10.1097/01.AOG.0000463220.05568.8a.

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at pharmacies. The reasons for seeking abortions extend beyond unwanted pregnancies to include gender preferences. Over the years in Kosovo, there has been no correlation between high knowledge of modern contraceptive methods and their relatively low use.[37] By increasing awareness of various methods of contraceptives among society; we can help prevent unintended pregnancy and, ultimately, unsafe abortions.[38]

Moreover, cultural norms in Kosovo place a strong emphasis on having sons, who are the priority and honour of the family and inheritors of the family name and, in most cases, the family wealth. In contrast, girls are considered 'foreign persons' who will marry and be someone's wife and leave their families. As brides, they are expected to make children. After the second daughter is born, family members usually worry about whether they will have a son/grandson. Women may face pressure to ensure the birth of a boy, and given that this issue is not up to her, she may be forced to abort female fetuses until she becomes pregnant with a boy.

While gynaecologists report a decrease in the number of women opting for gender selection, they acknowledge that this practice still exists and is not rare. In most cases, women are forced to abort female fetuses if there is pressure from the family to have a son.[39]

The prevalence of abortion around the globe belies considerable diversity in the social, political, and ethical meanings of terminating a pregnancy, as well as the practices surrounding it. All of these vary from locale to locale, from one historical time to another, and among various social.[40]

In discussing the topic, we have incorporated data not only from the legal normative field but also from the practical dimension of the presence and consequences resulting from the process of unauthorised termination of pregnancy in certain developmental stages of future life. However, we consider it important to emphasise several essential points to inform our recommendations.

Currently, both future (unborn) life and potential mothers lack adequate legal protection. This legal fragility is evident in provisions allowing for terminating the pregnancy after the 22nd week, which may only occur under special circumstances. We reiterate that such interventions should be carefully regulated to ensure the protection of both the unborn and the mother's rights.

37 Iliriana Banjska, *Abortions in Kosovo: An Analysis of Induced Abortions and Reproductive Health in Kosovo from 1999 to 2019* (Artpolis 2019).

38 Ruby Kumari and others, 'Mortality and morbidity associated with illegal use of abortion pill: a prospective study in tertiary care center' (2016) 4(7) International Journal of Research in Medical Sciences 2598, doi:10.18203/2320-6012.ijrms20161916.

39 Vlora Basha and Inge Hutter, *Pregnancy and Family Planning in Kosovo: Qualitative study* (Population Research Center, University of Groningen, Index Kosova, Joint Venture with BBSS Gallup International 2006).

40 Jeanne Marecek, Catriona Macleod and Lesley Hoggart, 'Abortion in Legal, Social, and Healthcare Contexts' (2017) 27(1) Feminism & Psychology 4, doi:10.1177/0959353516689521.

At this advanced development period, the absence of a clear time limit for intervention raises concerns. Even in cases of pregnancy resulting from criminal offences, we consider that they do not justify the termination of pregnancy at this stage or after it unless there are circumstances where the unborn's life is severely compromised, i.e. with extremely serious defects, or when the life of the mother is directly at risk.

Certainly, a concrete legal definition is necessary because, above all, future life, in addition to having careful medical protection, must inevitably also have legal protection, which is currently insufficient. While it is important to recognise that termination of pregnancy is not equivalent to murder, it is also crucial to acknowledge that such terminations in advanced stages of development cannot be called anything other than murder.

Moreover, Kosovar society is currently experiencing a dual fragility: a legal system that lacks robustness and a punitive policy that, in its effort to be humane towards the perpetrators of criminal offences, may not achieve its intended objectives. So, legislative policies towards certain anti-social phenomena must change, and with this, in a derivative way, the punitive policy will also change.

We assert with conviction that the current statistical data do not provide reliable data on the presence and consequences of the criminal offence called *Unauthorised termination of pregnancy* in Kosovo. Many factors affect such data, particularly the Kosovar tradition of greater appreciation and desire for males, for the abovementioned reasons. This selective bias often leads to selective abortions, the number of which can never be verified and presented in the official records on this criminal phenomenon.

Such a fact becomes even more worrying as a result of the work and irresponsibility of private clinics, where monetary interests in certain situations are more valuable than the sanctity of future life and the well-being life of potential mothers. Therefore, private clinics should be held accountable for such activities and forced to operate under strict supervision.

Ultimately, life is sacred and must be protected more rigorously from its start. We must recognise the fragility of unborn life, which is vulnerable to the fragility of existing laws.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

КРИМІНАЛЬНО-ПРАВОВІ, ЦИВІЛЬНО-ПРАВОВІ ТА СОЦІАЛЬНО-ЕКОНОМІЧНІ АСПЕКТИ ЗАХИСТУ НЕНАРОДЖЕНОГО ЖИТТЯ У РЕСПУБЛІЦІ КОСОВО

Фатміре Краснікі* та Ґьозим Юсуфі

АНОТАЦІЯ

Вступ. *Право людини на життя є природним, і як фундаментальне право, його втрата тягне за собою втрату всіх інших прав. Відповідно, життя людини охороняється міжнародними та національними правовими актами. У цьому дослідженні ми підійшли до обраної теми під кутом критичного мислення. Мета статті – представити основні поняття життя, розглянути питання захисту життя через позитивні правові норми, розглянути правове трактування самовільного переривання вагітності та надати огляд даних, пов'язаних із такими перериваннями. Крім того, ми оцінимо, чи чинні законодавчі положення Республіки Косово ефективно захищають життя та ненароджене життя.*

Тема розглядатиметься з погляду цивільного права та соціально-економічного аспекту цього явища. З огляду на те, що Косово колись було автономним регіоном Соціалістичної Федеративної Республіки Югославія, проведемо паралель щодо правових реформ. Важливість цієї праці є очевидною, адже досліджень взаємопов'язаного характеру такої теми бракує. А отже, це робота буде актуальною для законодавства та юридичної практики.

Методи. *Обрана тема розглядатиметься із застосуванням історико-правового, нормативного та порівняльного методу, а також методу аналізу та синтезу. Завдяки застосуванню цих методів було зроблено спробу досягти мети та виконати завдання дослідження, що передбачають надання конкретних відповідей на дослідницькі питання та підтвердження висунутих гіпотез.*

Результати та висновки. *Хоча переривання вагітності не є вбивством, важливо визнати, що, якщо воно відбувається на пізніх стадіях внутрішньоутробного розвитку, його не можна назвати інакше, як вбивством. На додаток до правової нестабільності, з якою стикається косовське суспільство, існують також помітні прогалини у каральній політиці. Ця політика, яка намагається бути гуманною стосовно осіб, що вчинили кримінальні злочини, може не досягти поставлених цілей.*

Отже, є нагальна потреба у зміні законодавчої політики щодо окремих антисуспільних явищ. Така зміна за своєю суттю призведе до перегляду заходів покарання, особливо з огляду на те, що кримінальне правопорушення за самовільне переривання вагітності і надалі присутнє у нашому суспільстві.

Ключові слова: *ненароджене життя, самовільне переривання вагітності, права жінок, постсоціалістична правова доктрина, Кримінальний кодекс, Цивільний кодекс.*

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Research Article

CONSENSUAL TERMS MODIFYING CONTRACTUAL LIABILITY IN THE LIGHT OF UAE LAW: A COMPARATIVE STUDY WITH FRENCH LAW

Pierre Mallet* and Hala Nassar

ABSTRACT

Background: *In the context of UAE law, this study explores the legitimacy and application of terms that modify contractual liability, drawing a comparative analysis with French law. Contractual terms are essential in shaping agreements, reflecting the parties' expectations and strategies for managing future risks. Since the 19th century, these terms have evolved significantly due to industrial growth and an increase in civil liability disputes. They are designed to limit or exclude a party's liability in the event of a contract breach, offering a mechanism for risk management and economic cost estimation.*

The paper differentiates between terms that directly address liability and those pertaining to the initiation of liability lawsuits. It examines various clauses, including guarantee clauses, terms that reduce liability, and penal clauses that establish fixed compensation amounts to incentivise contract performance. Additionally, contemporary legal frameworks, including both French and UAE laws, increasingly impose restrictions on contractual freedom to protect vulnerable parties, such as consumers and employees, by prohibiting certain terms and granting judges the authority to invalidate unfair clauses.

The study analyses UAE legal texts in comparison with French jurisprudence to clarify the UAE legislator's perspective on the legitimacy of terms.

Methods: *This study aims to conduct a comparative analysis of Emirati and French laws on modifying contractual liability by analysing primary and secondary sources such as legal texts, judicial decisions, and commentaries. It examines legislative approaches and judicial interpretations, aiming to identify similarities, differences, and areas for UAE legal reform. Inductive reasoning is used to derive broader principles, assessing the effectiveness and fairness of both legal frameworks and considering key differences and guiding principles.*

Results and conclusions: *To define the parties' rights and responsibilities, the parties must agree upon clear and explicit terms that define the damage scope, compensation limits, and exceptions to the contract. Even though these terms are common and regulated, the courts play a significant role in interpreting them, posing legal challenges when unclear. In the UAE, the Civil Transactions Law permits such terms under contractual freedom but lacks clarity on their legality, leaving judicial discretion under Article 206. Other UAE laws explicitly invalidate these terms, aligning with international standards. Post-2016, French law also invalidates terms that remove essential obligations. It is recommended that the UAE legislator clarify its stance on these terms within civil transactions, aligning with other UAE laws, to clearly specify what conditions are acceptable.*

1 INTRODUCTION

Contractual terms are crucial in the formation of a contract, as they interlink to realise the contract's intended effects, reflecting the parties' satisfaction with the expected contractual outcomes. This significance renders these terms a fertile area for study and research.

A contract acts as the primary instrument in civil and commercial transactions, encapsulating the parties' expectations and strategies for managing future risks. Consequently, the significance of contractual terms that modify liability is clearly recognised. Notably, comparative laws, such as those of England and France, have integrated these terms in various forms, thereby gaining acceptance within these laws.[1] Historically, these terms began to evolve substantially in the nineteenth century in response to the sharp increase in disputes related to civil liability. This increase was primarily driven by significant industrial growth in communities and advancements in transportation, leading to more accidents and, consequently, more victims.[2]

Contract terms are the specific provisions and stipulations that constitute the agreement between the parties. These terms define each party's rights, responsibilities, and obligations, including express terms, implied terms, conditions, and warranties. On the other hand, "modifying liability" refers to specific provisions within a contract that alter a party's standard legal liability. These terms are intended to limit, exclude, or extend the liability that would normally apply under general law and include clauses such as exclusion clauses, limitation clauses, indemnity clauses, and force majeure clauses.

Such terms are defined as contractual conditions designed to limit or exclude the liability of the party responsible for causing damage or loss resulting from the execution of the

1 Cécile Le Gallou, 'Les Clauses Limitatives et Exclusives de Responsabilité dans les Contrats d'Affaires Anglais' (2019) 176 Revue Lamy Droit Civil <https://publications.ut-capitole.fr/id/eprint/34444> accédé 10 juillet 2024.

2 Marie Leveneur-Azemar, *Etude sur les Clauses Limitatives et Exonératoires de Responsabilité* (LGDJ 2017) 3.

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contract. They are widely used in commercial contracts to set the boundaries of the parties' liability towards one another and are often a focal point of negotiation to establish the limits of their future responsibilities. Given that the contractual liability system in jurisdictions adhering to civil law traditions is not deemed a matter of public order, it is presumed that parties have complete autonomy to structure the consequences of non-performance or compensation methods contractually.

The primary goal of these terms is undoubtedly to protect the responsible party in the event of disputes by limiting the scope of liability in cases of contract breaches. These terms offer significant protection, shielding the responsible party from potentially excessive financial losses in the future. Furthermore, this contractual technique is recognised as a method of risk management and economic cost estimation for business transactions or future investments by reducing the potential financial liabilities of an economic activity. Its utility is also evident as it serves as a powerful negotiation tool in commercial deals. By agreeing to include these terms in a contract, both parties achieve legal certainty that reduces the perceived risks associated with commercial activities.

It is crucial to differentiate between contractual terms that relate directly to liability itself and those pertaining to the initiation of a liability lawsuit. The first type addresses what can be claimed by the victim's creditor, while the second type focuses on the procedures for accessing legal remedies through a liability lawsuit.

Various terms modify contractual liability, and these can be categorised into several types. The first type is the guarantee clause, which asserts the debtor's responsibility by imposing a guarantee obligation, holding them liable for performance regardless of any circumstances or obstacles. This is akin to a guarantee clause in force majeure events.

The second category includes terms that alleviate liability, aiming to define the scope of the debtor's obligation or mitigate or exclude their guarantee obligation. The objective in both instances is to lessen the debtor's liability. Still, the key difference lies in that the first type specifies the debtor's commitment itself, defining its scope from the outset as if the debtor's result-oriented obligation were transformed into a means-oriented obligation by a contractual term. The second type addresses the consequences of the debtor's failure to fulfil their obligation, either by reducing the extent of the guarantee or excluding it entirely, such as by establishing a fixed ceiling for compensation through a contractual clause.

Another type that modifies contractual liability is the penal clause, which sets a specified amount for compensation to motivate the debtor to fulfil the contract.

In light of the evolving dynamics within contractual relationships, especially concerning the working class and consumers, laws pertinent to these issues have shifted towards restricting contractual freedom to safeguard the weaker party, whether consumers or workers. Consequently, such laws explicitly prohibit certain terms and endow judges with broad discretionary power to classify them as unconscionable, thereby ruling them invalid.

This paper addresses a crucial question: What is the legitimacy of terms modifying contractual liability in UAE law? To answer this, this study employs an analytical approach, examining UAE legal texts to elucidate the stance of the UAE legislator on these terms.

2 METHODOLOGY

This study employs a comparative legal analysis methodology, specifically comparing Emirati and French law regarding contractual terms that modify liability. The study is designed to provide a comprehensive understanding of the legislative approaches and judicial interpretations in both jurisdictions. As a result of this approach, it will be possible to identify similarities, differences, and potential areas for legal reform in the UAE.

Data collection involves both primary and secondary sources:

- Legal Texts: Analysis of the UAE Civil Transactions Law 1985 and relevant French legal codes (e.g., the French Civil Code).
- Judicial Decisions: Examination of key court rulings from the UAE and France that interpret and apply laws related to contractual terms modifying liability.
- Legal Commentaries and Treatises: Review of scholarly articles, books, and commentaries discussing the interpretation and application of contractual liability modification terms in both legal systems.
- Legislative History: Exploration of the historical development of the relevant laws to understand the legislative intent behind their formulation.

As part of the analysis, an inductive reasoning approach is adopted, beginning with specific legal texts and judicial decisions and progressing towards broader legal principles and interpretations. In addition to assessing the effectiveness and fairness of the legal frameworks in both jurisdictions, the study will also employ a critical analysis. There are several key questions to consider:

1) In what ways do the UAE and French laws differ in their approach to modifying contractual obligations?
2) What are the underlying principles that guide these legal frameworks?
3) What effect do these differences have on the enforcement and fairness of commercial contracts?

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3 THE TENTATIVE POSITION OF THE UAE LEGISLATOR IN THE CIVIL TRANSACTIONS LAW

The UAE Civil Transactions Law of 1985 regulates civil relations and financial transactions within the United Arab Emirates,[3] covering general provisions related to civil rights and obligations. This law provides the legal framework for regulating transactions between individuals and companies within the state. It specifically governs obligations and contracts concerning their initiation, termination, the types of contracts, the necessary conditions for their validity, the consequences of contracts, methods of enforcement, and provisions related to specific contracts such as sales, leasing, and partnerships, as well as civil liability including the foundations of such liability, provisions for compensation resulting from harmful acts, and liability resulting from the use of objects or the guardianship of animals.

Despite the comprehensive scope of legal relationships addressed by the UAE Civil Transactions Law, it remains silent regarding terms that modify contractual liability. However, it contains texts upon which judges can rely to assess the legitimacy of these terms, which we will explore sequentially.

French legislators pay particular attention to contract clauses that limit or modify the parties' civil liability. Civil contractual liability and the contractual clauses that relate to it are governed by the French Civil Code. In French law, contractual freedom is a fundamental principle. Parties are free to determine the content of their contract, including any clauses relating to liability. It should be noted, however, that this freedom is subject to strict limits, particularly to protect the most vulnerable parties and maintain public order.

Under certain conditions, restrictive clauses or exclusions of liability are permissible. Article 1170 of the Civil Code, issued following the 2016 Contract Law Reform, 4 states "every condition which deprives the essence of the fundamental obligation of the debtor is considered unwritten."

Furthermore, Section 1231-3 specifically prohibits clauses that limit or exclude liability for serious or tortious errors. As a result, a party cannot waive its responsibility for an intentional error or gross negligence.[4]

3.1. The Silence of the UAE Legislator on Terms Modifying Contractual Liability

Under this section, we will examine the conditions of contractual liability in the UAE Civil Transactions Law and the absence of treatment by the UAE legislator of the issue of terms modifying contractual liability under this law.

3 Federal Decree Law no (5) of 1985 'Concerning the Issuance of the Civil Transactions Law of the United Arab Emirates' [1985] Official Gazette UAE 158 <https://uaelegislation.gov.ae/en/legislations/1025> accessed 10 July 2024.

4 Leveneur-Azemar (n 2) 215.

The UAE legislator has not provided an explicit definition of contractual liability but rather implies it through various provisions of the UAE Civil Transactions Law,[5] leaving room for jurisprudential interpretation. Contractual liability is a penalty imposed on anyone who breaches their obligations arising from a valid contract, whether through non-performance or delay in performance.[6] It is also defined as a failure to meet the obligations incumbent upon a person or the non-performance of an obligation originating from a contract.

To establish contractual liability, a set of conditions must be met, which the injured party can then use to seek judicial redress for compensation. Firstly, there must be a contractual relationship between the parties. The basis of contractual liability is a duly formed contract between the contracting parties. This contract must be complete in all essential elements, as it is inconceivable for contractual liability to arise without a formal contract between the parties. It is important to note that a contract is an agreement between two or more wills to create a legal effect, whether to establish, transfer, modify, or extinguish an obligation.[7] According to the UAE Civil Transactions Law, the legislator defines a contract in Article 125 as "the connection of an offer made by one of the contracting parties with the acceptance of the other, and their agreement in a manner that establishes its effect on the subject matter and entails an obligation on each of them towards the other. It is permissible for more than two wills to coincide to produce a legal effect." This definition clarifies that a contract is a concurrence of the contracting parties' wills, manifested as an offer by one and tied with the acceptance by the other, thus effectuating the contract and imposing obligations on each party.

Secondly, the contract must be valid. More than having a contract exist between the parties is required for liability to arise; the contract must also be valid. For a contract to be deemed valid, it must be complete in all essential elements and meet the conditions of validity, failing which it is void or voidable. Once declared void or annulled, its effect ceases, and no contractual liability arises from its breaching.[8] The UAE legislator outlines the pillars of a contract through Article 129 of the aforementioned law, stating that the parties must mutually agree on the fundamental elements, the subject matter of the contract must be realistic and specified or specifiable, and it must be permissible to deal in, in addition to the cause of the obligations arising from this contract being lawful.

The conditions of contract validity include the parties' contracting capacity and the absence of defects in their will. Article 157 of the Civil Transactions Law states that every person is deemed capable of contracting unless their capacity is removed or restricted by law. Through Article 85, the legislator specifies the age of majority is attained upon completing twenty-one lunar years, at which point a person enjoys full capacity and can exercise all rights afforded by law. Article 87 further clarifies, "Anyone who has reached the age of discernment

5 Federal Decree Law no (5) of 1985 (n 3).

6 Damin Salman Al-Mu'ayta, 'The Legal Framework for Exempting Agreements from Contractual Liability' (Master's thesis, Graduate School Mutah University 2015) 6.

7 ibid.

8 Pierre Mallet and Hala Nassar, *General Theory of Obligation* (Dar Al-Nahda Al-'Ilmiyyah 2024) 176.

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but not the age of majority and anyone who has reached the age of majority but is prodigal or negligent is considered to have limited capacity, as determined by law." The age of discernment is set at seven years, as stated in Paragraph 3, Article 159.

For a non-discerning minor, all actions are void, as indicated in Article 158. In contrast, for a discerning minor, actions that are financially beneficial actions are valid, purely harmful actions are void, and actions that benefit and harm require the guardian's consent within the legal limits of permissible actions or the minor's consent upon reaching the age of majority, as outlined in Article 159 of the Civil Transactions Law.

To ensure the contract's validity, as previously mentioned, the parties' will must also be free from defects that may vitiate it. Defects of consent include duress, gross deception, and being mistaken. Duress is addressed in Articles 176 to 184 of the Civil Transactions Law, gross deception in Articles 185 to 192, and being mistaken in Articles 193 to 198 of the same law. Therefore, should the contract be subject to annulment or cancellation, its effects cease, and contractual liability does not arise, nor may the parties request a guarantee in this case.

Thirdly, contractual obligations must not be breached, causing damage to the creditor. Once a contract is validly formed, fulfilling all its conditions and essential elements, it establishes obligations for the contracting parties. Each party is then obligated to fulfil these obligations, and any failure or delay in doing so triggers contractual liability, enabling the aggrieved party to seek legal redress.

Contractual liability arises only when contractual obligations are breached. It is inconceivable to have such liability without either a total or partial non-fulfilment of the contract. It should be noted that the damage suffered by one of the contracting parties must be caused by the other party's failure to fulfil their obligations, encompassing all obligations, whether primary or ancillary.[9] Consequently, there must be a contractual fault committed by one of the parties, manifested in the complete or partial failure to fulfil their contractual obligations, delay in their fulfilment, fulfilling them at a location not agreed upon, or fulfilling them in a manner not consistent with the contractual agreement.[10]

This contractual fault must result in damage to the other party in the contract, which can be defined as the harm that affects a person when a legitimate interest of theirs is impaired or when a right of theirs is violated.[11] Damage is not presumed; that is, the mere occurrence of a fault does not necessarily imply damage, as a fault can occur without causing any harm. Damage can be either material, affecting a person's body or property, or moral, affecting a

9 Nadia Mohamed Mustafa Qazmar, 'Limits of Contractual Liability in the Context of the Obligation to Exercise Care and to Achieve a Result' (2019) 7(48) Middle East Research Journal 381.

10 Mallet and Nassar (n 9) 185.

11 Mohamed Sabri Al-Sa'di, *The Clear Reference in Explaining Civil Law: General Theory of Obligations, Sources of Obligation, Contract and Unilateral Will: A Comparative Study in Arab Law*s (4th edn, Dar Al-Huda 2006) 314.

person's reputation, honour, emotions,[12] or esteem. According to the UAE Civil Transactions Law, Article 293 acknowledges moral damages and permits claims for compensation for such harm. Furthermore, Article 283 specifies that compensation for damage must be for direct damages; however, if the damage occurs indirectly, the legislator requires that the action be deliberate or intended or that the act (i.e., the fault) directly leads to the damage.

To complete the elements of contractual liability, a causal relationship between the contractual fault and the damage must be established. Contractual liability is only realised when these three elements are present. It is possible for a contractual fault to occur and damage to be sustained by the contracting party, but without any causal relationship between them. That is, the damage suffered by the aggrieved contracting party is not related to the fault committed by the other party; therefore, it is inconceivable for the party in breach of their obligation to be held contractually liable for damage that their fault did not cause. Thus, contractual liability arises only with the presence of these three elements. It should also be noted that if force majeure prevents a debtor from fulfilling their obligation, this will negate contractual liability. The debtor bears no contractual liability if the cause of the damage is an external factor, which could be force majeure, a sudden accident, the creditor's own fault, or the fault of a third party.[13]

According to French civil law, contractual liability is governed by the principles outlined in the French Civil Code. It occurs when one party fails to fulfil their contractual obligations, causing harm or loss to the other party. This concept is rooted in the broader doctrine of obligations, which encompasses both contractual and tortious obligations. To establish contractual liability under French civil law, certain conditions must be met. To prove a breach of contract and claim compensation,[14] these conditions must be met. The following are the main requirements:

- A valid contract must exist between the parties.
- A contractual obligation must be breached: There must be a breach of one of the specific obligations outlined in the contract. It can be a total or partial failure to perform, or an improper performance of the contractual obligation.
- There must be damage to the other party as a result of the breach. Depending on the type of damage, it may be material (such as financial losses) or moral (such as psychological or reputational damage).
- There must be a causal link between the breach of contract and the damage suffered by the other party. Therefore, the damage must be a direct result of the breach of contract.

12 Ahmed Muflih Abdullah Al-Khawaldeh, 'Exemption from Contractual Liability: A Comparative Study between Jordanian and Egyptian Civil Law' (Doctoral thesis, Faculty of Higher Legal Studies, Amman Arab University for Graduate Studies 2008) 5-6.

13 Al-Sa'di (n 12) 318.

14 Marie Malaurie-Vignal, Droit de la responsabilité civile (8e edn, LGDJ 2019) 325.

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- In the absence of a justifiable cause for the breach, such as force majeure or unforeseen events, contractual liability cannot be established.
- The injured party must seek compensation for the damages suffered as a result of the breach of contract. Typically, damages are sought through a legal action.

According to French civil law, contractual liability is governed by a number of provisions in the Civil Code. Article 1231-1 of the Civil Code states that "anyone who breaches a contract is liable for damages caused by that breach." Articles 1217 to 1231-7 provide detailed rules on compensation and the consequences of breaching contractual obligations.

The UAE Civil Transactions Law does not explicitly authorise specific contractual terms modifying liability. Some legal commentators argue that the UAE legislator has permitted the alteration to contractual liability rules based on Article 383 of the Civil Transactions Law. This article states:

> "Unless otherwise provided by law or stipulated in the agreement, a debtor who is required to preserve a thing, to manage it or to act with prudence in the performance of their obligation must bring to the performance thereof the care of a reasonable person, even if the object in view is not achieved."

Based on this article, proponents argue that since the legislator allows parties to agree on a standard of care different from that of a reasonable person, it implicitly accepts contractual terms that modify liability rules, whether by mitigation or intensification.[15] However, this analysis does not establish a general rule for the legislator's acceptance of modified liability terms because it pertains only to agreements regarding the parties' obligations and not to mitigate liability effects. This text suggests flexibility in the level of care but does not imply that parties can set the amount of compensation; for instance, it relates solely to the ability to mitigate or intensify obligations.

Others contend that the UAE legislator has embraced the perspective of Islamic jurisprudence, which does not allow agreements to modify the provisions of guarantees in contractual liability and liability based on harmful acts. Thus, no provision permits the alteration of guarantee provisions in contractual liability. Contracting parties are confined to establishing the contract but do not determine its consequences, as the prerequisites of contracts are legislated acts. For example, a sale necessitates the transfer of ownership from the seller to the buyer and the buyer's obligation to pay the price. The role of contracting parties is limited to freely entering into the agreement in a legally recognised form, with the effects and rulings ensuing from legislative will.[16] Furthermore,

15 Al-Shehabi Ibrahim Al-Sharqawi, *Voluntary Sources of Obligation in the UAE Civil Transactions Law* (4th edn, Al-Afaaq Al-Mushriqah 2014) 230.

16 Mohamed Boukmach, 'The Effect of Artificiality in Restricting the Principle of Will in Islamic Jurisprudence: A Comparative Study' (2012) 13 Journal of Research and Studies, University of El Oued 131.

an agreement to modify liability provisions is viewed as a condition that contravenes the contract's nature and is therefore invalid.[17]

We concur with the second opinion, as the explanatory note of the Civil Transactions Law clarifies that the obliged party must specifically perform their obligation; if not, a judge will enforce them to do so. Refusal to comply constitutes disobedience, warranting disciplinary measures to ensure compliance and the enforcement of property seizures by legitimate means to settle the debt.[18] Consequently, mitigating or exempting from liability conflicts with the principles of Islamic jurisprudence, which underpin the provisions of the UAE Civil Transactions Law, making these rules inviolable.

As a consequence of the 2016 amendment, the French legislator adopted the position of French jurisprudence, established a general standard for these types of conditions, and deemed any condition that deprived the debtor of its essence as if it had not been drafted in accordance with Article 1170 of the Civil Code. For example, French jurisprudence considered the condition that exempts the carrier from compensation in the event of loss of the subject of the contract of carriage to be invalid due to the fact that this condition renders the carrier's basic obligation useless, as though the carrier is exempting himself from fulfilling his original obligation[19].

It is important to note that in the UAE, there is no explicit legislative guidance regarding terms modifying liability, which can result in several legal uncertainties. There can be significant implications for parties entering into contracts within the jurisdiction if this silence is not addressed. Here are a few potential implications:

1. Challenges related to interpretation.

It may be difficult for courts and arbitrators to interpret and enforce terms modifying liability without clear statutory provisions. Inconsistent judgments can result in a lack of predictability for contracting parties. In interpreting liability clauses, courts have a wide degree of discretion, which may result in varying outcomes depending on the perspective of different judges. The absence of legislative clarity might necessitate a greater reliance on case law, which can evolve and may not provide immediate or comprehensive guidance.

2. Uncertainties associated with contract drafting.

There may be uncertainty regarding the enforceability of liability-modifying terms when parties draft contracts. Legal ambiguity can result in ambiguous contract terms since parties may not know how to limit or exclude liability in a way that will be upheld by the courts in

17 Abdel Nasser Al-Attar, *Voluntary Sources of Obligation in the UAE Civil Transactions Law* (2nd edn, UAE University 2000) 252.

18 Ministry of Justic of the UAE, *Explanatory Note of the UAE Civil Transactions Law* (Ministry of Justice 2015) 392.

19 Case no 93-18.632 (Court of Cassation, Cass Com, 22 October 1996).

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the event of a dispute. To minimise risks, parties may incur higher legal costs when drafting and negotiating contracts to ensure that liability clauses are clear and enforceable.

3. An increase in disputes and litigation.

Legislative uncertainty may increase disputes and litigation as parties contest the meaning and enforceability of liability-modifying clauses. Uncertain legal standards can result in prolonged disputes, as parties may be more inclined to litigate to resolve ambiguities. A higher number of lawsuits can result in higher litigation costs and resource expenditures for all parties involved.

3.2. The Role of the Judiciary in Assessing the Legitimacy of Modified Contractual Liability Terms

In the absence of explicit legislative provisions in the UAE Civil Transactions Law, the UAE judiciary has had the opportunity to articulate its position on this issue. In some decisions, the Federal Supreme Court and the Dubai Court of Cassation have recognised the freedom of contracting parties to modify the rules of contractual liability. However, these decisions do not establish a stable judicial direction,[20] and, thus, it cannot be asserted that the judiciary has adopted a general rule accepting agreements that modify contractual liability terms.

Despite the judiciary's non-definitive stance, judges can evaluate the contractual terms on a case-by-case basis to determine their legitimacy.

Article 206 of the Civil Transactions Law states:

> "A contract may include a suitable condition which confirms its terms, admitted by custom or usage, beneficial to one of the contracting parties or others unless it is prohibited by the legislator or contrary to public policy or morals, in which case the condition is void, but the contract remains valid except where the condition is the prime motive of contracting and, in this case, the contract shall also be void."

This article provides criteria for determining which contractual terms may be enclosed into a contract and which may not, which we will explore in detail.

The UAE judiciary can consider terms that modify contractual liability by utilising Article 206 of the Civil Transactions Law, accepting those conditions that meet the criteria described in this article, which we will analyse in order:

A. **The judiciary may approve a contractual term that modifies contractual liability if a legal provision permits it.** In such cases, the condition is valid because it is explicitly sanctioned by law, as seen with the sales contract conditions based on trial

20 Case no 494 of Legal Year 2017 (Dubai Court of Cassation, Civil Cassation, 4 January 2018) pt 1, 25; Case no 68 of Legal Year 15 (Federal Supreme Court, Civil and Commercial Circuit, 14 December1993) pt 3, 1530.

under Article 494 of the Civil Transactions Law and the non-compete clause in Article 10 of Decree-Law No. (33) of 2021 on regulating labour relations. An example concerning liability is found in the second paragraph of Article 307 of the Commercial Transactions Law, which permits carriers to fully or partially exempt themselves from liability for delays.

B. **The judiciary may accept a contractual term that affirms the purpose of the contract.** These terms support the contract's objectives and facilitate its execution, essentially aligning with the obligations stemming from the contract. For instance, the main goal of a sales contract is the payment of the price and delivery of the sold goods; therefore, any term that expedites part of the payment, allows instalment payments or requires the seller to deliver the item in a specific manner, or extends the warranty for hidden defects to a year, is considered permissible. Therefore, it is argued that terms modifying contractual liability do not typically align with the contract's purpose as they aim to circumvent the expected outcomes when contractual obligations are unmet, leading UAE judges to likely reject such terms for not conforming to the contract's intended purpose.

C. **The judiciary may accept a contractual term that modifies contractual liability when it is suitable for the contract.** This term should align with the intended purpose of the contract and be suitable for achieving the intended interests within the contract.[21] For example, requiring a guarantor to finalise the contract or reviewing the financial documents of a business before completing the contract is acceptable. However, terms that oppose the contract's purpose, such as prohibiting the use of the sold item or disallowing the sale of mortgaged property to satisfy a debt, are deemed invalid. Again, UAE judges would likely dismiss terms modifying contractual liability that solely serve one party's goals or prevent the debtor from assuming responsibility when breaching contractual obligations, as contracts are intended to be executed according to the agreed legal terms, and provisions that obstruct this execution are inappropriate.

D. **The judiciary may accept a contractual term that modifies contractual liability if it is consistent with customs and traditions.** Customary practices are as binding as explicitly stipulated conditions according to Article 50 of the Civil Transactions Law and among traders per Article 264 of the same law. If a contractual term reflects common custom or tradition, such as the implicit renewal term of the contract upon silence, it is considered valid. In this situation, a judge may accept certain contractual terms modifying liability if the custom supports them.

E. **The judiciary may accept a contractual term that modifies contractual liability if it provides a benefit to one of the contracting parties or others.** The relevant benefit here is not the assumed benefit for which the term is set – as no one includes a term without anticipating some benefit – but rather an additional advantage not inherently provided by the contract. For instance, a sales contract requires the seller

21 Al-Attar (n 18) 183.

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to deliver the property immediately upon contract completion, which does not inherently permit the seller to remain on the property for a specified period post-sale. The seller may stipulate staying on the property for a period after the sale to manage their affairs, which would be beneficial for the seller. Similarly, if the seller conditions the continued exploitation of sold land for a year before its transfer to the buyer, and the buyer agrees, this too can be seen as beneficial. Here, the judiciary might also approve contractual terms modifying liability if they find the additional benefits acceptable under the law and specific dispute circumstances.

A UAE judge will find themselves compelled to reject the validity of modified contractual liability terms through the application of Article 206 of the Civil Transactions Law when such a contractual term falls within the scope of terms that the law does not permit to be included in a contract.

Firstly, terms explicitly are prohibited by the law. These are provisions that the legislator has expressly forbidden in contracts, such as the invalid arbitrary terms mentioned in relation to insurance contracts in Article 1028 of the Civil Transactions Law, the invalidity of a term exempting a carrier from liability for the loss of goods under the transportation contract according to Article 307 of the Commercial Transactions Law, the invalidity of a term exempting a commission agent from liability for bodily injuries to a passenger according to Article 347 of the Commercial Transactions Law, and the invalidity of a term exempting a lessor from a warranty against eviction and hidden defects according to Article 775 of the Civil Transactions Law.

Second, terms contravene public order and morals. These are contractual terms that prescribe alternative dispute resolution methods different from those provided in the Civil Procedures Law,[22] or those that alter the rules of territorial jurisdiction of the courts, as well as terms involving bribery to finalise a specific contract.

According to Article 206 of the Civil Transactions Law, the principle is that the contract remains valid, and only the term is void, except in one case where the entire contract is voided if the term was the motivation for entering into the contract. That is if the reason for the contract is the term itself. If the term is not permissible, the reason for the contract does not exist, and thus the contract is not concluded. For instance, if a seller imposes an invalid condition on a buyer, such as exempting themselves in the contract from the warranty for hidden defects, and then the buyer challenges the validity of the term, the outcome depends on the seller's intention when setting the term. If the seller was indifferent to fulfilling their obligations with or without this term, then the contract remains valid, and the term is void. However, if their intention was not to enter the contract without this term, the entire contract is void.

22 Federal Decree by Law no (42) of 2022 'Promulgating the Civil Procedure Code' [2022] Official Gazette UAE 737 <https://uaelegislation.gov.ae/en/legislations/1602> accessed 10 July 2024.

Judicial precedents affirm that the review of contractual terms and the assessment of whether a contract may incorporate them is a substantive issue that lies within the discretion of the trial judge.[23] The general and flexible wording used in drafting Article 206 of the Civil Transactions Law grants the judge broad discretionary power to determine whether the term affirms the requirement of the contract, suits it, or benefits one of the contracting parties.

For example, if the term involves exempting the debtor from compensation in cases of fraud and gross negligence, this term would be considered void because the second paragraph of Article 383 of the Civil Transactions Law explicitly states the invalidity of such a term, stating, "under all circumstances, the debtor remains liable for fraud or gross negligence." This is an application of Article 206 of the Civil Transactions Law.

Article 1170 of the Civil Code provides that "any clause which deprives the debtor's essential obligation of its substance is deemed unwritten." This text applies, in particular, to clauses limiting and exonerating liability. Unless the clause contradicts the scope of the commitment entered into, by emptying the essential obligation of its substance, a clause limiting liability relating to an essential obligation of the debtor is not prohibited. A clause may only be set aside if it deprives the creditor of any consideration or if it deprives the essential obligation of all substances.

Following the 2016 amendment, the role of French jurisprudence can be characteried as follows:[24]

1. To neutralise the effects of an exonerating or limiting liability clause, several legal grounds may be invoked.
2. For a clause to be effective, it must be clearly drafted and accepted by the contractor.
3. For contractual liability clauses to be enforceable, they must be explicitly stipulated in the contract and accepted by the co-contractor.

A clause in Article 1119 of the Civil Code provides in this sense that "the general conditions invoked by one party have effect only if they have been brought to the attention and accepted by the other party." Thus, clauses must be inserted in the contract documentation and be legible. If a clause appears on an invoice, it is valid only if it can be proven that the party against whom it is enforced was aware of it beforehand and consented to it.

In the context of ongoing business relationships, several jurisdictions have been able to deduce this consent from the fact that the co-contractor did not challenge the reference to the limitation of liability clause in previous documents. However, in cases of gross or willful misconduct, such clauses do not apply.

23 Case no 372 of Legal Year 24 (Federal Supreme Court, Civil and Commercial Circuit, 26 March2005) pt 1, 605.

24 Pierre Catala (ed), *Les obligations* (Dalloz 2020) 450-500.

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According to Article 1231-3 of the Civil Code, an exonerating or limiting clause of liability is neutralised in the event of gross or willful misconduct, and the creditor may then claim full compensation for their losses.

4 THE EXPLICIT POSITION OF THE UAE LEGISLATOR

While the UAE legislator has adopted an undefined position regarding the validity of consensual terms modifying contractual liability clauses within the framework of the Civil Transactions Law (broadly allowing the judiciary to intervene and assess the legality and legitimacy of these terms), contrarily, it has taken a clear and explicit position in other legal texts. Several other UAE legislations explicitly confirm the illegitimacy of contractual terms that modify liability, emphasising the protection of parties' rights and preventing circumvention of the fundamental legal rules that govern contractual obligations and liabilities. We will explore this topic sequentially.

4.1. Within the Scope of Consumer Protection Law

Consumer protection legislation serves as a cornerstone of modern legal frameworks. Adopted across various nations for multiple fundamental reasons, it enhances market stability and ensures equity among contracting parties. These laws prioritise the protection of consumer rights, addressing prevalent unfair or deceptive commercial practices such as false advertising, price manipulation, or the distribution of low-quality goods and services.[25] Consequently, consumer protection legislation provides essential legal protection for consumers against such malpractices, ensuring they receive accurate and complete information about products and services. Moreover, these laws bolster market confidence by establishing clear regulations governing the relationship between consumers and suppliers.

When consumers are aware that their rights are protected and compensation is assured in the event of damage, it boosts their confidence in commercial transactions, thereby stimulating market activities and fostering increased consumption and investment. Additionally, these laws aim to promote social justice, recognising that consumers often find themselves in a less advantageous position compared to suppliers and large corporations with regard to resources, legal knowledge, and technical expertise. Therefore, consumer protection laws strive to balance these relationships by providing consumers with effective legal tools to defend their rights and interests, enhancing social justice and preventing exploitation of the weaker party by the stronger. Furthermore, these legislations encourage fair competition, enhance public health and safety, and adapt to economic and technological advancements.

25 Malaurie-Vignal (n 15) 20.

In line with comparative legislation models, the UAE legislator has addressed the permissible contractual terms in consumer contracts. Article 21 of the Federal Law No. (15) of 2020 on Consumer Protection[26] prohibits suppliers from incorporating any contractual terms that could harm the consumer, declaring any term that exempts the supplier from any obligations outlined in this law as null and void. Additionally, Article 34 of the Cabinet Resolution No. (66) of 2023 regarding the Executive Regulations of the Federal Law No. (15) of 2020 on Consumer Protection[27] confirms that any condition absolving the supplier from liability or any of their obligations towards the consumer under the law is void, whether or not these terms appear in contract templates, invoices, documents, or other materials related to the transaction.

This provision particularly nullifies any conditions that eliminate or reduce the consumer's right to compensation when the supplier fails to meet their obligations, as well as any term that causes the consumer to waive any rights provided under the Consumer Protection Law, and any term that inappropriately limits the consumer's rights against the supplier in cases where the supplier fails to fully or partially fulfil their obligations or performs them inadequately. This law also prohibits any term that compels the consumer, in the event of failing to meet their contractual obligations, to compensate the supplier in a manner disproportionate to the actual damages incurred due to the non-fulfilment of those obligations, as well as any condition that absolves the supplier of responsibility for the goods during the provision of the service.

Similarly, Article R 212-1, 6, of the French Consumer Code states that any clauses in contracts between professionals and consumers that aim to remove or reduce consumer's right to compensation in the event that a professional's failure to fulfil their obligations are presumed abusive and therefore prohibited.

4.2. Within the Scope of Commercial Laws

Transportation contracts, in their various formats, are ripe for modified liability terms, as transportation companies often seek to exempt themselves from liability or lessen it in scenarios involving human injuries or material losses during the transportation of people or goods or even when delays occur in delivering individuals or goods to their destinations. Given the frequent adoption of these terms by transportation companies, legislators in various jurisdictions have established controls and stipulations for the use of these contractual terms. The UAE legislator has explicitly and directly regulated the application of these terms in several legal texts, which we will examine in detail sequentially.

26 Federal Law no (15) of 2020 'On Consumer Protection' [2020] Official Gazette UAE 690(ann) <https://uaelegislation.gov.ae/en/legislations/1455> accessed 10 July 2024.

27 Cabinet Resolution no (66) of 2023 'Concerning the Executive Regulations of Federal Law no (15) of 2020 Concerning Consumer Protection' [2023] Official Gazette UAE 755 <https://uaelegislation.gov.ae/en/legislations/2157> accessed 10 July 2024.

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The UAE legislator, in Article 175 of the Federal Decree-Law No. (43) of 2023, concerning Maritime Law,[28] holds carriers accountable for the loss or damage of goods from the time of receipt until delivery to the rightful recipient. This responsibility persists unless the carrier can demonstrate that all reasonable measures to prevent such damage were taken or that it was impossible to take such measures. Additionally, carriers are liable for any damage or loss resulting from fires if it can be shown that the fire was caused by negligence or error on the part of the carrier, their agents, or employees or if these parties failed to take necessary fire prevention or control measures. Furthermore, carriers are liable for any harm to live animals being transported if it can be proven that the carrier or their representatives were negligent in following the shipper's instructions regarding transportation.

The application of civil liability provisions under the general rules of the Civil Transactions Law has led to a mitigated liability for maritime carriers because they often include contractual terms that reduce their liability. Generally speaking, the judiciary upholds these terms as valid based on the principle of contractual freedom.[29] However, to prevent abuse of such provisions by carriers, the legislators have explicitly prohibited these terms and declared them void under certain circumstances.

Article 179 of the Maritime Law stipulates that any condition in the bill of lading or any other document that exempts the carrier from liability for loss or damage of goods arising from their legal obligations is considered null and void. This includes any clause that waives liability, transfers rights from insurance on the goods to the carrier, limits the period during which the carrier is liable, reduces the timeframe for filing claims following a denial, or any other term that relieves the carrier of the responsibility to provide compensation for damages.

The stance of the UAE maritime commercial legislation is consistent with the international consensus that generally invalidates agreements that exempt maritime carriers from liability, except in certain cases specified by UAE legislation in Article 280 of this Law. This article permits parties to negotiate liability terms in specific circumstances such as coastal navigation or when the nature of the goods, their shipping conditions, or exceptional transport circumstances justify a special agreement, or when there is an agreement to transport goods on the deck, and the transportation is conducted in this manner. However, these agreements must not violate public order and must not exempt the carrier or their agents from obligations arising from the transport contract. There must be a bill of lading, and the agreements must be recorded in a non-negotiable receipt.[30]

28 Federal Decree Law no (43) of 2023 'Concerning the Maritime Law' [2023] Official Gazette UAE 760 <https://uaelegislation.gov.ae/en/legislations/2138> accessed 10 July 2024.

29 Mustafa Kamal Taha, *Fundamentals of Maritime Law* (2nd edn, Al-Halabi Law Publ 2012) 239.

30 Helu Abdulrahman Abu Helu, 'The Effects Arising from the Legal Nature of the Maritime Carrier's Liability on Including an Exemption Clause' (2014) 11(1) Journal for Sharia and Law Sciences, University of Sharjah 205.

Article 270 of the Federal Decree-Law No. (50) of 2022 Promulgating the Commercial Transactions Law[31] defines a transport contract as an agreement in which the carrier, for a fee, commits to transport a person or item from one location to another using their own means. All land transportation activities are deemed commercial under Article 6 of the Commercial Transactions Law if they meet the criteria for professionalism and business elements, irrespective of whether the carrier is a natural or legal person, owns or leases the transport means, and regardless of whether the carrier is a public or private legal entity.[32]

The Commercial Transactions Law directly and explicitly addresses contractual terms that modify liability, distinguishing between two types of terms.

The first type involves conditions related to exemptions from liability. Article 307 states:

> "Each term that relieves the carrier of liability for the total or partial destruction or damage of the item shall be null and void. Further, each term that relieves the carrier of such liability, if created by the actions of its affiliates, shall be null and void. Each term that binds the consignor or the consignee, in any capacity, to pay all or part of the expenses of the carrier's liability insurance shall be equivalent to the relief of liability."

Accordingly, carriers cannot impose contractual terms that exempt them from liability in cases of total or partial loss or damage, whether due to their own actions or those of their employees. They are also prohibited from imposing conditions that require the consignor or the consignee to bear any insurance expenses related to the carrier's liability.

The second type involves conditions relating to the amount of compensation. The UAE legislator has permitted carriers in Article 308 and subsequent articles of this law to establish contractual terms that specify the amount of compensation applicable to both total and partial destruction of the item. However, these conditions must satisfy the following requirements:

- The condition must be consensual, meaning it has been agreed upon by both parties of the contract.
- The consignee must demonstrate that they have incurred damage; otherwise, they are not entitled to any compensation if the carrier can prove that the consignee did not suffer any harm.
- The condition must be documented in writing.
- The agreed compensation must not be nominal, and the determination of whether the condition is nominal is subject to the discretion of the court adjudicating the dispute.
- The failure of the carrier to fulfill their obligation must not result from intentional fraud or gross negligence on their part or that of their affiliates.

31 Federal Decree Law no (50) of 2022 'Concerning Promulgating the Commercial Transactions Law' [2022] Official Gazette UAE 737(ann 1) <https://uaelegislation.gov.ae/en/legislations/1610> accessed 10 July 2024.

32 Omar Fares, *Introduction to Commercial and Business Law* (Dar Al-Nahda Al-'Ilmiyyah 2022) 122.

It is important to note that if the damage value is less than the agreed compensation, the judge may reduce this amount so it aligns with the actual damage value. Conversely, if the damage exceeds the agreed compensation, no more than the agreed value can be claimed unless it is proven that the carrier or their affiliates committed fraud or gross negligence. In such cases, the carrier is obligated to provide full compensation for the damage.

Furthermore, the UAE legislator has stated in Article 334 of this law that any term fully or partially exempting the carrier from liability for any physical harm inflicted on the passenger is invalid. Moreover, any condition that obliges the passenger to pay all or part of the insurance expenses against the carrier's liability is considered a waiver of responsibility.

In French law, particularly concerning goods transport contracts, Article 133-1 of the Commercial Code holds the carrier responsible for the loss of transported goods, except in cases of force majeure. Any clause to the contrary clause in a consignment note, tariff or other document is considered void.

As far as maritime transport contracts are concerned, Article L. 5422-15 of the Transport Code provides that "any clause having the direct or indirect object or effect […] of shielding the carrier from liability defined by the provisions of Article L. 5422-12 is null and void."

5 CONCLUSIONS

Consensual terms modifying contractual liability are pivotal in protecting the rights and responsibilities of contracting parties. The precise drafting of such terms is crucial in determining their effectiveness, necessitating that they be clearly and explicitly written. These terms must accurately define the scope of the damages covered, the maximum limits of compensation, and the exceptional circumstances that do not fall within these terms.

Terms modifying contractual liability serve as an essential legal instrument in commercial contracts, delineating the extent of liability for a party unable to meet their contractual obligations. Despite these terms being common in contractual practices and regulated by many laws, courts continue to play a vital role in interpreting and applying them. Implementing these terms introduces several legal challenges concerning their validity and the extent of their interpretation, especially when the terms used are ambiguous or imprecise. Additionally, proving fault or negligence, particularly in cases of personal injury or death, adds to these challenges.

Contractual liability, which obliges a debtor to compensate the creditor for breaches of contract, acts as an appropriate remedy for such failures. However, it is sometimes possible for a contract to include a condition that modifies the terms of contractual liability, either reducing the debtor's obligation or entirely exempting them from liability, potentially leading to a cap on the amount of compensation or a full exemption.

Although the UAE Civil Transactions Law is founded on the principle of contractual freedom, allowing for the inclusion of contractual terms that alter civil liability provisions, this law remains silent on the legality of these terms, leaving room for the judiciary to selectively intervene and assess their legality after examining each case on its merits. The study reveals that the UAE judiciary has not established a consistent position on the legality of these terms; instead, it accepts them in a few isolated decisions. Consequently, the UAE judge possesses broad discretionary power to assess the legality of these terms through the application of Article 206 of the Civil Transactions Law.

In contrast, following the 2016 amendment, French law, aligned with French jurisprudence, has taken a clearer stance. It deems any contractual condition that removes the essential obligation from its basic content invalid. The French judiciary has a decisive role in determining whether these conditions are legal, requiring that they be stipulated clearly and explicitly, and that the parties involved are free from intentional or serious errors.

While the UAE legislator has been unclear regarding these terms within the framework of the Civil Transactions Law, its position has been more explicit under other laws, such as the Consumer Protection Law, the Commercial Transactions Law, and the Maritime Law, which explicitly state the invalidity of these terms in multiple legal articles. The UAE legislator's position aligns with comparative legislation and the international consensus on the invalidity of agreements that exempt from liability in matters related to consumer protection and all forms of transport contracts.

Similarly, the French legislator has stipulated the invalidity of conditions that exempt or limit liability, aligning with the approach taken by the Emirati legislator.

The study recommends that the UAE legislator explicitly clarify its position on consensual terms modifying contractual liability within civil transactions. It suggests introducing a provision similar to those in the Consumer Protection Law or the Commercial Transactions Law, which would clearly specify the circumstances under which such terms are permissible and those under which they are not.

To address the legal uncertainties and challenges arising from the UAE legislator's silence on terms modifying liability, it is crucial to advocate for an amendment to the UAE Civil Transactions Law. This amendment should explicitly address these terms and reflect the clarity found in the UAE Consumer Protection Law as well as the UAE Commercial Transactions Law. The following elements should be included:

- Provide a clear definition of terms modifying liability, including exclusions, limitations, and indemnification clauses.
- Ensure that liability-modifying terms are expressly stated and conspicuous in the contract to be enforceable.
- Incorporate principles of fairness and reasonableness to prevent abusive or excessively one-sided terms.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

КОНСЕНСУАЛЬНІ УМОВИ, ЩО ЗМІНЮЮТЬ ДОГОВІРНУ ВІДПОВІДАЛЬНІСТЬ У СВІТЛІ ЗАКОНОДАВСТВА ОАЕ: ПОРІВНЯЛЬНЕ ДОСЛІДЖЕННЯ ЗАКОНОДАВСТВА ФРАНЦІЇ

П'єр Маллет* та Хала Нассар

АНОТАЦІЯ

Вступ. *У контексті законодавства ОАЕ це дослідження вивчає легітимність і застосування умов, які змінюють договірну відповідальність, за допомогою проведення порівняльного аналізу з законодавством Франції. Договірні умови мають важливе значення для формування угод, адже відображають очікування сторін і стратегії управління майбутніми ризиками. З 19 століття, ці умови зазнали значних змін у зв'язку зі зростанням промисловості та збільшенням кількості спорів про цивільну відповідальність. Вони призначені для обмеження або уникнення відповідальності*

сторони у разі порушення контракту, і пропонують механізм управління ризиками та економічної оцінки витрат.

У статті розрізняються умови, які безпосередньо стосуються відповідальності, та ті, що стосуються подання позовів про відповідальність. У ньому розглядаються різні положення, включно з гарантійними положеннями, умововами, що зменшують відповідальність, і штрафними положеннями, які встановлюють фіксовані суми компенсації для стимулювання виконання контракту. Крім того, сучасні законодавчі рамки, зокрема Франції та ОАЕ, дедалі більше накладають обмеження на договірну свободу для захисту вразливих сторін, таких як споживачі та працівники, за допомогою заборони певних умов і надання суддям повноважень визнавати несправедливі положення недійсними.

У дослідженні проаналізовано юридичні тексти ОАЕ у порівнянні з французьким правом, щоб уточнити позицію законодавства ОАЕ щодо легітимності умов.

Методи. *Метою цього дослідження є проведення порівняльного аналізу законів ОАЕ та Франції щодо зміни договірної відповідальності, який здійснювався за допомогою аналізу первинних і вторинних джерел, таких як юридичні тексти, судові рішення та коментарі. У ньому розглядаються законодавчі підходи та судові тлумачення для того, щоб виявити подібності, відмінності і можливі напрямки для реформування законодавства ОАЕ. Індуктивне міркування використовується для виведення ширших принципів, оцінки ефективності та справедливості обох законодавчих основ і врахування ключових відмінностей і керівних принципів.*

Результати та висновки. *Для того, щоб визначити права та обов'язки сторін, сторони повинні узгодити чіткі та однозначні умови, які визначають обсяг збитків, ліміти компенсації та винятки за договором. Незважаючи на те, що ці умови є загальними та регламентованими, суди відіграють значну роль у їх тлумаченні, що створює правові проблеми, якщо вони нечіткі. В ОАЕ Закон про цивільні правочини дозволяє такі умови згідно з договірною свободою, але немає чіткого пояснення щодо їх законності, тож залишається право на розсуд суду відповідно до статті 206. Інші закони ОАЕ прямо визнають ці умови недійсними відповідно до міжнародних стандартів. Після 2016 року французьке законодавство також визнає недійсними умови, які усувають основні зобов'язання. Рекомендується, щоб законодавство ОАЕ роз'яснило позицію щодо цих умов у межах цивільних угод, узгодивши їх з іншими законами ОАЕ, щоб чітко визначити, які умови є прийнятними.*

Ключові слова: *договірна відповідальність, законодавство ОАЕ, управління ризиками, гарантійне положення, захист прав споживачів.*

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Research Article

COPYRIGHT INFRINGEMENT IN THE DIGITAL AGE: THE CASE FOR REFORM TO KAZAKHSTAN'S COPYRIGHT LAWS

Ansagan Aronov* and Sara Idrysheva

ABSTRACT

Background: *The rapid digitalisation of copyrighted materials and the creation of new digital products pose significant challenges to copyright law in the era of globalisation. Digitisation has revolutionised access to information by converting it into a digital format, thus making it easier for anyone who surfs the internet to reproduce and share data. However, new technologies have also resulted in illegal activities such as online copyright infringement. That being the case, the development of digital technologies requires new relevant approaches and provisions from the national copyright law of Kazakhstan to handle copyright infringement on the internet. It could be argued that the current legislation cannot handle legal issues related to copyright, especially the responsibility of internet service providers (ISPs) for the violation of the copyright. This article aims to identify shortcomings in the legal regulation of ISPs in the Republic of Kazakhstan and to offer recommendations for improving legislation in this area. The novelty of the paper lies in Kazakhstan's legislation, lacking regulation on the legal status of ISPs and their role in protecting copyright on the internet. By comparing Kazakh legislative developments with practices in the US, UK, and Ukraine, the paper provides insights into potential reforms for better handling digital copyright infringement.*

Methods: *This paper applies several research methods, including systemic, comparative legal, and historical legal analysis. The primary focus is on examining the legislation and case law of the US, UK and Ukraine regarding copyright issues to enhance Kazakhstan's existing legislative framework.*

Results and conclusions: *This article argues that national acts of Kazakhstan on copyright were obsolete before the advancement of digital technologies and therefore, need to be updated to keep pace with modern technologies.*

1 INTRODUCTION

In his 2019 State of the Nation address, the President of Kazakhstan, K. Tokayev, announced the need for the government to revise its legislation to accommodate new technological phenomena, including 5G, smart cities, big data, blockchain, and other tools.[1] The advancement of digital technologies has posed a significant challenge to intellectual property rights (IPR), particularly copyright, by altering its scope and subject matter. In the digital environment, information is not only accessible in the blink of an eye but can also be stored and shared at a low price.[2] Two key aspects stand out: first, the digitisation of copyrighted works, such as the scanning of photos into image files and the emergence of new products like software; and second, the rise of the internet.[3]

Kazakhstan's 2015 Law on Informatization defines the internet as "a worldwide system of integrated networks of telecommunications and computing resources for the transmission of electronic information resources."[4] The World Wide Web has enabled a growing practice where some individuals illegally copy and sell existing works or products for commercial gain. This kind of illegal activity is well known as online copyright infringement or online piracy and has become a hot topic amongst rights holders and scholars. Online infringement has significantly affected copyright, converting it to a tool by which some users steal creative products that initially belonged to copyright owners.[5] It is worth noting that online copyright infringement is globally acknowledged as a serious crime. It undermines the creative potential of society by depriving copyright owners of legal fees and leads to economic losses for all those who invest in creative industries.[6]

This issue is prevalent in Central Asia, including Kazakhstan, due to the lack of effective legal frameworks to regulate internet copyright matters.

1 Kassym-Jomart Tokayev, 'Constructive Public Dialogue - The Basis of Stability and Prosperity of Kazakhstan: President of Kazakhstan Kassym-Jomart Tokayev's State of the Nation Address' (*President of the Republic of Kazakhstan: Official Website*, 2 September 2019) <https://www.akorda.kz/en/addresses/addresses_of_president/president-of-kazakhstan-kassym-jomart-tokayevs-state-of-the-nation-address-september-2-2019> accessed 25 June 2024.

2 Alankrita Mathur, 'A Reflection upon the Digital Copyright Laws in India' (2020) 25 (1-2) Journal of Intellectual Property Rights 5, doi:10.56042/jipr.v25i1-2.65193.

3 Simon Stokes, *Digital Copyright : Law and Practice* (5th edn, Bloomsbury 2019) 298.

4 Law of the Republic of Kazakhstan no 418-V of 24 November 2015 'On Informatization' <https://adilet.zan.kz/eng/docs/Z1500000418> accessed 25 June 2024.

5 Omotayo F Awomolo-Enujiugha, 'Piracy and Its Burden on Copyright in Nigeria: Challenges and Solutions' (2020) 23(3-4) Journal of World Intellectual Property 413, doi:10.1111/jwip.12158.

6 Mathur (n 2).

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This highlights the need to review some of the legislation which regulates copyrights and related rights on the internet, according to the "Kazakstan-2050 Strategy".[7] Similarly, the Conception of the legal policy of Kazakhstan until 2030 emphasises the importance of strengthening copyright laws, with a particular emphasis on thoroughly examining the composition of participants in legal relations concerning the protection of intellectual rights online.[8]

This article aims to critically analyse the current development of copyright protection in Kazakhstan in the digital age and recommend adequate solutions to improve them. To do this, it compares the copyright laws of Kazakhstan and foreign jurisdictions such as the US, UK, and Ukraine to distinguish major characteristics and legal issues on ISP liability. The study of foreign legal practice related to copyright protection in the digital age, along with recommendations for improving Kazakhstan legislation, represents a significant contribution to the country's development in addressing this issue. Although "piracy" is slang for copyright infringement, both words are used interchangeably in this article.

2 METHODOLOGY

This paper applies several research methods: systemic, comparative legal, historical legal analysis, and methods of interpreting law and legislation. The systemic method made it possible to review and analyse the copyright in the digital environment, involving its further active study and legal regulation. Comparative legal methods allowed the authors to compare the best practices of the US, UK, and Ukraine to make relevant recommendations to address the issue of the liability of ISPs in Kazakhstan. Relying on historical legal analysis, the authors could make a brief review of the development of national copyright legislation from the 1990s to the current copyright challenges in the digital landscape. Methods of interpreting law and legislation offered a clear understanding of terms and definitions used by legal authorities and international organisations in the legal regulations of ISPs.

The outcomes of these methods include conclusions and recommendations on protecting copyright in the digital environment, particularly concerning the liability

7 Nursultan Nazarbayev, 'Strategy "Kazakhstan-2050": New Political Course of the Established State: Address by the President of the Republic of Kazakhstan NA Nazarbayev" (*President of the Republic of Kazakhstan: Official Website*, 14 December 2012) <https://www.akorda.kz/en/addresses/addresses_of_president/address-by-the-president-of-the-republic-of-kazakhstan-leader-of-the-nation-nnazarbayev-strategy-kazakhstan-2050-new-political-course-of-the-established-state> accessed 25 June 2024.

8 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 25 June 2024.

issues of ISPs. The paper's findings are mostly based on primary and secondary sources. To better understand the current overview of copyright protection in Kazakhstan, primary sources such as legal acts, conventions, regulations and legal cases are used. Secondary sources, including books, journal articles, websites, and relevant web pages, were consulted to gain insights into copyright issues in the digital environment and to recommend relevant solutions.

3 COPYRIGHT INFRINGEMENT

3.1. Copyright Infringement in Cyberspace

Digital technologies have brought major challenges to the entire world, including copyright. While these technologies offer many benefits, they also pose threats to owners of intellectual properties, whose copyrighted works in cyberspace are increasingly vulnerable in cyberspace. Irina Atanasova claimed that the impact of technologies on copyright protection can be seen from the following four elements: the ease of copying, the ease in the dissemination of copyrighted works, the expanded storage of digital tools, and the cheap process of producing creative works.[9]

Kaushiki Ranjan and Siddharth Srivastava suggest that there might be a number of parties involved in digital copyright violation. The parties normally include copyright owners or authors, internet service providers(ISPs), and users who upload material or content to the service of ISPs. Pamela Samuelson indicates other characteristics of digital technologies, such as the compactness of works in digital form, linking abilities, and non-human author features.[10] For instance, one of the outcomes of digital technologies regarding copyright issues was the advent of peer-to-peer (P2P) systems such as Napster, Gnutella, KaZaA, Grokster and others well-known for unauthorised usage of copyrighted works among the public.[11] One of the advantages of a P2P system is that it provides software programs that allow file transfers without needing a central server. In a P2P system, each computer functions as a server, and therefore, once a user connects to the system, he or she can search files on other users' computers.

Online copyright infringement appears to be a vast and growing issue in the music, game, computer software and movie industries. This typically occurs through the purchase of counterfeit products at a discounted price compared to copyrighted works and the illegal

9 Irina Atanasova, 'Copyright Infringement in Digital Environment' (2019) 1(1) Economics & Law 13.

10 Pamela Samuelson,'Digital Media and the Changing Face of Intellectual Property Law' (1990) 16 Rutgers Computer and Technology Law Journal 323.

11 Atanasova (n 9).

sharing of copyrighted materials via file-sharing technologies. Today, online copyright infringement may take place in the following ways:

- downloads: these actions occur when one downloads e-books, music, video and other content from the internet without permission;
- reposting copyrighted work or other multimedia content on the internet;
- hot-linking or hyperlinking: it is a system which allows a person to redirect a user to another website by clicking a button on previous websites;
- using circumvention technical measures;
- using digital content without appropriate acknowledgement or citation;
- illegal use of computer programs and databases without payments and other actions.[12]

Although Kazakhstan has a legal and institutional framework similar to developed states in terms of IPR, the state has a high rate of copyright infringement, amounting to 73 %, according to the Business Software Alliance.[13] It could be noted that Kaznet (kz domain) is full of copyright violations such as pirated movies, photos, music, and plagiarism.[14]

The rapid growth of the internet has led to a major issue, such as online copyright infringement. Notably, illegal exploitation of IP in the digital landscape is normally associated with cybercrime. Any unauthorised use of computers, the internet, or using a computer as a tool to commit copyright abuse can be assessed as cybercrime. Cybercrime, as a broad term, apart from copyright abuse, also includes other serious crimes such as fraud, child pornography, and security issues.[15] Websites and platforms which offer illegal streaming and downloads of copyrighted works without proper authorisation seem to be widespread today. This offence usually includes streaming and downloading music, movies, TV shows, and distributing e-books without the permission of a right holder or author. Plagiarism is another major issue which involves the illegal use of someone else's idea, work or research as one's own without proper attribution. Plagiarism can often be met in spheres such as academy, media and R&D.[16]

12 Albert Olu Adetunji and Nosakhare Okuonghae, 'Challenges of Copyright Protection in the Digital Age: The Nigerian Perspective' [2022] Library Philosophy and Practice <https://digitalcommons.unl.edu/libphilprac/7159> accessed 25 June 2024.

13 Alexey Malchenko, 'In Kazakhstan, Seven out of 10 Citizens Engage in Piracy' (*MK Kazakhstan*, 19 April 2017) <https://mk-kz.kz/articles/2017/04/19/v-kazakhstane-sem-iz-10-grazhdan-zanimayutsya-piratstvom.html> accessed 5 January 2024.

14 Global Voices Online, 'Kazakhstan Combats Internet Piracy' (*Petosevic*, 25 July 2011) <https://www.petosevic.com/resources/news/2011/07/000716> accessed 19 January 2024.

15 Jibran Jamshed and others, 'Critical Analysis of Cybercrimes in Pakistan: Legislative Measures and Reforms' (2022) 7(1) International Journal of Business and Economic Affairs 22, doi:10.24088/IJBEA-2022-71002.

16 Samza Fatima and Syed Mudassir Shah, 'Violation of Copyright in Pakistan: Issues and Future Prospects' (2023) 3(1) Pakistan Journal of Criminal Justice 54, doi:10.62585/pjcj.v3i1.24.

Recently, several significant cases related to copyright in the digital environment have emerged, necessitating a review of national copyright laws, particularly concerning the status of service providers. As judicial practice shows, copyright materials, in the process of reproduction on sites, lose the mention of true authors and can sometimes be altered.

One such case involved Mr Zolotuhin, a professional photographer, who brought a lawsuit against the defendants for the infringement of his exclusive rights to his photos, which were used on a website from 2016 to 2019. The defendants claimed the images were from the public domain; however, after the claimant presented the original format, it was confirmed that the photos were his.

According to Law on Copyright and the Related Rights 1996 (hereafter: the Copyright Law), the exclusive rights of an author include the right to carry out, allow or prohibit the following actions: to reproduce the work (the right to reproduce); to perform other operations, including an open network (the right to distribute); and to publicly display the work (the right to public display).

Additionally, the law grants authors or rights holders the entitlement to remuneration for each use of their work. The amount is determined by the copyright agreement and the agreements concluded by copyright collecting societies. According to the provisions of the Copyright Law, the author's property rights might be assigned in whole or part and may also be transferred for use under an author's contract.

In Mr Zolotuhin's case, during the judicial process, it was revealed that the defendants had not concluded a copyright contract with the claimant. Based on this, the court obliged the defendants to pay 2 272 500 tenges (approximately 4 791,2 USD at current exchange rates), as compensation for the violation of copyright between 2016 and 2019.[17]

In another case, Salem Social Media and Alisher Utev, the director of the TV series "5:32", filed a civil action concerning a video posted on the Telegram channel "Men t.me/menmediakz." In that video, Askar Dzhaldinov, author of the book "Off the Record: Secrets of High-Profile Crimes in Kazakhstan," announced reader meetings in Almaty and Astana. The series' creators alleged that Dzhaldinov used footage from six episodes and the official trailer of "5:32" in his video. Aside from this, Dzhaldinov accused Alisher Utev of plagiarism since the series was based on stolen stories from his book.

The claimants sought a court order to cease actions that violated their personal non-property rights, demanded the removal of the video from the social network, and requested compensation amounting to 2800 monthly calculation indexes. Despite Dzhaldinov's defence that the video was created for educational and informative purposes, the court found that it was produced for advertising to promote the book.

17 *Zolotuhin v ATIS* LTD no 7514-19-00-2/10892 (Bostandyk District Court of Almaty, 5 March 2020) <https://office.sud.kz/courtActs/documentList.xhtml> accessed 21 May 2024.

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Under Article 16 of the Copyright Law, the court found that the defendant, without permission from the claimants, reproduced, posted, and distributed the video containing fragments of an audiovisual work on the internet. The law stipulates that any use of copyrighted works must be authorised by the rights holder. In determining the amount of compensation, the court considered several factors, such as the violation of the claimant's copyright, the video's use for advertising, and the negative reflection on the series' creator. The court, guided by principles of fairness, proportionality, reasonableness, sufficiency, and nature of copyright violation, ordered the defendant to pay compensation amounting to 200 monthly calculation indices, totalling 690 000 tenge (approximately 1 454,77 USD at current exchange rates).[18]

In another instance, Saltore Saparbayev took a photo titled "Tian Shan Mountain Sheep" and posted it on his Instagram account. He later discovered that his work had been published on the official website "egemen.kz" without his permission, without crediting him as the author, and without any remuneration for its use. Thus, the claimant sued LLP "Kazakh Papers," demanding compensation for infringing copyright. During the court investigation, it was confirmed that the LLP posted and published the photo on egemen.kz. The court also established that the defendant used the photo without the author's permission, as no copyright contract existed between the parties. Regarding these findings, the court ruled in favour of the claimant, awarding compensation for the copyright infringement.[19]

In recent years, legal issues in the sphere of copyright, such as the liability of ISPs or the operators/companies providing the transmission of creative works, have recently grown in Kazakhstan.[20] The reason for concern is that these entities provide services that facilitate copyright infringement on the internet. In practice, they may offer various services, from providing cables to operating bulletin boards and websites where users can share information.[21]

In 2013, it was discovered that the text of a Doctor of Law dissertation, originally presented in electronic format and repeatedly discussed at a university in Kazakhstan, had been posted on the internet by one of the providers. Due to the termination of candidate and doctoral dissertations in Kazakhstan, according to new rules, this dissertation was defended in Moscow in 2012. It was discovered that an employee from the Kazakh university had posted the full text of an unprotected 2010 dissertation on a particular internet resource in exchange for free access to other materials available on the site. The author appealed to the

18 *Utev v Dzhaldinov* no 7142-24-00-2/1662 (Almaty District Court of Astana, 29 March 2023) <https://office.sud.kz/courtActs/document.xhtml> accessed 21 May 2024.

19 *Saparbayev v Kazakh gazetteri Ltd* no 7142-24-00-2/1662 (Inter-District Court for Civil Cases of Astana).

20 OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (OECD Publ 2011) doi:10.1787/9789264115644-en.

21 Lionel Bently and Brad Sherman, *Intellectual Property Law* (5th edn, OUP 2018).

internet provider with a demand to stop copyright infringement, resulting in the information intermediary adding the following text to the dissertation placement page: "The possibility of downloading this file is blocked at the request of the copyright holder".

However, the dissertation itself was not removed. According to the provider, the dissertation was re-uploaded in April 2015, again with the same restriction on downloading. The author had to send another request for its removal, but no response has been received.[22]

It is plausible that technological advancement has brought both pros and cons – the main one being online copyright infringement, which has become a serious issue for ex-Soviet states, including Kazakhstan. As a developing nation, Kazakhstan is at a nascent stage of combatting online copyright infringement and lacks extensive legal practice in this area. The above-mentioned cases and judicial practice suggest the current Kazakh legal act on copyright appears outdated and inadequate for handling copyright piracy in the digital environment.

4 LEGAL FRAMEWORK FOR INTERNET INTERMEDIARIES: INTERNATIONAL AND KAZAKHSTANI PERSPECTIVES

4.1. Roles of ISPs

ISPs play a key role in distributing digital content, and thus, they are an essential part of the network of actors. The World Intellectual Property Organization (WIPO) called their role a main challenge for copyright in the digital space. It should be noted that there is no single way to distribute copyrighted materials because the internet has brought about various mechanisms, both lawful and unlawful ways. In addition, the Organization for Economic Co-operation and Development (OECD) describes ISPs as an organisation which gives access to, host, transmit and index various materials, products, and services originated by third parties on the internet or provide online services to third parties. However, this definition appears too broad to cover various types of intermediaries with different goals, including commercial and non-commercial, public and private.[23]

Generally, ISPs provide internet access and other services to subscribers who connect through various means, including dual-up connection across the public telecommunication network, gaining access to internet sources once connected. While intermediaries transmit, host and index various content, not all of this content is copyrighted. Apart from copyright,

22 Sara Idrysheva, 'Public Contract in Civil Law of the Republic of Kazakhstan: Problems of Theory and Practice' (PhD (Law) thesis, Maqsut Narikbayev University (KAZGUU) 2010).

23 Bethany Klein, Giles Moss and Lee Edwards, *Understanding Copyright: Intellectual Property in the Digital Age* (SAGE 2015).

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intermediaries can have a huge impact on human rights, such as access to information, freedom of expression, privacy, and security issues.[24]

According to Uta Kohl, it is important to distinguish various types of internet intermediaries. Besides ISPs that provide internet access, there are other types of intermediaries, such as search engines that help users locate content online and social platforms or networks that host users and their content. These internet intermediaries have different relations to copyright and can be viewed as legitimate or illegitimate by copyright owners and media users.[25]

ISPs typically offer four main categories of services such as conduit communication services, information location tools, system caching, and hosting services. However, these services can expose ISPs to liability risks as they provide internet users with the tools to violate exclusive copyright rights such as reproduction, transformation, distribution, and the right to public communication. These services offered by the ISPs can be detrimental and harmful, especially for copyright owners, when intermediaries arm potential infringers with services and facilities such as transmission, routing and storing copyrighted content on their networks.

On the other hand, many ISPs provide websites to their subscribers and run web servers to other users to get access to the site's content.[26] Given their pivotal role in disseminating digital content on the internet, ISPs enable global distribution of copyrighted works, which can seriously damage the rights of copyright owners when infringers use ISP-provided facilities. This raises the question of whether ISPs should be held responsible for copyright violations committed by users using their services. To address this question, we will explore and compare various legal frameworks in the following jurisdictions.

4.2. ISP Liability Rules in the US

It is noteworthy that governments can take one of the following actions to hold intermediaries accountable under the law. They can make intermediaries criminally liable for users' actions, impose civil liability for damages caused by users, require intermediaries to monitor subscribers' actions or support an intermediary in taking down the content as part of a notice-and-takedown approach.[27]

24 ibid.

25 Uta Kohl, 'The Rise and Rise of Online Intermediaries in the Governance of the Internet and beyond - Connectivity Intermediaries' (2012) 26(2-3) International Review of Law, Computers and Technology 185, doi:10.1080/13600869.2012.698455.

26 Ruwan Fernando, *The Liability of Internet Service Providers for Copyright Infringement in Sri Lanka: A Comparative Analysis* (EconStor Research paper 150, South Centre 2022).

27 Margot Kaminski, 'Positive Proposals for Treatment of Online Intermediaries' (2012) 28(1) American University International Law Review 203.

For instance, the US government has adopted a system of notice-and-takedown in terms of intermediary liability. In 1998, the US Congress adopted the Digital Millennium Copyright Act (hereafter: the DMCA), which was controversial among the public. By adopting such an act, the US was the first state to address the application of copyright law to the liability of ISPs for digital copyright violations committed by their subscribers. The DMCA introduced safe-harbour provisions that protect ISPs from liability for infringing content created or posted through their services. To rely on safe-harbours, the DMCA requires ISPs to have a repeat infringer policy - a policy which ceases users who repeatedly commit IP violations on their platforms.

With the DMCA, the US not only regulated a domestic copyright law but also established a model that has been adopted by countries like Australia, Chile and Singapore. One of the main aims of the DMCA was to address copyright problems in the digital domain. Key provisions include protections for ISPs, the criminalisation of circumventing copyright access controls, and granting authors the right to control access to their works. To comply with the international legal framework, the DMCA prohibits the circumvention of copyright protection measures.

It should be noted that before the adoption of DMCA, the issue of ISPs' liability for copyright violation was largely left to the courts, which created inconsistent rulings. There was no common view or approach between the courts, and both users and ISPs were held liable for copyright infringement.[28]

In terms of copyright issues, the US courts recognised secondary liability for vicarious and contributory infringement. In addition, the Supreme Court recognised intermediary liability for inducement infringement. It could be argued that the US case laws have established the liability issues of copyright infringement in the digital landscape. One landmark case is Sony Corp vs. Universal Studios, where ISPs were liable for contributory and vicarious infringements. Another important case is Religious Technology Center vs. Netcom Online Communication Services, Inc., in which the court addressed three main questions concerning ISP liability. First, Netcom was not held liable for the content posted by its users, as the court ruled that the ISP merely provided a tool, while the infringement was committed by the users who uploaded the content. Second, there was no link between Netcom's liability and any financial benefits derived from the infringing action. Third, while Netcom could be held liable for contributory infringement, it could not be considered liable for primary copyright violation.[29]

28 Tatiana Lopez Romero, 'Internet Service Providers'liability for Online Copyright Infringement: The US Approach' (2006) 55 (112) Vniversitas 193.

29 Kaushiki Ranjan and Siddharth Srivastava, 'Copyright Protection in Cyberspace Challenges and Opportunities' (2021) 4 (3) International Journal of Law Management and Humanities 837, doi:10.10000/IJLMH.11546.

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It is worth mentioning that since the adoption of DMCA, one of the prominent cases regarding online infringement was Viacom vs. YouTube. YouTube is one of the largest video platforms in the US. It is also a website where numerous music and video content can be uploaded illegally. In this case, Viacom collected over 100,000 unlawfully uploaded videos, expecting to get 1 billion dollars as compensation for copyright violation. However, the US court did not support the claim, arguing that merely knowing users upload illegal works does not create responsibility for ISPs, and they do not need to monitor what the users are doing. Viacom believed that the court's decision came from a misunderstanding of DMCA. After the case, YouTube introduced a piracy detection system. According to that tool, a suspected user of copyright abuse receives a notification letter where that requests the user to delete materials, which leads to copyright violation. If a user confirms that they are not infringing copyright, they can also send a counter-notification to the ISPs. It would be plausible to say that authors can use such a method to defend their rights, regardless of whether they have registered their work in the US IP Office.[30]

Apart from the DMCA, the US House of Representatives drafted the SOPA (Stop Online Piracy Act), while the US Senate drafted the Protection of Intellectual Property Act (PIPA), both aimed to combat digital piracy. These bills sought to prohibit American citizens from accessing foreign websites that provide pirated content.

SOPA included two major clauses: the first aimed at protecting digital IP rights, and the second focused on enforcing measures against IP theft. Notably, SOPA allowed US prosecutors to bring lawsuits against the owners of foreign websites or foreign infringing websites. Besides, it gave right holders or authors the ability to send a notification letter to various types of service providers to cease copyright infringement.[31]

Interestingly, the bills propose that anyone found in copyright infringement ten or more times within six months should face up to five years in jail. Pursuant to these bills, ISPs, payment processors and advertisers in the US could be prohibited from doing business with pirated websites. Unlike PIPA, SOPA requires search engines such as Google, Yahoo, and others to remove infringing sites from their results. Additionally, both bills called for ISPs to use a tool, Domain Name System (DNS), to block users from accessing pirated websites.

Despite these measures, these bills were not supported by a majority of the public. Both offered immunity to ISPs if they had "reasonable evidence" that a third party's websites contained illegal content, a provision that raised concerns about potential conflicts of interest. Critics argued that this could lead ISPs to block access to competitor's websites

30 Jiaqi Liu, Xinui Wang and Yihao Wang, 'Research on Internet Copyright Protection Mechanism: Based on the Perspective of the Comparison of Chinese and American Legislation' (Proceedings of the 2022 7th International Conference on Social Sciences and Economic Development (ICSSED 2022)) 1592.

31 ibid.

or trigger firms to take a safety-first approach, potentially resulting in users being banned from using legal materials.[32]

To sum up, it is plausible to say that the DMCA continues to play a vital role in the protection of copyright in the digital environment. The DMCA has benefited a wide range of participants in the digital society, from copyright holders to users to internet service providers, by providing a legal mechanism that addresses the challenges of online distribution and consumption of copyrighted works. Given the fact that digital technologies develop rapidly and bring about challenges, the DMCA needs constant adjustments to keep a balance between users and copyright owners.

4.3. ISP Liability Rules the UK

Under Section 97A of the Copyright, Designs and Patents Act (1988) (hereafter: the CDPA), UK rights holders can seek injunctions from local courts to prevent ISPS from allowing their users to access certain websites known to infringe copyrighted works. This provision empowers the High Court to issue injunctions when ISPs have actual knowledge that their services are being used for copyright infringement. To determine whether ISPs have actual knowledge, courts usually consider all relevant matters, particularly whether the ISP obtained a notice according to the Electronic Commerce (EC Directive) Regulations 2002. That notice must include the full name and address of the sender and full information of infringement.[33]

Before the introduction of Section 97A, the UK implemented the E-Commerce Directive and the Copyright in the Information Society (Infosoc Directive) through certain regulations. These regulations aligned UK rules with European instruments, particularly addressing liability exemptions under Articles 12, 13, and 14. Thus, those regulations incorporated Sections 97A and 191JA into the CDPA.[34]

The regulations provide a defence for ISPs, which allows them to be excluded from liability when they are:

> *"a) **acting a mere conduit** – i) does not initiate the transmission; ii) does not choose the receiver of the transmission; iii) does not select or alter the data in the transmission.*
> *b) **caching** – i) does not change information; ii) complies with conditions on access to the information; iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry; iv) does not interfere*

32 'Sopa and Pipa Anti-Piracy Bills Controversy Explained' (*BBC News*, 8 March 2012) <https://www.bbc.com/news/technology-16596577> accessed 25 June 2024.

33 Law of the Parliament of the United Kingdom of 15 November 1988 'Copyright, Designs and Patents Act 1988' <https://www.legislation.gov.uk/ukpga/1988/48/contents> accessed 25 June 2024.

34 Sophie Stalla-Bourdillon, 'Liability Exemptions Wanted: Internet Intermediaries' Liability under UK Law' (2012) 7(4) Journal of International Commercial Law and Technology 289.

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with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; v) acts expeditiously to remove or to disable access to the information he has stored upon receiving actual knowledge that the information at the initial source of the transmission has been removed from the network.

c) ***hosting*** *– does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful."*[35]

In addition to those regulations, the UK Government introduced the Digital Economy Act (2010) (hereafter: DEA) to address online copyright infringement more effectively. Before the DEA, online copyright infringement was poorly tackled by existing legislation. For example, CDPA did not have provisions to prevent file-sharing actions where infringers were countless and unidentified.[36] The DEA intended to tackle several legal issues, from regulating digital media services to solving illegal P2P sharing systems.[37]

The CDPA aimed to combat the commercial use of copyright, while the DEA intended to focus on the problem of digital copyright violation, including illegal P2P file sharing.[38] One of the main features of the DEA is that it requires major ISPs to contact their users when their IP addresses are reported by rights holders for infringing IP rights. To be clear, the entire procedure is introduced by the following: first, right holders ask ISPs to reveal the identity of the subscribers whose IP addresses used to infringe copyright materials; and then, after three warnings, they help copyright owners to get civil liability against these infringers.[39] Sections 3 to 18 of the DEA introduced appropriate digital copyright provisions. The significance of the act lies in its statuary obligations, which are applied directly to ISPs rather than supporting service providers and rights holders in achieving an industry-led solution.[40]

Despite its aims, the DEA faced criticism from the public. Some argued that the act was rushed through with insufficient investigation and that it imposed disproportionately harsh obligations on the ISPs.[41] Since the act imposed harsh obligations on ISPs, it is unsurprising that major British ISPs such as TalkTalk and BT were its main opponents. As a result, they

35 Stokes (n 3).
36 Nick Cusack, 'Is the Digital Economy Act 2010 the Most Effective and Proportionate Way to Reduce Online Piracy?' (2011) 33(9) European Intellectual Property Review 559.
37 Robin Mansell and W Edward Steinmueller, 'Copyright Infringement Online: The Case of the Digital Economy Act Judicial Review in the United Kingdom' (2013) 15(8) New Media & Society 1312.
38 Anna Karwowska, 'Copyright and the Digital Economy Act: A Comparative Perspective' (2015) 2(1) European Journal of Comparative Law and Governance 19, doi:10.1163/22134514-00201001.
39 Mansell and Steinmueller (n 37).
40 Cusack (n 36).
41 Karwowska (n 38).

initiated a judicial review, but the High Court ruled in favour of the act, dismissing arguments that certain provisions were unreasonable.[42]

It is worth noting that the adoption of the DEA meant that ISP subscribers would be liable for copyright violations in the digital domain. Furthermore, the UK took the view that implementing such an act would alter the minds of users towards copyright infringement, portraying it as unacceptable. It is believed that a mass notification or warning, according to the DEA, will teach the public about copyright and change their behaviour.[43] To date, the UK relies on two different approaches when it comes to cease infringement actions. The first approach is linked to the Voluntary Copyright Alert Program (VCAP), a project between the British Phonographic Industry, the Motion Picture Association and major ISPs. This approach is aimed at targeting infringers and sending them warning emails for educational purposes. The second approach is used to block websites with unlawful content to cease users from accessing illegal copyrighted materials. This process is usually conducted by a special law enforcement body such as the Police Intellectual Property Crime Unit.[44]

To sum up, it is plausible that the UK appears to keep pace with the latest technological advancements by adopting reasonable legislation to tackle online copyright infringement. Its legal, technological, and administrative achievements could be a positive example for developing states like Kazakhstan.

4.4. ISP Liability Rules in Ukraine

As an ex-Soviet republic, Ukraine was named by global copyright associations as one of the world's largest centres for online copyright infringement. Kyiv's Petrovka market platform has notoriously been famous for pirated copyrighted works from music to software.[45] It is worth noting that Ukraine has faced significant international pressure to adopt Western copyright standards since gaining independence in 1991. Ukraine joined the Geneva Phonograms Convention and the WIPO Copyright Treaty in 2000 and 2002, respectively. Despite these legal changes, the country remains on the list of the most pirated states and has faced harsh criticism from respected organisations such as the IFPI (International Federation of Phonograms and Videogram Producers) and the International Intellectual

42 Alexandra Giannopoulou, 'Copyright Enforcement Measures: The Role of the ISPs and the Respect of the Principle of Proportionality' (2012) 3(1) European Journal of Law and Technology <https://ejlt.org/index.php/ejlt/article/view/122/204> accessed 25 June 2024.

43 Adetunji and Okuonghae (n 12).

44 Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report* (IPO 2015).

45 Maria Haigh, The "Goodbye Petrovka" Plan: The Moral Economy of File Sharing in Post-Soviet Society (Working Paper Series of the Research Network 1989 no 7, SSOAR 2008) <https://www.ssoar.info/ssoar/handle/document/1640> accessed 25 June 2024.

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Property Alliance.[46] Ukraine has taken steps to enhance its legal framework for copyright protection in the digital age. The Constitution of Ukraine has relevant articles concerning protecting intellectual property rights. For instance, Article 41 determines the rights of possession and use of the results of intellectual and creative activities, while Article 54 guarantees public freedom of literary, artistic, scientific and technical creativity as well as moral and material interests emerging from intellectual, creative activities. Furthermore, the Constitution prohibits the dissemination and exploitation of the results of intellectual activity without the permission of the copyright owner.[47]

In Ukraine, other codified regulations govern intellectual property issues, including copyright, such as the Civil Code of Ukraine (Law No. 435- IV, 2003), which contains some main provisions as the definition, subject and object of IP rights, personal non-property, etc; the Commercial Code of Ukraine which regulates IP rights in economic and business activities; the Code of Ukraine on Administrative Offences which contain norms concerning administrative sanctions in the sphere of copyright relations; the Criminal Code of Ukraine which provides for liability for copyright violation such as illegal reproduction and distribution of copyrighted works. The subject of IP rights is also regulated by the Law of Ukraine, "On Copyright and Related Rights," which provides provisions for the protection of the author's personal non-property and property rights.[48]

One of the main legal issues in the field of copyright was the liability of ISPs. To solve these issues and protect IP rights in the digital landscape, an Association Agreement between Ukraine and the European Union, the European Atomic Energy Community, has been ratified. Therefore, parties have a common view that ISPs can be used by third parties for illegal activities such as digital piracy.[49]

In 2017, Ukraine made amendments to its copyright legislation, introducing significant changes, including the imposition of liability on ISPs – such as website and webpage owners – for third-party infringements. Under the new law, IP rights holders can send a breach of notification ("take-down notice") to ISPs requesting to remove infringed content. If intermediaries fail to address such requests, they can be liable for IP infringement. However, the law is accessible for a limited number of copyrighted objects such as audio-visual works, music, computer programs, video games and broadcasts. Second, intermediaries are required to provide full information about themselves on their websites

46 ibid.
47 Olesia Kharchenko and others, 'Protection of Intellectual Property Rights on the Internet: New Challenges' (2021) 10(41) Amazonia Investiga 224, doi:10.34069/AI/2021.41.05.22.
48 ibid.
49 ibid.

or publicly available platforms. Third, ISPs may face civil, administrative and even criminal liability if they fail to act according to the law.[50]

In conclusion, the mechanism of copyright protection in Ukraine is still under development. Implementing the best practices from developed states in the sphere of IP rights on the internet has benefited Ukraine by enhancing its legal framework, particularly concerning the liability of ISPs regarding copyright infringement. Although the above-mentioned legal frameworks might not have fully demonstrated their effectiveness and efficiency before digital piracy, there is no doubt that Ukraine has made significant strides in improving its copyright protection mechanisms. The Ukrainian case could serve as a valuable model for Kazakhstan.

4.5. Kazakhstan

It is worth mentioning that the Constitution of Kazakhstan (1995) provides some fundamental rights, such as the freedom of creativity, freedom of expression, and protection of intellectual property. International conventions ratified by Kazakhstan, the Civil Code of Kazakhstan, and copyright legal acts rely on the principles of the Constitution.[51]

For example, Article 20 of the Constitution of Kazakhstan guarantees creative activity and prohibits censorship. Moreover, it also ensures that everyone has the right to access and disseminate information through any lawful means. It should be noted that currently, in Kazakhstan, copyright is protected by law, and anyone who infringes it could face sanctions.[52]

Kazakhstan has been a member of the WIPO since 1993 and currently is a party to the following international treaties that regulate these legal relations: Berne Convention for the Protection of Literary and Artistic Works (1886), Universal Copyright Protection (1952), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation, WCT (1996), and WPPT (1996).[53] Additionally, Kazakhstan's national legal acts include the Civil Code (1999) and Copyright Law (1996).[54]

50 'Enforcement of IP Rights on the Internet in CEE, Ukraine and Turkey' (*Kinstellar*, July 2017) <https://www.kinstellar.com/news-and-insights/detail/552/enforcement-of-ip-rights-on-the-internet-in-cee-ukraine-and-turkey> accessed 26 June 2024.

51 Constitution of the Republic of Kazakhstan of 30 August 1995 <https://adilet.zan.kz/eng/docs/K950001000_> accessed 25 June 2024.

52 ibid.

53 Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan no 11 of 25 December 2007 'On the Application by the Courts of Certain Norms of Legislation on the Protection of Copyright and Related Rights' <https://adilet.zan.kz/rus/docs/P07000011S_> accessed 25 June 2024.

54 Law of the Republic of Kazakhstan no 6-I of 10 June 1996 'On Copyright and the Related Rights' <https://adilet.zan.kz/eng/docs/Z960000006_> accessed 25 June 2024.

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According to Article 971 of the Civil Code, "copyright law applies to scientific, artistic and literary works, which are the results of creative activity, regardless of their aim, content, and dignity, as well as the mode of their expression". It should be mentioned that the Civil Code provides general provisions of intellectual property rights, which in turn regulates not only copyright and related rights but also patents, trademarks, and a right to the topology of integrated circuits.[55] At this moment, in Kazakh legislation, Chapter 5 of the Civil Code of Kazakhstan is devoted to copyright law. However, among the current chapter's articles, no specific provision regulates copyright on the internet.

As aforementioned, the primary act regulating copyright and related rights on creations is the Copyright Law. Many view the adoption of this law as marking the beginning of a new era for copyright in Kazakhstan, a period that continues to this day.[56] Since its enactment, the law has undergone 20 amendments, primarily to address emerging challenges,[57] particularly those posed by the rapid rise of "digital piracy".[58] Despite these amendments, the Copyright Law still lacks comprehensive definitions or terms tailored to regulating copyright on the internet. Hence, all subject matters posted on the internet are protected as traditional subject matters of copyright.[59]

Regarding the mechanism of copyright protection, Kazakh law provides civil and criminal liabilities for online copyright infringement. For example, the Kazakhstan Civil Code and the Copyright Law have clear norms on the responsibility for copyright violation and liability for compensation. Under the Civil Code, remedies for copyright infringement include measures such as the suppression of actions, recovery of losses, seizure of material objects, and mandatory publication of the violation.[60]

The Copyright Law, specifically Article 49, provides the ways in which copyright and related rights are protected through a court. These remedies include 1) recognising the rights; 2) restoring the situation that occurred prior to the infringement of the rights; 3) prohibiting the actions that violate or threaten to violate the rights; 4) compensating for the damages, including lost profits; 5) recovering the income, obtained by the infringer after the infringement of copyright and (or) the related rights; and 6) awarding

55 Civil Code of the Republic of Kazakhstan (Special part) no 409 of 1 July 1999 <https://adilet.zan.kz/eng/docs/K990000409_> accessed 25 June 2024.

56 Madi Elyubayev and others, 'Protection of the Subjective Copyrights (on Example of Legislation of the Republic of Kazakhstan, Russian Federation and Germany)' (2018) 21 Journal of Legal, Ethical and Regulatory Issues <https://www.abacademies.org/abstract/protection-of-the-subjective-copyrights-on-example-of-legislation-of-the-republic-of-kazakhstan-russian-federation-and-g-7479.html> accessed 21 January 2024.

57 Law of the Republic of Kazakhstan no 6-I (n 54).

58 Saule Demezhanova, 'Jurisdiction on Protection of Intellectual Property in the Republic of Kazakhstan' (2018) 4 Issues of Law 93.

59 Law of the Republic of Kazakhstan no 6-I (n 54).

60 Civil Code of the Republic of Kazakhstan no 268-XIII of 27 December 1994 <https://adilet.zan.kz/eng/docs/K940001000_> accessed 25 June 2024.

compensation ranging from one hundred monthly calculation indices to fifteen thousand monthly calculation indices determined by the court, or twice the value of the copies of the work or twice the value of the right to use the work, determined on the basis of the price.[61] Therefore, it is plausible that civil remedies can be applied in both traditional and digital environments.

As noted, copyright violation is a widespread issue in cyberspace, often causing substantial damage to authors and copyright owners where civil remedies fall short. Apart from civil remedies, the protection of copyright and related rights can also be seen in the Criminal Code of Kazakhstan (2014), which has severe sanctions for those who abuse authors' rights. For example, under Article 198, criminal liability occurs when a person uses the products of copyright and related rights without the consent of right holders, as well as storing and manufacturing counterfeit products of copyright and (or) related rights for commercial profit. Penalties for such offences include fines, a correlation of labour, community service, and imprisonment.[62]

Despite these detailed provisions, there remains a legislative gap concerning online copyright protection. The current framework does not specifically address how to combat copyright infringement directly on the internet. Comparative analysis reveals that while other countries have developed relevant regulations for digital copyright protection, Kazakhstan's Copyright Law (1996) appears inadequate in this regard.

For instance, the Copyright Law defines "internet resource" as an electronic information resource displayed in the text, graphic, audiovisual, or other form, with a unique network address and (or) domain name and functioning on the internet (Sections 1.14, Article 2). However, such a term is used only when regulating the activities of entities that manage property rights on a collective basis. There are no legal norms or provisions in the Copyright Law that address the legal issues of ISPs. Kazakhstan lacks a special law to provide relevant protection for ISP's functions, which could otherwise minimise their vulnerability. Furthermore, among the objects of copyright listed in Article 6 of Copyright Law, there is no indication of objects in electronic or digital formats. The only exception is audio or video recordings in digital form, and there are no norms for other objects.[63]

It is worth mentioning that to enhance copyright protection against piracy, in 2011, the Kazakh state authorities proposed introducing a "three strikes" approach to copyright infringement – where the first strike involves a notification, the second a warning, and the third leads to a criminal case in copyright legislation. However, this proposal was opposed by some internet users and bloggers, who argued that such harsh measures would harm

61 ibid.

62 Criminal Code of the Republic of Kazakhstan no 226-V of 3 July 2014 <https://adilet.zan.kz/eng/docs/K1400000226> accessed 25 June 2024.

63 Law of the Republic of Kazakhstan no 6-I (n 54).

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Kaznet – which exists because of pirated content – by driving users away due to restrictive policies. By arguing that the state's method to stop copyright infringement may force users to leave Kaznet and, as a result, make it less competitive, the internet community asked the local government to temporarily halt changes to copyright legislation. While many users supported this suggestion, others criticised the continued tolerance of copyright infringement as a means to preserve Kaznet.[64] Since then, no further amendments have been made to the copyright legislation.

Based on a detailed analysis of the above legal acts, the following norms could be introduced into domestic legislation to enhance the scope of copyright in the digital environment.

1. Section 2 of Copyright Law should be supplemented with the following terms:

a) Digital information – audiovisual works, musical works (with or without text), computer programs, phonograms, and other objects suitable for reading and reproduction by computers, existing and (or) may be stored in one or more files (parts of files), in the form of records in databases on computers on the internet, on storage devices such as servers;
b) Internet service provider – an entity, a body, or individual that provides services or resources to website owners for hosting websites or parts thereof on the internet, facilitating access to them over the internet. A website owner who publishes his/her website or part of it using their own resources to make it uniquely accessible via the internet is also considered an internet service provider.

2. Given the UK's legal experience, particularly with EC Directive Regulations (2002), it is appropriate to consider adding an additional article addressing internet intermediaries to Chapter 5 of the Civil Code.

Article 970.1 Features of the Responsibility of Internet Service Provider

a) Internet service providers are responsible for the infringement of intellectual rights on the internet according to the general grounds provided in this Code, considering the specific conditions established by the article below.
b) An internet service provider is not responsible for the infringement of intellectual rights that occurred as a result of this transfer, provided that the following conditions are met:
i) they are not the initiator of this transmission and do not determine the receiver of the information;
ii) they do not change the information when providing communication services, with the exception of changes made to ensure the technological process of transferring the material;

64 Global Voices Online (n 14).

iii) they did not know, and should not have known, that the use of intellectual activity by the body or individual who arranged the transmission of the material containing the result of intellectual activity was unlawful;
iv) upon obtaining such knowledge or of the copyright holder about the infringement of intellectual rights, act quickly to remove or disable access to the information.

3. Given the insights from the UK's legal experience, particularly Section 124A of the DEA, it would be prudent to incorporate similar provisions into Kazakhstan's Copyright Law. This would entail obligating ISPs to notify subscribers of copyright infringement reports received from rights holders. The proposed provision should include specific criteria for these reports, such as: a) the name and location of the right holder; b) the name and registered address of the representative, if applicable a qualified copyright owner has the authority and proof of authority to act; c) information of copyrighted work including the title and description of the work; d) a statement that copyright infringement has been taken place on the right holder's work; e) a description of the infringement, in particular, the filenames and content of the file; f) the date of copyright infringement which has been committed; g) the IP address of the apparent infringement; 8) the website where copyright infringement happened; h) the date and time of copyright infringement report. The provision may also include the conditions specifying when the subscriber must cease infringement actions within a certain time from receipt of the notification, as well as terms for subscribers who disagree with the notification. It could outline actions that ISPs can take, such as blocking access to the website when the website owner has not taken steps to stop infringement, among other terms.

Based on the above findings, it is plausible to say that the Kazakh legislation on copyright and related rights cannot fully regulate copyright issues in the digital environment and appears to be outdated. It should be mentioned that the abovementioned provisions and proposed articles, particularly limitations to ISPs' liability, are aimed at strengthening the legal protection of copyright in the digital environment. In general, they align with the contemporary conditions of digital society. Therefore, introducing these provisions into the legal framework of domestic legislation would be quite reasonable.

5 CONCLUSION

Today, copyright infringement on the internet threatens copyright and appears to harm the exclusive rights of copyright owners. The function of copyright in cyberspace is completely different from traditional copyright due to the digitisation of copyright products and the role played by intermediaries. In this digital environment, where online piracy is a global issue, it is essential to modify the legal system regarding the liability issues of ISPs.

The comparative analysis of international legislation and legal cases regarding online copyright infringement, including ISP's liability issues, reveals that Kazakh copyright

legislation and related rights are inadequate in fully addressing the problems which have arisen out of technological advancement. It is important to highlight that the current copyright system in Kazakhstan, by and large, still relies on an obsolete regulatory framework to respond to contemporary challenges posed by technologies despite a few amendments in legal acts over the years.

So, having analysed current Kazakh legislation in the field of copyright protection, considering the development of the digital environment, it has been possible to come to the following conclusions:

1) The initial step should be to update Articles 970 and 971 of the Civil Code of Kazakhstan by supplementing the relevant abovementioned provisions to enhance the protection of copyright in the digital environment; in addition, today, ISPs play one of the essential roles in the field of IP, apart from users and right holders, it is suggested that the concept of ISP and its liability exceptions should be introduced;
2) Moreover, relying on the DEA, there is a need to introduce an additional article in the Copyright Law concerning the obligations of internet intermediaries to notify their subscribers about copyright violation reports;

In conclusion, it should be noted that copyright protection in the digital environment is under development in Kazakhstan. Implementing the best practices from global jurisdictions, tailored to legal conditions, will result in a relevant regulatory framework. This framework will provide effective mechanisms for copyright protection in the digital landscape and regulate relationships involving copyright owners, users, and ISPs.

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RIGHTS AND PERMISSIONS

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПОРУШЕННЯ АВТОРСЬКИХ ПРАВ У ЦИФРОВУ ЕПОХУ: АРГУМЕНТИ НА КОРИСТЬ РЕФОРМИ ЗАКОНІВ ПРО АВТОРСЬКЕ ПРАВО В КАЗАХСТАНІ

Ансаґан Аронов* та Сара Ідришева

АНОТАЦІЯ

Вступ. *Швидка цифровізація об'єктів авторського права та виникнення нових цифрових продуктів створюють значні виклики для законодавства про авторські права в умовах глобалізації. Цифровізація спричинила революцію в доступі до інформації, перетворивши її в електронний формат, що значно полегшує відтворення та поширення даних будь-яким користувачем інтернету. Однак нові технології також призвели до незаконної діяльності, зокрема до порушення авторських прав в інтернеті. У зв'язку з цим розвиток цифрових технологій потребує нових відповідних підходів і положень у національному законодавстві Казахстану щодо захисту авторських прав в інтернеті. Можна стверджувати, що чинне законодавство не здатне ефективно вирішувати правові питання, пов'язані з авторськими правами, особливо, що стосується відповідальності постачальників інтернет-послуг (ISP) за порушення авторського права. Метою цієї статті є виявлення недоліків у правовому регулюванні діяльності постачальників інтернет-послуг у Республіці Казахстан та надання рекомендацій щодо вдосконалення законодавства у цій сфері. Новизна дослідження полягає у тому, що в законодавстві Казахстану відсутні чіткі положення щодо правового статусу постачальників інтернет-послуг та їхньої ролі у захисті авторських прав в інтернеті. Порівнявши казахстанські законодавчі розробки з практиками США, Великої Британії та України, ми запропонували у статті перспективи реформування для того, щоб більш ефективно вирішити питання порушення авторського права у форматі цифрових відтворень об'єктів авторського права.*

Методи. *У цій статті застосовано кілька методів дослідження, зокрема системний, порівняльно-правовий та історично-правовий аналіз. Основна увага зосереджена на вивченні законодавства та прецедентного права США, Великобританії та України щодо питань авторського права з метою вдосконалення наявної законодавчої бази Казахстану.*

Результати та висновки. *У статті стверджується, що національні акти Казахстану щодо авторського права були застарілими ще до появи цифрових технологій і тому потребують оновлення для відповідності сучасним технологічним реаліям.*

Ключові слова: *цифрові технології, авторське право, порушення авторських прав в інтернеті, постачальники інтернет-послуг, правовласники, користувачі.*

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Research Article

THE PHENOMENON OF THE JUDGE'S SEPARATE OPINION EUROPEAN COURT OF HUMAN RIGHTS

Serhii Kravtsov*, Svitlana Sharenko, Iryna Krytska and Vladyslava Kaplina

ABSTRACT

Background: *The authors of the article refer to the institution of separate opinions of the judges of the European Court of Human Rights (hereinafter referred to as the European Court, the Court or the ECtHR). They emphasise that this phenomenon has not been sufficiently studied in the legal literature. However, given the leading role of the European Court, its progressive views and authority – primarily on the European continent, where it serves as an umbrella for those who have not found protection at the national level – a judge's opinion should not merely be an appendix to the Court's decision. Instead, it should be regarded as the driving force for the development of the doctrine, warranting academic study, consideration by practitioners at the national level, and a possible reference point for forecasting and shaping future interpretations of the provisions of the European Convention on Human Rights in ECtHR future decisions.*

Methods: *In the article, the authors present the points of view of scientists and practitioners on the phenomenon of separate opinions, illustrating specific examples of what they consider to be the most interesting separate opinions attached to the decisions of the European Court of Human Rights. Based on substantive analysis, they formulate conclusions, emphasising the prospective doctrinal importance for world science, law-making and law-enforcement perspective for national legal systems, as well as unconditional axiological importance, because they play the role of a catalyst for creative judicial search, contribute to the support of judicial independence and personal responsibility. The special importance not only of the decisions of the European Court of Human Rights but also of individual opinions, according to the authors, stems from the fact that those key problematic issues that bring citizens before the ECtHR are a priori difficult for the entire European community.*

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The authors analysed separate opinions, such as that of ECtHR Judge Elósegui, which was expressed in the ECtHR case Mortier v. Belgium, regarding the ratio of the provisions of Article 2 "Right to Life" ECHR and euthanasia. The authors also focused on the key conclusions made by the Portuguese ECtHR Judge Paulo Pinto de Albuquerque, who, in his nine-year tenure, independently or with colleagues, formulated more than 150 separate opinions. The authors particularly explore his opinions in two well-known cases, Bărbulescu v. Romania and Svetina v. Slovenia. Notably, in the former case, although the judge remained in the section in the minority, his separate opinion later turned into the opinion of the majority of the Grand Chamber of the ECtHR.

Results and conclusions: *The authors consider the phenomenon of a separate opinion of a judge of the European Court as a result of independent and deep thinking, an expression of the judge's individual legal awareness. This perspective is based on the author's immersion in the problems that were the subject of consideration by the panel of judges and found or, on the contrary, did not find their expression in the court decision.*

In examining separate opinions, the authors also pay attention to the specifics of their structural construction often employed by ECtHR judges. These skillfully structured opinions can serve as a valuable example for national courts, many of which are still in search of their individual legal style.

1 INTRODUCTION

In the context of Ukraine's ongoing integration into the European community, the penetration of European values into Ukrainian legal consciousness, the processes of global convergence, and the adaptation of Ukrainian legislation to European standards for the protection of human rights and fundamental freedoms, it is entirely natural for Ukrainian legal scholars to show increased interest in the influence of precedent practice of the ECHR on the development of Ukrainian legislation. This interest is evidenced by a considerable number of scientific works on the subject.[1] The European Court of Human Rights serves as a guiding beacon in the stormy sea of reformation processes, providing impetus for national changes and inspiring improvements among legislators, scientists and law enforcers - judges, prosecutors, and lawyers alike. At the same time, it is noteworthy that most scientific works focus primarily on analysing the legal positions outlined in the Court's main

1 Mykhailo Buromenskyi and Vitalii Gutnyk, 'The Impact of ECHR and the Case-Law of the ECtHR on the Development of the Right to Legal Assistance in International Criminal Courts (ICTY, ICTR, ICC)' (2019) 9(3) TalTech Journal of European Studies 188, doi:10.1515/bjes-2019-0029; Oksana Kaplina and Anush Tumanyants, 'ECtHR Decisions that Influenced the Criminal Procedure of Ukraine' (2021) 4(1) Access to Justice in Eastern Europe 102, doi:10.33327/AJEE-18-4.1-a000048; Nina Karpachova and others, 'Impact of Direct Effect of Constitutional Norms and Practice of the European Union on the Efficiency of Human Rights Realization and Protection' (2021) 24(1spec) Journal of Legal, Ethical and Regulatory Issues 1; Vyacheslav Komarov and Tetiana Tsuvina, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' (2021) 4(1) Access to Justice in Eastern Europe 79, doi:10.33327/AJEE-18-4.1-a000047.

decisions. In contrast, the arguments given in individual or special opinions of ECtHR judges, often rich in weight and scientific applied value, may not be inferior to the motives and arguments set forth in the main text of the majority.

A logical explanation for this phenomenon is offered in the preface to the collection of translations of individual opinions attached to the decisions of the *ECtHR*, written by Paulo Pinto de Albuquerque, an ECtHR judge elected from Portugal. In particular, he highlights several factors contributing to the unexplored nature of a separate opinions by ECtHR judge, including the "lapidity of the normative regulation of the institution of a separate opinion of a judge", "the insufficient prevalence of the phenomenon of a separate opinion itself", and "the absence of binding legal force in a separate opinion, since its presence, as a general rule, does not have legally significant consequences, which is more to a certain extent inherent in the countries of the Romano-Germanic legal system". However, this work rightly points out the importance of a judge's separate opinion, which can be considered as "a product of the judge's independent and deep thinking, an expression of his individual legal awareness", which "facilitates immersion in the problems that were the subject of consideration in the court decision, and helps to realise their legal significance the essence".[2]

2 SEPARATE OPINION OF A JUDGE OF THE EUROPEAN COURT OF HUMAN RIGHTS: COURAGE FOR JUSTICE

Despite the positive characteristics of separate opinions mentioned above, even on the European continent, at the level of regional judicial institutions, there is no uniform attitude towards this phenomenon. In particular, Article 45 of the European Convention on Human Rights, as well as Paragraph 2 of Rule 74-1 of the Rules of the ECtHR, allow judges participating in the consideration of cases at the level of the Chamber or the Grand Chamber to express their separate opinions. These opinions can either coincide with the court's decision (concurring opinions), when a judge or judges agree with the decision of the ECtHR, seek to further explain their position, clarify it, provide additional arguments or emphasise some nuances of their position, or dissent (dissenting opinion), where judges disagree with the reasons of the Court and/or the decision on the case.[3] In practice, separate opinions can be partially coincident (partly concurring) or partially non-coinciding (partly dissenting), and it is common for one ECtHR judge's separate opinion to be joined by several other judges.

2 Paulo Pinto de Albuquerque, *Separate Opinion: The Way to Fairness* (Vladyslava Kaplina tr, Oksana Kaplina ed, Pravo 2020) 13.

3 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECtHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 10 May 2024; ECtHR, *Rules of Court* (Registry of the Court 22 January 2024) <https://www.echr.coe.int/documents/d/echr/rules_court_eng > accessed 10 May 2024.

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In contrast to this approach outlined in the European Convention on the Protection of Human Rights and Fundamental Freedoms, the publication of individual opinions of judges is not allowed in the Court of Justice of the EU.

The differing approaches of these highly respected institutions prompt an analysis of the arguments *pro et contrary to* the phenomenon we are considering, namely the judge's separate opinion.

In their study on the relationship between the growing number of separate opinions among the decisions of the ECtHR and the level of human rights protection that this judicial institution declares at the present stage, Laurence R. Helfer and Erik Voeten reach a rather significant concern that this phenomenon may be a manifestation of the politics of dissent in the ECtHR. This is, in particular, the assumption that some opinions implicitly express disagreement or generally "accuse" the Court of refusing protection, trying to "silently cancel" its precedents, thereby lowering the standards of rights protection and/or significantly expanding the autonomy of states in the field of legal regulation.[4]

In contrast, Alec Stone Sweet, Wayne Sandholtz, and Mads Andenas challenge this rather radical opinion, pointing out the lack of empirical support in Helfer and Voeten's analysis, which is based on just 23 ECtHR decisions. They note that while the internal policy of the ECtHR is usually expressed in individual opinions, these opinions deserve analytical attention. Moreover, they contend that individual opinions can indicate the direction of the development of law and politics.[5]

In his speech at the Annual Seminar of the European Court of Human Rights held in Strasbourg on 25 January 2019, the judge of the Federal Constitutional Court of Germany, having accumulated existing opinions on this issue, cited a number of important functions performed by separate opinions in the practice of the Court. Among other things, he emphasised that separate opinions:

(1) can contribute to greater transparency of court hearings in a democratic society;
(2) assist in understanding the constitutional issues at stake and the reasoning behind the underlying decision;
(3) encourage the majority to provide the best possible justification for its conclusions, and the threat of their appearance may also facilitate the achievement of a compromise within the court, preventing the majority from simply imposing its will on the minority;
(4) allow the losing party to see that its arguments have been adequately considered;

4 Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) European Journal of International Law 797, doi:10.1093/ejil/chaa071.

5 Alec Stone Sweet, Wayne Sandholtz and Mads Andenas, 'Dissenting Opinions and Rights Protection in the European Court : A Reply that Laurence Helfer and Erik Voeten' (2021) 32(3) European Journal of International Law 905, doi:10.1093/ejil/chab057.

(5) give a special role to the judge ad hoc or national judge in clarifying the internal position;
(6) indicate deficiencies in the main decision, misinterpretation of norms, going beyond the jurisdiction of the Court;
(7) may be an indicator of differences between established case law and a new decision, thereby preventing potential precedents from emerging;
(8) may assist the Grand Chamber in deciding whether to accept the lower court's decision on review;
(9) represent a kind of current commentary of the ECHR.[6]

The given list seems to be close to exhaustive, as it allows us to reveal the meaning and value of individual opinions of ECtHR judges from different sides.

For the sake of fairness, it is important to address the arguments of sceptics against judges exercising their right to a separate opinion. Angela Huyue Zhang presents some of these arguments in her study, which, while primarily focused on judges of the Court of Justice of the EU, nevertheless explores broader aspects of the nature and functional purpose of the phenomenon of separate opinions in the legal sphere. Therefore, it is relevant to our work.

One argument posited that the absence of such a right might contribute to preserving judges' independence, as judges might fear that disclosing voting information could put them under political control during reassignment.[7] However, this concern is irrelevant to judges of the ECtHR, as Article 23 of the ECHR stipulates that they are elected for a term of nine years without the right to re-election. Furthermore, Article 22 of the Convention states that the decision to elect a specific judge from a list of three candidates proposed by the state is made by the Parliamentary Assembly of the Council of Europe.

At the same time, some other counterarguments regarding the existence of such a judicial instrument as a separate opinion can be extrapolated to the judges of the ECHR, such as:

(1) preservation of the authority of the Court, in particular for the governments of the states that have to implement the relevant decision;
(2) the "collegial" decision-making process indicates that the Court holds together, the minority is not excluded from the deliberation process;
(3) increasing the legitimacy of the Court - contributes to public perception of law as reliably stable and protected.[8]

6 Andreas Paulus, 'Judgments and Separate Opinions: Complementarity and Tensions' (Opening of the Judicial Year: Seminar, Strasbourg, 25 January 2019) <https://www.echr.coe.int/documents/d/echr/Speech_20190125_Paulus_JY_ENG> accessed 10 May 2024.

7 Angela Huyue Zhang, 'The Faceless Court' (2016) 38(1) University of Pennsylvania Journal of International Law 111.

8 ibid.

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Interestingly, the researcher immediately gives additional arguments in support of the expediency of the existence of the right of judges to publish a separate opinion, some of which can fully complement the above list, in particular: first, the existence of a single decision that takes into account different opinions can inevitably tend to blur differences, which will reduce the clarity of judgment, make it more abstract and rhetorical; secondly, judges are deprived of the opportunity to "build" their individual reputation, to form an audience of "supporters" among colleagues, practising lawyers, academics and the general public.[9]

In continuation of the above-mentioned counter-argument regarding the authority of the Court, it is appropriate to include some clarifying explanations from Kateřina Šimáčková, a current Judge of the ECtHR from the Czech Republic. She highlights an important perspective on this issue: when a lack of a common position among judges becomes publicly recognised, there is a fear that the decision made by the minimum by the majority – accompanied by detailed, meaningful and well-argued separate opinions – reduces the authority of the Court as a body. Such a decrease in authority might lead to reduced confidence among states in the Court's powers to issue binding decisions.

Although the Court's decisions are formally legally binding, opponents of the presence of special opinions raise the question of whether a decision made by a minimum majority of votes has a morally binding effect.[10] However, Šimáčková disagrees with such a line of reasoning since it is the plurality of opinions that is a sign of the legitimacy of the law. She contends that the transparency of the ECtHR's work is a guarantee of its authority; the principle of publicity and the authority of the Court are inseparable concepts, and therefore, it is impossible to build their hierarchy because transparency increases authority.[11]

Empirical studies from the relevant aspect demonstrate several factors that can encourage judges to more actively express their disagreement with the majority through separate opinions. These factors include personal qualities – such as reluctance to seek compromises or, on the contrary, efforts to defend their views in the struggle and ensure their victory – along with professional experience. Researchers have noted that judges who have previously served in national courts often do not object to the frequent and wide use of judicial disagreements in their decisions. Other influential factors include previous career growth and the field of competence, for example, the presence of special knowledge in the issue being resolved in a specific case.[12]

9 ibid 112.

10 Kateřina Šimáčková, 'Dissenting Opinions in Constitutional Courts: A Means of Protecting Judicial Independence and Legitimizing Decisions' (The Rule of Law in Europe - Vision and Challenges: Seminar, Strasbourg, 15 April 2021) 2 <https://www.echr.coe.int/documents/d/echr/Intervention_20210415_Simackova_Rule_of_Law_ENG> accessed 10 May 2024.

11 ibid 1.

12 Gregor Maučec and Shai Dothan, 'Judicial Dissent at the International Criminal Court: A Theoretical and Empirical Analysis' (2022) 35(4) Leiden Journal of International Law 960, doi:10.1017/S0922156522000103.

Commenting on the latter factor, we tentatively note that in the case of *Mortier v. Belgium*, which will be analysed in the future, Spanish judge María Elósegui's prior experience in the field of bioethics enabled her to approach the complex aspects of the case from a different angle.

3 SEPARATE OPINIONS OF THE JUDGES OF THE EUROPEAN COURT OF HUMAN RIGHTS: FROM THE DEVELOPMENT OF THE DOCTRINE TO CHANGING TRENDS IN LAW ENFORCEMENT PRACTICE

One notable example of a recent case considered by the ECtHR where a dissenting opinion reflects the inner independent conviction of a judge and provides a fresh perspective on the circumstances is the case *Mortier v. Belgium* (application No. 78017/17), decision dated 4 January 2023, considered as part of the Chamber, the level of importance of the case is key.[13]

The cited case holds both scientific and practical relevance, especially concerning possible improvements to national legislation, as it marks the first time the ECtHR considered the compliance of euthanasia that had already been carried out. The Court clarified that its focus was not on the existence of a right to die (or the right to euthanasia) under Article 2 but rather on whether the euthanasia performed in relation to the applicant's mother could occur without violating Article 2 of the ECHR, given certain conditions and guarantees.

The interest of the case is actualised by the lack of consensus on euthanasia regulation at the legislative level across Europe. Moreover, the previous practice of the Court in several similar cases, such as *Pretty v. United Kingdom,*[14] does not indicate a well-established and developed approach by the ECtHR to this problem.

In summarising the circumstances of *Mortier v Belgium*, it is crucial to highlight its relevance to Article 2 (Right to Life) of the Convention in its material and procedural aspects from the position of positive obligations of the state. The applicant contended that the Belgian Euthanasia Act procedures were not followed, arguing that the legally established guarantees were illusory and insufficient to ensure effective protection of his mother's right to life. The case also raised concerns about the failure to ensure an effective investigation into the circumstances surrounding the euthanasia of the applicant's mother. In particular, the applicant questioned the independence of the investigation, noting that the doctor (Professor D.) who performed the euthanasia procedure was the co-chair of the Federal Commission for Monitoring and Evaluation of the Law on Euthanasia, which checked and evaluated its legality post-factum, and the criterion of reasonable speed.

13 *Mortier v Belgium* App no 78017/17 (ECtHR, 4 October 2022) <https://hudoc.echr.coe.int/eng?i=001-219988> accessed 10 May 2024.

14 *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) <https://hudoc.echr.coe.int/fre?i=002-5380> accessed 10 May 2024.

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Separately, the applicant claimed a violation of Article 8 of the ECHR from various angles. However, the ECtHR narrowed the scope of its review, focusing solely on the applicant's assertion that his lack of prior notification and involvement in the euthanasia decision-making process constituted a violation of his right to respect for private life and family life.

With regard to the material aspect of Article 2 of the ECHR, the Court stated that the Law "On Euthanasia " can meet these requirements, as it can protect the right to life, as required by the article. In addition, the ECtHR noted that the provisions of the Law on Euthanasia were observed. For instance, the Court determined that the patient's donation to the fund headed by the doctor who performed the euthanasia (Professor D.) did not constitute a conflict of interest. This assessment was based on the size of this donation and the timing of its contribution.

Additionally, the Court addressed the concerns about the independence of the doctors consulted by Professor D., who were members of the LEIF association[15] he headed. The Court concluded that this affiliation was insufficient to imply their dependence on Professor D., as many doctors in Belgium who participate in euthanasia procedures have been trained and/or are members of this organisation. Thus, the Court concluded no violation of Article 2 ECHR in the material aspect.

At the same time, the Court acknowledged the existence of a violation of Article 2 in its procedural aspect, recognising that, at least under the circumstances of this case, the examination of *ex post facto* (that is, one that has an a posteriori nature) in the Federal Commission did not meet the required independence standard. This was particularly concerning because Belgian law allows a doctor involved in euthanasia to participate in the commission's meetings, even if they observe the rule of silence.

Also, the ECtHR found no violation of Article 8 of the Convention since the legislation in the case ensured a fair balance between the competing interests. The doctors took all possible reasonable measures to encourage the patient to notify her relatives in advance, yet ultimately acted in accordance with her wishes, thus fulfilling the legal requirements regarding the preservation of confidentiality and medical secrecy.

It is clear that this debatable, ambiguous question could become a catalyst for the search for hypothetical errors potentially made in the decision and possible legislative deficiencies that need to be corrected in the future. Judge Elósegui, in her separate partially dissenting opinion, concurred with the Court's conclusion concerning the violation of the procedural aspect of Article 2 of the Convention but added an important additional legal argument. She suggested that the relevant violations were not just an isolated case of incorrect application of the Belgian legislation on euthanasia; instead, they could reflect a systemic problem affecting certain categories of persons.

15 *Levens Einde Information Forum* <https://leif.be/home/> accessed 10 May 2024.

In particular, the judge emphasised that postmortem (a posteriori) reviews of performed euthanasia, alongside the procedure for the formation and functioning of the Federal Commission overseeing the law, are practically incompatible with the guarantees provided for in Article 2 of the ECHR for vulnerable groups. Thus, the dissenting opinion, in contrast to the Court's decision itself, points to a systemic flaw in Belgian legislation regarding euthanasia for people with mental illness (since, as pointed out in the dissenting opinion, there are significant medical disagreements about the true incurability of certain mental illnesses, e.g. chronic depression). The crux of the issue lies in the fact that verification only occurs post-factum, e.g. after the person's death. The opinion suggests that Belgium may have violated the substantive aspect of Article 2 in this case and warns of the threatening consequences that could occur in the future if the relevant legislation is not reviewed and updated.

Judge Elósegui also disagrees with the ECtHR's conclusion that there is no violation of Article 8 of the Convention due to maintaining a balance between competing interests, in particular, the predominance of the applicant's mother's right to the autonomy of her decision to end her life. The judge, taking into account her five-year experience as deputy chairman of the Bioethics Committee of the Autonomous Community of Aragon, gives additional justification to confirm that the principle of autonomy has no legal meaning without taking into account the other three principles of bioethics, especially when vulnerable individuals are involved, as their ability to make autonomous decisions may itself be questionable. In a separate opinion, the current significant risk of abuse of respect for the dignity and rights of the patient is noted, as a defenceless and vulnerable person can simply be left alone in the hands of a doctor, isolating him from his family and loved ones. That is why, referring to a number of conclusions of non-governmental organisations, the judge disagrees with the majority of judges that a mentally ill person is endowed with complete freedom in this matter and can express his own will.

Based on the above, we can note that the given separate opinion of Judge Elósegui, which is partially inconsistent, can claim to express an alternative, reasoned vision of the problem of guaranteeing the standards arising from the provisions of Article 2 of the ECHR, cases of the application of the euthanasia procedure to persons with mental illnesses, and also have an important meaning to analyse possible defects of national legislation in this aspect.

Another significant example where a judge's separate opinion does not coincide with the majority is *Hassan v. United Kingdom, decided on* 16 September 2014 (application No. 29750/09).[16] It is also appropriate to immediately note that the partially dissenting opinion of Judge Robert Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, may have an important doctrinal significance. It addresses several theoretical and practical issues: first, the possibility of applying extraterritorial jurisdiction in the context of the provisions of Article 1 of the ECHR; second, the adequacy of the interpretation of the provisions of Article 31 Para. 3 (b) of the Vienna Convention on the Law of International

16 *Hassan v The United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) <https://hudoc.echr.coe.int/fre?i=001-146501> accessed 10 May 2024.

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Treaties in matters of taking into account the subsequent practice of applying the treaty (in particular, the European Convention on Human Rights), which establishes the agreement of the participants regarding its interpretation; and third, the problems of correlation between the provisions of international human rights law and international humanitarian law, as well as the correctness of the application of the European Convention on Human Rights in the conditions of an international armed conflict.

Thus, the case referred to, among other things, the actions of the British armed forces in Iraq, the capture of the applicant's brother by the British armed forces and his subsequent detention in a camp on the territory of Iraq in April 2003 as part of the internment procedure regulated by the provisions of the Third and Fourth Geneva Conventions.

It is important to emphasise that, based on the circumstances of the case, the British authorities did not *de jure* carry out the derogation procedure from the state's obligations defined by the Convention, in particular the right to freedom, because such a critical formal requirement of this procedure as notification was missing.

Furthermore, the British government argued before the Court that the state's contractual obligations under Article 5 of the ECHR should either be deemed inapplicable or assessed in light of international humanitarian law rather than the European Convention on Human Rights.

Interestingly, the majority of the judges of the Grand Chamber sided with the government's position, agreeing that the applicant's brother was not within the jurisdiction of the United Kingdom from the time of his arrest by the British military until he disembarked from the bus that transported him from the camp. Also, the ECtHR found no violation of Article 5 (1-4) because it determined that international humanitarian law could be applied in this case. Therefore, the European Convention on Human Rights could implicitly accommodate these provisions, which meant that the detention of the applicant's brother was not considered arbitrary and adhered to the requirements of international human rights law, in particular, Article 5 of the ECHR. Furthermore, it should be noted that, in its reasoning, the Court referenced the rule of subsequent state practice under the Convention, which the majority of judges interpreted as demonstrating an agreed common and consistent intent among member states to modify the fundamental rights guaranteed by the ECHR.

However, in their separate opinion, the aforementioned judges offered quite relevant, logical and sufficiently convincing arguments and criticised the main conclusions made by the majority of the judges of the Grand Chamber. They specifically highlighted key points regarding the given case. In particular:

(1) the appropriateness of the application of the rule on the subsequent practice of the signatory states provided for in Article 31 (para. 3) (b) of the Vienna Convention on the Law of International Treaties with reference to three key reasons:
    a) the inconsistency of the Court in the issues of the existence of extraterritorial jurisdiction of the state in situations related to armed conflict and the presence of the fact of occupation of part of the territory by a member state of the Council of Europe;

b) the given rule should be applied exclusively when the relevant practice meets the criteria of consistency and is common to all parties to the international agreement, which, according to the judge, could not be established in the case under consideration. In addition, in a separate opinion, it is emphasised that such subsequent practice in matters of interpretation of the foundations of legal rights should be directed towards expanding the normative content of such rights and not towards narrowing their meaning, as was the case in this case;
c) the irrelevance of the references of the majority of judges to the practice of states refraining from derogating from Article 4 of the ICCPR in the context of actions to restrict freedom through internment, since Article 9 of the Covenant, in contrast to Article 5 of the ECHR contains only a general prohibition of arbitrary deprivation of liberty without an exhaustive list of grounds for such actions;

(2) the possibility of an expansive interpretation of the list of grounds for deprivation of liberty under Article 5-1 of the ECHR due to an attempt to "inscribe" provisions of other norms of international law into it (in particular, provisions of the Third and Fourth Geneva Conventions) is denied. The opposite approach, according to the judge, would simply make Article 15 obsolete and unnecessary in the structure of the Convention;
(3) significant methodological and structural differences in the norms of international human rights law and international humanitarian law are indicated, which determines different judicial approaches to the assessment of individual rights and testifies to the impossibility of automatic assimilation of these two different legal regimes. This is especially relevant, according to the judge, in the case of Article 5 of the ECHR, since the indefinite and preventive internment permitted under international humanitarian law is completely inconsistent with the exhaustive list of grounds established by paragraphs of Article 5-1 and other guarantees of the same article of the ECHR;
(4) the approach of the majority of judges regarding the "adjustment" of the convention rights of Article 5 to the internment of prisoners of war and civilians in accordance with the prescriptions of international humanitarian law in the absence of a formal derogation in accordance with Article 15 of the Convention. As noted, such "adjustment" absolutely contradicts the compositional structure of Article 5 of the ECHR, which contains an exhaustive list of grounds.

In conclusion, we note that the above partially inconsistent opinion raises many interesting issues for practice and doctrine. It contains weighty legal arguments on each outlined issue and claims to be the result of the judge's internal independent conviction and his creative scientific research.

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Another example of a separate opinion, which seems to be worthy of attention within the framework of the covered topic, is one expressed by Judge Iulia Motoc in the case of *N. v. Romania (No. 2)*, the decision of 16 November 2021 (application No. 38048/18).[17] This merits attention as it extends beyond the arguments presented by the ECtHR, significantly expanding the scope of debatable issues that could potentially be the subject of analysis by the Court. By doing so, it has the potential to contribute to the development of future ECtHR practices and legal positions,

The case concerned the decisions of the national courts of Romania, by which the applicant was completely deprived of legal capacity based mainly on the opinions of medical experts who transferred him under the full supervision of a legal guardian appointed by the state. The absence of close relatives to assume this role further complicated the situation. Additionally, the applicant was unable to initiate proceedings to challenge the appointed legal guardian, leaving him completely dependent on state institutions and their representatives. The corresponding procedure also did not give the applicant the opportunity to express his actual needs and wishes regarding the appointment of a legal guardian. Thus, the existing legal framework of Romania in this aspect did not leave any space for the individual situation of the person.

In the ECtHR's opinion, these circumstances constituted a significant interference with the applicant's right to respect for his private life, lacking adequate guarantees. Notably, the entire proceedings, which concerned, first of all, the fate of N., took place between the social protection authorities and two legal guardians. The applicant himself was excluded from the proceedings on formal grounds - exclusively due to the relevant medical documentation, without any consideration of his actual current state of health and ability to understand the situation and express his personal opinion. Based on this, the ECtHR found a violation of the applicant's right guaranteed by Article 8 of the ECHR.

However, in the context of our research, it is notable that the applicant' referred not only to the violation of Article 8 (Right to Respect for Private and Family Life) but also Article 6 (Right to a Fair Trial) and Article 14 (Prohibition of Discrimination). However, the Court, in its one-paragraph judgment, indicated that since a violation of Article 8 had been established, there was no need to separately examine and analyse the violations of other articles in this case. This aspect prompted Judge Motoc's dissenting opinion, which highlighted the possible violation of Article 14 of the ECHR and its complete neglect by the majority of judges. In her opinion, she compared Article 14 to "Cinderella" and "Hamlet" of the Convention, suggesting that it is very often wronged by other "characters" (that is, violations of other articles of the ECHR).

In particular, the judge drew attention to the dangerous situation when people with mental illnesses are discriminated against and stigmatised because of the presence of these

17 *N v Romania* (no 2) App no 38048/18 (ECtHR, 16 November 2021) <https://hudoc.echr.coe.int/rus?i=001-213207> accessed 10 May 2024.

disorders, which causes a high risk of violation of their fundamental rights - especially in circumstances when this already vulnerable category of persons is under long-term supervision from state institutions. From the point of view of the analysis of the signs of the phenomenon of discrimination, the given separate opinion is of scientific and applied interest since it examines in detail the issue of discrimination without a "comparator" (that is, without the presence of another identical group of persons). Thus, the judge carefully analysed the question of whether discrimination is even possible under such initial circumstances - it is emphasised that Article 14 is aimed at protecting against different treatment "without objective and reasonable justification/ justification with persons who are in similar or *similar situations* situations", which, according to the judge, indicates the absence of an imperative requirement about the identity of the comparison groups.

After analysing the circumstances of the case once again, Judge Motoc was convinced that N.'s presence of a mental disorder was automatically equated with his complete civil incapacity. She noted that such an approach contradicts both the national legislation of Romania (the "Law on Psychiatric Care") and international treaties (for example, the UN Convention on the Rights of Persons with Disabilities, to which the respondent state in this case is a party), as well as the previous practice of the ECtHR, which indicated that "the treatment of persons with intellectual or psychiatric disorders as a separate class is questionable classification, and the restriction of their rights should be subject to strict control."

Based on the above, Judge Motoc, in her separate opinion, summarised the evidence of the applicant N. *prima facie* discrimination against him based on the presence of a mental disorder. She noted the Romanian government's failure to refute the presumption of discrimination, which bears the burden of proof. This could indicate a violation of Article 14 (Prohibition of Discrimination) and Article 8 (Right to Respect for Private and Family Life) of the ECHR in this case.

It seems that the logic and consistency of the judge's arguments, their weight, as well as her desire to not only express her disagreement with the opinion of the majority but also to significantly go beyond the issues examined by the ECtHR, makes the above separate opinion interesting. It contributes to both scientific developments in the aspect of studying various manifestations of the phenomenon of discrimination and the development of further practice of the Court on these issues.

We also suggest that you pay attention to the joint partially dissenting separate opinion of seven judges (Spano, Kjølbro, Turković, Yudkivska, Pejchal, Mourou-Mikström, Felici) regarding the decision of the Grand Chamber of 3 November 2022 in the *Vegotex case International SA v. Belgium* (application No. 49812/09).[18] The specified separate opinion may be interesting not only from the point of view of the fact that so many judges disagreed with the majority of the Grand Chamber of the ECtHR in the given case but also because it

18 *Vegotex International SA v Belgium* App no 49812/09 (ECtHR, 3 November 2022) <https://hudoc.echr.coe.int/eng?i=001-220415> accessed 10 May 2024.

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raises important theoretical and practical issues of the relationship and harmonious application of the guarantees established in Articles 6 and 7 of the Convention, and also, as the judges themselves emphasise, is aimed at preventing confusion regarding the application of established principles, which, in their opinion, the majority of judges misinterpreted, which caused ambiguity in matters of taking into account previous case law and created the basis for possible negative consequences for the practice of the Court in the future.

Briefly analysing the relevant facts of this case, we note that the applicant was a Belgian company, and the case concerned tax assessment proceedings in which the applicant company was ordered to pay approximately €298,813 with 10 percent additional tax. While this extra tax did not fall within the scope of "criminal prosecution" under Article 6 of the ECHR, the tax surcharges, i.e. a fine, which, according to the relevant criteria, can be considered as a "criminal prosecution" under the relevant criteria, thus bringing the case under the protections of Article 6 of the Convention.

Proceedings were initiated in October 1995 when the tax authorities notified the applicant company of their intention to correct the company's 1993 tax return and impose an additional tax. These proceedings lasted until 2009, during which the applicant company contested the claim of the tax authorities as out of time. Thus, during the specified period in 2000, the tax authorities issued a demand for payment; however, according to the applicant, this demand did not interrupt or suspend the statute of limitations, and therefore, the claim was overdue. Such conclusions of the applicant were based on the decisions of the Administrative Court of Cassation dated 10 October 2002 and 21 February 2003. However, in July 2003, the Law "On Other Provisions" was adopted, which entered into force on 6 February 2007. The Court of Appeal of Antwerp ruled in favour of the tax authorities; however, in its motivation, it did not refer to the provisions of this law but to another reason. Instead, the Court of Cassation, to which this decision was appealed, left it unchanged but, at the same time, referred to the provisions of Article 49 of the above-mentioned law of 2003, indicating that the demand for payment in 2000 interrupted the limitation period. Therefore, this demand was not overdue.

In the end, the majority of the judges of the Grand Chamber of the ECtHR found a violation of Article 6-1 of the Convention in the aspect of non-observance of a reasonable time. However, on all other issues, they found no violation of the requirements of Article 6. According to the majority, the adoption of Section 49 of the Law was necessary to correct the judicial practice of the Administrative Court of Cassation and, thus, to ensure legal certainty. In addition, the Court noted that, in exceptional cases, retrospective legislation may be justified, especially for the purpose of interpreting or clarifying an old legal provision, filling a legal vacuum or levelling the effects of new judicial practice.

In contrast, Judges Spano, Kjølbro, Turković, Yudkivska, Pejchal, Mourou-Vikström, and Felici, in their joint separate opinion, criticised the Court's approach to resolving the case. In particular, they highlighted the failure to consider the previous practice of the ECtHR under Article 7 of the Convention, which states reinstating criminal (in its content)

responsibility for a crime for which the statute of limitations has expired would violate Article 7 of the Convention, regardless of whether responsibility will be restored through legislative intervention, as in this case, or through a change in judicial practice. The authors emphasised the need for harmonising Articles 6 and 7 of the ECHR in such cases.

Both scientific and applied interest from the point of view of the further development of the precedent practice of the Court may be part of a separate opinion devoted to the analysis of the connection between Article 6, which provides for procedural guarantees in criminal cases, and Article 7, which regulates material guarantees. Not limited only to the connection between these articles in terms of the autonomous interpretation of the concept of "criminal prosecution", the judges state that "Article 6 of the Convention cannot be interpreted in such a way as to allow the adoption of new legislation with retrospective effect, which extends the statute of limitations for criminal charges offences for which the statute of limitations has already expired under national law, thereby restoring or renewing criminal liability, as this would constitute a violation and, therefore, would be incompatible with Article 7 of the ECHR." Finally, the authors of the considered separate opinion not only disagree with the majority regarding the absence of violation of Article 6 in other aspects (except failure to observe reasonable time limits) but also point to the potential negative consequences of the Court's reasoning in the given case for its further practice, which can undoubtedly indicate an important applied meaning of this shared separate thought.

Continuing the analysis of individual opinions of ECtHR Judges, we cannot fail to pay attention to those added by Judge Paulo Pinto de Albuquerque. Serving as a judge for nine years (between 2011 and 2020), he independently or collaboratively formulated more than 150 separate opinions, which since have been translated into several languages and published in collections.[19]

Thus, in 2016, the Fourth Section of the ECtHR issued a decision in *Bărbulescu v. Romania* (application No. 61496/08), in which it acknowledged the absence of violation of Article 8 of the ECHR in the aspect of the right to respect for private life and the secrecy of correspondence.[20] In this case, Mr. Bărbulescu was fired by his employer, a private company, for using the Internet during working hours for personal purposes, contrary to internal rules prohibiting it.

19 See *inter alia*, the following collections of translation of Paulo's thoughts Pinto de Albuquerque: Paulo Pinto de Albuquerque, *I Diritti Umani in Una Prospettiva Europea: Opinioni Concorrenti e Dissenzienti (2011-2015)* (Davide Galliani ed, Giappichelli 2016) (in Italian); Paulo Pinto de Albuquerque, *Convenção Europeia dos Direitos Humanos: Seleção de opiniões* (Revista dos Tribunais 2019) (in Portuguese); Albuquerque (n 2) (in Ukrainian); Paulo Pinto de Albuquerque ve diğer (ed), *İçtihatlarla İnsan Hakları: Yargıç Pinto de Albuquerque'nin Seçilmiş Şerhlerinin ve İlgili AİHM Kararlarının İncelemeleri*, 3 cilt (OnİkiLevha 2021) (in Turkish).

20 *Bărbulescu v Romania* App no 61496/08 (ECtHR, 12 January 2016) <https://hudoc.echr.coe.int/eng?i=001-159906> accessed 10 May 2024.

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Over a period of time, the employer monitored the applicant's messages on a Yahoo Messenger account, which was opened for the applicant to communicate with clients. The transcript of the messages presented in the national proceedings showed that he exchanged messages of a purely private nature with third parties, including his wife and brother.

In proceedings at the national and international levels, the applicant complained that the termination of his contract resulted from a violation of his right to respect his private life and correspondence and that the domestic courts had failed to protect that right.

The ECtHR, having considered the complaint, indicated that the applicant's case should be assessed from the point of view of the state's positive obligations. The Court noted that the applicant had the opportunity to put forward his arguments in the national courts, which had properly considered and recognised the existence of a disciplinary violation because the applicant had used Yahoo Messenger on the company's computer during working hours, in violation of the rules established by the employer.

The national courts attached particular importance to the fact that the employer had accessed the applicant's Yahoo Messenger account, believing that it contained professional messages. They did not give much weight to the actual content of the applicant's messages. Still, they relied on the transcript only to the extent that it proved that the applicant was using the company computer for personal purposes during working hours. There was no reference in their decisions to the specific circumstances under which the applicant communicated or the identity of the parties with whom he communicated. Thus, the content of the messages was not a decisive element in the conclusions of the national courts.

In this case, only the applicant's Yahoo Messenger account was monitored, and no data and documents stored on the applicant's computer were reviewed. The ECtHR found no indication that the national authorities had failed to strike a fair balance, within their discretion, between the applicant's right to respect his private life under Article 8 and the interests of his employer. Thus, the Court concluded no violation of Article 8 of the ECHR.

At the time of the decision, the forces in the Fourth Section were divided into six judges in favour of no violation and one against. Judge Paulo Pinto de Albuquerque, while sharing the opinion of the majority that there was no violation of Article 6 (Right to a Fair Trial) of the ECHR, argued that Article 8 (The Right to Respect for Private and Family Life) had been violated. In his partially dissenting opinion, the judge emphasised that the presented case was an excellent opportunity for the ECtHR to develop its practice in privacy protection in the field of employee communications on the Internet. The novelty of this case concerned:

(1) the non-existence of an Internet surveillance policy duly implemented and enforced by the employer;
(2) the personal and sensitive nature of the employee's communications that were accessed by the employer;
(3) the wide scope of disclosure of these communications during the disciplinary proceedings brought against the employee.

Judge Pinto de Albuquerque indicated that these facts should affect the assessment of the validity of the disciplinary proceedings and the sanction applied. Unfortunately, neither the national courts nor the ECtHR majority paid attention to these important factual features of the case.

After analysing the circumstances of the case and its specified features, as well as acts of hard and soft law which exist at the international level and provide guidance on respect for the right to privacy and protection of personal data of both ordinary users and workers, the judge concluded that employees must be made aware of the existence of an internet usage policy in force at their workplace. This includes policies that apply outside the workplace and during out-of-work hours, involving communication facilities owned by the employer, the employee or third parties, which, according to Judge Pinto de Albuquerque, was not properly done in the case of Mr Bărbulescu.

The judge pointed out that despite the Romanian government's claims that Mr Bărbulescu knew about the existence of these rules set out in Notice 2316 adopted by the employer in July 2007, and even the existing disciplinary proceedings against Mr Bărbulescu's colleague, the Government failed to provide evidence that the applicant was actually communicated this document. Its only copy, available in the Court's files, did not even contain the applicant's signature.

The judge also observed that even assuming that Notice 2316 did exist and was communicated to employees, including the applicant, before the events of the case, this would not be sufficient to justify Mr Bărbulescu's dismissal, given the extremely vague nature of this notice. A simple notification by the employer to the employees that "their activities have been monitored" is clearly insufficient to provide the latter with adequate information about the nature, scope and consequences of the implemented internet surveillance program. The author of the dissenting opinion emphasised that the majority of the Section judges did not care to consider the terms of communication to employees of the company's online surveillance policy despite the critical importance of this analysis to the outcome of the case.

After the ruling in the case, the applicant, dissatisfied with the position of the Section, invoked Article 43 of the ECHR and appealed to the Grand Chamber with a request to review his case. In September 2017, the Grand Chamber, after analysing the arguments of the parties and the case materials, adopted a decision that recognised the existence of a violation of Article 8 of the ECHR.[21] That is, this court opposed the earlier decision made by the Section.

Unlike the Section, the Great Chamber shared Judge Pinto de Albuquerque's reasoning regarding the need to analyse whether the employer properly communicated the extent and nature of his employer's monitoring activities or the possibility that the employer might

21 *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) <https://hudoc.echr.coe.int/eng?i=001-177082> accessed 10 May 2024.

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have access to the actual content of his messages. The Grand Chamber highlighted that the domestic courts had failed to determine whether the applicant had been notified in advance about the possible introduction of monitoring measures and their scope. For such notice to qualify as prior notice, the warning from the employer had to be given before the monitoring activities were initiated, especially where they also entailed accessing the contents of employees ' communications.[22]

In addition, the Strasbourg Court indicated that neither court had considered the seriousness of the consequences of the monitoring and the subsequent disciplinary proceedings. In this regard, the applicant had received the most severe disciplinary sanction– dismissal.[23]

Thus, we can see how the opinion of a minority of judges (in our case, the opinion of one judge of the Section) can later evolve into the majority opinion of the Grand Chamber. The given example is an excellent embodiment of the position that the separate opinions of the judges of the ECtHR can have not only doctrinal significance but also practical value. In this case, the dissenting opinion helped the applicant strengthen his arguments for referring the case to the Grand Chamber, showcasing its applied law-enforcement relevance. Secondly, it contributes to developing new approaches in the dynamic interpretation of some provisions of the ECHR, ensuring their ongoing relevance to the current state of social development.

Finally, we would like to draw attention to one more separate opinion of Judge Pinto de Albuquerque, which is crucial not only for the doctrine but also for law enforcement practice in the field of criminal procedure. This opinion was added to the case *Svetina v. Slovenia* (application No. 38059/13).[24] In this case, Mr Svetina raised concerns about the lack of a court order granting access to his mobile phone data, evidence which was later allegedly used to convict him of murder.

Mr Svetina was convicted of aggravated murder in September 2009. He appealed the verdict to the Court of Appeal, the Supreme Court and the Constitutional Court. In particular, he claimed that the police had illegal access to his mobile phone data and the data of the victim as they had not obtained court orders to examine the devices. The Supreme Court of Slovenia found that the police had indeed examined his phone without a court order but decided that the evidence obtained would have been obtained anyway in other ways and did not rule it inadmissible.

Disagreeing with the decisions of national courts, Mr Svetina appealed to the ECtHR, believing that such actions of the police and courts violated his rights under Articles 6 and 8 of the ECHR. The Strasbourg Court, having considered the case, concluded that there was a violation of Article 8 but found no violation of Article 6(1).

22 ibid, para 133.
23 ibid, para 137.
24 *Svetina v Slovenia* App no 38059/13 (ECtHR, 22 May 2018) <https://hudoc.echr.coe.int/eng?i=001-183124> accessed 10 May 2024.

The court indicated that "the applicant was able to challenge the legality of the examination of his mobile phone and admissibility of related evidence in the adversarial procedure before the first-instance court and in its grounds for appeal. His arguments were addressed by the domestic courts and dismissed in well-reasoned decisions. The applicant made no complaints in relation to the procedure by which the courts reached their decision concerning the admissibility of the evidence." Additionally, the ECtHR mentioned that "the crux of [the] complaint lies in [appl and cant's] disagreement with the domestic courts' legal assessment of the admissibility of evidence […] which is essentially based on the view that evidence which resulted from an unlawful examination or search but would have inevitably been discovered even in the absence of such an examination could be admitted to the criminal file […] This disagreement, however, concerns a question of interpretation of domestic law, which is primarily a matter to be resolved by domestic courts. The Court accordingly does not draw any conclusion as to the compliance of the "inevitable discovery doctrine" with the Convention requirements".[25]

Finally, the Court expressed that the conviction of the applicant "was based on a number of other items of incriminating evidence, not related to the unlawfully obtained data, such as (i) his own acknowledgment that he had run over X, (ii) the results of the reconstruction of events undertaken in order to test the applicant's version of events, (iii) biological traces found on the applicant, his car and on X, and (iv) material evidence, such as a rubber tube belonging to the applicant's car found at the scene, and (v) the testimony of witnesses".[26]

Judge Pinto de Albuquerque, agreeing in general with the decision of the Court on the absence of violation of Article 6(1) of the ECHR, added a concurring separate opinion to the decision, in which he disagreed with the use of the doctrine of "inevitable discovery" by domestic courts. This dissenting opinion is of extraordinary doctrinal importance as the judge analysed the history of the creation of this theory by the US Supreme Court in 1984 in the case of *Nix v. Williams* and provided some critical remarks regarding its application. In particular, he indicated that "the inevitable discovery of the evidence would have to take place within a short period of time after the State misconduct had occurred and in "essentially the same condition" as it was actually found, but it remained unclear how short this period should be and to what extent the conditions of the possible future findings could differ from the actually uncovered evidence. Factual considerations unique to each case could lead different courts to distinguish between degrees of "inevitability" based on arbitrary factual distinctions."

Through logical and linguistic analysis, Pinto de Alburquerque identified the shortcomings of the "inevitable detection" doctrine, asserting that the certainty called for by the "inevitable source" exception is purely virtual, echoing the sentiment of an English court that stated, "nothing is so easy as to be wise after the event".[27]

25 ibid, para 49.
26 ibid, para 50.
27 ibid, concurring opinion, para 12.

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Lastly, the judge emphasised that even assuming for the sake of argument that the examination of the applicant's telephone had contributed to the discovery of the tainted evidence (the telephone records of the communication between the applicant and the victim), it could be argued that the defect relating to the telephone search had later been purged because the applicant admitted, of his own accord, that he knew the victim and had run him over. Hence, the "purged taint" exception to the exclusionary rule could have been invoked, but indeed not the "inevitable discovery" exception. Its use by the Supreme Court was wrongful, both on Convention law grounds and the facts of the case.[28]

The separate opinion presented above compels lawyers to recognise the role the court plays as a "deterrent" against law enforcement agencies in their operational and investigative activities. The active use of such a doctrine can push these agencies to disregard the criminal procedural norms, especially those related to the right to protection. In support of this thesis, Judge Pinto de Albuquerque cited the following case:

Imagine the situation, "when there are numerous, lawfully obtained indicia that a person may be hiding a prohibited substance in her house, police protocol may indicate that a home search be conducted after obtaining a judicial warrant. The police, however, skip the warrant and search the house directly, finding the prohibited substance. When the evidence is challenged in court, the prosecution may invoke the "inevitable discovery" doctrine and argue that, under the circumstances of the case, the warrant would have been asked for and obtained, and the evidence would have been found in any case. Even if one concedes that this were true, the seemingly automatic application of this doctrine in this type of cases deprives the police of any incentive to actually request a warrant. More generally: the surer the police are that in a routine procedure they will find what they are looking for, the more likely they are to halt the formal procedures and the less likely they are to behave in a lawful way."[29]

The doctrine applied by Slovenian courts and mentioned in the *Svetinac case* challenges the entire established system of criminal procedural law among Council of Europe member states, leaving readers with more questions than answers. Instead, the judge's dissenting opinion sheds some light on this doctrine of "inevitable discovery" and why law enforcement should be doubly careful when it comes up in a particular case.[30]

28 ibid, concurring opinion, para 23.

29 ibid, concurring opinion, para 17.

30 For example, in 2022, the Ukrainian Supreme Court mentioned the doctrine of "inevitable discovery" in its decision, stating that " ...the appellate court should take into account that according to the content of part 1 of Art. 87 of the Criminal Procedure Code, the evidence must be declared inadmissible only if it was obtained exclusively as a result of actions that constituted a significant violation of human rights and freedoms. At the same time, if the relevant evidence would inevitably have been obtained regardless of such violation of the suspect's rights, such evidence may be considered admissible (the doctrine of "inevitable discovery" is one of the exceptions to the doctrine of "fruit of the poisonous tree"). Therefore, in order to resolve the issue of admissibility or inadmissibility as a whole of the report of the inspection of the scene of the incident and physical evidence discovered during this inspection, the court of appeal must, taking into account the specific circumstances of this criminal proceeding, find out whether there are objective grounds to believe that

4 CONCLUSIONS

The research indicates that the phenomenon of a separate opinion can have a direct, immediate meaning, which can appear almost simultaneously with the appearance of a corresponding separate opinion and a prospectively mediated one - the manifestation of which is possible in the future. In particular, we can talk about direct meaning in several ways: first, as a manifestation of the judge's independence; second, its impact on improving the quality of the reasoning of the majority of ECtHR judges in this decision since the arguments presented in individual opinions are discussed during ECtHR sessions and influence the decisions of the majority; third, in the professional development of the judge who expressed a separate opinion (contributes to his creative search, allows him to show his responsibility, etc.); fourth, in enabling the losing party to see that its arguments were also considered and were not without merit; and finally, it may be of decisive importance when the Grand Chamber decides to accept the case for its proceedings.

Regarding the indirect prognostic value of a separate opinion of a judge, several directions can be distinguished:

- *doctrinal* (a separate opinion prompts the emergence of a scientific discussion on a certain aspect and can reveal the essential features of some categories, allowing us to see the pluralism of approaches to the analysis of a certain phenomenon);
- *law-making* (a separate opinion can indicate legislative defects and serve as a model for their correction. In addition, the presence of regular disagreements can indicate that the law in a certain field does not work properly or is outdated, which potentially makes separate opinions a "bridge" between yesterday and tomorrow;
- *law-enforceable* (a separate opinion most often points to weaknesses and shortcomings in the judge's reasoning and, therefore, can influence the improvement of its level and serve as a model for correcting the judges' mistakes in the future. In addition, a separate opinion can contribute to a correct understanding and interpretation of the majority decision itself);
- *axiological* (both in a personal and general aspect. So, directly for the judge or judges - authors of a separate opinion, its preparation is a catalyst for creative judicial search and contributes to the support of judicial independence and personal responsibility. For the ECtHR, in general, the phenomenon of a separate opinion gives the opportunity to be transparent, thereby democratising the Court).

the location the corpse would inevitably be discovered regardless of PERSON_1's testimony..." See, Case no 737/641/17 (Cassation Criminal Court of the Supreme Court of Ukraine, 26 September 2022) <https://reyestr.court.gov.ua/Review/106598651> accessed 10 May 2024.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ФЕНОМЕН ОКРЕМОЇ ДУМКИ СУДДІ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ

Сергій Кравцов*, Світлана Шаренко, Ірина Крицька та Владислава Капліна

АНОТАЦІЯ

Вступ. *У статті автори посилаються на інститут окремої думки суддів Європейського суду з прав людини (далі – ЄСПЛ або Суд). Наголошують, що це явище недостатньо вивчене в юридичній літературі. Однак, з огляду на провідну роль Європейського суду, його прогресивні погляди та авторитет - насамперед на європейському континенті, де він слугує «парасолькою» для тих, хто не знайшов захисту на національному рівні, - окрема думка судді не повинна бути лише додатком до рішення Суду. Натомість її слід розглядати як рушійну силу розвитку доктрини, що потребує академічного вивчення, врахування практиками на національному рівні, а також як можливий орієнтир для прогнозування та формування майбутніх інтерпретацій положень Європейської конвенції з прав людини у майбутніх рішеннях ЄСПЛ.*

Методи. *У статті автори розглянули погляди науковців і практиків на феномен окремої думки, проілюструвавши конкретні приклади найбільш цікавих, на їхню думку, випадків, долучених до рішень Європейського суду з прав людини. На основі ґрунтовного аналізу вони сформулювали висновки, підкресливши доктринальне значення для світової науки, правотворчу та правозастосовну перспективу для національних правових систем, а також безумовну аксіологічну важливість, оскільки окрема думка відіграє роль каталізатора творчого суддівського пошуку, сприяє підтримці незалежності суддів та персональної відповідальності. Особлива важливість не лише рішень Європейського суду з прав людини, а й окремої думки, з погляду авторів, зумовлена тим, що ті ключові проблемні питання, з якими громадяни звертаються до ЄСПЛ, апріорі є складними для всієї європейської спільноти.*

Автори проаналізували окрему думку, наприклад, судді ЄСПЛ Елосегі, яка була висловлена у справі «Мортьє проти Бельгії», щодо співвідношення положень статті 2 «Право на життя» Європейської конвенції з прав людини та евтаназії. Автори також зосередили увагу на висновках, що зробив португальський суддя ЄСПЛ Пауло Пінто де Альбукерке, який за дев'ять років перебування на посаді судді самостійно або разом з колегами сформулював понад 150 окремих думок. Автори особливо досліджують його думку у двох відомих справах - «Барбулеску проти Румунії» та «Свєтіна проти Словенії». Варто зазначити, що в першій справі, хоча суддя залишився у складі меншості, його окрема думка згодом перетворилася на думку більшості Великої палати ЄСПЛ.

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Результати та висновки. *Автори розглядають феномен окремої думки судді Європейського суду з прав людини як результат самостійного та глибокого мислення, вираження індивідуальної правосвідомості судді. Такий погляд ґрунтується на зануренні автора в проблеми, які були предметом розгляду колегії суддів, і знайшли або, навпаки, не знайшли свого вираження в судовому рішенні.*

Дослідивши окремі думки, автори також звертають увагу на особливості їхньої структурної побудови, яку часто використовують судді ЄСПЛ. Ці вміло структуровані висновки можуть слугувати цінним прикладом для національних суддів, більшість з яких все ще шукає свій індивідуальний правовий стиль.

Ключові слова: *Європейський суд з прав людини, окрема думка судді, правова позиція, права людини, суддівський розсуд, право на справедливий суд, судове рішення.*

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Research Article

ONLINE DISPUTE RESOLUTION IN UKRAINE: EXPECTATIONS AND REALITY

Pavlo Riepin

ABSTRACT

Background: *As digital interactions and transactions grow, people are more inclined to participate if they feel secure and assured of fair procedures. However, online dispute resolution is still rarely used in Ukraine due to a lack of regulations. This research article provides a legal analysis of online dispute resolution (ODR) in Ukraine, concentrating on defining the ODR landscape, as well as on considering its potential in e-commerce and traditional court proceedings. Besides, the article presents a vision and proposals for the future adoption of European laws in Ukraine while discussing the current challenges in the online justice system that hinder its successful implementation.*

As a result, the article emphasises the need for an adequate legal instrument to regulate ODR in Ukraine, particularly in the context of e-commerce. It highlights the importance of implementing EU legislation, developing ODR platforms and ADR institutions, and ensuring their decisions are binding. It also addresses the challenges related to remote hearings in the judiciary during different circumstances and suggests adopting cloud-based case management to improve efficiency and reduce the risk of document destruction.

Methods: *The research methodology for this study on online dispute resolution in Ukraine included a comprehensive literature review, a comparative analysis of ODR systems in European countries, and a systems analysis to forecast the future trajectory of ODR in Ukraine. This approach aimed to assess the current state of ODR in Ukraine, identify areas for improvement, and explore potential achievements and challenges in its implementation.*

Results and conclusions: *The article concludes that Ukraine is in the process of establishing a legal framework for online dispute resolution, which is expected to progress further after the war. The implementation of EU legislation and the development of ODR platforms and ADR institutions are crucial, along with ensuring accessibility for all, including vulnerable groups without internet access. Related to online courts, it is necessary to address challenges such as judges' absence during remote hearings. It is also recommended that the process be expedited and the risk of document loss internally in the case management system minimised.*

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1 INTRODUCTION

Every year, Ukraine is increasingly and actively pursuing its chosen path towards integration with the European Union, which necessitates harmonising its national legislation with the international community's standards. The matter of establishing a proficient framework for safeguarding the rights and freedoms of individuals, particularly in the context of access to justice, is currently being brought up.

In developing countries such as Ukraine, access to justice is a fundamental premise that shapes the structure and functioning of the judiciary. This is because ordinary citizens view justice as a distinct process that takes place within an exclusive institution. Nevertheless, the present situation indicates that the exercise of the right to judicial protection is significantly hindered by the excessive burden on courts, limited accessibility for the majority of citizens, and the prolonged duration of the process. It often leads to expensive delays, causing the original issues of the claims to become irrelevant and resulting in both moral and financial losses for the parties involved.

Advancements in technology and shifts in methodologies now enable us to perceive justice not as a privilege but as a service that should be accessible to all. With an increasing number of interactions and transactions occurring in the digital realm, individuals are increasingly inclined to participate, provided they feel secure and assured of fair procedures. Regrettably, this matter has not received adequate scrutiny within Ukrainian nation, resulting in a scarcity of specialists with genuine expertise in this field. Studying online and alternative dispute resolution methods and their potential use in our country is quite relevant, especially given the difficulties encountered by individuals living in Ukraine. The contemporary justice system's effectiveness diminishes significantly when faced with unforeseen factors that can disrupt court proceedings.

In the midst of the pandemic, Ukrainian society witnessed a rise in the duration of court proceedings, as well as delays in court hearings due to technical constraints or excessive workload. Additionally, the ongoing war, with its destruction of court buildings and the loss of thousands of paper-only case records, has demonstrated the urgent need for a comprehensive online dispute resolution system. Such a system, catering to both e-commerce and traditional courts, would ensure efficient access to justice and a prompt and convenient review mechanism for individuals and businesses.

2 METHODOLOGY

The research methodology used in this study integrates several approaches to thoroughly analyse online dispute resolution in Ukraine. First, a comprehensive literature review was conducted to examine existing research on the development and implementation of ODR systems in both Ukraine and the European Union. To this end, a descriptive-analytical

method was used to clarify the concept and current state of ODR, providing a detailed understanding of its characteristics, functionality and approaches in both broad and narrow terms, as well as a historical method to identify key milestones and events, and to trace the evolution of ODR systems in both the European Union and Ukraine. Thus providing a solid basis for understanding the current state of the ODR in the Ukrainian context. Secondly, a comparative analysis was conducted for the ODR systems and practices in Ukraine with similar systems and practices in other European countries, identifying similarities, differences and potential areas for improvement, especially in the context of consumer ODR and ODR as part of a traditional court. Thirdly, a systems analysis approach was applied to forecast the future trajectory of ODR in Ukraine to explore potential achievements, challenges and strategic directions. This multifaceted approach provides an in-depth understanding of the expectations and reality of ODR implementation in Ukraine, offering a detailed view of its current and future landscape.

3 THE CONCEPT OF ODR

Today, multiple alternate definitions of online dispute resolution (ODR) exist, and the specific meaning varies based on numerous circumstances. The contemporary world is complex and rapidly evolving, generating novel ways of life and breaking down traditional ones. Hence, due to the lapse of time, the efficacy of conventional dispute resolution procedures has been undermined by geographical, cultural, or language issues, leading to the emergence of online dispute resolution as an alternative.

ODR originated during the nascent stages of the online environment, which generated a significant number of misunderstandings and disputes but lacked a viable resolution mechanism. Within legal doctrine, the term online dispute resolution encompasses two distinct conceptions. The initial, more specific interpretation concentrates on e-commerce, which includes the resolution of conflicts between businesses and businesses, businesses and consumers, consumers and consumers, and, in certain instances, governments and consumers or governments and businesses.[1] The second, more comprehensive definition of ODR includes all forms of dispute resolution that are predominantly executed through online platforms. This encompasses both digital platforms that are explicitly customised for resolving conflicts and the application of conventional online methods of alternative dispute resolution (ADR), including arbitration, mediation, negotiation, and so forth. A broadened interpretation of the term ODR covers the transition of traditional court settlements to the digital realm as well.[2]

1 Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publ 2012) 275.

2 Daniel Rainey, Ethan Katsh and Mohamed S Abdel Wahab (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (2nd edn, Eleven International Publ 2021) 178.

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Nevertheless, it is important to point out that the ODR was not designed to undermine or disturb the existing alternative dispute resolution system. Its purpose was to address the lack of regulations or inadequate regulations regarding online disputes at that time and to offer improved methods for resolving conflicts arising from internet use.[3] Furthermore, it is noteworthy that while online courts are controlled and regulated by the government, ODR, in its precise meaning, is under the purview of the private sector.[4]

Beyond that, the distinction between the online and offline realms is gradually becoming less distinct, and the variety and scope of online conflicts have evolved alongside the expanding spectrum of human activities on the Internet. Similarly, the understanding of ODR has shifted from being seen solely as a method for resolving e-commerce or social media conflicts to a system that can be used for a variety of disputes, including those that occur offline. ODR has been increasingly utilised by the judicial system to address minor disputes, including traffic tickets, road accidents, marital cases.[5] Consequently, these modifications have placed the ODR in the current position of needing to identify tools and resources that are equally effective in resolving disputes, irrespective of their origin.

On the basis of the software's functionality, ODR systems can be categorised.[6] This categorisation is predicated on the development of specialised dispute resolution software that can be employed to settle conflicts in both digital and physical environments. ODR, in this regard, does not constitute an independent industry; instead, it serves as a support system for arbitrators and mediators tasked with resolving specific disputes and searching for software capable of carrying out particular functions and being seamlessly incorporated into their professional practices.

One crucial component of ODR is the idea of a "fourth party". First introduced by Ethan Katsh and Janet Rifkin in their book "Online Dispute Resolution: Resolving Conflicts in Cyberspace," the fourth party refers to another party involved in the dispute resolution process. Alongside the first and second parties (the disputants) and the third-party arbitrator,[7] the fourth party in both its initial and present forms primarily aids the third neutral party, typically through the provision of convenience and efficiency.

Additionally, scholars concur that the future of ODR is influenced by a growing array of tools that will grant third parties novel opportunities; thus, the future of ODR appears to be contingent upon the ongoing advancement of software that is progressively more potent and applicable in ever more complex circumstances.[8]

3 ibid 10.
4 Richard Susskind, *Online Courts and the Future of Justice* (OUP 2019) 63.
5 Rainey, Katsh and Wahab (n 2) 50.
6 G Peruginelli and G Chiti, 'Artificial Intelligence in Alternative Dispute Resolution' in G Sartor (ed), *The Law of Electronic Agents: Selected Revised Papers: Proceedings of the Workshop on the Law of Electronic Agents (LEA 2002)* (CIRSFID, Universita di Bologna 2002) 97.
7 Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass 2001).
8 Wahab, Katsh and Rainey (n 1).

An additional way to classify the systems is by generation. First-generation systems are guided by the principle that individuals should continue to occupy a central position in the process of planning and making decisions. While computing tools can be used in these systems, they are considered mere instruments without autonomy or substantial involvement in the action process. First-generation ODR systems typically utilise instant messaging, video and telephone conversations, mailing lists, and, more recently, video presence.

Second-generation ODR systems are characterised by a greater reliance on technological instruments, expanding their function beyond simple information dissemination or communication. In addition to its intended purpose, it helps generate ideas, formulate plans, establish strategies, and reach decisions. By integrating additional intelligent and autonomous components, second-generation systems surpass the functionalities of their initial-generation counterparts.[9] The growing popularity of these systems can largely be attributed to the incorporation of artificial intelligence components.

In the abovementioned book, Katsh and Rifkin also proposed an optimal framework for effective dispute resolution, conceptualising it as a triangle, with each side representing a crucial aspect of the process: convenience and efficiency, experience and intelligence, and trust.[10]

Currently, the Ukrainian legal system does not have an appropriate set of rules and regulations governing online dispute resolution, severely limiting its use. Therefore, in the following sections, the author will focus on understanding the narrow and broad meaning of ODR in Ukraine, consider the potential of its application in e-commerce, present his vision and proposals for the future adoption of European laws in Ukraine, and highlight the current challenges in the online justice system that hinder its successful implementation.

4 THE CONCEPT OF ODR IN THE NARROW SENSE, PRIVATE SECTOR USE

The e-commerce market, both in Ukraine and globally, is growing every year. Despite a sharp decline in 2022-2024, statistics show a recovery and growth in the sector, with growth projected to return to 2021 levels by 2025.[11] The share of financial and trade transactions conducted online is also growing. Undoubtedly, this development has both positive economic benefits and drawbacks, especially in terms of consumer protection. This raises the question: how should e-commerce disputes be resolved? It seems only logical that consumers would want to resolve disputes as easily and conveniently as they buy goods or services from the comfort of their homes.

9 Noam Ebner and John Zeleznikow, 'No Sheriff in Town: Governance for the ODR Field' (2016) 32(4) Negotiation Journal <https://dx.doi.org/10.2139/ssrn.2845639> accessed 22 May 2024.

10 Katsh and Rifkin (n 7) 15.

11 'ECommerce – Ukraine' (*Statista*, 2024) <https://www.statista.com/outlook/emo/ecommerce/ukraine#revenue> accessed 15 May 2024.

Currently, however, court proceedings govern the resolution of disputes between purchasers and vendors in Ukraine. As stipulated in the Law of Ukraine "On Electronic Commerce," conflicts that arise among participants in electronic commerce are adjudicated in compliance with the legally prescribed procedure.[12] Therefore, e-commerce participants in Ukraine currently have no recourse other than the courts in the event of a dispute. However, this is far from the best, or even the most optimal, option for parties intending to resolve an online dispute. Many objective factors discourage parties from going to court in the event of online commercial disputes, with economic impracticality being perhaps the most significant. Since internet purchases in Ukraine are often not substantial, the expenses associated with the legal procedure of evaluation and involvement of lawyers are rather high.

Despite the fact that consumers are exempt from paying court fees under the Law of Ukraine "On Protection of Consumers` Rights,"[13] the overall expenses may surpass the average amount of the cheque multiple times. Additionally, the duration of court proceedings in civil cases (which typically last 212 days in Ukraine)[14] generally discourages individuals from investing time and effort in protecting their rights. The general level of public confidence in the judicial system is an additional significant and unfavourable factor, with approximately 68% of citizens expressing mistrust of the system overall.[15] Furthermore, average consumers cannot utilise costly mediation or arbitration processes, even when offered online.

Hence, prior to finalising a transaction, every online consumer in Ukraine is fully aware of the potential for financial losses and the absence of safeguards in the event of infringements. At this time, the State Service of Ukraine for Food Safety and Consumer Protection's "e-Consumer" chatbot is the only one available on Telegram.[16] This bot enables users to lodge complaints regarding infringements of their rights and attach evidence to their claims. In the event that the inspection uncovers a legitimate breach of consumer protection legislation, the business could potentially incur a monetary penalty. However, the growing

12 Law of Ukraine no 675-VIII of 3 September 2015 'On Electronic Commerce' [2015] Official Gazette of Ukraine 78/2590 <https://zakon.rada.gov.ua/laws/show/675-19#Text> accessed 15 May 2024.

13 Law of Ukraine no 1023-XII of 12 May 1991 'On Consumer Rights Protection' (amended 19 November 2022) <https://zakon.rada.gov.ua/laws/show/1023-12#Text > accessed 15 May 2024.

14 Supreme Court of Ukraine, *Analytical Review of the State of Civil Proceedings in 2023* (Supreme Court 2024) <https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/ogliady/Analiz_KCS_2023.pdf> accessed 18 May 2024.

15 'Attitude to foreign Countries, International Organisations and Politicians, and Ukraine's Accession to the European Union (January, 2024)' (*Razumkov Centre*, 7 February 2024) <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/otsinka-gromadianamy-sytuatsii-v-kraini-ta-dii-vlady-dovira-do-sotsialnykh-instytutiv-politykiv-posadovtsiv-ta-gromadskykh-diiachiv-sichen-2024r> accessed 18 May 2024.

16 'The State Service of Ukraine on Food Safety and Consumer Protection's Chatbot is the Most Frequently Used by Ukrainians to Complain about Violations of Consumer Rights' (*Southern Interregional Department of the State Service of Ukraine for Food Safety and Consumer Protection at the State Border*, 23 June 2021) <https://pmgu.dpss.gov.ua/?p=1793> accessed 18 May 2024.

concerns about the potential ban of Telegram due to its Russian origins, as raised by the National Security and Defence Council[17] and the European Commission,[18] cast doubt on the feasibility of using this bot.

There was also a proposal to develop a Consumer+ project on the Diia portal, with functionality similar to the current chatbot, but the results did not go further than the roundtable discussions.[19]

In June 2023, the Ukrainian Parliament approved a new version of the Consumer Protection Law, set to enter into force one year after its official publication – on 7 July 2024 – but no earlier than the day martial law was terminated or cancelled.[20] Among its innovations, the Law establishes the E-Buyer web portal,[21] which is intended to serve as a hub for interaction and communication between e-commerce actors, consumers, and the competent authority (the State Service of Ukraine for Food Safety and Consumer Protection) or other state authorities that protect consumer rights in the relevant areas under their jurisdiction. Through this portal, consumers will be able to file complaints about violations of their rights when purchasing goods, receive commercial notices, and track the status and outcome of their complaints.

In essence, the Law establishes a more civilised version of the Telegram chatbot with additional functionality. The E-Buyer also establishes an automated system of verified sellers: e-commerce entities that have passed electronic identification and authentication and registered on the E-Buyer Portal must put a "verified seller" mark in their online stores.

It is worth noting that the provisions of this law will significantly bring Ukrainian legislation closer to EU law in the relevant area. Thus, taking into account the provisions of Directive 2000/31/EC "Directive on electronic commerce", Art. 17(2) states that "*Member States shall encourage bodies responsible for the out-of-court settlement of, in*

17 Roman Melnyk and Yuliya Lavryshyn, 'MDI of Ukraine Acknowledges that Telegram Contains a Number of threats to Ukraine's Security' (*Detector Media*, 14 February 2024) <https://detector.media/infospace/article/222955/2024-02-14-u-gur-vyznaly-shcho-telegram-mistyt-nyzku-zagroz-dlya-bezpeky-ukrainy/> accessed 18 May 2024; Valeriya Shipulya, 'Arguments are there: will Telegram be banned in Ukraine' (Korrespondent.Net, 2 April 2024) <https://ua.korrespondent.net/articles/4675836-arhumenty-ye-chy-zaboroniat-Telegram-v-ukraini> accessed 18 May 2024.

18 Věra Jourová, 'Telegram is an Issue' (*Bloomberg Technology: TV Shows*, 31 May 2024) <https://www.bloomberg.com/news/videos/2024-05-31/telegram-is-an-issue-eu-commissioner-jourova-says-video> accessed 19 May 2024.

19 Viktoriya Kulykova, Kostyantin Gamkrelidze and Yevhen Shkola, 'The "Consumer +" application on the Diia portal will help protect consumer rights' (*European Business Association (EBA)*, 13 August 2020) <https://eba.com.ua/dodatok-spozhyvach-na-portali-diya-spryyatyme-zahystu-prav-spozhyvachiv/> accessed 19 May 2024.

20 Law of Ukraine no 3153-IX of 10 June 2023 'On Consumer Rights Protection' [2023] Official Gazette of Ukraine 65-1/3648.

21 ibid, art 16.

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particular, consumer disputes to operate in a manner that provides adequate procedural guarantees for the parties concerned".[22]

The new Ukrainian legislation establishes a mechanism for out-of-court dispute resolution as well. According to Arts. 38 - 41, consumer complaints regarding the protection of their rights may be considered by business entities, competent authorities, other state authorities, local self-government bodies, out-of-court dispute resolution bodies or the court.[23] Consumers who believe that their rights have been violated have the right to apply to a business entity, either orally or in writing, to restore their rights, including in cases where the agreement was concluded outside the trading premises or remotely.

If the dispute cannot be resolved immediately, the consumer is required to file a written complaint, attaching any necessary documents confirming the transaction. As noted previously, this complaint can also be filed through the E-Buyer portal. The business entity is then obliged to consider the complaint within the timeframe specified by law and provide a response, which may include satisfaction of the requirements, proposals for resolving the dispute, or a refusal indicating other ways of resolution. If the consumer is unsatisfied with the response, he or she may apply to the competent authorities, local governments, out-of-court dispute resolution bodies or the court. Out-of-court dispute resolution applies to goods worth up to UAH 50,000 (approx. USD 1220), violations of warranty repair, changing goods or delivery of goods purchased under contracts concluded outside of the office or retail premises.

An interesting novelty of the new legislation is that the decisions of out-of-court settlement bodies are binding on business entities but may be appealed in court if one of the parties disagrees. Since the provisions of consumer protection legislation also supplement the Law of Ukraine "On Electronic Commerce," this law is also expected to be amended after the Law of Ukraine "On Protection of Consumers` Rights" comes into force. However, as the law's implementation is contingent upon the end of martial law, the only current option for resolving consumer problems remains the court process. Furthermore, there is no separate platform for resolving disputes between consumers and sellers in Ukraine.

In 2017, in response to the introduction of the European Online Dispute Resolution Platform, Ukrainians attempted to launch its own online platform for consumer dispute resolution and launched the start-up Pinky Solutions.[24] However, despite several workshops

22 Regulation (EU) no 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) no 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L 165/1.

23 Law of Ukraine no 3153-IX (n 20) arts 38-41.

24 Elizaveta Gogilashvili, 'Ukrainian Startup of the Day: Online Dispute Resolution Platform Pinky Solutions' (*Bit.ua*, 13 November 2017) <https://bit.ua/2017/11/ukrainskij-startap-dnya-onlajn-platforma-po-razresheniyu-sporov-pinky-solutions/> accessed 19 May 2024.

and grants being completed, it has never been fully implemented, mainly due to the lack of legislative regulation. Of course, while Ukraine's aspirations for integration into the European single market and full EU membership necessitate legislative harmonisation, this does not oblige Ukraine to blindly follow. Currently, Ukraine is in a fairly favourable position, as it has the opportunity to fill the legal vacuum, considering all European experience and correcting mistakes by creating its own effective system. The author suggests delving deeper into this matter in the following section

The starting point for the regulation of online dispute resolution procedures in the EU was 2013 when Directive No. 2013/11/EU on alternative dispute resolution (hereinafter: Directive),[25] and Regulation No. 524/2013 on online consumer dispute resolution (hereinafter: Regulation) were adopted.[26] The Directive entered into force in July 2015, and the Regulation in January 2016. The two above-mentioned EU legislative acts are interrelated and complementary and regulate relations on out-of-court settlement of consumer disputes through an online platform. The Regulation mandates the creation of an ODR Platform of this nature. These documents have served as the basis for further developing the concept of online consumer dispute resolution in e-commerce, depending on the national peculiarities of the respective state. The scope of the Regulation covers out-of-court settlement of disputes regarding contractual obligations arising from sales contracts, but it focuses on online transactions and e-commerce.[27] The ODR Platform deals with disputes arising from the purchase of goods or services online and is designed to facilitate coordination between consumers, sellers and European-certified online dispute resolution organisations.

The Platform functions as a search engine for European-certified ADR organisations and can be accessed through the "Your Europe" portal.[28] The ODR Platform procedure has multiple stages: customers initiate their complaints using an online form, sellers are promptly notified and invited to specify the appropriate ADR body, and subsequently, the parties are given a period of thirty days to mutually determine the competent ADR body.[29] If the online seller fails to offer a dispute resolution body or achieve an agreement within the required timeframe, the complaint will be automatically closed. If the parties are able to successfully communicate within ninety days of obtaining the necessary papers, the ADR body is obligated to review the complaint and suggest a resolution.

25 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) no 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L 165/63.

26 Regulation (EU) no 524/2013 (n 22).

27 ibid, art 2.

28 ibid, art 5.

29 ibid, art 9.

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In 2019, the European Commission released a report evaluating the Platform's performance, revealing its comparatively low effectiveness.[30] The European Commission's reports on the European ODR Platform and the ODR process show a substantial volume of consumer complaints and appeals submitted since its launch. Notably, 81% of cases were automatically closed after 30 days without reaching the ADR authority, 20% of respondents stated that their disputes were resolved on or off the Platform, and another 18% were in the process of negotiating with the trader.

Several factors impede the success of online dispute resolution mechanisms, such as low consumer awareness, limited availability of dispute resolution bodies and their inconsistency, lack of trust in the system, language barriers, technical issues and enforcement. The lack of awareness results from the slow implementation of ADR/ODR in various countries, coupled with the disorganised and fragmented information provided to consumers on ODR procedures. Just 28% of traders adhere to the obligation to include a hyperlink to the ODR platform in their informational materials, and 8% of traders are familiar with the system but choose not to use it. In 2020, the ADR body received complaints from approximately 5% of EU consumers on average, with only 8% expressing an intention to approach an ADR body in case of future issues.[31]

The minimal harmonisation approach of the ADR Directive has led to significant differences in the availability of ADR across Europe. Currently, the system of alternative dispute resolution bodies comprises more than 430 certified entities dispersed in a complex network of different systems. The structure of ADR/ODR differs among countries, ranging from sectoral and internal systems to broader ones such as an ombudsman. This fragmentation poses challenges for clients, particularly when the ADR/ODR company lacks broad coverage of a certain sector of the economy. According to the Directive's ideology, the ADR system should provide adequate coverage of all e-commerce segments, but this does not mean that a separate ADR institution should be established for each segment; cross-sector ADR companies that facilitate complaints across all segments suffice. At the same time, it is noted that the Directive does not interfere with the activities of already operating dispute resolution companies. The Directive also does not set out a specific supervisory mechanism to be established by Member States, which leads to gaps in the effectiveness of supervision.

30 European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Regulation (EU) no 524/2013 of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes* (COM/2019/425 final, 25 September 2019) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2019:425:FIN> accessed 20 May 2024.

31 European Commission, *4th Report on the Functioning of the Online Dispute Resolution Platform* (20 December 2021) <https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-reports-and-research_en> accessed 20 May 2024.

Some states have gone beyond the Directive by requiring legal qualifications to provide ODR services, while others have drafted legislation too broadly to cover multiple sectors.[32]

Lack of trust plays a crucial role in the ADR/ODR system, as it was created as an alternative to traditional court systems, which typically operate on the fundamental assumption of complete mistrust between the parties involved.

To establish confidence in ODR systems, individuals must possess awareness, which implies having sufficient information, expertise, and comprehension of the conflict resolution procedure. Nevertheless, under the existing framework of ODR, customers continue to have several inquiries regarding the procedure's transparency.

Consumers are increasingly encountering a dispute resolution process that does not meet or exceed their expectations. Researchers from KU Leuven (Katholieke Universiteit Leuven) note that the trust issue is not only a two-way one between buyers and sellers but rather a three-way one, as both consumers and sellers perceive ADR actors as biased against them.[33]

Currently, enforcement of decisions is the cornerstone of the ADR procedure for consumers. Typically, consumers enter into an agreement to resolve any future disputes through ADR before the dispute arises. However, they are not obliged to comply with this provision. Art. 9(3) of the Directive states that a final decision may only be binding if the Member State adopts such a mechanism.[34] According to Art. 10(2) of the Directive, in the context of ADR proceedings where the goal is to resolve a dispute by making a decision, the decision can only be legally binding on the parties if they have been notified beforehand that it will be binding and they have explicitly agreed to it. If national law stipulates that decisions are legally binding on business entities, specific permission is not necessary.[35]

In 2023, the European Commission released its second report on the implementation of the Directive.[36] The report highlighted a lack of awareness among consumers and traders regarding the options for alternative dispute resolution. Out of the approximately

32 European Consumer Organisation, 'Alternative Dispute Resolution for Consumers: Time To Move Up A Gear' (*BEU*, 16 June 2022) <https://www.beuc.eu/position-papers/alternative-dispute-resolution-consumers-time-move-gear> accessed 20 May 2024.

33 Stefaan Voet and others, 'Recommendations from Academic Research Regarding Future Needs of the EU Framework of the Consumer Alternative Dispute Resolution (ADR) (JUST/2020/CONS/FW/CO03/0196)' (*KU Leuven*, 2022) <https://kuleuven.limo.libis.be/discovery/search?query=any,contains,LIRIAS4073076&tab=LIRIAS&search_scope=lirias_profile&vid=32KUL_KUL:Lirias&offset=0> accessed 20 May 2024.

34 Directive 2013/11/EU (n 25).

35 ibid.

36 European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Regulation (EU) no 524/2013 of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes* (COM/2023/648 final, 17 October 2023) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52023DC0648> accessed 29 September 2024.

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430 nationally registered dispute resolution organisations, an estimated 64% provide non-binding outcomes, 20% provide binding decisions on both parties, and the remaining organisations only enforce decisions on traders. Only six EU member states have implemented a mechanism for mandatory trader participation in the alternative dispute resolution process across all sectors of the economy, limiting the effectiveness of the system at the national level.[37] Furthermore, only 30% of retailers in the European Union have expressed their willingness to use ADR mechanisms, while 43% have no information about such mechanisms at all.[38] It is worth noting that most traders are interested in participating in the ADR process when approached by relevant institutions. However, there have been instances where traders (less than 10% of cases) have refused to engage in the process, contradicting the purpose for which the platform was created. Despite the European Commission's efforts to improve the design and functionality of the ODR platform, consumer engagement remains low. Many market participants perceive the platform as a complex and inefficient tool for conflict resolution. Consequently, a significant number of complaints on the platform are closed automatically without reaching any resolution, further undermining its effectiveness.

The 2023 report revealed that while the ODR platform receives between 2 and 3 million visits each year, the actual number of cases resolved is only around 200 annually.[39] This raises questions about the feasibility of its continued existence as a dispute resolution tool, considering the low number of resolved cases in comparison to the costs of its maintenance. In response to these challenges, on 17 October 2023, the European Commission proposed amending Directive 2013/11/EU,[40] which deals with alternative dispute resolution for consumers. The proposed changes include updating the regulatory framework for alternative dispute resolution, amending Directive 2013/11/EU, and repealing Regulation (EU) 524/2013, which regulates the European Online Dispute Resolution Platform. This repeal would effectively terminate the ODR Platform due to its failure to meet expectations.

The Commission also suggested creating a new digital tool to provide detailed information on dispute resolution organisations and guidance on resolving cross-border disputes. This tool would be integrated with other European and national digital resources, allowing consumers to access dispute resolution authorities. Additionally, the proposal includes establishing contact centres in each EU Member State to help consumers and traders resolve both domestic and cross-border disputes. Member States will have the discretion to determine whether these centres will focus solely on cross-border disputes or also cover

37 ibid 4.
38 ibid.
39 ibid 7.
40 European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828* (COM/2023/649 final, 17 October 2023) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52023PC0649> accessed 29 September 2024.

domestic conflicts, and they will select the bodies responsible for their operation. European Consumer Protection Centres (ECCs) could potentially serve as contact points, especially if they specialise in cross-border issues.

The success of the ODR system in any country is heavily dependent on the state tasked with ensuring the system's efficacy and the integrity of its consumer dispute resolution. Ukraine presently possesses an opportunity to develop an exceptionally good Online Dispute Resolution system by addressing the deficiencies of the current European system. To be more precise, the aim is to create an integrated structure for certified ADR bodies that is not fragmented but instead cross-sectoral, encompassing a wide range of economic sectors. For instance, one ODR institution could oversee the entire transportation industry, while another could manage the financial and insurance sectors, and so forth.

The author believes such institutions ought to be non-governmental in nature, given the ineffectiveness of public administration in Ukraine, as demonstrated by experience. This belief is supported by the existing example of a fairly effective International Commercial Arbitration Court at the Ukrainian CCI (ICAC), which operates as a non-governmental organisation within the walls of which an arbitration court operates.

Particular emphasis should be placed on consumer confidence and awareness, considering the significant level of scepticism about the legal system. Thus, this gap can have both positive and negative implications for a recently implemented online consumer dispute resolution system. If there is a high level of trust and justified efficiency, it can serve as an opportunity for growth. On the other hand, if the customer is unable to perceive any distinction between the traditional court system and the alternative system, it is destined to fail.

In the author's opinion, there are several ways to ensure the enforcement of judgments. Initially, Ukrainian legislators could consider preemptively implementing an anticipated updated Directive from the European Union, which is currently under discussion and expected to address existing inadequacies. However, this approach would be a needless expenditure of time in the pursuit of European integration. An alternative approach would be to create legislation that builds upon the existing provisions of the Directive while also incorporating a compulsory mechanism for recognising judgments within Ukraine's legal framework. Nevertheless, the fundamental question of whether it is obligatory to recognise judgments remains unchanged.

5 THE CONCEPT OF ODR IN ITS BROADEST SENSE, E-COURTS

With regard to the broad understanding of online dispute resolution, namely the use of digital technologies in traditional court proceedings, Ukraine has a so-called hybrid form of dispute resolution, namely a combination of online and offline elements. Over the past few years, external factors such as the pandemic and the declaration of martial law have radically affected Ukrainian justice, highlighting its shortcomings and the need to introduce

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a full-fledged online court. During the pandemic, people faced the suspension of proceedings, and now, amidst martial law, there are numerous cases of judges and other participants being unable to attend courtrooms due to air raid sirens, power shortages, and similar disruptions. Furthermore, numerous courts lack the necessary infrastructure to offer even the most basic level of protection against shelling.[41] It is worth mentioning that the idea of creating an electronic court in Ukraine was enshrined in the Concept of the Electronic Court of Ukraine in 2012.[42] Subsequently, in 2017, the system was implemented with the adoption of amendments to the procedural codes, which introduced the term UJITS - the Unified Judicial Information and Telecommunication System. However, the system was actually launched only in January 2019.[43] In fact, the project aims to convert to electronic form and consolidate all pre-existing digital tools into a single structure, organised into separate modules. Accordingly, all paper files and paper decisions would also have to be converted into electronic form.

In general, Ukraine was already quite digitised before the introduction of the UJITS. It had an automated system for distributing cases among judges, audio and video recording of court hearings, and automated access to state registers for judges. Still, the lack of a comprehensive approach to online justice has constantly led to problems with the introduction of new technologies.

The Estonian electronic judicial system, established over two decades ago, serves as a role model. Estonia is a perfect illustration of the efficient application of electronic justice. The nation has successfully constructed and deployed the electronic court system, which functions as a unified information system for all tiers of the judicial system, extending from the primary level to the Supreme Court.[44] Notable features of this system include the registration of court cases and proceedings, automatic assignment of cases to judges, generation of subpoenas, and publication of court decisions, with access to confidential information restricted to the judge hearing the case and court personnel involved in the case. Consequently, every procedural document is submitted, appealed, and monitored electronically.

However, Ukrainian lawmakers should have taken into account the fact that the environment in which the systems operate in Ukraine and Estonia are significantly different, both in terms of population and the complexity of the judicial system itself. As a result, the

41 Vladyslav Teremetskyi and others, 'Electronic Judiciary in Ukraine: Problems of Implementation and Possible Solutions' (2023) 12(68) Amazonía Investiga 33, doi:10.34069/ai/2023.68.08.3.

42 SO Kira, 'History of the Development of Electronic Judiciary in Ukraine' (2024) 5 The Legal Scientific Electronic Journal 296, doi:10.32782/2524-0374/2024-5/72.

43 Olexander Svitlychnyy and others, 'Electronic Justice as a Mechanism for Ensuring the Right of Access to Justice in a Pandemic: The Experience of Ukraine and the EU' (2023) 37(2) International Review of Law Computers & Technology 325, doi:10.1080/13600869.2023.2221820.

44 'Online Processing of Cases and E-communication with Courts' (*European E-Justice*, 31 January 2023) <https://e-justice.europa.eu/280/EN/online_processing_of_cases_and_ecommunication_with_courts?ESTONIA&member=1> accessed 22 May 2024.

undertaking of simultaneously digitising everything proved to be exceedingly ambitious and financially unviable.

Thus, on 27 April 2021, the Verkhovna Rada adopted the Law of Ukraine "On Amendments to Certain Legislative Acts to Ensure the Phased Implementation of the UJITS",[45] which postponed the start of the UJITS and provided for the possibility of commissioning its individual modules. Consequently, only a limited number of the modules are now functioning.

On 5 October 2021, the e-Court module, along with the e-Cabinet and the video conferencing subsystem, achieved complete functionality.[46] The e-Court module facilitates electronic case management, allocation of cases to judges, storage of court cases as electronic archives, creation of a unified database, and access to the Unified State Register of Court Decisions and other registers, such as the Unified Register of Lawyers. In turn, the Electronic Cabinet allows users to obtain necessary information about the course of the proceedings, submit procedural documents, pay court fees, and create and provide an electronic power of attorney to represent another person in court. To accomplish this, users must possess a certified electronic signature and an authorised email address.

Nevertheless, the modules stated above, namely the "Electronic Court" and "Electronic Cabinet," which facilitate communication between litigants and the court, are currently flawed, exhibiting numerous questions and logical contradictions during the functioning of UJITS. The primary drawbacks of the system encompass its impractical design, intricacy of utilisation (the software is primarily tailored for legal professionals and is not a user-friendly tool for non-legal individuals), persistent software malfunctions in the form of case disappearance from the database, and temporary access disruptions. A party that decides to participate in such a process without a lawyer – whether online or offline – is at a disadvantage from the outset.[47]

The absence of clearly defined roles and duties for system maintenance has led to technical issues in design and communication. At first, the State Enterprise (SE) "Information Court Systems" was responsible for running the full multifunctional UJITS, offering services to judges, court personnel, and litigants. However, this arrangement created a conflict of interest. In response, the State Judicial Administration has decided to reallocate responsibilities: the SE "Court Services Centre" will now offer services to litigants, legal

45 Law of Ukraine no 1416-IX of 27 April 2021 'On Amendments to certain Legislative Acts of Ukraine to Ensure the Phased Implementation of the Unified Judicial Information and Telecommunication System' [2021] Official Gazette of Ukrainian 42/2502.

46 Natalya Mamchenko, 'E-Court is Ready to Go: UJITS Subsystems (Modules) Officially Launched in Ukraine' *Sudebno-Juridichna Gazeta* (Kyiv, 5 October 2021) <https://sud.ua/ru/news/publication/215755-elektronniy-sud-na-start-v-ukrayini-pochali-ofitsiyno-funktsionuvati-pidsistemi-moduli-yesits> accessed 22 May 2024.

47 OV Skochylias-Pavliv, 'The Current State of Electronic Justice in Ukraine' (2024) 1 Kyiv Law Journal 207, doi:10.32782/klj/2024.1.29.

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entities, and individuals, while the SE "Information Court Systems" will be in charge of court maintenance, equipment, engineering services, and other related tasks.[48]

On 21 July 2023, the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Mandatory Registration and Use of Electronic Cabinets in the Unified Judicial Information and Telecommunication System or its Separate Subsystem (Module) Enabling Document Exchange" dated 29 June 2023 came into force.[49] This law now mandates legal professionals – including defence lawyers, notaries, public and private bailiffs, insolvency officers, forensic experts, public authorities, and other state bodies – and legal entities to register for and utilise the electronic offices of the UJITS. Before the enactment of this law, litigants had the option to use the Electronic Court at their discretion, resulting in its limited effectiveness.[50] Nevertheless, even while case files are received through the UJITS system, a specific court may still need to rely on physical case files to review papers and evidence, primarily because of a deficiency in technological resources.[51]

It is important to mention that nearly five years have elapsed since the UJITS system was introduced. Several of its modules have become partially obsolete, exhibit poor interoperability, and encounter difficulties with updates. This is largely due to their development at different points in time and by different contractors, which resulted in them not fully meeting current needs.

Moreover, even in the process of developing the UJITS system and facing continuous user problems, efforts to establish an alternate or supplementary system persist. For example, in 2020, USAID, in cooperation with the Kyiv District Court and with the assistance of the High Council of Justice, presented the project of the ODR platform "Search for Solutions".[52] This platform was designed to handle simple cases that could be settled without a trial, namely traffic violations (appeals), divorce (in cases where there is no property conflict and subject to the consent of both parties) and alimony.

48 Maksym Maika, 'The Implementation of E-Justice within the Framework of the Right to a Fair Trial in Ukraine: Problems and Prospects' (2022) 5(3) Access to Justice in Eastern Europe 249, doi:10.33327/ajee-18-5.2-n000320.

49 Law of Ukraine no 3200-IX of 29 June 2023 'On Amendments to Certain Legislative Acts of Ukraine Regarding Mandatory Registration and Use of Electronic Cabinets in the Unified Judicial Information and Telecommunication System or its Separate Subsystem (Module) that Provides for the Exchange of Documents' [2023] Official Gazette of Ukrainian 70/4041.

50 Olena Bakonina, 'The Law on the Obligation to Register Electronic Accounts for Participation in Court Proceedings has Entered into Force' (*LIGA ZAKON: Jurliga*, 21 July 2023) <https://jurliga.ligazakon.net/news/221039_zakon-pro-obovyazok-restrats-elektronnikh-kabnetv-dlya-uchast-v-sudovikh-protsesakh-nabuv-chinnost> accessed 23 May 2024.

51 'Electronic or Paper? How Courts Will Conduct Cases after October 18' (*Ukrainian National Bar Association*, 29 September 2023) <https://unba.org.ua/news/8387-elektronka-chi-papir-yak-sudi-vestimut-spravi-pislya-18-zhovtnya.html> accessed 23 May 2024.

52 Council of Judges of Ukraine, 'The Council of Judges of Ukraine Got Acquainted with the Online Dispute Resolution Platform (ODR) "Solution Finder" (*Judiciary System of Ukraine*, 1 November 2021) <https://court.gov.ua/press/news/1203321> accessed 23 May 2024.

The selection criteria for these types of cases included their high frequency, the possibility of resolving them out of court, and simplicity. Interestingly, the platform was not designed to handle consumer disputes. According to the project developers, the platform was based on the voluntary participation of users, adaptability to current court information systems, and a user-friendly interface that would allow people without legal education to use it by following specific steps on the website. A notable feature of the platform was that it did not collect user data and allowed for the transfer of documents with certain quality standards, hence eliminating the need for courts to make corrections.

The developers had aspirations for the platform to serve as a foundational component of the UJITS and eventually be integrated into the courts.[53] However, there is a lack of information regarding its successful functioning and deployment. It likely met the same fate as Pinky Solution, as accessing the platform via the court's official website results in a server error.[54]

In 2021, the Regional Framework Project on Digital Transformation of Courts - Development of Online Courts for Small Cases was launched as a joint project with the European Bank for Reconstruction and Development (EBRD). This project aims to make it easier to access justice and specifically focuses on creating online courts for small claims ranging from €5,000 to €10,000. The EBRD pilot effort aims to collaborate with the British Institute of International and Comparative Law to create and disseminate a system to countries in the Caucasus, Eastern Europe, Western Balkans, and Central Asia.[55]

As per the statements of Olena Kibenko and Oleksandr Oliynyk, the finalisation of the terms of reference is presently underway. Initially scheduled for the second or third quarter of 2023, the project's execution was delayed due to the war.[56] The project is being implemented in cooperation with the Supreme Court and the Ministry of Digital Transformation of Ukraine; it is designed as a supplement to, not a replacement for, the existing e-court system and will use the Diia portal and a smartphone application for its functions.[57]

53 Anatoliy Hvozdetsky, 'Mobile Justice' *Court Gazette: Legal Practice* (Kyiv, 24 December 2020) 3.

54 Website *Judiciary Power of Ukraine* <https://ki.od.court.gov.ua/sud1512/> accessed 23 May 2024.

55 Axel Reiserer, 'EBRD Supports the Creation of Online Courts for Low Value Claims' (*European Bank for Reconstruction and Development (EBRD)*, 24 March 2021) <https://www.ebrd.com/EBRD-to-support-development-of-online-courts-for-small-claims> accessed 23 May 2024.

56 Olena Kibenko, 'The Future of Online Courts in Ukraine: Digitization of Existing Processes or Digital Transformation of Justice?' (*Supreme Court*, 20 March 2023) <https://supreme.court.gov.ua/supreme/pres-centr/zmi/1397565/> accessed 23 May 2024; 'Oleksandr Oliynyk: The Ministry of Justice proposes to introduce a pilot project on online consideration of cases in civil proceedings' (Ministry of Justice, 5 February 2024) <https://minjust.gov.ua/news/ministry/oleksandr-oliynik-minyust-proponue-zaprovaditi-pilotniy-proekt-schodo-onlayn-rozglyadu-sprav-v-tsivilnomu-sudochinstvi> accessed 23 May 2024.

57 Nadiya Gryshanova, 'Electronic court: The Ministry of Digital Transformation is Working on an Updated Concept' (*LIGA ZAKON: Jurliga*, 28 February 2024) <https://jurliga.ligazakon.net/news/225934_elektronniy-sud-mntsifri-pratsyu-nad-onovlenoyu-kontseptsyu> accessed 23 May 2024.

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Currently, some e-judiciary development processes are being transferred to the Ministry of Digital Transformation of Ukraine, and the Ministry is working with partners to update the UJITS. Certain services will be accessible through a distinct e-cabinet within the e-court system, while others will be accessible through the Diia platform. At present, citizens have access to an e-cabinet for online video conferencing and document management, while the Diia app allows users to receive notifications of court hearings in which they are parties to the case, pay and refund court fees and bail, submit evidence, and pay fines for administrative offences (with receipts automatically sent to the court for case closure).

In addition, the Ministry has provided support in conducting an IT audit of the entire UJITS system. This audit was important to address the objective difficulties causing the system to perform unsatisfactorily. The implementation of the UJITS revealed the specific components that require updating.[58] This March, on 1 March 2024, Dmytro Maslov, the Chairman of the Committee on Legal Policy of the Verkhovna Rada of Ukraine, during the roundtable discussion dedicated to the presentation of Consultative Council of European Judges (CCJE) Opinion No. 26, expressed his views on this matter.[59] According to Maslov, the results of the UJITS audit are discouraging, and significant efforts will be necessary to start anew.[60] An operational audit is currently in progress, and plans are underway to introduce enhanced services for the public. These services will include 24/7 online filing of court applications and a new service for obtaining electronic court decisions with a qualified electronic signature of judges, giving the digital document the same legal force as its paper counterpart. This service has already been recently launched and is linked to the register of court decisions.[61]

However, the participation of judges outside of court remains an open question, as it is not regulated by law. Since the full-scale invasion, the Ukrainian parliament has made multiple attempts to regulate the implementation of remote justice at the legislative level. However, the first draft of Law of Ukraine of 24 May 2022 No. 7404, "On Amendments to the Code of

58 'The Ministry of Digital Transformation Conducts an Audit of the UJITS and is Working to Improve E-Court Services' (*Pravo*, 28 February 2024) < https://pravo.ua/mintsyfry-provodyt-audyt-iesits-ta-pratsiuie-nad-udoskonalenniam-servisiv-e-sudu/ > accessed 23 May 2024.

59 Opinion no 26 (2023) 'Moving Forward: The Use of Assistive Technology in the Judiciary' (CCJE, 1 December 2023) <https://rm.coe.int/ccje-opinion-no-26-2023-final/1680adade7> accessed 30 September 2024.

60 'Presentation of Opinion of the Consultative Council of European Judges No 26 (2023) "Moving forward: the use of Assistive Technology in the Judiciary"' (*Council of Europe Office in Ukraine*, 20 February 2024) <https://www.coe.int/uk/web/kyiv/-/presentation-of-opinion-of-the-consultative-council-of-european-judges-no.-26-2023-moving-forward-the-use-of-assistive-technology-in-the-judiciary-> accessed 23 May 2024.

61 Ministry of Digital Transformation of Ukraine, 'Ukrainians are Able to Use E-Court Decisions in Diia Instead of Paper Documents: New Service in Diia' (*Government Portal*, 6 March 2023) <https://www.kmu.gov.ua/news/ukraintsi-mozhut-korystuvatysia-elektronnym-sudovym-rishenniam-u-dii-zamist-paperovoho-dokumenta-nova-posluha-v-dii> accessed 23 May 2024.

Ukraine on Administrative Offences regarding the Conduct of Proceedings under Martial Law," was rejected on 16 August 2022.[62]

The second draft, Law No. 7316, "On Amendments to the Code of Administrative Procedure of Ukraine, the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine (regarding the conduct of court proceedings under martial law or a state of emergency) introduced on 26 April 2022, was also rejected by the Verkhovna Rada of Ukraine on 1 July 2022.[63]

The third draft, Law No. 8358, "On Amendments to the Code of Administrative Procedure of Ukraine, the Civil Procedure Code of Ukraine, the Commercial Procedure Code of Ukraine and Other Legislative Acts on the Conduct of Proceedings during Martial Law or the State of Emergency and the Settlement of Disputes with the Participation of a Judge" dated 13 January 2023 has already been considered by the Committee and has been pending consideration in the Parliament since June last year.[64]

In parallel, the Ministry of Justice has developed two draft laws: No. 9090 "On Amendments to Certain Legislative Acts on Digitalisation of Legal Proceedings and Improvement of the Writ Proceedings in Civil Litigation" dated 10 March 2023,[65] which has been under consideration by the Verkhovna Rada Committee since 13 March 2023, as well as draft Law No. 9091 "On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" on Digitalisation of Legal Proceedings",[66] which has also been under consideration by the Committee since 13 March 2023.

According to Yevhen Sobol, the slow progress in resolving the issue of introducing remote justice is associated with concerns about increasing risks in the form of judicial abuse,

62 Draft Law of Ukraine no 7404 of 24 May 2022 'On Amendments to the Code of Ukraine on Administrative Offenses regarding the Conduct of Proceedings under Martial Law' <https://itd.rada.gov.ua/billInfo/Bills/Card/39662> accessed 23 May 2024.

63 Draft Law of Ukraine no 7316 of 26 April 2022 'On Amendments to the Code of Administrative Procedure of Ukraine, the Civil Procedure Code of Ukraine and the Commercial and Procedural Code of Ukraine (Regarding the Conduct of Proceedings under Martial Law or a State of Emergency)' <https://itd.rada.gov.ua/billInfo/Bills/Card/39489> accessed 23 May 2024.

64 Draft Law of Ukraine no 8358 of 13 January 2023 'On Amendments to the Code of Administrative Procedure of Ukraine, the Civil Procedure Code of Ukraine, the Commercial and Procedural Code of Ukraine and Other Legislative Acts on the Implementation of Legal Proceedings During Martial Law or a State of Emergency and the Settlement of Disputes Involving a Judge' <https://itd.rada.gov.ua/billInfo/Bills/Card/41130> accessed 25 May 2024.

65 Draft Law of Ukraine no 9090 of 10 March 2023 'On Amendments to certain Legislative Acts on Digitalization of Legal Proceedings and Improvement of the Writ Proceedings in Civil Litigation' <https://itd.rada.gov.ua/billInfo/Bills/Card/41530> accessed 25 May 2024.

66 Draft Law of Ukraine no 9091 of 10 March 2023 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" on Digitalisation of Legal Proceedings' <https://itd.rada.gov.ua/billInfo/Bills/Card/41532> accessed 25 May 2024.

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disruption of hearings due to technical reasons and challenges in ensuring transparency in case consideration.[67]

In summary, the development of online court proceedings has faced a turbulent journey. It is now almost rhetorical to ask why Ukraine did not initially follow the British model, where the creation of an online court was not based on existing courts and procedural rules but as a completely new court with a new type of dispute resolution service based on its own procedural rules, rather than a separate judicial institution.[68] But after years of uncertainty, Ukraine seems to have returned to a similar approach in the form of the Diia application services. The lack of regulation is also a cornerstone of development, and Ukraine must address the absence of judges in physical courtrooms during remote case hearings through legislative measures.

6 CONCLUSIONS

Ukraine is currently in the process of creating an adequate legal mechanism for regulating online dispute resolution and will likely make further progress after the war. There exists a potential for e-dispute resolution to serve as the primary instrument by which Ukraine overcomes judicial corruption and strengthens confidence in the entirety of the system. Therefore, it is now necessary to focus on the development and proper regulation of the ODR environment.

In the field of e-commerce, it is necessary to implement EU legislation and address its shortcomings. Clear guidelines must define the structure of ODR platforms and ADR institutions. Reflecting current trends, platforms are being developed both within and outside the judicial system, often as private initiatives that can be fully automated or include the intervention of third parties in the form of mediators, independent experts, bilateral, trilateral, multilateral, etc. ADR institutions, likewise, should be certified and cross-sectoral rather than overly specialised to encompass the greatest number of economic sectors. Ensuring that these institutions' decisions are binding at the legislative level will further enhance their effectiveness.

A practical solution to address the needs of vulnerable groups without internet access or communication tools like computers or smartphones would be to establish specialised centres equipped with the necessary equipment and communication infrastructure to support their operation. Additionally, consultants could be available to assist with platform usage. If legislators determine that a public service should be established to address consumer disputes and be affiliated with the State Service of Ukraine for Food Safety and

67 Yevhen Sobol, 'The Activity of the Court as a Law Enforcement Body in the Implementation of Electronic Justice' (2023) 1 Scientific Bulletin of the Dnipropetrovsk State University of Internal Affairs 8, doi:10.31733/2078-3566-2023-1-8-13.

68 Kibenko (n 56).

Consumer Protection, the appropriate centres could be established using the existing infrastructure of the Centres for Administrative Services.

Significant progress has been made in relation to online dispute resolution in the judiciary. However, Ukraine must now promptly tackle the matter of judges being physically absent from the courtroom during remote hearings. This includes situations where judges could work from home due to blackouts, air raid alerts, or other circumstances preventing them from reaching their workplace. Furthermore, adopting cloud-based case management instead of hybrid systems will speed up the transition and reduce the chances of paper files being destroyed.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ОНЛАЙН ВИРІШЕННЯ СПОРІВ В УКРАЇНІ: ОЧІКУВАННЯ ТА РЕАЛЬНІСТЬ

Павло Рєпін

АНОТАЦІЯ

Вступ. *Україна з кожним роком все активніше крокує до інтеграції в Європейський Союз (ЄС), це вимагає гармонізації її законодавства з міжнародними стандартами та створення належного механізму захисту прав і свобод людини, зокрема доступу до*

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правосуддя. Пересічний громадянин розглядає правосуддя як окремий процес для обраних, що відбувається в «ексклюзивній» установі, проте сучасні технології та методи дозволяють розглядати правосуддя як послугу, що має бути доступною для всіх. Цифрові взаємодії та транзакції зростають, і люди все частіше беруть у них участь. Проте кожен учасник такої взаємодії має почувати себе в безпеці та мати справедливі процедури швидкого вирішення суперечок. Онлайн вирішення спорів (ОВС) рідко використовується в Україні через брак нормативно-правового регулювання. Таким чином, метою цієї статті є визначення ландшафту ОВС в Україні, розгляд його потенціалу в електронній комерції та традиційному судочинстві, представлення бачення та пропозицій щодо майбутнього прийняття європейського законодавства в Україні, а також обговорення наявних викликів у системі онлайн-правосуддя, які перешкоджають його успішному впровадженню.

Методи. *Методологія дослідження передбачає застосування аналітично-описового методу, доповненого історичним, порівняльним та методом системного аналізу. Ідея врегулювання конфліктів онлайн була пояснена за допомогою аналітико-описового та історичного методу. За допомогою порівняльного методу зіставлялися системи ОВС в Європейському Союзі та Україні. Метод системного аналізу дав змогу зрозуміти майбутні етапи розвитку та становлення власної системи онлайн вирішення спорів в Україні, а також переваги та недоліки кожної з систем.*

Результати та висновки. *За результатами проведеного дослідження можна дійти висновків, що в Україні активно розвивається законодавча база для ОВС, яка здатна подолати проблему судової корупції та підвищити довіру до правової системи. Однак таке законодавство не охоплює питання електронної комерції. Таким чином, є потреба у розвитку та регулюванні середовища, імплементації законодавства ЄС у сфері електронної комерції, а також визначення структури платформ врегулювання онлайн вирішення спорів та інститутів альтернативного вирішення спорів для належного функціонування європейської системи ОВС в Україні. Онлайн вирішення спорів у судовій системі демонструє прогрес, але Україні необхідно вирішити проблему фізичної відсутності суддів під час дистанційних засідань, запровадити хмарне управління справами замість гібридних систем тощо. Прогрес України значною мірою залежить від важливого розвитку та контролю екосистеми онлайн вирішення спорів.*

Ключові слова: *онлайн вирішення спорів (ОВС), електронна комерція, онлайн правосуддя.*

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Research Article

EXPLORING INTELLECTUAL AND EDUCATIONAL MIGRATION IN KAZAKHSTAN: DOCUMENTARY ANALYSIS

Ainur Narymbaeva, Yerkesh Rakhymzhanov*, Zauresh Abdukarimova, Gulaina Osmanova, Aizhan Satbayeva and Alida Alimbetova

ABSTRACT

Background: *Addressing brain drain and fostering human capital development are critical for sustaining a nation's long-term economic growth, innovation capacity, and global competitiveness. Kazakhstan has faced significant brain drain, particularly following the dissolution of the Soviet Union, as many skilled professionals sought better opportunities abroad. Despite government efforts to retain talent, the country continues to experience a negative migration balance, with a substantial portion of emigrants being highly educated and skilled. This study examines the challenges posed by brain drain and evaluates Kazakhstan's current policy initiatives aimed at addressing intellectual migration and fostering human capital development.*

Methods: *The study employs a qualitative research approach using documentary analysis to explore intellectual and educational migration in Kazakhstan. The methodology involves systematically reviewing key government policy documents and reports, such as the Concept of Migration Policy of the Republic of Kazakhstan for 2023-2027. Documentary analysis was selected for its ability to provide in-depth insights into government initiatives and policy frameworks, enabling an assessment of their long-term effectiveness. Content analysis was applied to identify recurring themes and policy shifts related to human capital development and brain drain.*

Results and conclusions: *The findings highlight the government's efforts to attract skilled professionals, retain domestic talent, and foster international collaboration through streamlined visa processes, academic partnerships, and the establishment of international branch campuses. The analysis highlights educational immigration as a core component of*

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Kazakhstan's migration strategy, shaped by regional factors and geopolitical considerations. Despite these efforts, the study identifies ongoing challenges in creating attractive domestic career opportunities and competitive research environments, which are crucial for the long-term retention of talent. By leveraging international best practices and fostering collaboration between the government, academia, and industry, Kazakhstan can enhance its position in the global knowledge economy while addressing demographic and economic challenges. The paper concludes by discussing the potential policy implications and recommendations for sustaining Kazakhstan's human capital development in the context of global intellectual migration trends.

1 INTRODUCTION

Despite achieving impressive economic growth since the 2000s, fueled by resource extraction and market reforms, Kazakhstan faces challenges sustaining this progress. According to the World Bank, the current resource-dependent, state-controlled model risks stagnation and widening inequality.[1] It is emphasised that overcoming these vulnerabilities requires Kazakhstan to prioritise human capital development alongside economic reforms. A key component of this vision is the development of a strong knowledge-based economy fueled by a skilled and innovative workforce. However, this objective is challenged by the phenomenon of intellectual migration, also known as *brain drain*. Brain drain refers to the emigration of highly educated and skilled individuals, often to developed countries with more attractive job opportunities and living standards. This loss of human capital can have a significant negative impact on developing countries, hindering economic growth, innovation, and long-term development prospects.[2] The World Migration Report 2024 from the International Organization for Migration (IOM) highlights major trends in global migration, emphasising that most international migration is driven by work, family, and educational opportunities.[3]

1 World Bank, *Kazakhstan: Strengthening Public Finance for Inclusive and Resilient Growth: Public Finance Review; Overview Report* (World Bank Group 2023) <https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/099057102282440191/idu18abfcc0a1106d14eee1ace011ff55c80e795> accessed 10 September 2024.

2 Michel Beine, Frédéric Docquier and Hillel Rapoport, 'Brain Drain and Economic Growth: Theory and Evidence' (2001) 64(1) Journal of Development Economics 275, doi:10.1016/S0304-3878(00)00133-4; Bhawana Bhardwaj and Dipanker Sharma, 'Migration of Skilled Professionals across the Border: Brain Drain or Brain Gain?' (2023) 41(6) European Management Journal 1021, doi:10.1016/j.emj.2022.12.011; Wei Li, Lucia Lo and Yixi Lu, 'Introduction: The Intellectual Migration Analytics' (2023) 49(18) Journal of Ethnic and Migration Studies 4577, doi:10.1080/1369183X.2023.2270314.

3 Marie McAuliffe and Linda Adhiambo Oucho (eds), *World Migration Report 2024* (IOM 2024) <https://publications.iom.int/books/world-migration-report-2024> accessed 10 September 2024.

In turn, intellectual migration significantly contributes to the economic development and competitiveness of host countries.[4]

From 2011 to 2022, Kazakhstan experienced a confluence of globalisation and its influence on migration patterns. This period was marked by a negative migration balance starting in 2012, indicating an outflow of population exceeding the inflow. According to the newly adopted Concept of Migration Policy of the Republic of Kazakhstan for 2023-2027 (hereafter: the Concept), this phenomenon was particularly concerning due to the significant number of skilled labourers with higher education (38%) and technical-professional backgrounds (34%) leaving the country (reference).[5] This trend in outward migration negatively impacts Kazakhstan's human capital, a crucial factor for economic development and innovation.

Furthermore, educational migration, where Kazakhstani youth pursue higher education abroad, presents a "double-edged sword".[6] While it offers exposure to diverse knowledge and potentially higher quality education, it can also lead to a loss of intellectual potential if graduates choose to remain abroad for employment or permanent residence. Recognising this challenge, developing and retaining human capital becomes paramount. Implementing policies that address the root causes of emigration and incentivise skilled professionals to stay in Kazakhstan are crucial steps towards achieving sustainable development and fostering a thriving knowledge economy. Given the limited dissemination of specific initiatives within the new Concept, this study delves into the policy document to shed light on previously unknown details concerning Kazakhstan's strategies for retaining and attracting skilled professionals.

4 Michael C Ewers and others, 'Skilled Migration to Emerging Economies: The Global Competition for Talent beyond the West' (2022) 19(2) Globalizations 268, doi:10.1080/14747731.2021.1882816; Olena Oliinyk and others, 'Integrated Assessment of the Attractiveness of the EU for Intellectual Immigrants: A Taxonomy-Based Approach' (2022) 182(7) Technological Forecasting and Social Change 121805, doi:10.1016/j.techfore.2022.121805.

5 Resolution of the Government of the Republic of Kazakhstan no 961 of 30 November 2022 'On approval of the Concept of Migration Policy of the Republic of Kazakhstan for 2023-2027' <https://adilet.zan.kz/kaz/docs/P2200000961> accessed 10 September 2024.

6 Baurzhan Bokayev and others, 'Migration Trends in Kazakhstan: Exploring Migration Causes and Factors' (2021) 22(2) Central Asia and the Caucasus 150, doi:10.37178/ca-c.21.2.13; Baurzhan Bokayev, Zulfiya Torebekova and Zhuldyz Davletbayeva, 'Preventing Brain Drain: Kazakhstan's Presidential "Bolashak" Scholarship and Government Regulations of Intellectual Migration' (2020) 19(3) Public Policy and Administration 25, doi:10.5755/j01.ppaa.19.3.27764.

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2 BACKGROUNDS

Brain drain presents a complex challenge for developing nations. While it contributes to global economic growth and benefits both migrants and receiving countries, it depletes developing countries of their most critical resource - skilled human capital. International organisations and home governments must navigate this paradox to find solutions that optimise human capital for global prosperity. The British Royal Society first coined the term "brain drain" in the 1960s to describe the exodus of many highly skilled professionals, like scientists and doctors, leaving the country. Bhagwati and Hamada were the first to develop a major theory about brain drain, arguing that it brings about negative consequences.[7]

Since the 1960s, the number of immigrants in developed countries has skyrocketed, tripling in size and doubling again by 1985, mirroring the growth in global trade. Notably, this migration is increasingly skilled, with these professionals coming primarily from developing nations. This trend suggests a brain drain from developing countries as skilled workers move to developed regions at a faster pace than overall migration.[8] This seems even more critical since international migration statistics in general are only increasing (Table 1).[9]

Table 1. International migrants since 1970

Year	Number of international migrants	Migrants as a % of the world's population
1970	84 460 125	2.3
1975	90 368 010	2.2
1980	101 983 149	2.3
1985	113 206 691	2.3
1990	152 986 157	2.9
1995	161 289 976	2.8
2000	173 230 585	2.8
2005	191 446 828	2.9
2010	220 983 187	3.2
2015	247 958 644	3.4
2020	280 598 105	3.6

7 Jagdish Bhagwati and Koichi Hamada, 'The Brain Drain, International Integration of Markets for Professionals and Unemployment. A Theoretical Analysis' (1974) 1(1) Journal of Development Economics 19, doi:10.1016/0304-3878(74)90020-0.

8 Frédéric Docquier and Hillel Rapoport, 'Quantifying the Impact of Highly-Skilled Emigration on Developing Countries' in Tito Boeri and others (eds), *Brain Drain and Brain Gain: The Global Competition to Attract High-Skilled Migrants* (Oxford Academic 2012) 211, doi:10.1093/acprof:oso/9780199654826.001.000.

9 McAuliffe and Oucho (n 3).

Following the dissolution of the Soviet Union in 1991, Kazakhstan experienced a period of significant intellectual migration. Many skilled professionals, particularly those in scientific and technical fields, left the country seeking better opportunities in the newly formed market economy. This initial wave of brain drain was driven by the economic instability and uncertainty of the post-Soviet transition.

The President of the Republic of Kazakhstan, Kassym-Zhomart Tokayev, has emphasised the need to revitalise the country's scientific capacity, pointing to how decades of neglect have deteriorated Kazakhstan's scientific positioning, resulting in a loss of research infrastructure and talent. The exodus of 40,000 scientists during the 1990s compounded these systemic issues, leaving lasting consequences today. Recent events, such as the worst floods in over 80 years, as well as wildfires and earthquakes in Almaty, have highlighted the need for improved scientific forecasting and risk assessment of emergencies. Systemic problems, such as a lack of qualified personnel and scientific support, hinder effective emergency prevention. Research by Docquier and Rapoport highlights the extent of this challenge; for example, in 2003, 9.7% of Kazakhstan's researchers in science and technology were working in the US, with 1,108 researchers abroad out of a total of 10,339 at home, indicating a 9,7% brain drain to the US only.[10]

More recently, data from the Bureau of National Statistics of Kazakhstan reveals significant emigration trends. By mid-2021, out of Kazakhstan's approximately 20 million citizens, over 4 million were residing abroad, with Russia being the primary destination, accounting for 64% of these expatriates. Germany, Ukraine, Belarus, and the United States also attracted a considerable number of emigrants. Notably, Kazakhstan has experienced a negative migration balance for nearly two decades, with departures exceeding arrivals by a factor of three in 2021.[11]

More concerning is that around 40% of the emigrants are skilled labourers with higher education and professional technical backgrounds. Kassym-Jomart Tokayev's speech at the National Council on Science and Technology meeting clearly highlighted this. Therefore, an urgent radical change in addressing migration policies is necessary.

Given these demographic shifts and economic aspirations, a closer look at Kazakhstan's migration policy is crucial to understanding its challenges and opportunities. This paper explores the government's current initiatives to address brain drain and foster a more sustainable migration landscape.

10 Docquier and Rapoport (n 8).

11 Gulsara Kappassova and others, 'Migration Processes in the Republic of Kazakhstan: Regularities, Problems, and Prospects' (2024) 59 Two Homelands 107, doi:10.3986/2024.1.07.

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3 LITERATURE REVIEW

The challenges of brain drain and human capital development have been extensively studied within the broader context of migration and its impact on national economies. The IOM acknowledges the absence of a universally agreed-upon definition for "migrant" within international law. To address this gap, the IOM has adopted a working definition that reflects the common understanding: a person who moves, either temporarily or permanently, away from their usual residence, within a country or across international borders, driven by various motivations. This broad definition encompasses established legal categories like migrant workers, those whose movement is legally defined (e.g., smuggled migrants), and individuals whose migratory status or means of movement lack specific legal definition under international law (e.g., international students).

According to the IOM, migration is the act of moving from one place to another, encompassing both internal (within a country) and international relocations. This movement can be from rural to urban areas, across districts or provinces, or even across national borders. However, the term migrant describes a person based on their circumstances, not necessarily the act of moving itself (as defined in the "Defining migration, migrant and other key terms" section). While many migrants do indeed undertake some form of migration, the term can encompass individuals who have not necessarily moved but whose circumstances fall within the definition.[12]

Migration affects not only a country's demographic structure but also its national economy, with the potential to either enhance or undermine economic development, thus presenting a crucial concern for policymakers.[13]

Whereas intellectual migration, characterised by the movement of scientists and technologists across institutions, societies, or industries, serves as a conduit for disseminating advanced scientific knowledge, both temporarily and permanently.[14] It represents a dynamic interplay between the mobility of highly educated and skilled individuals and the various life stages that influence their decisions to migrate. Research suggests that intellectual migration involves the movement of skilled individuals across borders to pursue educational and professional opportunities.[15]

Recent global studies on intellectual migration have increasingly emphasised its critical role in fostering innovation and driving economic development, particularly through the

12 Janie A Chuang, 'The International Organization for Migration and New Global Migration Governance' (2022) 63(2) Harvard International Law Journal 401.

13 Tetiana Zatonatska and others, 'Impact Factors for Immigration to Spain' (2024) 7(1) Access to Justice in Eastern Europe 264, doi:10.33327/AJEE-18-7.1-a000119.

14 Li, Lo and Lu (n 2).

15 Wei Li and others, 'Intellectual Migration: Considering China' (2020) 47(12) Journal of Ethnic and Migration Studies 2833, doi:10.1080/1369183X.2020.1739393.

transnational movement of highly skilled individuals.[16] The study by Li found that for China-born scholars in the US, a significant portion of their intellectual capital is within Chinese networks, which supports knowledge transfer back to China. The study argues that intellectual capital is dynamic and context-dependent, shaped by intellectual migration and academic ties.[17]

Meanwhile, Tan and Li identified China's Pearl River Delta region of China as an emerging "intellectual gateway" attracting skilled international migrants, particularly from the US, due to its knowledge-based economy and socio-cultural environment. While the region facilitates the accumulation of intellectual capital, structural barriers, such as China's immigration policies and global power dynamics, hinder full integration into local society, leading to low intentions among migrants to assimilate. The study underscores the need for cohesive policies that enhance both structural and socio-cultural integration to retain global talent and support sustainable, innovative development.[18]

Simon analysed the role of two Hungarian-born economists in the British economy in the post-1945 period and found that their migration, along with the resulting intellectual cross-fertilisation, significantly impacted the development of economic thought in the UK.[19] Collectively, these studies demonstrate the pivotal role that intellectual migration plays in shaping the global landscape of knowledge and innovation. Facilitating the exchange of ideas and expertise across borders not only enhances the intellectual capital of host countries but also fosters connections with home countries, creating a dynamic cycle of knowledge transfer.

Intellectual migration is a journey of spatial mobility driven by individuals accumulating and utilising intellectual capital, a combination of human, social, cultural, and symbolic assets. Through active engagement, these capitals synergistically fuel upward social and economic mobility.[20] Migration patterns often exhibit a cumulative nature, with flows tending to follow established geographical, cultural, or political channels. Early migration by highly skilled individuals who benefit from lower moving costs or greater incentives

16 Xiaojie Li, 'China-Born Scholars' Intellectual Capital: A Network Approach' (2023) 49(18) Journal of Ethnic and Migration Studies 4681, doi:10.1080/1369183X.2023.2270337; Yixi Lu, Jason Jean and Ling Ma, 'Comparing Chinese Academic Returnees in Chengdu and Guangzhou: Reasons for Return, Choice of Destination and Onward Migration Intention' (2023) 49(18) Journal of Ethnic and Migration Studies 4747, doi:10.1080/1369183X.2023.2270342; Yining Tan and Wei Li, 'Skilled US Migrants in the Pearl River Delta Region: The Rise of an Intellectual Gateway in China' (2023) 49(18) Journal of Ethnic and Migration Studies 4768, doi:10.1080/1369183X.2023.2270343.

17 Li (n 16).

18 Tan and Li (n 16).c

19 Ágnes Simon, 'Intellectual Migration and Economic Thought: Central European Émigré Economists and the History of Modern Economics' (2012) 38(3) History of European Ideas 467, doi:10.1080/01916599.2012.681524.

20 Li, Lo and Lu (n 2); Yining Tan and others, 'Intellectual Capital and Student Mobility' (2023) 49(18) Journal of Ethnic and Migration Studies 4641, doi:10.1080/1369183X.2023.2270332.

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reduces the barriers for subsequent migration waves. This process continues as long as the net benefits of migration outweigh the associated costs.[21] This movement can influence both the origin and destination countries by fostering knowledge transfer, innovation, and national development. For instance, Beine et al.'s study analysed 127 developing countries using estimates of emigration rates for highly educated individuals. The research revealed a positive impact of skilled migration prospects on the levels of human capital prior to migration, indicating that the possibility of emigration can encourage greater investment in education.[22]

Kazakhstan, as a developing nation striving for global integration, faces the challenge of intellectual migration, or brain drain. While open communication fosters the movement of skilled individuals, economic disparity makes it difficult to compete with developed nations. This brain drain threatens national security, prompting the need for further research on its specific impact on Kazakhstan.[23]

Well-recognised for their quantitative research in measuring migration, Docquier and Rapoport challenge the prevailing notion that the emigration of highly skilled individuals is invariably detrimental to sending countries.[24] Their analysis suggests a threshold effect, where brain drain becomes only truly negative when exceeding 20% of the skilled workforce. When considering additional factors like knowledge transfer, improved institutions, selective migration of the most qualified, remittances, and increased trade and foreign direct investment (FDI), this threshold can be reasonably extended to 35%. Consequently, the optimal emigration rate for skilled workers in developing countries could be around 15%. However, in the case of Kazakhstan, data since the 1990s indicate that the country has suffered a detrimentally significant brain drain, which has hindered its economic and technological development.

Oliinyk confirms a positive correlation between the immigration of highly skilled workers and a country's competitiveness and economic growth.[25] Factors like a nation's attractiveness to highly educated immigrants and the potential for "brain gain" significantly influence competitiveness and GDP per capita. Policies that encourage the arrival of highly skilled migrants can significantly replenish intellectual capital and create a competitive environment that motivates domestic professionals to improve continuously. The study

21 Docquier and Rapoport (n 8).

22 Michel Beine, Fréderic Docquier and Hillel Rapoport, 'Brain Drain and Human Capital Formation in Developing Countries: Winners and Losers' (2008) 118(528) Economic Journal 631, doi:10.1111/j.1468-0297.2008.02135.x.

23 Bokayev, Torebekova and Davletbayeva (n 6); Kargash Zhanpeisova and others, 'Brain Drain from the Republic of Kazakhstan as Analyzed by Political Scientists' (2020) 21(4) Central Asia and the Caucasus 142, doi:10.37178/ca-c.20.4.14.

24 Docquier and Rapoport (n 8).

25 Olena Oliinyk and others, 'The Impact of Migration of Highly Skilled Workers on the Country's Competitiveness and Economic Growth' (2021) 17(3) Montenegrin Journal of Economics 7, doi:10.14254/1800-5845/2021.17-3.1.

emphasises the need for further research on designing and implementing public policies that create favourable conditions for attracting these professionals. This could include visa facilitation, support services, and family-friendly living conditions. While social development indicators remain important, the identified connections highlight the efficiency of creating an attractive environment for highly skilled migrants.

At the same time, while some definitions of brain drain focus on migration from developing to developed countries, this view is debatable. Brain drain can also occur between nations with similar income levels and quality of life.[26] This is supported by the Deputy Prime Minister and Minister of Labour and Social Protection of Population Duissenova, who has reported that the majority of immigrants originate from neighbouring Commonwealth of Independent States (CIS) countries, China and Mongolia. Notably, the largest share of these immigrants possesses technical (1,443), economic (577), pedagogical (288), and medical (191) skills. Furthermore, according to the Concept, a significant increase in arrivals, with a 49% rise in the first eight months of 2022 compared to the same period in 2021 (9,595 people in 2022 compared to 6,339 in 2021), necessitates a strategic response.[27] Notably, this influx includes a growing number of skilled professionals, particularly in the IT sector.

Recognising the potential economic benefits associated with this demographic, the government is exploring the introduction of a "digital nomad visa." This visa would be designed to attract and retain high-earning remote IT workers, allowing them to reside and work in Kazakhstan for an extended period. This suggests an influx of skilled labour in these specific areas. Additionally, the arrival of 13,569 "kandas" since the beginning of the year signifies a significant movement of ethnic Kazakhs returning to their homeland.

Moreover, the migration corridor between Kazakhstan and Russia has recently been identified as one of the largest in the world. The term "migration corridor" refers to the movement of people from a specific origin country (country A) to a specific destination country (country B). Its size is quantified by the number of individuals born in country A who reside in country B at a particular time.[28] The war in Ukraine and mobilisation in Russia sparked a massive exodus to Central Asia in 2022. Hundreds of thousands, with over 200,000 entering Kazakhstan alone after a partial mobilisation, fled to countries like Kazakhstan, Uzbekistan, and Tajikistan. With its relaxed entry rules and large Russian population, these nations, especially Kazakhstan, became preferred escape routes. In response to this influx, Kazakhstan tightened its entry regulations in 2023.

While the data clearly shows a picture of Kazakhstan's brain drain, focusing solely on increasing emigration neglects a crucial element: understanding the root causes that push

26 ibid.

27 Resolution of the Government of the Republic of Kazakhstan no 961 (n 5).

28 Marie McAuliffe and Anna Triandafyllidou (eds), *World Migration Report 2022* (IOM 2022) <https://publications.iom.int/books/world-migration-report-2022> accessed 10 September 2024.

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skilled professionals to leave in the first place. Only by addressing these drivers of migration can Kazakhstan develop a sustainable strategy to retain its talent pool while simultaneously being more attractive to potential skilled migrants.

4 FACTORS DRIVING INTELLECTUAL MIGRATION

A complex interplay of factors drives intellectual migration from Kazakhstan, categorised as push factors within the country that incentivise emigration and pull factors offered by destination countries. The most comprehensive overview of drivers and motivations of skilled migration is represented in Figure 1 as a result of a systematic literature review by Bhardwaj and Sharma.[29]

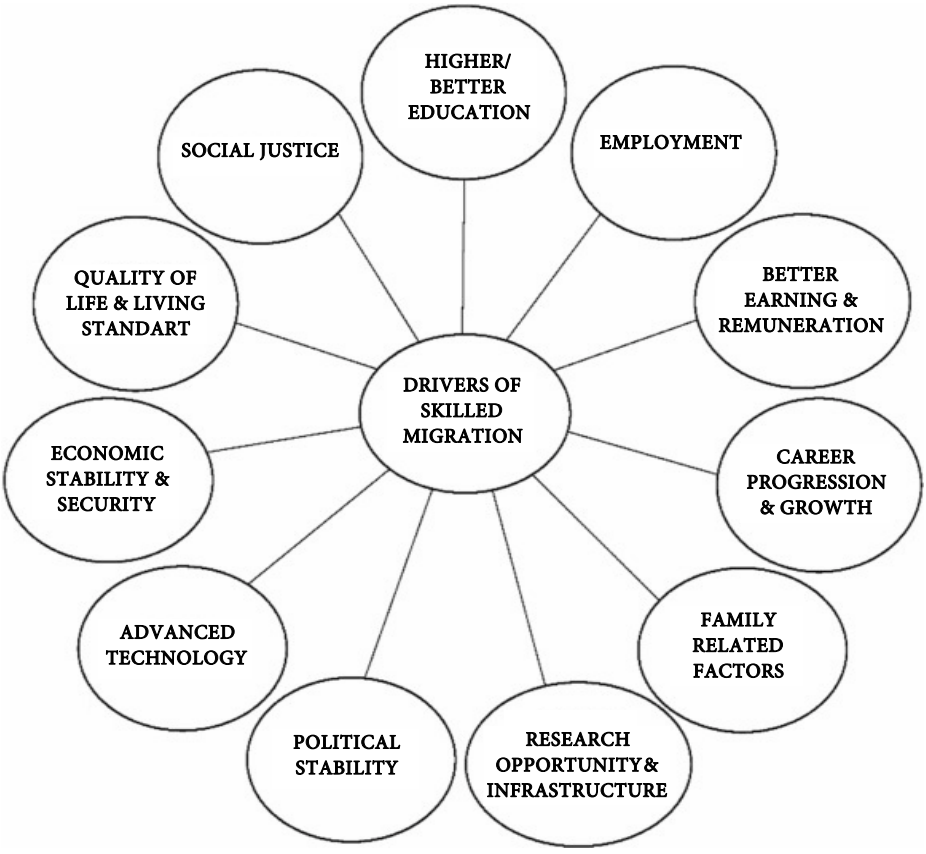

Figure 1. Drivers of skilled migration

29 Bhardwaj and Sharma (n 2).

In the context of Kazakhstan, push factors involve limited economic opportunities when many skilled professionals face limited career advancement opportunities and stagnant wages, particularly outside the major cities. A World Bank study found that Kazakhstan's labour market suffers from skill mismatches, with a surplus of low-skilled labour and a shortage of highly skilled workers in specific sectors.[30] This mismatch can lead to underemployment and frustration among educated individuals, pushing them to seek better opportunities abroad.

Kazakhstan's investment in research and development (R&D) remains low compared to developed economies,[31] limiting opportunities for innovation and restricting skilled researchers from pursuing cutting-edge work within the country. A UNESCO Institute for Statistics report highlights the significant gap between Kazakhstan and developed nations in terms of research expenditure per capita.[32] In addition to that, outdated infrastructure and limited access to advanced technologies hinder productivity and innovation. The World Economic Forum's Global Competitiveness Report ranks Kazakhstan low in terms of infrastructure development, particularly in information and communication technologies.[33] This lack of access to modern tools can be a significant push factor for skilled professionals seeking to work in environments that support cutting-edge research and development.

Moreover, bureaucratic hurdles and corruption within government institutions can create frustration and discouragement for skilled professionals. A Transparency International survey shows that despite efforts to combat corruption, Kazakhstan continues to struggle with these issues despite ongoing government efforts,[34] making it difficult for skilled individuals to navigate the system and establish themselves professionally.

A study by Bokayev examines the factors influencing the migration patterns of Kazakhstani graduates who pursued higher education abroad and chose to migrate permanently.[35] Based on a survey of 1,111 graduates and interviews with highly qualified individuals, the research found that competitive salaries (54%) were the primary driver, followed by a strong desire for a high level of socio-economic development (52%)

30 World Bank (n 1).

31 Mariza Tsakalerou and Almat Abilez, 'The Paradox of Kazakhstan: Linear vs Harmonic Innovation' (2022) 217 Procedia Computer Science 1734, doi:10.1016/j.procs.2022.12.373.

32 UNESCO Institute for Statistics, 'Global Investments in R&D' (2020) 59 UIS Fact Sheet <https://uis.unesco.org/sites/default/files/documents/fs59-global-investments-rd-2020-en.pdf> accessed 10 September 2024.

33 Klaus Schwab (ed), *The Global Competitiveness Report: Insight Report* (World Economic Forum 2019) <https://www.weforum.org/publications/how-to-end-a-decade-of-lost-productivity-growth/> accessed 10 September 2024.

34 Transparency International, *Corruption Perception Index 2021* (Transparency International 2022) <https://www.transparency.org/en/cpi/2021> accessed 10 September 2024.

35 Baurzhan Bokayev, 'Beyond Borders: Understanding Intellectual Migration among Kazakhstani Graduates of Foreign Universities' (2023) 14(3) Journal of Social Studies Education Research 167.

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in the destination country. Career advancement opportunities (38%), access to quality education and healthcare (32%), and lower levels of corruption (28%) were also identified as significant factors influencing decisions to migrate permanently. Furthermore, the study highlights a preference among highly qualified Kazakhstani specialists for countries like the USA, Great Britain, and Canada. The analysis also suggests that prior work experience abroad, studying in the UK, and residing in Kazakhstan's suburban areas increase the likelihood of permanent migration.

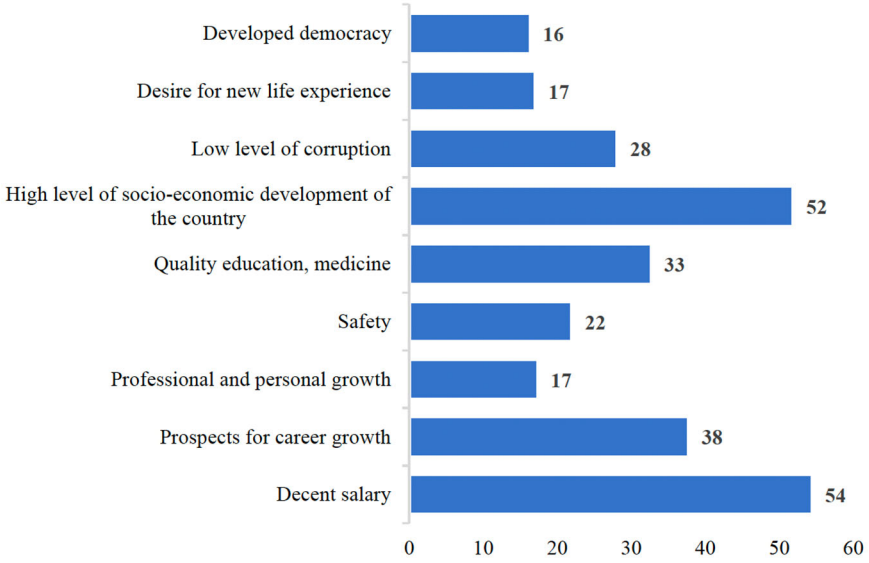

Figure 2. Motives for moving abroad for permanent residence

As Figure 2[36] shows, the main factors influencing decisions are economic. Migrants are drawn to higher salaries, better career prospects, and lower levels of corruption in their new countries. Developed nations, with their strong economies and abundant opportunities, are particularly attractive destinations. Developed countries often offer significantly higher salaries and more attractive career prospects for skilled professionals compared to Kazakhstan.

A study by the Organization for Economic Co-operation and Development (OECD) found that the average salary for scientists and engineers is considerably higher in countries like the United States, Germany, and Canada compared to Kazakhstan.[37] Developed countries typically have well-funded research institutions and access to cutting-edge technology. This

36 ibid.

37 OECD, *OECD Science, Technology and Industry Scoreboard 2023* (OECD Publ 2023) <https://www.oecd-ilibrary.org/science-and-technology/oecd-science-technology-and-innovation-outlook_25186167> accessed 10 September 2024.

creates a stimulating environment that allows skilled professionals to participate in groundbreaking work and contribute to their fields of expertise.

Political stability and a strong rule of law can also be highly attractive for skilled professionals seeking predictability and security in their lives. A report by The Economist Intelligence Unit's Democracy Index categorised several developed countries as "full democracies" compared to Kazakhstan's "hybrid regime" classification.[38] This perception of a more stable political and social environment can be a strong pull factor for Kazakhstani professionals seeking a secure environment to work and raise their families.

Bokayev et al. surveyed over 3,200 citizens in Kazakhstan and found that 75% of respondents were satisfied or somewhat satisfied with the causes of migration.[39] However, in-depth interviews with experts and the fact that over 46% of respondents were willing to emigrate suggests a disconnect. This implies that satisfaction with current living conditions may not translate to long-term confidence in Kazakhstan's future. The study highlights the need to consider factors beyond basic satisfaction when understanding migration intentions. The study found social, economic, and political factors driving migration. Economic concerns were most prominent, with low wages and limited job opportunities leading many (50%) to seek work abroad. Education also played a role, with dissatisfaction over quality and limited support for young professionals motivating some to seek education and careers elsewhere. Political concerns such as corruption and limited human rights protections were also identified as key factors driving emigration. The authors concluded that Kazakhstan must address issues such as improving wages, enhancing education quality, and strengthening human rights to prevent a talent drain and demographic decline. A study by Dalmatov et al. confirms the alarming levels of human rights violations in Kazakhstan.[40] Therefore, considering these factors to effectively address migration patterns, policymakers must acknowledge the complex interplay of economic, social, political, and environmental factors that drive people to move. A nuanced understanding of these various migration drivers is crucial for crafting policies supporting sending and receiving communities.

With intensified competition for skilled labour among both developed and developing nations, educational migration is on the rise, contributing to increased national competitiveness and human capital development.[41] Kappassova et al.'s study proposes key vectors for Kazakhstan's contemporary migration strategy. These include integrating global migration trends into national development programs, establishing conditions

38 EIU, 'Democracy Index 2022' (*Economist Intelligence: EIU*, 2023) <https://www.eiu.com/n/campaigns/democracy-index-2022/> accessed 10 September 2024.

39 Bokayev and others (n 6).

40 Kanatay Dalmatov and others, 'Addressing Human Rights Violations in the Criminal Justice System of Kazakhstan: The Role of the Prosecutor's Office and a Call for Legislative Reforms' (2024) 7(3) Access to Justice in Eastern Europe 63, doi:10.33327/AJEE-18-7.3-a000323.

41 Kappassova and others (n 11).

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facilitating successful migrant reception, and promoting seamless integration through social programs, legislative adjustments, and information resources. Furthermore, the research emphasises the importance of utilising cultural and educational resources to foster sociocultural adaptation and strengthen Kazakh identity.[42] To ensure effective implementation of the migration policy, Kazakhstan must adopt a comprehensive set of indicators to evaluate its migration policy. These indicators should assess policy alignment with national goals and international benchmarks, as well as track migration rates and the quality of life for migrants. For example, the government of Kazakhstan is poised to implement a major overhaul of its migration policy through the "Open Kazakhstan 500+" concept.[43] This comprehensive approach addresses several key challenges, including attracting skilled workers, safeguarding the rights of Kazakh citizens working abroad, and tackling regional population imbalances. Furthermore, the concept seeks to modernise the entire migration framework. To achieve these goals, specific initiatives such as a simplified ten-year scientific and pedagogical visa for educational immigration and a new investor visa program for business immigration are being proposed. These reforms hold promise for attracting talent and investment, ultimately contributing to Kazakhstan's long-term development.

5 METHODOLOGIES

This study employs a qualitative research approach using documentary analysis methodology to explore intellectual and educational migration in Kazakhstan. The selection of documentary analysis was based on its ability to offer thorough insights into government initiatives and policy frameworks pertinent to the study's aim.[44] This method allows the researcher to trace the trajectory of government initiatives and assess their long-term effectiveness. Furthermore, documentary analysis is suitable for studies that analyse large amounts of text data from multiple sources, making it an ideal approach for investigating complex phenomena such as human capital development and brain drain. The documentary analysis was conducted through a systematic review of the selected documents to determine recurring themes and policy initiatives that pertain to intellectual and educational migration.

The data collected for this study was primarily in the form of official policy documents and reports, including national policy papers and strategic development plans related to migration, education, and human capital development in Kazakhstan, making content analysis suitable for data examination. Key policy documents, such as the Concept of

42 ibid.
43 Resolution of the Government of the Republic of Kazakhstan no 961 (n 5).
44 Glenn A Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) Qualitative Research Journal 27, doi:10.3316/QRJ0902027.

Migration Policy of the Republic of Kazakhstan for 2023-2027, were analysed to trace the evolution of migration-related strategies, examining how government priorities have shifted over time in response to both internal and external challenges.

6 FINDINGS AND DISCUSSION

Kazakhstan's migration policy places a strong emphasis on intellectual migration and educational immigration as key strategies for fostering human capital development and positioning the country as a regional educational hub. This strategic approach focuses on attracting skilled professionals and academics through streamlined visa processes, partnerships with international universities, and developing world-class educational infrastructure. These efforts aim to enhance Kazakhstan's global competitiveness and mitigate the effects of brain drain.

Docquier and Rapoport posit a nuanced perspective on the impact of brain drain,[45] highlighting the role of incentive structures, particularly the interplay between wage differentials, emigration probabilities, and credit constraints. For moderately developed countries, the brain drain presents a significant challenge: while wage gaps create emigration incentives, these nations lack the extreme wealth of developed nations to fully offset the loss through knowledge or technology transfer. Conversely, in very poor countries, credit constraints often limit skilled emigration, which mitigates the immediate human capital loss. However, these constraints also restrict the potential benefits of remittances, potentially hindering development.

Prioritising human capital development through migration necessitates a dual focus: mitigating the outflow of highly educated youth and skilled professionals and attracting high-calibre specialists with in-demand skills.[46] This entails implementing policies to curb brain drain and developing a comprehensive program to lure talent. Additionally, establishing a transparent and flexible entry system for these specialists is crucial.

Kazakhstan's new migration policy, informed by international best practices, seeks to bolster economic development through targeted initiatives. These include attracting skilled professionals by simplifying entry and integration, addressing internal demographic imbalances, and upholding international commitments. Additionally, the policy prioritises protecting Kazakh citizens abroad and implementing measures to regulate migration flows and optimise the country's demographic structure.

This study identified educational immigration as a key pillar of Kazakhstan's evolving migration policy. This strategic focus is driven by several factors. Firstly, Kazakhstan's education system boasts a high degree of integration with the global market, facilitating

45 Docquier and Rapoport (n 8).

46 Resolution of the Government of the Republic of Kazakhstan no 961 (n 5).

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student and faculty mobility. Secondly, ongoing efforts to expand educational infrastructure and attract leading foreign universities further solidify the country's position as a regional education hub. "The first direction of migration policy is educational immigration, the goal of which is to position Kazakhstan as a regional educational hub - Kazakhstan - a centre of academic mobility and attraction of leading scientists and specialists in the most demanded specialities".[47]

The current geopolitical situation and the limitations of the Bologna Process in the CIS region present additional opportunities for Kazakhstan to assert its educational leadership. Additionally, the country's success in attracting foreign faculty underscores its commitment to establishing a diverse and competitive academic environment. Notably, Kazakhstan's education sector remains competitive compared to its CIS counterparts, offering an attractive value proposition for international students. Furthermore, the shortage of higher education institutions in Central Asia, coupled with regional migration patterns, creates a strategic opportunity for Kazakhstan to attract students from neighbouring countries. This aligns with the broader objectives of fostering cultural exchange and expanding Kazakhstan's regional influence. Combining these conditions, Docquier and Rapoport have predicted that middle-income countries with sizable populations will experience the most advantages from skilled emigration, even without considering potential return effects.[48] Their theoretical insights are supported by cross-sectional and panel data analyses presented earlier. However, the question remains: can this inform migration policy? The answer is cautiously optimistic. While destination countries could potentially discriminate in favour of migrants from certain origins, this approach raises complex legal and ethical issues beyond the scope of their paper. The challenge lies in designing quality-selective immigration policies that address the varying effects of brain drain across origin countries without disrupting the entire immigration system.

From the Concept analysis, it is evident that the government has planned several initiatives to enhance intellectual and educational migration. These initiatives are strategically designed to attract and retain skilled professionals, bolster the country's educational infrastructure, and position Kazakhstan as a regional hub for academic excellence.[49] For instance, Initiative 1 prioritises academic mobility to cultivate a knowledge-based economy in Kazakhstan. Through partnerships with leading international universities, this initiative expands educational infrastructure, fosters knowledge exchange, and promotes the

47 ibid.

48 Docquier and Rapoport (n 8).

49 Bakhyt Altynbassov and others, 'The Establishment of International University Campuses as a Key Factor in the Development of Local Tourism in the Turkestan Region in Kazakhstan: Economic and Legal Aspects' (2021) 12(6) Journal of Environmental Management and Tourism 1454, doi:10.14505//jemt.v12.6(54).03; Aigerim Bayanbayeva and others, 'The Transformational Role of Entrepreneurial Universities in Fostering Tourism Sector of Kazakhstan: Legal Documentary Analysis' (2023) 14(4) Journal of Environmental Management and Tourism 2046, doi:10.14505/jemt.14.4(68).16.

adoption of best practices.[50] The Minister of Higher Education and Science recently announced that Kazakhstan has signed 23 academic partnerships, with three university campuses already established in the country. These include De Montfort University (UK), which celebrated its first graduation this year, and the upcoming campuses of Coventry University (UK) and Woosong University (South Korea). Additionally, a dozen branches of foreign universities are operational or planned to open nationwide. Figure 3[51] explicitly shows collaborations with foreign centres for academic and research excellence.

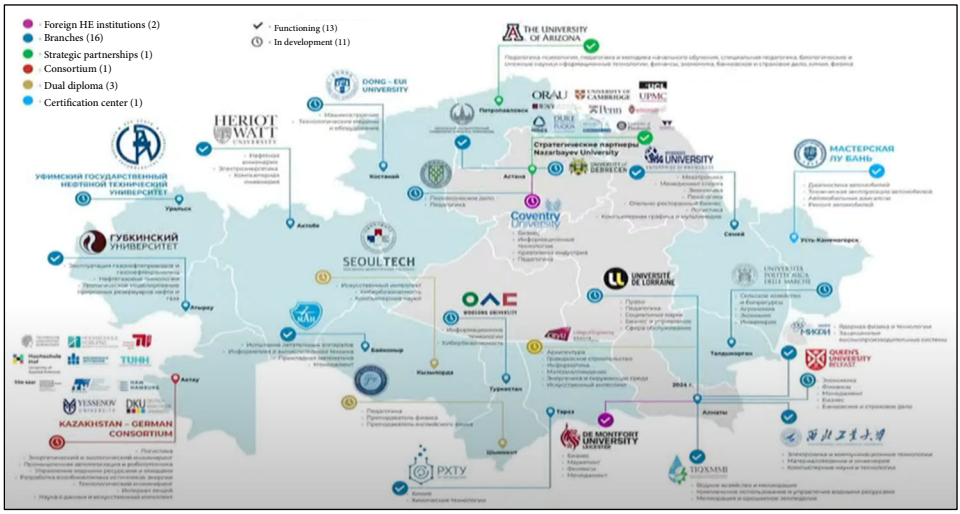

Figure 3. Centres for academic and research excellence

A central strategy involves recruiting highly skilled scientists, both from within the country and abroad, to enhance national innovation and research capacity. These researchers not only contribute directly to scientific progress but also improve the overall quality of human capital in the country. To achieve this, Kazakhstan plans to learn from international best practices and create an environment that fosters research productivity. Ultimately, success in domestic science relies on a collaborative effort between the government, the scientific community, and the business sector.

Educational migration can enhance the competitiveness of Kazakhstan's higher education system as a whole. Students returning from abroad bring back valuable knowledge, new skills, and experience adapting to different socio-cultural environments. This can lead to professional development and increased entrepreneurial potential through startup

50 Bakhyt Altynbassov and others, 'Academic Tourism as an Emerging Tourism Industry in Kazakhstan' (2022) 13(6) Journal of Environmental Management and Tourism 2068.

51 Center for Communication Services, 'Opening Foreign Higher Education Institution Branches' (*You Tube*, 20 June 2024) <https://www.youtube.com/watch?v=YvacG300t5c> accessed 10 September 2024.

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capital, ultimately contributing to a more robust national human capital base. Thus, by empowering domestic talent and mitigating brain drain, Initiative 1 seeks to transform Kazakhstan into a global hub for education and innovation, driving human capital development and societal advancement.

Narrowing down the academic focus to improve Kazakhstan's education system, Initiative 2 focuses on attracting top international faculty and students. Long-term visas with residency options are offered to renowned professors and researchers in critical fields, while talented international graduate and undergraduate students are incentivised to study in Kazakhstan through limited work permits.[52] This initiative aims to elevate the academic standing of Kazakh universities, create a more diverse learning environment, and potentially retain skilled graduates in Kazakhstan, ultimately transforming the country into a global hub for education and innovation. Motivated by maximising their own productivity and fostering international collaboration, inventor migration patterns suggest movement towards areas that facilitate these goals.[53] However, on a broader scale, emigration rates of skilled workers must be managed, stating that even with an incentive effect, high emigration possibilities can counteract the benefits.[54] Increased migration options may initially encourage education but ultimately lead to a larger skilled workforce leaving. This suggests a positive impact that diminishes as emigration rates rise. Therefore, origin countries can benefit from skilled emigration as long as these rates remain moderate.

Recognising the importance of human capital for long-term development, the Kazakhstani government has implemented several initiatives to attract and retain skilled professionals. A notable program is the Bolashak Scholarship, established in 1993, which provides financial support for Kazakhstani students to pursue graduate degrees at prestigious universities abroad.[55] The program aims to foster a highly skilled workforce upon the graduates' return to Kazakhstan, equipped with knowledge and expertise gained in leading international institutions. However, concerns have been raised regarding the effectiveness of the Bolashak program, as some graduates choose to remain abroad after completing their studies.[56] A survey of 724 Bolashak scholarship recipients found that while many express a desire to stay in Kazakhstan, a significant portion (21% + 29%) consider emigrating.[57]

52 Resolution of the Government of the Republic of Kazakhstan no 961 (n 5).

53 Marta Prato, 'The Global Race for Talent: Brain Drain, Knowledge Transfer, and Growth' (*SSRN*, 27 November 2022) <https://ssrn.com/abstract=4287268> accessed 10 September 2024.

54 Docquier and Rapoport (n 8).

55 Laura W Perna, Kata Orosz and Zakir Jumakulov, 'Understanding the Human Capital Benefits of a Government-Funded International Scholarship Program: An Exploration of Kazakhstan's Bolashak Program' (2015) 40 International Journal of Educational Development 85, doi:10.1016/j.ijedudev.2014.12.003; Dilrabo Jonbekova and others, 'How International Higher Education Graduates Contribute to Their Home Country: An Example from Government Scholarship Recipients in Kazakhstan' (2023) 42(1) Higher Education Research and Development 126, doi:10.1080/07294360.2021.2019200.

56 Bokayev (n 35).

57 Bokayev, Torebekova and Davletbayeva (n 6).

The research identifies age as a key factor influencing this decision. Younger graduates (23-28 years old) prioritise a higher standard of living abroad, while older graduates (29-35 years old) prioritise career advancement opportunities. Lower wages and a lower standard of living in Kazakhstan than potential destinations are significant push factors for emigration, particularly among younger graduates (23-28 years old). While some graduates, especially older ones (29-35 years old), prioritise career opportunities over the standard of living, a perception of limited career prospects in Kazakhstan serves as a strong push factor for younger graduates. Although such findings imply that many graduates pursue their careers or consider their life abroad, an official statement from the Bolashak authorities states that out of over 12000 graduates, only around 1% have not returned to their home country.

Li et al. explain these tendencies where highly educated individuals, like academics, often pursue careers across borders[58] driven by factors such as research opportunities, career advancement, and compensation. However, their mobility is shaped by limitations, including disciplinary constraints, cultural factors, and career stages. Ultimately, academics weigh these factors to find the environment that best supports their growth and value. At the same time, early and mid-career academics from developing countries working in developed nations are less likely to return home, often citing cultural differences and a more supportive work environment abroad. Returns tend to occur due to family reasons or targeted recruitment efforts, while senior academics may be drawn back by leadership roles or plans for retirement in their home countries.

Similarly, highly skilled professionals – like knowledge workers, entrepreneurs, and technocrats –also exhibit high mobility and are often sought after by immigration policies. However, they may face integration challenges into their new societies, including underemployment, identity issues, and limited career advancement. Temporary visa holders face additional barriers to social mobility and policy influence, creating a precarious situation despite their expertise.

For return migration to be beneficial, two conditions are essential: migrants must acquire successful skills and capital acquisition while abroad, and home countries must implement effective reintegration policies by the home country. Such policies should facilitate investment by returnees through streamlined bureaucracy, accessible investment information, and a conducive macroeconomic environment.[59]

58 Li, Lo and Lu (n 2).

59 Benzies Isaac Adu-Okoree and others, 'Reintegration of Return Migrants in Northern Ghana and Their Remigration Decisions: A Qualitative Study' (2023) 28(6) The Qualitative Report 1641, doi:10.46743/2160-3715/2023.5778; Christian Dustmann, Itzhak Fadlon and Yoram Weiss, 'Return Migration, Human Capital Accumulation and the Brain Drain' (2011) 95(1) Journal of Development Economics 58, doi:10.1016/j.jdeveco.2010.04.006.

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To address skill gaps and enhance Kazakhstan's workforce competitiveness, Initiative 9 focuses on attracting top foreign specialists.[60] In collaboration with leading global companies, these experts will establish national (international/regional) centres of excellence, providing advanced training for domestic personnel. To incentivise their participation, the initiative offers streamlined visa and work permit processes, attractive visa options with residency permits, and fosters stronger collaboration with employers to ensure educational programs align with industry needs. By attracting global expertise and tailoring education to industry demands, Initiative 9 seeks to cultivate a highly skilled domestic workforce capable of driving Kazakhstan's economic development.

To address skill shortages, Initiative 6 offers streamlined visas and residency permits for foreign professionals in science, healthcare, industry, and IT. This initiative prioritises attracting both international experts and ethnic Kazakhs with valuable skills in science, education, industry, IT, sports, and culture. It further aims to attract renowned figures in art, sports, and literature by facilitating the establishment of their schools. By simplifying visa processes and offering residency options, Initiative 6 seeks to make Kazakhstan a more attractive destination for global talent, fostering innovation and economic growth across diverse sectors.

Initiative 8 introduces the "Neo Nomad Visa" to attract remote workers and enhance Kazakhstan's image as a digital nomad hub. This visa offers long-term residency, initially for one year with renewal options, for individuals with foreign employment – either through remote work contracts or freelance clients – and requires a minimum monthly income of USD 3,000 while restricting local employment. By simplifying entry procedures, attracting skilled professionals, and boosting domestic consumption through visa holder spending, this initiative aims to position Kazakhstan as a hub for innovation, entrepreneurship, and global connectivity. However, the effectiveness of this initiative hinges on effectively marketing Kazakhstan's unique offerings to the global digital nomad community and ensuring a seamless visa application and renewal process.

Expansion of visa programs, exemplified by the H1B system (US), presents a potential policy tool for optimising talent allocation and knowledge transfer across borders, ultimately benefiting both sending and receiving countries.[61] However, Docquier and Rapoport posit a nuanced perspective on the brain drain's impact, highlighting how incentive structures – particularly the interplay between wage differentials, emigration probabilities, and credit constraints – shape migration.[62] For moderately developed countries, brain drain presents a significant challenge. While wage differentials incentivise emigrating, these countries lack the extreme wealth of developed nations to fully offset the loss through knowledge or technology transfer. Conversely, in very impoverished countries,

60 Resolution of the Government of the Republic of Kazakhstan no 961 (n 5).
61 Prato (n 53).
62 Docquier and Rapoport (n 8).

credit constraints often limit the emigration of skilled individuals, mitigating the immediate human capital loss. However, these constraints also restrict the potential benefits of remittances, potentially hindering development.

Linked to human capital development, Initiative 5 introduces a streamlined investor visa program.[63] This initiative seeks to attract top business leaders, particularly those specialising in the knowledge-based creative industries. By simplifying visa procedures for investors making a USD 300,000 investment, the program aims to stimulate economic growth, foster a culture of valuing knowledge, and promote high-quality education. Through residency rights and leveraging the Astana International Financial Center, Initiative 5 hopes to expand investment opportunities, create jobs for Kazakhs, and facilitate technology transfer. Ultimately, this initiative positions Kazakhstan as an attractive destination for global investment, fostering economic diversification and a knowledge-based economy. While short-term policy solutions, such as tax cuts for foreign inventors, can stimulate innovation within a specific nation, the study emphasises potential long-term drawbacks for global economic growth.[64] Zhanpeisova et al. analysed surveys from emigrated specialists, conducted expert interviews on brain drain and polled graduating students to gather comprehensive insights on the issue.[65] Based on their research, they propose a solution: creating scientific centres and implementing economic, social, and professional support programs to retain Kazakhstan's intellectual talent. At the same time, Kazakhstan is aiming to repatriate its scientists who are working abroad. The government recognises the value these researchers bring and is offering targeted support for their research upon return. This initiative acknowledges the importance of a strong scientific workforce for national development.

While Kazakhstan's policies aimed at attracting international talent have the potential to boost innovation, economic development, and global competitiveness, they also carry several potential risks and downsides that require careful consideration. First, there is a possibility of domestic talent displacement, where foreign experts and professionals may occupy positions that could otherwise be filled by local workers, potentially leading to frustration and demotivation among Kazakhstani professionals. This could, in turn, result in a brain drain of local talent to other countries if domestic opportunities are perceived as limited due to the focus on international recruits.

Additionally, an over-reliance on foreign talent might undermine long-term sustainable development if these policies do not equally prioritise the development of local human capital.[66] By focusing predominantly on attracting external expertise, the government risks neglecting investments in local education and training systems, which are critical for

63 Resolution of the Government of the Republic of Kazakhstan no 961 (n 5).
64 Prato (n 53).
65 Zhanpeisova and others (n 23).
66 Ewers and others (n 4).

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nurturing homegrown talent capable of sustaining innovation in the long term. Furthermore, intellectual migration policies, while beneficial, could lead to uneven development where urban centres, such as Almaty and Nur-Sultan, benefit disproportionately, leaving peripheral regions behind. This could exacerbate regional inequalities and deepen socio-economic divisions within the country.

Documentary analysis of the newly adopted Concept reveals a focus on fostering human capital development in Kazakhstan through a multi-pronged approach prioritising global collaboration. Several initiatives target partnerships with leading international universities (Initiatives 1 and 2) to elevate the quality of education and attract expertise. These collaborations involve faculty recruitment, student exchange programs, and the development of dual-degree options. This strategy leverages global best practices to establish Kazakhstan as a hub for innovation and knowledge exchange. While these initiatives offer a promising path forward, some considerations require further discussion to ensure long-term success. Attracting and retaining talent necessitates not only competitive educational opportunities but also attractive career prospects and a stimulating research environment. Initiatives offering streamlined visa processes and residency permits are a positive step. However, an additional focus on fostering domestic innovation ecosystems, competitive industry salaries, and career development programs would further incentivise both domestic and international talent to contribute long-term to Kazakhstan's development. Secondly, document analysis suggests that some initiatives might unintentionally incentivise emigration by promoting intellectual migration for economic benefits. To mitigate this potential effect, it is crucial to strike a balance by enhancing domestic opportunities alongside programs attracting international expertise. This can ensure a net gain for Kazakhstan's human capital development.

7 CONCLUSIONS

To conclude, Kazakhstan's migration policy is a reflection of its strategic efforts to address the brain drain, enhance human capital development, and establish itself as a regional educational hub. The government is positioning itself to attract international talent, develop academic partnerships, and establish a competitive research and innovation environment by prioritising intellectual migration and educational immigration. However, sustained progress will depend on the successful implementation of these policies, continuous collaboration between key stakeholders, and the creation of attractive domestic career opportunities to retain talent.

The newly adopted Concept demonstrates a commendable commitment to cultivating a highly skilled and globally engaged workforce in Kazakhstan. By prioritising international collaboration, implementing effective talent retention strategies, and fostering a holistic approach to innovation, Kazakhstan can effectively translate these plans into tangible

advancements for its knowledge-based economy and long-term prosperity. Further analysis and policy development should ensure these initiatives not only attract international expertise but also create a compelling environment for domestic talent to thrive and contribute to the nation's growth.

The government's acknowledgement of the critical need for a strong scientific workforce and its plan to repatriate scientists working abroad demonstrate a shift in focus. This recognition of the value of intellectual migration, both in terms of regaining lost expertise and attracting new talent, is crucial for Kazakhstan's future. By fostering an environment conducive to research and collaboration between the government, academia, and the private sector, Kazakhstan can leverage intellectual migration to rebuild its scientific capacity and ensure a brighter future.

The findings of this study highlight the multifaceted nature of migration in Kazakhstan, where economic, social, political, and environmental factors collectively drive the population's mobility intentions. Economic concerns, particularly low wages and limited job opportunities, remain the primary drivers of emigration. Still, dissatisfaction with education quality and political factors such as corruption and human rights violations also play a critical role. Addressing these issues requires a holistic approach, where improvements in wages, job opportunities, educational support, and political reforms are prioritised. Policymakers must adopt a nuanced understanding of these migration drivers to create effective strategies that prevent talent drain, foster demographic stability, and enhance the nation's long-term prospects. This calls for balancing immediate economic remedies with structural reforms to sustain long-term confidence in the country's future. Kazakhstan can implement international best practices by investing in continuous education and skills development, ensuring professionals have opportunities for growth.

By actively attracting and integrating international students, Kazakhstan can cultivate a strategic talent pool to fuel its economic growth. This approach can also contribute to addressing demographic imbalances through targeted measures. Structuring educational institutions in line with international best practices will not only elevate the quality of education but also further strengthen Kazakhstan's position as a regional leader. Overall, Kazakhstan's focus on educational immigration presents a promising strategy for fostering economic development, promoting cultural exchange, and enhancing the nation's overall educational landscape. By implementing a well-designed and well-managed program, Kazakhstan can solidify its position as a regional hub for education and innovation.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДОСЛІДЖЕННЯ ІНТЕЛЕКТУАЛЬНОЇ ТА ОСВІТНЬОЇ МІГРАЦІЇ В КАЗАХСТАНІ: ДОКУМЕНТАЛЬНИЙ АНАЛІЗ

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АНОТАЦІЯ

Вступ. *Вирішення проблеми «відтоку мізків» і сприяння розвитку людського капіталу мають вирішальне значення для підтримки довгострокового економічного зростання, інноваційного потенціалу та глобальної конкурентоспроможності країни. Казахстан зіткнувся зі значним «відтоком мізків», особливо після розпаду Радянського Союзу, оскільки багато кваліфікованих фахівців шукали кращих можливостей за кордоном. Незважаючи на зусилля уряду, спрямовані на те, щоб утримати таланти, країна продовжує відчувати негативне сальдо міграції, причому значна частина емігрантів є високоосвіченими і кваліфікованими спеціалістами. У цьому дослідженні розглядаються виклики, пов'язані з «відтоком мізків», та оцінюються наявні політичні ініціативи Казахстану, спрямовані на вирішення проблеми інтелектуальної міграції та сприяння розвитку людського капіталу.*

Методи. *У статті застосовується якісний підхід із використанням документального аналізу для вивчення інтелектуальної та освітньої міграції в Казахстані. Методологія передбачає систематичний перегляд ключових державних програмних документів і звітів, таких як Концепція міграційної політики Республіки Казахстан на 2023-2027 роки. Документальний аналіз було обрано через його здатність забезпечити глибоке розуміння урядових ініціатив і політичних меж, що дозволило оцінити їхню довгострокову ефективність. Контент-аналіз був використаний для того, щоб виявити повторювані теми і політичні зміни, пов'язані з розвитком людського капіталу та «відтоком мізків».*

Результати та висновки. *Отримані результати підкреслюють зусилля, яких докладає уряд, для того, щоб залучити кваліфікованих фахівців, утримати вітчизняні таланти і сприяти міжнародній співпраці за допомогою спрощення візового режиму, академічного партнерства та створення міжнародних філій. Аналіз показує освітню імміграцію як основний компонент міграційної стратегії Казахстану, що формується під впливом регіональних чинників і геополітичних міркувань. Незважаючи на ці зусилля, дослідження визначає наявні проблеми у створенні привабливих можливостей для кар'єрного зростання в країні та конкурентного дослідницького середовища, що мають вирішальне значення для довгострокового утримання талантів. За допомогою передового*

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міжнародного досвіду і сприяння співпраці між урядом, академічними колами та промисловістю, Казахстан може посилити свої позиції в глобальній економіці знань, що одночасно вирішить демографічні та економічні проблеми. Стаття завершується обговоренням потенційних політичних наслідків та рекомендацій щодо підтримки розвитку людського капіталу Казахстану в контексті глобальних тенденцій інтелектуальної міграції.

Ключові слова: *освітня міграція, інтелектуальна міграція, «відтік мізків», розвиток людського капіталу, Казахстан.*

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Research Article

LEGAL AND PRACTICAL IMPLICATIONS OF DIGITIZING THE SLOVAKIAN CADASTRE: CHALLENGES AND OPPORTUNITIES

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ABSTRACT

Background: *Acquiring ownership rights to real estate in Slovakia is complex and frequently encounters hurdles. The formal procedures governing this process can be stringent, resulting in challenges when transferring ownership rights. This article critically evaluates the obstacles and potential advantages as the Slovakian Cadastre shifts towards a digital system.*
The authors also explore the scope of contractual freedom and governmental intervention in acquiring property rights alongside recent challenges encountered by the digitalized system under both Slovakian and European law. The study analyses the theoretical framework guiding decision-making by Slovak administrative authorities in cadastral proceedings, underscoring the critical role of formal legal procedures in ensuring legal certainty and stability. Additionally, the research underscores the importance of accurately registering changes to property rights within the digitalized real estate registration system to uphold the integrity and transparency of title records.
Methods: *The research follows a qualitative methodology, employing various qualitative methods, including historical description and analysis, in-depth document analysis, inductive method, comparative analysis, and case studies rooted in legal theory, administrative law and property law. It may utilise conceptual frameworks like legal certainty and stability to inform its examination. The methodology may not involve empirical data collection or statistical analysis but rather a critical examination of the existing legal framework and theoretical perspectives.*

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Results and conclusions: *Acquiring ownership rights to real estate in Slovakia is a complex process hindered by discrepancies between registered and actual property statuses, outdated maps and inaccuracies in parcel boundaries. The lack of clarity and precision significantly affects legal certainty and private property rights. In response, the Office of Geodesy, Cartography and Cadastre has proposed a comprehensive amendment to the Cadastral Act, aiming to update the classification of land, regulate electronic submissions, and simplify application processes. However, the proposed amendment may restrict public access to information contained in the Cadastre, which could negatively impact the exercise of property rights and the right to freely access information.*

1 INTRODUCTION

Pursuant to Section 2 of Act No. 162/1995 Coll. as amended (hereinafter: the Cadastral Act),[1] the purpose of registration in the Slovak Cadastre of Real Estate is, in addition to the protection of rights to real estate, also tax purposes, fiscal purposes, protection of the environment, forest and land fund and others. The basic purpose of keeping real estate records in the Cadastre is to protect legal relations to real estate. For the Land Registry (the Cadastre) as a state registration system to serve all the above-mentioned purposes, especially the protection of ownership relations, the records must be made on the basis of legally relevant documents. These documents (deeds) must be in accordance with the data of the cadastral register - the data that enters the Cadastre.

The digitization of cadastral maps began in 1991, with the first attempts to register real estate using scanners. The digitization of cadastre maps has been fully launched since 1996.[2] Today, the Slovakian Land Register is entirely digitized and publicly accessible. However, the data it contains is insufficient in many respects.

The current digitized Cadastre offers several advantages, including its public form, online public accessibility, clarity, and the regular updating of data on owners and properties or rights to these properties. Thus, these data can be relied upon for local tax purposes, protection of public interests, and, in particular, in the disposal of real estate.

Disposal of real estate refers to various processes in which cadastral data plays a vital role. This includes contractual transfers in the acquisition of ownership of the real estate, security measures, information relating to real estate (long-term lease contracts for agricultural land are linked to them), protection of cultural monuments (special conditions for the transfer of such properties, in particular, the right of the State to purchase them), nature

1 Act no 162/1995 coll of the Slovak Republic 'On the Real Estate Cadastre and the Entries of Ownership and other Rights to the Real Estates (Cadastral Act)' (amended 2024) <https://www.zakonypreludi.sk/zz/1995-162> accessed 31 May 2024.

2 Renáta Kmeťková a Petra Pechová, 'Digitalizácia katastrálnych máp Slovenskej republiky a tvorba ich metaúdajov' (2012) 21(2) Kartografické listy 14.

conservation (preventing the transfer of small areas of agricultural and forestry land to secure its economic purpose), and expropriation for public utility buildings.

The present study examines the complex legal and practical implications associated with the digitalization of the Slovakian Cadastre, focusing on the challenges and opportunities this transformative process presents. In Slovakia, the acquisition of ownership rights to real estate is a challenging endeavour that involves a two-stage procedure: the execution of a valid legal act, typically a contract, followed by a decision from the Cadastre office, the administrative authority responsible for authorising the registration of ownership. This formalised approach is crucial for upholding legal certainty and ensuring the stability of property rights within the jurisdiction.

However, the digitization of the Cadastre has unveiled several challenges under national law. Discrepancies between the registered and actual status of properties, compounded by outdated maps and inaccuracies in parcel dimensions, contribute to a pervasive lack of legal certainty and transparency in property transactions. Additionally, historical complications stemming from the communist era, during which private ownership was largely disregarded and records poorly maintained, continue to impact the current property rights landscape. The existing registration process is often viewed as rigid and formalistic, creating barriers that impede efficient property transactions and market fluidity.

At the European Union level, adapting the Slovak Cadastre to align with the EU Succession Regulation (Brussels IV) introduces further complexities. The exclusive availability of cadastre information in Slovak creates significant language barriers for foreign notaries, complicating their navigation of the registration system. Furthermore, the stringent formal requirements for registering inherited property often conflict with the Regulation's objectives, adding another layer of complexity to compliance efforts.

The interaction of diverse legal frameworks among EU member states also generates tensions that challenge the harmonisation efforts mandated by the Regulation. The first part of this article examines the theoretical foundation of administrative authorities' decision-making process, such as those at the Cadastre office, when it comes to acquiring property rights to real estate in Slovakia. The description of this formal legal process serves as a basis for the presentation of the complexity of the Slovak legislation in the registration of property rights to real estate in the state registration system.

The subsequent section delves into the Cadastre itself, discussing aspects of its development and practical implications, which helps outline the initial subset of challenges it faces following the launch of digitalization. Furthermore, we explore current European trends and challenges related to implementing European Union standards into national legislation. We exemplify these challenges through the application of decisions of foreign judicial authorities in the context of the EU Succession Regulation.

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2 METHODOLOGICAL RESEARCH FRAMEWORK

The research framework of the present study is based on qualitative research due to the complex and multifaceted legal issues associated with the digitalization of land registries. This methodology enables an in-depth exploration of intricate aspects of legal theory, substantive administrative law, and property law.[3] From a procedural law perspective, the study draws upon the empirical experiences of notarial practice, elucidating the implications of digitalisation on private property rights and the principle of legal certainty. Employing a qualitative lens, the research focuses on uncovering the subjective experiences and interpretations of various stakeholders involved in digitalizing land registries. This approach provides a deeper understanding of the perspectives of those affected by this transition. To achieve the objective, the study employs various qualitative methods, including historical description and analysis, in-depth document analysis, inductive inquiry, comparative analysis, and case studies.[4]

A key element of the methodology is document analysis, which involves examining existing legal texts, statutes, and administrative guidelines pertaining to the Land Registry. This analysis helps clarify the development of property rights and the legal frameworks governing them, enabling a comprehensive understanding of the issue.

The research examines the existing legal framework regulating property rights in Slovakia, focusing on relevant legislation, regulations, and administrative practices. This review offers insight into the legislative environment affecting property rights and acquisition processes. Additionally, the analysis considers how administrative bodies make decisions related to property registration, scrutinising the criteria and procedures integral to these determinations. Understanding these mechanisms is crucial for identifying barriers and inefficiencies in the current system. The descriptive analysis also identifies specific challenges faced by stakeholders within the existing system, such as bureaucratic inefficiencies, legal ambiguities, and issues regarding information accessibility. Identifying these challenges serves as the basis for proposing practical solutions to improve the efficiency and effectiveness of the Slovakian Cadastre.

The analysis includes an exhaustive examination of the decision-making processes within administrative bodies, such as the cadastral office, regarding the authorisation of property registrations. By examining these processes, the research highlights the complexities of the Slovak legislative environment concerning property registration and potential challenges that may arise during the transition to a digital system. To provide a detailed overview of the theoretical foundations and formal legal processes governing property acquisition in Slovakia, elements of historical-descriptive analysis are applied. By considering the

3 Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (3nd edn, Edinburgh UP 2024).
4 Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2017).

historical development of land law in Slovakia, the study contextualises contemporary challenges within a broader legal and political framework, enriching the analysis with insights on how historical developments continue to influence current issues. Based on inductive reasoning, the researchers propose actionable solutions and recommendations to address identified challenges, including amendments to the Cadastral Act or introducing new administrative practices.

The presented model of scientific inquiry is consequently based on the principle of the inductive scientific method. Induction involves inferring general principles from specific facts and cases. In this form of argumentation, the process moves from empirical premises to empirical conclusions, with the findings not strictly derived from the premises. Thus, inductive argumentation represents an amplificatory type of reasoning whereby more is inferred than is explicitly contained in the premises. Inductive reasoning is used to conclude the analysis of the legal framework and theoretical perspectives.[5] This method enabled the authors to identify patterns and trends in the challenges faced by the digitalized Slovak Land Registry. By examining aspects of the historical development of land law, the impact of political regimes, and conflicts between national and European law, the study aims to provide a comprehensive and causal understanding of contemporary problems.

Case studies offer contextual depth, illustrating specific instances of how the digitalization process is implemented. This approach reveals not only successes but also points out issues encountered during the transition, thus providing a nuanced view of the process.[6]

Legal comparison is partially employed to examine the challenges faced by the digitalized Slovak Land Registry in relation to national and European Union law. This comparative analysis allows for identifying discrepancies and conflicts between the Slovak legal framework and the harmonisation efforts of the European Union. By briefly comparing the Slovakian Cadastre with land registration systems in other European countries, the research sheds light on best practices and potential obstacles in the digitalization process. The study examines how the Slovak Land Registry aligns with EU regulations and directives, identifying areas of agreement and conflict. Understanding these dynamics is crucial to ensuring digitalization efforts meet broader European standards and expectations. Furthermore, by analysing land registration systems in other EU member states, the research identifies best practices that could serve as reference points for the Slovak approach to digitalization. Findings from the legal comparison provide valuable insights into potential recommendations for legislative amendments aimed at improving the legal framework governing the Slovak Land Registry and addressing identified gaps to facilitate a smoother transition to a digital system.

5 Uzoma Ihugba, *Introduction to Legal Research Method and Legal Writing* (Malthouse Press Limited 2020).

6 ibid.

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In the present study, the authors work with conceptual frameworks such as legal certainty and stability to inform the investigation of the transition of the Slovak Land Registry to a digital system. These frameworks provide a theoretical basis for understanding the importance of accurate and reliable property registration and the potential consequences of discrepancies and ambiguities in cadastral data. The research highlights the necessity of legal certainty in property registration and illustrates how digital systems may enhance or undermine this certainty. Legal certainty is essential to fostering confidence in property transactions and ownership claims.

Additionally, the study examines how the digitalization of the Land Registry may affect the stability of property rights, especially in the context of disputes and claims. A stable framework for property rights is crucial for economic development and social stability. Conceptual frameworks help contextualise the challenges the Slovakian Cadastre faces within a broader legal and political context, particularly in relation to EU harmonisation efforts.

The research captures the complex dynamics of the legal aspects of digitalizing the Slovak Land Registry through specified qualitative methods. This comprehensive approach enables a thorough understanding of the relationship between legal principles and practical implementation, thereby contributing valuable insights to the ongoing discourse on property law and digital transformation. Ultimately, the qualitative methodology enhances the study's capacity to inform relevant legislative stakeholders, ensuring that the transition to a digital land registry is legally sound and responsive to the needs of those it serves.

The qualitative research methodology employed in this study enables a comprehensive and in-depth analysis of the legal challenges and opportunities associated with digitalizing the Slovak Land Registry. Integrating descriptive analysis, legal comparison, and inductive reasoning, all informed by conceptual frameworks, provides a nuanced understanding of the complex issues under examination. This methodology enriches the academic discourse on property law and digitalization while providing practical insights. By addressing the multifaceted nature of the legal environment, this study aims to promote a more efficient and effective property registration system aligned with contemporary needs and expectations. Through ongoing research and engagement with stakeholders, the study strives to contribute to developing property law and digitalization efforts in Slovakia, ultimately supporting legal certainty and the protection of property rights.[7]

7 McConville and Chui (n 3).

3 REGISTRATION OF DATA IN THE STATE REGISTRATION SYSTEM OF REAL ESTATE - CADASTRE OF REAL ESTATE

Real estate, as an object of contractual relationships, is subject to a special regime in most European countries. From a legal perspective, it lies between public and private law, incorporating elements of both. In the Slovak Republic, the acquisition of ownership or other specified rights to real estate requires a valid legal act followed by a decision from an administrative authority.[8]

In the first phase, fulfilling the obligation-law aspect requires concluding a valid legal act. The legal act, which concerns real estate, must be in writing and contain the mandatory elements regulated by the Civil Code and the Cadastral Act.[9] For certain properties, other requirements under specific legislation must also be met. This phase establishes a binding relationship between the entities under agreed-upon conditions.

In the second phase, a decision from the competent administrative authority is required to realise the substantive effects of the binding relationship. This is where the authorisation regime is manifested, leading to the issuance of a decision following an administrative procedure. The commencement of the administrative procedure – specifically the authorisation of the deposit – follows the principle of disposition. The contracting parties submit an application to initiate the procedure, which is governed by the provisions of the Cadastral Act or, alternatively, the Administrative Procedure Code.[10]

Under the Slovakian Cadastral Act,[11] the competent administrative authority will conduct a thorough examination of the application, assessing both the formal requirements and the substantive requirements of the legal act. In evaluating the formalities, the authority considers whether the application for registration meets the requirements, whether all required annexes[12] have been submitted, and whether the contract complies with the

8 Administrative authority refers to the District Office, specifically the Cadastral Department, with local jurisdiction determined by the location of the property.

9 Act no 40/1964 coll of the Slovak Republic 'Civil Code' (amended 2024) <https://www.zakonypreludi.sk/zz/1964-40> accessed 31 May 2024; Cadastral Act no 162/1995 coll (n 1).

10 Act no 71/1967 coll of the Slovak Republic 'On Administrative Proceedings (Administrative Code)' (amended 2018) <https://www.zakonypreludi.sk/zz/1967-71> accessed 31 May 2024.

11 Cadastral Act no 162/1995 coll (n 1) s 31 (1).

12 ibid, s 30 (4). "*The annex to the proposal for the record shall be the contract on the basis of which the right to the real estate is to be registered in the cadastre, in two copies. a) public deed or other document confirming the right to the immovable property, if this right to the immovable property is not recorded in the title deed, b) identification of parcels, if the right to the immovable property is not recorded in the title deed, c) agreement on power of attorney, if the party to the proceedings is represented by an attorney; the signature of the attorney must be certified, if the certification of the signature is required pursuant to Section 42, Paragraph 1, of the Act on the Registration of Immovable Property. (d) the notification referred to in paragraph 3 in paper form, (e) an affidavit stating that the conditions pursuant to Section 59a of the Commercial Code have been fulfilled or an affidavit stating that these conditions do not apply to the company in question, (f) the authorization of the legal entity granted to its employee, if the party to the proceedings on the application for a record is a legal entity which authorizes its employee in writing in the course of its business to file the application for a record, (g) documents having evidentiary value for the proceedings on the application for a record,..*"

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relevant formalities, including but not limited to a) the identification of the parties involved in the transaction; b) the signature and date of the contract; c) the accurate identification of the immovable property as required by law; and d) compliance with the prescribed form for the transaction.

The competent administrative authority also thoroughly examines whether the legal act comprises the essential elements, is executed in the prescribed form, and whether the transferor possesses the necessary authority to dispose of the real estate. It evaluates the clarity and unequivocal nature of the parties' intentions and ensures that contractual freedom or the right to dispose of the real estate is not unduly restricted. Furthermore, the authority considers whether the contract is consistent with the applicable law, whether it attempts to circumvent the law, and whether it is contrary to good morals. In making a decision regarding the registration of immovable property, the authority also considers any relevant facts and legal issues that may have a bearing on the authorisation of registration. This includes examining any potential obstacles or impediments that may affect the registration process.[13]

If all the requirements for authorising registration are met, the administrative authority will issue a decision permitting registration. This decision is final and non-appealable, provided that all parties to the proceedings have been notified. Based on the final decision, the administrative authority will register the property in the Land Register. The competent authority is required to complete the registration on the day the decision enters into force but not later than the following working day. It is important to note that registration is an administrative act that does not, by itself, have any legal effects on the registration process.[14]

The acquiring entity becomes the owner of the immovable property on the date the registration decision is issued rather than when the registration is made. If the submitted document contains a legal act that does not meet the requirements under examination, the administrative authority will either discontinue the procedure or reject the application. If the procedure is discontinued, a situation may arise where a validly concluded legal act does not have substantive effects (i.e., no change of ownership). This can occur if a party fails to provide a required document or remove a formal requirement within the act itself or in the application for registration.

In contrast, in cases involving the forfeiture of a movable object, the second phase involves taking possession of or handing over the object. Only upon taking possession or receiving the object does the party obtain ownership.

A contract is a bilateral or multilateral legal act that does not affect the transfer of ownership to the transferee. The contract does not convey ownership; rather, it constitutes a binding

13 Marian Ďurana, 'Proportionality of Restrictions of Ownership by Act 140/2014 on the Acquisition of Ownership of Agricultural Land and its Amendment' (2014) 13(1) Społeczeństwo i Edukacja: Międzynarodowe Studia Humanistyczne 153.

14 Cadastral Act no 162/1995 coll (n 1) s 31 (3).

obligation on the transferor to transfer ownership to the transferee. In the case of the transfer of immovable property (registered in the Land Register), this principle is consistently applied. In essence, the contract itself only contains an obligation to transfer ownership, and how ownership is acquired depends on whether the property in question is movable or immovable.[15] The acquisition of ownership involves a two-stage process: the contractual commitment and the actual transfer of ownership.

We believe that the formal procedural regulation governing the acquisition of ownership of immovable property in Slovakia is essential. The primary reason is to ensure legal certainty and stability of legal relationships, as outlined in Section 2 of the Cadastral Act.[16] This formal regulation provides a clear and predictable framework for acquiring ownership, which is crucial for maintaining trust and stability in property transactions.

Additionally, considering the development of land law in Slovakia, this formal regulation brings a desirable order and system to ownership relations, which are not, arguably, currently truly adapted to introducing new regulations through European law. This is due to the historical development and genesis of the registration system of property rights. As a result, the acquisition of property rights has become a rigid process, as previously mentioned.

4 CHALLENGING LEGAL ASPECTS OF REAL ESTATE REGISTRATION IN THE SLOVAKIAN LAND REGISTRY (CADASTRE) UNDER NATIONAL LAW

The Cadastre of Real Estate, as a Slovakian state registration system of immovable property and rights to it, is characterised by several distinctive features. One of the typical features is the principle of publicity.[17] The Cadastre of Immovable Property is kept in digital form; all data are accessible to the public. Data from the Land Register are made available to the public electronically through the Land Registry website.

However, public access to specific documents, such as contracts, succession certificates, and decisions of the courts of the Slovak Republic, is limited. This access is limited to property owners, their legal predecessors or other authorised persons. Additionally, certain professionals involved in land development activities, such as surveyors, those drawing up geometrical plans or demarcating land, or experts in surveying, cartography and cadastre,

15 Marek Števček a kol, Občiansky zákonník: Komentár, 1 d (§ 1-450) (CH Beck 2015) 888.

16 Cadastral Act no 162/1995 coll (n 1) s 2. Section provides that the cadastre serves multiple purposes, including the protection of rights to real estate, tax and fee purposes, valuation of real estate (especially land), protection of agricultural and forest land funds, environmental protection, protection of mineral wealth, protection of national and other cultural monuments, protected areas and natural creations, and the construction of other information systems on real estate.

17 ibid, s 68 (1).

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may also access these documents.[18] It is important to note that the publication of birth numbers and the prices of agricultural and forest land is prohibited. However, property owners may request to inspect this information from the cadastral register, or it may be provided to them upon request.

When providing the data, the state body administering the Cadastre of Real Estate is obliged to pay attention to the standards on the protection of personal data according to the Data Protection Regulation.[19] In connection with the aforementioned, the Cadastre of Real Estate provides data in the form of:

- extracts or copies of descriptive information (extract or copy of the title deed, complete or partial)
- extracts from geodetic information (cadastral map)
- extract from the land register, railway register
- identification of parcels (comparison of the entry and drawing of the same property with the entry in the file of descriptive and geographic information). [20]

Electronically provided information on real estate is provided free of charge.

Pursuant to the Czech digital Cadastre, for instance, interested parties may access selected data regarding parcels, buildings, units (residential and non-residential premises), and building rights, which are registered in the Cadastre. Additionally, information on the status of proceedings related to the registration of ownership and other rights of entitled parties to real estate in the Czech Republic is also available. Furthermore, this register contains contracts, including the purchase price of real estate, which constitutes a higher level of public disclosure than the Slovak Cadastre. Notwithstanding, access to the Czech register is freely available and does not require any prior registration.[21]

Today, the data entered in the Cadastre, which serves as the Land Register, acts as a legally binding information system primarily used to protect real estate rights. This data serves as a basis for the drafting of public deeds and other documents.

The data provided by the Cadastre are "*in principle reliable,*"[22] meaning that everyone can rely on the fact that these data are accurate and can, therefore, be relied upon unless proven

18 Decree no 178/1996 coll of the Department of Geodesy, Cartography and Cadastre of the Slovak Republic 'On the Implementation of the Act of the National Council of the Slovak Republic on Geodesy and Cartography' <https://www.epi.sk/zz/1996-178> accessed 31 May 2024.

19 Regulation (EU) no 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.

20 Civil Code no 40/1964 coll (n 9) s 131 (1 - 2).

21 Act no 256/2013 coll of the Czech Republic 'On the Cadastre of Real Estate (Cadastral Act)' (amended 2022) <https://www.zakonyprolidi.cz/cs/2013-256> accessed 31 May 2024.

22 Cadastral Act no 162/1995 coll (n 1) s 70 (1).

otherwise. If the validity of the data is disputed, it may not be used (e.g. duplicate ownership - reason for not recording the deed). Moreover, material publicity is not a universally applicable rule, as highlighted in the ruling of the Constitutional Court of the Czech Republic II. ÚS 349/03,[23] which states that the real estate cadastre does not operate on principles that ensure full confidence in its content. This lack of assured reliability undermines one of the cadastre's basic functions, which citizens expect to be fulfilled. This concern also applies to the data currently recorded in the Slovakian Cadastre of Real Estate, which can be declared invalid if proven so.

One means of mitigating the potential conflict between public law principles and private law relationships in the context of real estate is to restrict the drafting of legal instruments to qualified individuals, thereby ensuring that such instruments are legally compliant. This goal has been partially achieved through procedural safeguards, such as requiring that contracts establishing rights to acquire real estate be primarily drafted by lawyers or as notarial deeds.[24]

In the case of notarial deeds, the relevant administrative authority in cadastre proceedings proceeds in a streamlined manner, scrutinising only the conformity of the legal instrument with the existing cadastre records rather than examining its content. Responsibility for the content lies with the individual who drafted the deed, typically a notary or attorney. This approach has led to a reduced timeframe for administrative decision-making.

Notwithstanding, it is crucial to note that not all the current cadastre data are comprehensive in scope for establishing real property ownership, as required under today's legal standards. The root causes of the current state of partial legal disarray can be traced back to the historical development of immovable property rights without a central registry. During that period, legal transactions were not uniformly recorded and registered, thereby creating a lack of transparency and certainty in the ownership of such properties. In many cases, evidence of changes in ownership was not adequately preserved, resulting in situations where the actual occupant or user of the property may not be the same individual listed as the registered owner in the original records. Regrettably, these discrepancies have persisted to date and have contributed to the current state of legal uncertainty.

The antecedent records of the Cadastre today were originally maintained in the form of written land books, which continue to be utilised for notarial purposes and possess enduring documentary significance. Over time, this system transitioned into the modern cadastre format, with all information recorded in written form on title deeds. The contemporary challenge of Slovakian land law lies in reconciling the fact that, despite the full digitisation of available data, these data are often preserved in the original format of historical land books. Before 1950, the format of these books required only the recording

23 Case no II.ÚS 349/03 (Constitutional Court of the Czech Republic, 26 February 2004) <https://nalus.usoud.cz/Search/GetText.aspx?sz=2-349-03> accessed 31 May 2024.

24 Cadastral Act no 162/1995 coll (n 1) s 31 (2), in force as from 1 September 2018.

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of the owner's name and surname, with additional information such as nicknames or spouses' names frequently being used for identification purposes. Consequently, due to the lack of data prior to 1950, particularly in rural areas of Slovakia, the Land Register still lacks identifiers that would allow for clear and precise identification of property owners or testators.[25]

During the communist period from 1948 to 1989, the state assumed control over property ownership, rendering private ownership legally insignificant. Consequently, the registration of immovable property held by private individuals was not accurately or transparently recorded, and the nationalisation of assets led to a lack of centralised records.[26]

Today, public law intervention in the acquisition of ownership of immovable property is evident, requiring registration for a private-law transaction to take legal effect. Should the relevant administrative authority refuse registration, the transfer of property rights would not be deemed to have occurred. Public authority involvement arises when an administrative authority intervenes in the private law relationship involving the transfer of ownership of immovable property by authorising the registration of the right. It is noteworthy that this legislation has been in effect since 1 January 1993.

Before the late 1950s, the principle of intabulation governed the acquisition of ownership of immovable property, whereby title was established through registration in the land book. However, the Civil Code of 1950 repealed this principle and introduced a consensual approach whereby ownership was acquired through the execution of a contract. However, this regime was short-lived; Act No. 65/1951 Coll.,[27] effective 1 July 1951, introduced a further requirement for the transfer of ownership, namely the consent of the then-District National Committee. The Civil Code of 1964 subsequently introduced the registration principle, which remained in effect until 31 December 1992. Under this regime, a contract for the transfer of immovable property was subject to registration by a State notary. It was only upon registration that the right of ownership was acquired.

25 Jozef Bujňák, 'Vývoj a evidovania vlastníckeho práva k nehnuteľnostiam na území Slovenska do 1.4.1964' (*Progres CAD Engineering, s.r.o.*, s a) <https://www.pce.sk/clanky/vlprnehn.htm> accessed 31 May 2024; Róbert Jakubáč, 'O Uhorských pozemkových knihách a ich spravovaní' (2022) 52(2) Právnohistorické štúdie 151, doi:10.14712/2464689X.2022.25; Peter Gabrik, 'Pozemkové úpravy a neznámi vlastníci pozemkov na Slovensku' (2021) 1-2 Bulletin slovenskej advokácie 12; Maroš Pavlovič and Matúš Michalovič, 'Challenges and Perspectives of the Legislative Solution to the Problem of the Plots of Land of Unidentified Owners in the Slovak Republic – Defining the Public Interest' in Natalia Kryvinska, Michal Greguš and Solomiia Fedushko (eds), *Developments in Information and Knowledge Management Systems for Business Application*, vol 6 (Springer Cham 2023) 541, doi:10.1007/978-3-031-27506-7_20.

26 Jozef Vanek, 'Usporiadanie pozemkového vlastníctva v Slovenskej republike' v Peter Repáň (ed), *Dištančné vzdelávanie pre projektantov pozemkových úprav: Učebné texty*, 1 d (STU Bratislava 2002) 7.

27 Act no 65/1951 Coll of the Czech Republic 'On Transfers of Real Estate and Leases of Agricultural and Forest Land' (canceled 1 April 1964) <https://www.zakonyprolidi.cz/cs/1951-65> accessed 31 May 2024. Temporary version of the regulation effective from 29.08.1951 to 31.03.1964.

Many records from historical land registries have been lost, destroyed, or remain archived in foreign state repositories. This has led, in certain cases, to challenges in reliably establishing land ownership. Consequently, the Slovak legislator enacted Act No. 229/1991 Coll., governing ownership relations to land and other agricultural property, thereby introducing the legal concept of *presumed ownership*. An individual could be deemed a presumed owner if they asserted entitlement in restitution proceedings but were unable to credibly substantiate their ownership rights. This concept was subsequently replaced by the designation of an *unidentified owner*.

An unidentified owner is an individual whose land is not accurately recorded in the Land Registry. Such individuals may have unknown addresses, with only their name and surname or, in some instances, no ownership information at all appearing in the registry. In these cases, the registry labels the property under an unknown owner. Currently, such properties fall under the administration of the Slovak Land Fund and cannot be encumbered or transferred to another person.[28]

Implementing an electronic land registry, in line with the principle of material publicity (whereby land registry data are publicly accessible), plays a significant role in recording properties on behalf of unidentified owners or owners whose location is unknown. Historical data continue to be digitised; however, these records are often insufficient. The issue regarding property in the Slovak Republic results from the historical circumstances previously discussed.

However, any citizen can now check the register to ascertain whether a property belonging to a deceased legal predecessor is recorded and, thus, if there is a need to resolve ownership. Currently, this resolution process is managed by the individual claiming ownership rights. In our view, this procedure is relatively complex for citizens and inefficient for the state from the perspective of a practical and systematic resolution of properties with unidentified owners.[29]

The resolution of such unregulated and unidentified ownership could be advantageous from a procedural economic standpoint, particularly for notaries. It would also benefit municipalities, especially in terms of collecting property taxes on lands situated within their boundaries. A potential solution could be facilitated by municipalities establishing a special register, based on the general digitalization of the Land Registry, to record properties located within their jurisdiction separately for unknown owners or owners whose whereabouts are unknown.

If unidentified or incomplete records could be specified from the digital land registry, a systematic approach—using cadastral maps in cooperation with notaries, civil society,

28 Juraj Kolesár a kol, *Československé pozemkové právo* (Obzor 1980).

29 See: Jarmila Lazíková, 'Land Fragmentation and Land Abandonment in Central and Eastern European Countries' (Vybrané otázky agrárneho práva Európskej Únie, II: Medzinárodnej vedeckej konferencii, Slovenská poľnohospodárska univerzita, 2006) 69.

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neighbourly relations, and grassroots social networks—could allow for more efficient identification of historical records. In this manner, municipalities could take the initiative *ex proprio motu* to contact owners as legal successors, progressively formalising legal relations to these lands. It would naturally be necessary to address the participation (both in terms of personnel and finances) of municipalities in resolving this issue.

Municipalities in the Slovak Republic perform a self-governing function as well as functions within the framework of delegated state administration.[30] "Delegated state administration" refers to the process by which the state has transferred certain functions to municipalities (and regional self-governing authorities).[31] Municipalities (and self-governing regions) fulfil their responsibilities using their budgets. For delegated state administration tasks, they are allocated state budget funds as specified by a separate law.[32] This decentralised competency could, on the one hand, provide municipalities with financial support from the state and, on the other, allow them to systematise additional revenue from property taxes currently lost due to the outlined issues. As certain expenses are reimbursed to municipalities, identifying unknown property owners could be designated as a subsidiary role for municipalities.

In the case of parcels that are still recorded in land books, this process will logically be more complicated; however, their number is by no means high. Subsequently, the publication of such a report could also be electronic. In addition to publishing this report in the form of a public notice, which would also be available on the municipality's notice board, the report could be mandatorily published on the websites of the relevant municipalities whose territory will form the area of the particular proceedings. In this case, however, we cannot yet speak of electronicization, only of electronic publication. True electronicization, however, could be implemented through one of the electronic portals of the Land Registry.[33]

Today, however, material publicity conflicts with the provision of personal data in accordance with Regulation (EU) 2016/679 of the European Parliament and Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data

30 Martin Píry, *Úvod do stavebného práva: Vybrané problémy územného plánovania a konania* (Stredoeurópsky inštitút správnych a ekologických štúdií 2017).

31 Act no 416/2001 coll of the Slovak Republic 'On the Transfer of Certain Competencies from State Administration Authorities to Municipalities and Higher Territorial Units' (amended 2016) <https://www.zakonypreludi.sk/zz/2001-416> accessed 31 May 2024. Under this Act, municipalities are tasked with responsibilities across various domains, including the management of public roads, general internal administration (such as registry office duties), social assistance, spatial planning, building code enforcement, functions of the building authority, nature conservation, education, regional development, and other designated areas.

32 Act no 303/1995 coll of the Slovak Republic 'On Budgetary Rule' (amended 2004) <https://www.onlinezakony.sk/?uniqueid=OhwOuzC33qd2W4_6TwF4qI1V18c9u2J_GhNd4X4r7lqVdaLTRYHmJQ> accessed 31 May 2024.

33 Ľudovít Máčaj a Maroš Pavlovič, 'Význam Elektronizácie Katastra Nehnuteľností pri Identifikácii Vlastníkov Pozemkov s Nezisteným Vlastníkom' (Míľniky práva v stredoeurópskom priestore 2022: Vedeckej konferencii, Univerzita Komenského v Bratislave, Právnická fakulta, 24 jún 2022) 65.

and on the free movement of such data (GDPR). Access to published data, except for personal identification numbers (name, surname, and permanent address), could potentially be restricted to registered users who commit to respecting the provisions of the GDPR in this specific matter and will not further disclose the data.

How important is it to keep public and private documents in physical form during the digitisation of property records in the Land Registry? While no new entries are being added, these existing paper registers remain valuable sources of information for resolving land ownership disputes and restitution proceedings.

The Land Registry, known as the Cadastre, is gradually moving to a digital format, which includes the digitisation of technical data, ownership information, and documents submitted for registration by various entities. This transformation occurs at two levels: the first involves digitising paper records, such as original maps, title deeds, and other registered documents, which are progressively converted into electronic form. The second level introduces the option for electronic proceedings related to creating, altering, or terminating ownership or other registered rights to property, thus simplifying the process for submitting applications for registration or modification of ownership and property rights directly in digital form.

The choice between digital and paper form submissions is still available to participants, with a financial incentive for those who opt for electronic submissions – the basic fee is reduced by 50% compared to standard paper submissions. Applicants can also file a so-called intended application exclusively in electronic form via the Land Registry portal. If the intended application for registration is filed electronically, the fee is further decreased by an additional €15.

Such submissions are deemed efficient, as the Land Registry already possesses the requisite data directly integrated into the decision-making process. By submitting the owner and property details in digital format, the application streamlines the preparation of the decision by the competent authority, as this information can be incorporated directly, reducing time and enhancing overall efficiency.

However, a drawback exists in the potential for errors when completing the information, as any flawed application will be returned, necessitating the payment of the fee once more. Despite land registry staff converting data into digital format, all information is still transcribed and maintained in paper form. While this situation may be characterised as an endeavour towards efficiency and cost-effectiveness, it perpetuates the formal and bureaucratic administration elements characteristic of Central and Eastern Europe.[34] The objective is to mitigate potential defects that could compromise the legal certainty principle.

34 Lazíková (n 29).

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A distinct category is the title deed, which is accessible and published electronically on the Land Registry portal. The digitalization process is being gradually implemented, enabling the generation of all amendments related to ownership and property. Both the digital and paper versions of the title deed should document the complete genesis/history of the property. This is crucial for establishing ownership lineage and identifying any encumbrances or rights associated with the property. The written title deed continues to serve as an archival document. The importance of retaining the written version lies in the ability to cross-verify the digital information with the data transferred from paper to digital format. Nevertheless, we maintain the role of preserving a historical record, underscoring the necessity of safeguarding this documentation in view of the historical evolution of land law in the Slovak Republic, as such data has been historically maintained in physical form.

5 CHALLENGING LEGAL ASPECTS OF REAL ESTATE REGISTRATION IN THE SLOVAKIAN LAND REGISTRY (CADASTRE) UNDER EUROPEAN UNION LAW

The European Union's legal system is a unique and independent entity that aims to standardise the laws of its member states and, in some cases, supersedes national laws. What began as a community of six states with common rules for trade in coal and steel has evolved into a community of 27 states with uniform rules governing a wide range of legal relationships. While it is beyond the scope of the present article to name these harmonisation efforts, it highlights an interesting challenge related to the harmonisation initiative in the area of private law relations.

One notable area of harmonisation is cross-border succession, which is closely tied to the acquisition of property rights in individual member states. Previously, cross-border succession in Slovakia was governed by the Private International Law and Procedure Act,[35] with similar national legislation in other EU countries. As a result, each country had its own set of rules for notaries, attorneys, and other individuals involved in the matter of cross-border succession processes, leading to varying approaches and regulations.

However, the adoption of the European Succession Regulation EU650/2012,[36] otherwise known as Brussels IV (the Regulation), came into effect on 17 August 2015 and applies to all EU member states except Denmark and Ireland, which opted out. As stated, prior to this, the acceptance and recognition of foreign decisions in the Slovak Republic –

35 Act no 97/1963 coll of the Slovak Republic 'Act on International Private and Procedural Law' (amended 2023) <https://www.zakonypreludi.sk/zz/1963-97> accessed 31 May 2024.

36 Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 'On Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession' [2012] OJ L 201/107.

including in matters of succession – were regulated by Act No. 97/1963 Coll. on Private International Law and Procedure.[37] For immovable property located in the territory of the Slovak Republic, the jurisdiction to decide on succession proceedings was conferred exclusively on the authorities of the Slovak Republic, who were well-versed in the peculiarities of the Slovakian Cadastre.

Implementing the Regulation has created disparities between the various national laws of the EU member states, which are at odds with the Regulation's objectives. Some EU countries have already confronted this challenge.[38] It is important to note that the diverse approaches adopted by certain EU countries to address this issue do not offer a uniform solution. Nevertheless, these solutions can serve as a useful precedent for the development of further centralised measures to resolve this issue.[39]

For instance, in cases where succession proceedings took place in the Czech Republic but the testator's real estate was located in the territory of the Slovak Republic, jurisdiction previously lay with the Slovak Republic. Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, and the recognition and enforcement of decisions, and the acceptance and enforcement of authentic instruments in matters of succession – along with the creation of a European Certificate of Succession (the Succession Regulation) – aimed to simplify the succession process where the testator owned property in different EU Member States. At present, such cases are handled and adjudicated entirely by a single judicial authority, in this case, the Czech one. For an EU citizen to be able to claim ownership of immovable property in a succession case, the inheritance must be officially recorded in the relevant register (the Cadastre).[40]

The problematic factors in the context of the digitalized and strictly formal Slovak Cadastre of Real Estate, as presented in the previous part of the study in this context, are quite numerous. Among the most crucial practical ones for a notary of another EU Member state is the unavailability of Slovak Land Registry information in a language other than Slovak. By comparison, after simple research on the French Cadastre's website, a Slovak notary would not be confronted with a similar problem when dealing with the registration of inherited real estate. The French Cadastre offers the availability of the requested information not only in English but also in Spanish. However, similar language unavailability is

37 Elena Júdová, 'Výklad nariadenia č. 650/2012 o dedičských veciach v judikatúre Súdneho dvora EÚ' v Miroslav Slašťan a Michael Siman (eds), *Aktuálne otázky európskeho medzinárodného práva súkromného* (Justičná akadémia Slovenskej Republiky, Slovenská asociácia európskeho práva 2018) 81.

38 For more details see: Ľuboslav Sisák, 'Európske osvedčenie o dedičstve a prepis vlastníctva k zdedenej nehnuteľnosti' (2021) 10 Právník 854.

39 Elena Júdová and Lucia Gandžalová, 'Application of EU Private International Law in Slovakia' in Csongor István Nagy (ed), *Cross-border Litigation in Central Europe: EU Private International Law before National Courts* (Kluwer Law International 2022) 447.

40 Miriam Imrich Breznoščáková, *Cezhraničné dedenie: Nariadenie EÚ č 650/2012 o cezhraničných dedičstvách* (Wolters Kluwer 2015) 88.

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experienced in the Czech Republic, Hungary and Poland. When Slovak documents are required for administrative relations to use abroad, an official translation (approved by a certified authority) is necessary and obligatory, even though the original documents are publicly and digitally available in the Slovak language within the digital Cadastre and such authentication is not necessary for any further legal relations under domestic law. Notably, no comparable formalism due to translations is requested in Western European countries.

Furthermore, in succession proceedings conducted by a European notary, the primary responsibilities are identifying heirs (legal, testamentary) and assets or debts contained in the succession. If the subject of the succession is the real estate specified in a decision of a judicial authority - a resolution, such a resolution must be recorded into the Cadastre under Slovak legislation. A specific law, the Cadastral Act, regulates the exact procedure of the administrative authority (typically an official at the Cadastre office) to register such resolutions (deeds) on succession.

The administrative authority carefully reviews the submitted resolution for clerical or numerical errors, other obvious inaccuracies, and compliance with the requirements set out by the Cadastral Act. If any discrepancies are found, the resolution is returned for correction. The Regulation did not account for the unique requirements of various national legislation, including Slovak's detailed procedure. To illustrate the challenges European law poses for registering real estate in the Slovak Cadastre, we present a range of formal mandatory requirements that must be satisfied. In particular, if the subject of the resolution on inheritance is land, it must have the following particulars:

- the cadastral territory in which it is located,
- the 'C' register ('precisely measured land with binding acreage) or 'E' register ('land where the acreage is not measured') in which it is registered,
- the plot numbers,
- the area of the land,
- the type of land,
- the extent of the co-ownership share.

Additionally, if the subject of the succession order is a building, it shall be demarcated by:

- the cadastral territory in which it is located,
- the registration number of the building,
- the land on which the building is situated (register marked as 'C' or 'E' and the parcel number of the land),
- the extent of the co-ownership share.[41]

41 Cadastral Act no 162/1995 coll (n 1) s 42.

If the subject of succession provided by the resolution of succession is a flat or non-residential premises, the obligation to specify it is defined in another separate act.[42]

As far as formalities are concerned, if the property is the subject of a succession, the resolution on the succession must also hold details of the acquirer - the heir. The heir shall be identified by first name, surname, family name, date of birth, birth number, and place of residence. If any of these details are missing, the administrative authority responsible for recording the resolution in the Cadastre will not record the deed and will return it to the notary for completion.[43]

Currently, numerous situations still exist where property ownership is solely identified by the owner's first and last name, lacking any other distinctive information. In such cases, the legitimacy of ownership must be deduced from the property itself and historical land register entries, especially those predating 1950.[44] Even in contemporary times, these records remain the sole source of information concerning the property rights of deceased individuals, especially when the property is registered solely under their name.

When it comes to asserting rights from foreign decisions in matters of succession, particularly involving real estate situated in Slovakia, grappling with legislative formalities can be a formidable challenge, and in some cases, it might even prove insurmountable.[45] The introduction of the Regulation has created a conflict between the diverse legal systems of various EU countries and the overarching objectives outlined in the Regulation. Most of the EU countries have already had to deal with this issue. However, it should be noted that the individual ways in which EU countries have coped with the problem do not provide a one-size-fits-all solution. It is the fragmentation and heterogeneity of national land registers that make it often difficult to acquire property rights.

42 Act no 182/1993 coll of the Slovak Republic 'On the Ownership of Flats and Non-Residential Premisses' (amended 2024) <https://www.zakonypreludi.sk/zz/1993-182> accessed 31 May 2024.

43 Cadastral Act no 162/1995 coll (n 1) s 42 (2).

44 See: Morten Hartvigsen, *Land Reform in Central and Eastern Europe after 1989 and its Outcome in form of Farm Structures and Land Fragmentation* (FAO Land Tenure Working Paper 24, Orbicon 2013); Rudolf Lazur, 'Slovakia Case Study: Land Consolidation in Slovakia' (Land Consolidation and Territorial Organization: FAO Regional workshop, Prague, 6-10 March 2005) <https://www.fao.org/fileadmin/user_upload/reu/europe/documents/LANDNET/2005/Slovakia.pdf> accessed 31 May 2024; Peter Dale and Richard Baldwin, 'Lessons Learnt from Emerging Land Markets in Central and Eastern Europe' (Quo Vadis - International Conference: FIG Working Week 2000, 21-26 May, Prague) 4 <https://www.fig.net/resources/proceedings/2000/prague-final-papers/baldwin-dale.htm> accessed 31 May 2024; Johan FM Swinnen and Liesbet Vranken, 'The Development of Rural Land Markets in Transition Countries' (FAO Regional Workshop on the Development of Land Markets and Related Institutions in Countries of Central and Eastern Europe: Experiences, Approaches, Lessons Learned, Nitra, Slovak Republic, 6-7 May 2005) <https://typeset.io/papers/the-development-of-rural-land-markets-in-transition-2j8ceidwvj> accessed 31 May 2024.

45 Elena Júdová, 'Current Issues of Deciding Cross-Border Succession Matters in the Slovak Republic' in Naděžda Rozehnalová (ed), *Universal, Regional, National: Ways of the Development of Private International Law in the 21st Century* (Masaryk UP 2019) 179.

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The above examples illustrate the excessive formalism of real estate registration in Slovakia. Similar can be seen in other EU Member States such as the Czech Republic,[46] Poland,[47] Hungary[48] and Lithuania.[49] This formality reflects a legislative intent, especially in post-communist countries like Slovakia, to establish a systematic registration of real estate – a goal seen as crucial for clarifying property rights after years of communism and inconsistent ownership records.

This meticulous approach contrasts with the formalism of Central and Eastern European states like France and Germany, where succession rights and property registration are managed with fewer formalities.[50] Recently, the Court of Justice of the European Union (ECJ) issued a ruling that sheds light on the registration of changes in property ownership in Lithuania.[51] The ECJ held that the Lithuanian real estate register may refuse to register changes in property ownership if the property is not specifically identified in the certificate of succession. The ECJ's decision concerns a dispute between the German probate courts and the Lithuanian real estate register. The German probate courts sought to register changes in property ownership in Lithuania, but the Lithuanian real estate register refused to do so, citing the absence of specific identification of the property in the certificate of succession. The ECJ held that Lithuania has the authority to determine the requisite information for registration, taking into account the specificities of its national cadastre law. In particular, the ECJ emphasised that Lithuania has the right to determine what information is necessary for registration concerning pecuniaries of the national cadastral law.

The ECJ's decision underscores the critical need to ensure that property ownership is accurately registered and reflected in national records. In this case, the ECJ's holding requires German probate courts to verify whether the asset in question was owned by the deceased and falls within the scope of succession. However, the ECJ did not provide guidance on how German probate courts may implement this requirement without access to the Lithuanian Land Register and knowledge of Lithuanian real estate law.

46 Magdalena Pfeiffer, 'Legal Certainty and Predictability in International Succession Law' (2016) 12(3) Journal of Private International Law 566, doi:10.1080/17441048.2016.1261848.

47 Mariusz Załucki, 'Impact of the EU Succession Regulation on Statutory Inheritance' (2018) 23 Comparative Law Review 223, doi:10.12775/CLR.2017.010.

48 Tibor Szôcs, 'The European Succession Regulation from the Perspective of the First Three Years of Its Application' (2019) 1 ELTE Law Journal 45.

49 Agne Limante, 'The EE Decision Sheds Light on Notaries Acting as "Courts" and on a Few Other Notions Within the Context of the Succession Regulation' (2021) 6(1) European Papers: A Journal on Law and Integration 45.

50 Reinhard Zimmermann, 'Intestate Succession in Germany' in Kenneth Reid, Marius de Waal and Reinhard Zimmermann (eds), *Comparative Succession Law: Intestate Succession*, vol 2 (OUP 2015) 181, doi:10.1093/acprof:oso/9780198747123.003.0008.

51 *RJR v Registrų centras VĮ* Case C-354/21 (Court of Justice of the European Union, 9 March 2023) [2023] CJEU C-354/21 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62021CJ0354> accessed 31 May 2024.

The ECJ's decision has significant implications for international inheritance and succession proceedings. It highlights the need for cooperation between national courts and registries, as well as the importance of ensuring that property ownership is accurately registered and reflected in national records.

6 CHALLENGES IN PRACTICE: NOTARIAL DECISION-MAKING AND PROPERTY REGISTRATION IN SLOVAKIA

In the Slovak Republic, succession proceedings, which constitute a means for heirs to acquire ownership rights from the deceased, are overseen by a notary with the power to make binding decisions that carry the same legal weight as those issued by a court. However, for the specific succession matter, the notary must first be designated as a court commissioner. These notarial proceedings are conducted in private, and unlike court rulings, decisions made by notaries are not published. In succession matters, the focus is on reaching an agreement among the heirs, and the notary's primary role is to facilitate this consensus. Consequently, the confidentiality of the heirs is maintained to the fullest extent possible. This emphasis on privacy contributes to the limited availability of succession decisions, which would underline the article's thesis, with only a few court decisions currently accessible.[52]

The issue concerning the registration of real property rights, recognised by a decision of a foreign Member State, within the Slovak Republic was addressed by the Supreme Court of the Slovak Republic decision No 2CdoGp/1/2021 in 2022.[53] The case involved a deceased person who had a habitual residence in the Czech Republic and owned immovable property in the territory of the Slovak Republic. The heirs submitted a petition to the Slovak authorities to adjudicate the inheritance of the deceased's property located in Slovakia. The petition was based on the necessity of obtaining a decision from a Slovak authority (a notary) containing all the requisite particulars for registration in the Land Registry. The notary halted the proceedings due to a lack of jurisdiction. In Resolution No. II. ÚS 537/2021 of 11 November 2021, the Constitutional Court of the Slovak Republic eventually provided its view on a similar matter, affirming that the general jurisdiction to adjudicate the inheritance matter lies with the Czech Republic, irrespective of the location of the deceased's immovable property within a Member State. Regarding the further exercise of the heirs' rights, the Constitutional Court of the Slovak Republic opined that the EU Regulation left it entirely within the competence of the Member States' authorities that maintain the register of rights to determine the legal conditions for recording rights to movable or immovable

52 Elena Júdová, 'Decisions on the European Succession Regulation in Slovakia' (2023/2024) 25 Yearbook of Private International Law 217.

53 Case no 2CdoGp/1/2021 (Supreme Court of the Slovak Republic, 30 March 2022) <https://www.epi.sk/rozhodnutie-sudu/prislusnost-sudu-v-konani-o-dedicstve-s-cudzim-prvkom.htm> accessed 31 May 2024.

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property. The EU Regulation mandates the introduction of a certificate enabling any heir or person entitled as mentioned in the certificate to prove their status and rights in another Member State, primarily regarding the allocation of specific property to the heir named in the certificate. According to Article 69(1) of the EU Regulation, the certificate has effect in all Member States without the need for any special procedure.[54]

In practice, resolving these issues often necessitates direct action within the registries where immovable property is recorded (the Cadastral Register). The central government authority in this sector issued an opinion stating that the requirements for registration in the Cadastral Register remain in force according to the legal provisions in the Member State, i.e., the registration of rights in the Cadastral Register in Slovakia continues to be governed by the Cadastral Act.[55]

In its ruling on 19 February 2019, the Supreme Administrative Court of the Slovak Republic held that the Slovak Land Registry would refuse to register real property rights if the submitted documents did not contain the necessary information for the accurate identification of the immovable property. [56] This case involved an heir's complaint concerning the Cadastral Department of the District Office's decision to deny the registration of the heir's ownership rights to immovable property in Slovakia. This denial occurred despite the heir presenting a European Certificate of Succession (ECS) issued by a court in Germany. The primary reason for the refusal was that the ECS lacked essential identifying information about the immovable property, as required by Slovak legal standards for registering ownership in the Land Register.

Seeking to resolve the matter, the heir requested that the German court amend the ECS to include the necessary property details. However, the German court declined this request, citing adherence to the principle of universal succession as outlined by Germany's highest courts. Both the Regional Court, which the heir approached through an administrative action against the District Office and the Supreme Court, where the heir filed a cassation complaint against the Regional Court's ruling, rejected the heir's claims.

The courts primarily concentrated on procedural matters, with the Regional Court acknowledging the heir's predicament regarding their inherited rights and suggesting potential solutions: if the German court continued to refuse to add the necessary property details in the ECS, the heir could amend their ECS application to include these details and

54 Case no II.ÚS 537/2021 (Constitutional Court of Slovak Republic, 11 November 2021) <https://www.ustavnysud.sk/docDownload/846fe628-d2cb-4821-8089-549d64c0e8c0/%C4%8D.%20106%20-%20II.%20%C3%9AS%20537_2021.pdf> accessed 31 May 2024.

55 'Katastrálny bulletin (Bulletin of the Cadastre) no 1/2018, Response to Question no 13' (*Úrad geodézie, kartografie a katastra SR*, 2018) <https://www.skgeodesy.sk/files/sk/slovensky/ugkk/rezortne-periodika/kb_1_2018.pdf> accessed 31 May 2024.

56 Case no 8Sžk/25/2021 (Supreme Administrative Court of the Slovak Republic, 19 February 2019) <https://www.slov-lex.sk/vseobecne-sudy-sr/-/ecli/ECLI-SK-NSSSR2021-5020200108_1> accessed 31 May 2024.

resubmit it to the Slovak District Office. Alternatively, the heir could present the final decision from the succession proceedings, along with an official translation, as supporting documentation for the ECS.

In its final opinion, the Supreme Administrative Court stated that, in line with Article 63 of Regulation (EU) No. 650/2012 on Succession, heirs may establish their rights through a European Certificate of Succession issued in another Member State. However, they must also follow the specific registration procedures for immovable property as prescribed by the national laws of the Member State where the property is located. The Court further noted that the Regulation does not cover the registration of rights in immovable property or the relevant registration requirements, as outlined in Article 1(2)(l). The District Office rightfully refused to register ownership based solely on the ECS, as it did not fulfil the complete data requirements stipulated by Slovak law. Both the Regional Court and the Supreme Court did not find the actions of the District Office to be legally improper. As can be seen from the decision of the Supreme Administrative Court of the Slovak Republic of 19 February 2019, the Slovak Land Registry will not record rights *in rem* to immovable property located in the territory of the Slovak Republic if the document submitted does not contain the required data precisely identifying the immovable property.

7 CONCLUDING REMARKS

The acquisition of ownership rights to real estate in the Slovak Republic is a complex process that involves consideration of various legal aspects. Since 1996, the system has been transformed into a publicly accessible and regularly updated digitalized state registration system. However, the complex development of land law in Slovakia and the challenges posed by the integration of European law into the Slovak legal system have resulted in various challenges. The most pressing issues arise from discrepancies between the registered, legal, and actual status of parcels of land and insufficient identification data for the real estate, which today are entirely inadequate for further disposal of the property. This lack of clarity and precision has significant implications for the legal certainty of private property rights. Furthermore, the poor quality and credibility of cadastral data are evident, as more than half of the Slovakian territory still relies on maps created over a century ago using non-numerical methods.

Properties inherited from the socialist era remain insufficiently identified and situated on disputed land, including roads, thereby perpetuating uncertainty and hindering the exercise of property rights. The limited scope for arranging land tenure arrangements renders it significantly more challenging to implement measures integral to European policies, such as the green recovery of the economy.

The Slovak national legislation's emphasis on formalism is considered beneficial as it promotes a rigorous focus on precision and reliability, thereby facilitating unification and

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much-needed order. However, every formalism is perceived in some way as an additional obstacle. To overcome this challenge, measures have been implemented to expedite procedures and simplify them for the public.

The second referred sub-group of challenges in acquiring ownership rights to real estate in Slovakia arises from recent developments in European Union law. This has been exemplified by the application of decisions by judicial authorities from other EU Member States since the introduction of the Succession Regulation in 2017. Overcoming language barriers set by the Slovak Cadastre is a common challenge. Additionally, stringent formalism may be bureaucratic or coercive when considered in a broader European context.

Given the challenges that the current cadastral law poses, the Office of Geodesy, Cartography and Cadastre, responsible for this branch of the legal relationship, has proposed a comprehensive amendment to the Cadastral Act to address inconsistencies and lack of clarity.[57] The proposed changes aim to rectify legislative and technical shortcomings, update the classification of land, regulate electronic submissions, clarify decision-making processes, simplify application processes, remove administrative fees for registration notifications, amend conditions for registering property in the Land Register, introduce new regulations for registering municipal boundaries, and adjust time limits for retaining records.

The proposal also seeks to address concerns about the misuse of personal data related to individuals with rights to registered immovable property by introducing mandatory registration for access to cadastral data via cadastral portals, i.e. lowering the public accessibility standards of the Cadastre. Unlike the Czech Republic, where substantial cadastral information is publicly accessible, Slovakia's proposed amendment to the Cadastral Act would limit such access. The rationale behind this restriction is to prevent data misuse, ensure compliance with data protection legislation, and safeguard personal data. However, this aspect of the amendment has raised concerns. Restricting public access to cadastral information may not be consistent with the right of free access to information and may substantially complicate access to information on property ownership rights.[58]

57 Draft Act PI/2024/44 'Amending Act of the National Council of the Slovak Republic no 162/1995 coll On the Cadastre of Immovable Property and on the Registration of Ownership and other Rights to Immovable Property (Cadastral Act) as amended' <https://www.slov-lex.sk/elegislativa/legislativne-procesy/SK/PI/2024/44> accessed 31 May 2024.

58 *Preliminary Information* (pursuant to Section 9 of Act no 400/2015 coll of the Slovak Republic 'On the Drafting of Legislation and on the Collection of Laws of the Slovak Republic and on the Amendment and Supplementation of Certain Acts' <https://www.zakonypreludi.sk/zz/2015-400> accessed 31 May 2024).

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОВІ ТА ПРАКТИЧНІ НАСЛІДКИ ОЦИФРУВАННЯ СЛОВАЦЬКОГО КАДАСТРУ: ВИКЛИКИ ТА МОЖЛИВОСТІ

Андреа Баранцова та Любіца Сакторова*

АНОТАЦІЯ

Вступ. *Набуття права власності на нерухомість у Словаччині є складним питанням, тут часто можна зіткнутися з перешкодами. Офіційні процедури, які регулюють цей процес, можуть бути суворими, що призводить до проблем під час передачі права власності. У цій статті критично оцінюються виклики та потенційні переваги переходу словацького кадастру на діджиталізовану систему.*

Автори також досліджують межі свободи договору та втручання держави у процес набуття прав власності, а також нещодавні виклики, з якими зіткнулася оцифрована система відповідно до словацького та європейського законодавства. У дослідженні було проаналізовано теоретичні засади, якими керуються словацькі адміністративні органи під час прийняття рішень у кадастрових справах, було звернено увагу на важливу роль формальних правових процедур у забезпеченні правової визначеності та стабільності. Крім того, у дослідженні наголошено на необхідності точної фіксації змін прав власності в цифровій системі реєстрації нерухомості для підтримки цілісності та прозорості записів прав власності.

Методи. *Основою дослідження є якісна методологія, зокрема застосовуються такі методи, як історичний опис та аналіз, поглиблений аналіз документів, індуктивний метод, порівняльний аналіз, а також використовуються тематичні дослідження, що базуються на теорії права, адміністративному праві та праві власності. Для обґрунтування експертизи можуть бути вжиті такі концептуальні засади, як правова визначеність і стабільність. Методологія може містити не збір емпіричних даних чи статистичний аналіз, а скоріше критичний аналіз чинної правової бази та теоретичних перспектив.*

Результати та висновки. *Набуття права власності на нерухоме майно в Словаччині є складним процесом, якому перешкоджають розбіжності між зареєстрованим і фактичним статусами власності, застарілі карти та неточності в межах земельних ділянок. Відсутність ясності та точності суттєво впливає на правову визначеність і права приватної власності. У відповідь Управління геодезії, картографії та кадастру запропонувало комплексні зміни до Закону про кадастр, спрямовані на оновлення класифікації земельних ділянок, регулювання електронного подання та спрощення процесів подання заяв. Проте запропонована поправка може обмежити доступ громадськості до інформації, яка міститься в Кадастрі, що негативно вплине на реалізацію права власності та права на вільний доступ до інформації.*

Ключові слова: *земельне право Словаччини, кадастрові процедури, набуття права власності в Словацькій Республіці, проблеми, пов'язані з Положенням про правонаступництво.*

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Research Article

CONTROL AND PREVENTION OF CORRUPTION CRIMES IN UKRAINE AND LITHUANIA DURING THE STATE OF EMERGENCY AND MARTIAL LAW

Kateryna Kulyk

ABSTRACT

Background: *Martial law in Ukraine and the state of emergency in Lithuania have changed the daily lifestyles of many residents of these countries. The circumstances necessitating the introduction of these special regimes have also increased the risk of illegal activities, including corruption, in these territories.*

Methods: *This study applied a comprehensive approach that included a thorough analysis of Ukrainian and Lithuanian anti-corruption legislation, reports on the implementation of anti-corruption measures during the state of emergency in Lithuania and martial law in Ukraine, and content analysis of news media. The researcher surveyed 13 anti-corruption experts in Ukraine and, based on their answers and previous research materials, identified the factors that contribute to the spread of corruption in Ukraine during martial law and in Lithuania during its state of emergency. Survey results were also used to determine measures to control and prevent corruption during periods of exception in these countries.*

Results and Conclusion: *The study of corruption in these contexts provides insight into the factors contributing to the spread of corruption. The anti-corruption experts in Ukraine selected the following factors as the greatest contributors to corruption: inadequate control and supervision (53.8%), increased need for funding (23.1%), lack of transparency and openness (53.8%), vulnerability and citizens' moral hazards (38.5%), and aggravation of social problems and mistrust in authorities (61.5%). The analysis of these factors made it possible to provide recommendations to enhance the control and prevention of corruption offences in Ukraine and Lithuania. These measures include strengthening the independence of anti-corruption bodies, increasing the transparency of government activities, disseminating anti-corruption education, promoting international cooperation in combating corruption, and strengthening public control.*

1 INTRODUCTION

Corruption poses a significant threat to national security and state stability, leading to substantial and tangible economic, social, and political losses. Corruption undermines the principles of democracy and the rule of law, leads to human rights violations, reduces the quality of life, creates a negative image of the state in the international community, and contributes to the spread of crime.

Fighting corruption has always been an integral part of the public policy of every democratic and rule-of-law state, including Ukraine and Lithuania. The fight against corruption began when these countries declared independence from the Soviet Union in 1991 and 1990, respectively.[1] Anti-corruption activities continue even under a state of emergency and martial law when statehood is at risk.

Since the beginning of the full-scale invasion of Ukraine by Russian troops on 24 February 2022,[2] Ukraine has faced the need to defend its territory and population while implementing state policies in various areas, including anti-corruption policies. Many partner countries, including Lithuania, have supported Ukraine. Due to the aggression of the Russian Federation against Ukraine, Lithuania declared a state of emergency in its territory on 24 February 2022.[3] Later, this declaration remained only in the border area.[4] Lithuania has made excellent progress in fighting corruption, as evidenced by the 2023 Corruption Perceptions Index.[5] Moreover, Lithuania was under a state of emergency before 24 February 2022,[6] and its fight against corruption under these conditions showed positive results. Thus, successful practices must be analysed to reveal their feasibility for implementation in Ukraine.

1 Resolution of the Verkhovna Rada of Ukrainian SSR no 1427-XII of the 24 August 1991 'On the Proclamation of Independence of Ukraine' [1991] Vidomosti Verkhovna Rada of Ukraine 38/502; Act of the Supreme Council of the Republic of Lithuania of 11 March 1990 on the Restoration of the Independent State of Lithuania 'Aktas dėl Lietuvos nepriklausomos valstybės atstatymo' <https://www.e-tar.lt/portal/lt/legalAct/TAR.12C754906DE4> accessed 29 August 2024.

2 Decree of the President of Ukraine no 64/2022 of 24 February 2022. 'On the Introduction of Martial Law in Ukraine' [2022] Official Gazette of Ukraine 46/2497.

3 'The Lithuanian Seimas has Extended the State of Emergency in the Border Area with Belarus and Russia' (*UkrInform*, 14 March 2023) <https://www.ukrinform.ua/rubric-world/3682267-sejm-litvi-prodovziv-diu-nadzvicajnogo-stanu-u-prikordonni-z-bilorussu-ta-rosieu.html> accessed 29 August 2024.

4 'The State of Emergency in Lithuania will be in Effect Until May' (*State Border Guard Service at the Ministry of the Interior of the Republic of Lithuania*, 14 March 2023) <https://vsat.lrv.lt/lt/naujienos/nepaprastoji-padetis-lietuvoje-galios-iki-geguzes/> accessed 29 August 2024.

5 'CPI-2023 Lithuania: Corruption Perceptions Index 2023' (*Transparency International Lithuania*, 2024) <https://www.transparency.org/en/countries/lithuania> accessed 29 August 2024.

6 Oleksandr Topchii, 'For the First Time in its History, Lithuania has Declared a State of Emergency over Migrants from Belarus' (*UNIAN*, 9 November 2021) <https://www.unian.ua/world/litva-vpershe-v-istoriji-zaprovadila-nadzvichayniy-stan-cherez-migrantiv-z-bilorusi-novini-svitu-11604361.html> accessed 29 August 2024.

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2 METHODOLOGY OF THE STUDY

The research methodology is based on formal legal methods and special methods of criminological research. This study applied a comprehensive approach that included a thorough analysis of Ukrainian and Lithuanian anti-corruption legislation, reports on the implementation of anti-corruption measures during the state of emergency in Lithuania and martial law in Ukraine, and content analysis of news media. The researcher surveyed 13 anti-corruption experts in Ukraine and, based on their answers and previous research materials, identified the factors contributing to the spread of corruption in Ukraine during martial law and Lithuania during its state of emergency. Survey results were also used to determine measures to control and prevent corruption during periods of exception in these countries.

3 FINDINGS

3.1. Ukraine's fight against corruption during martial law

Corruption in Ukraine was mostly caused by the fact that, after the collapse of the Soviet Union, the state system remained almost unchanged. Ukraine inherited all the management problems of a totalitarian regime. After the declaration of independence, there was no lustration – former Communist Party members were not prohibited from holding positions of responsibility in the governmental structures of the new state.[7] The old Soviet bureaucracy retained its primary right of access to privatisation, lucrative government contracts, and loans.

In the initial years of Ukraine's independence, the absence of comprehensive legislation, which merely established the foundation for new market relations, played a negative role in this process. The practice of substituting the priority of the law with numerous bylaws was widespread. Well-known Ukrainian criminologist O. Kostenko describes corruption in Ukraine as a crisis-type corruption, stemming from the broader crisis of modern Ukrainian society rather than solely from the imperfection of criminal justice. This type of corruption not only deepens the crisis of society but also negates any political, economic, legal, and moral reforms, posing a direct threat to Ukraine's national security.[8] Corruption in Ukraine is a consequence of systemic contradictions of political, moral, psychological, economic, organisational, managerial, legal, and ideological nature.

7 BM Holovkin, VV Holina and OYu Shostko, (eds), *Criminology* (Pravo 2020).

8 Oleksandr Kostenko, 'Crisis-Type Corruption: Concept and Ways of Counteraction' (2008) 18 Fight Against Organized Crime and Corruption (Theory and Practice) 136.

For a long time, a very high level of corruption has been reported in Ukraine. Until 2014, studies by international anti-corruption organisations,[9] as well as research by Ukrainian and foreign scholars,[10] recorded a low level of counteraction to these illegal acts. The situation began to improve significantly after 2014,[11] and Ukraine received 36 points out of 100 in the 2023 Corruption Perceptions Index.

First, the creation of specialised anti-corruption bodies in Ukraine stems from the provisions of Article 6 of the United Nations Convention Against Corruption (2003)[12] and Article 20 of the Criminal Law Convention on Corruption (1999)[13] for member states, both of which Ukraine ratified in 2006 and enacted in 2010. As a result, five key institutions were established: the National Agency on Corruption Prevention; the National Anti-Corruption Bureau of Ukraine; the National Agency of Ukraine for Finding, Tracing and Management of Assets Derived from Corruption and Other Crimes; Specialised Anti-corruption Prosecutor's Office; and the High Anti-Corruption Court. These institutions, each with their own distinct functions and defined jurisdictions, operate independently but with the shared mission to fight and prevent corruption. In addition, existing law enforcement agencies, such as The National Police of Ukraine, the Security Service of Ukraine and the State Bureau of Investigation, have special competencies to investigate certain categories of corruption offences. Since Russia's full-scale invasion of Ukraine in 2022, all institutions, in addition to their primary duties, have begun to perform functions aimed at protecting the state and accelerating Ukraine's victory.

Second, in accordance with the Anti-Corruption Strategy for 2014-2017,[14] reforms were introduced in various areas, such as public service, public procurement, judiciary and criminal justice, the private sector, election legislation, executive authorities, and access to information. In addition, legislation on liability for corruption offences has significantly improved. An important element of anti-corruption reform is the formation

9 'CPI-2012 Ukraine: Corruption Perceptions Index 2012' (*Transparency International Ukraine*, 5 December 2012) <https://ti-ukraine.org/en/research/cpi-2012/> accessed 20 September 2024; 'Global Corruption Barometer-2013' (*Transparency International Ukraine*, 1 March 2013) <https://ti-ukraine.org/en/research/barometr-svitovoyi-koruptsiyi-2013/> accessed 20 September 2024.

10 O Bereza, 'Corruption in the Field of Public Administration as a Deterrent to Socio-Economic Reforms' (2014) 1 Public Administration: Theory and Practice 173; Drago Kos, 'War and Corruption in Ukraine' (2022) 2 Eucrim 152, doi:10.30709/eucrim-2022-007; Fabian Teichmann, Marie-Christin Falker and Bruno S Sergi, 'Extractive Industries, Corruption and Potential Solutions: The Case of Ukraine' (2020) 69 Resources Policy 101844, doi.org/10.1016/j.resourpol.2020.101844.

11 'CPI-2023: Corruption Perceptions Index 2023' (*Transparency International Ukraine*, 2024) <https://cpi.ti-ukraine.org/en/> accessed 20 September 2024; Javier Cifuentes-Faura, 'Corruption in Ukraine During the Ukrainian-Russian War: A Decalogue of Policies to Combat it' (2024) 24(1) Journal of Public Affairs 3, doi:10.1002/pa.2905.

12 United Nations Convention Against Corruption of 31 October 2003 [2007] UNTS 2349/41.

13 Criminal Law Convention on Corruption of 27 January 1999 [1999] ETS 173/1

14 Law of Ukraine no 1699-VII of 14 October 2014 'On the Principles of State Anti-Corruption Policy in Ukraine (Anti-Corruption Strategy) for 2014-2017' [2014] Official Gazette of Ukraine 87/2473.

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of the idea of zero tolerance for corruption in society, which is one of the most important factors in combating corruption.

During the period of martial law in Ukraine, many laws and regulations have been adopted, with key amendments made to critical areas, including those related to anti-corruption. Such amendments include "On Amendments to the Criminal Code of Ukraine on Strengthening Liability for Looting", adopted on 3 February 2022 No. 2117-IX. This law amended Part 4 of Article 191 (Appropriation, embezzlement, or possession of property belonging to another by abuse of office) by adding a provision on the commission of the said offence in a state of martial law or emergency.[15]

The Law of Ukraine "On Prevention of Corruption" has also undergone numerous amendments,[16] notably with Article 3 supplemented with a new category of subjects subject to its requirements: "chairmen and members of medical and social expert commissions, as well as chairmen, their deputies, members and secretaries of freelance permanent military medical and flight commissions, who are not persons referred to in paragraph 1 of part one of this article."[17]

A significant milestone in Ukraine's anti-corruption framework is the adoption of the Anti-Corruption Strategy until 2025, as outlined in the Law of Ukraine "On the Principles of State Anti-Corruption Policy for 2021-2025" (20 June 2022 No. 2322-IX), the country's main anti-corruption document.[18] In pursuit of this strategy, the Cabinet of Ministers of Ukraine developed and adopted the State Anti-Corruption Programme for 2023-2025,[19] which includes 1187 measures to combat and prevent corruption. The programme aims to achieve significant progress in preventing and combating corruption, ensuring the coherence and systematic anti-corruption activities of all state and local governments, as well as a proper post-war recovery process in Ukraine. The listed legal acts are the most important ones for the formation and implementation of anti-corruption policies in the state; however, they are not the only ones.

A significant achievement in combatting corruption has been the creation of digital systems that facilitate citizens' access to anti-corruption information and provide the necessary measures to prevent corruption. The National Agency on Corruption Prevention has

15 Law of Ukraine no 2117-IX of 3 March 2022 'On Amendments to the Criminal Code of Ukraine on Strengthening Liability for Looting' [2022] Official Gazette of Ukraine 32/1691.

16 Law of Ukraine no 1700-VII of 14 October 2014 'On Prevention of Corruption' (amended 4 May 2024) <https://zakon.rada.gov.ua/laws/show/1700-18#Text> accessed 20 September 2024.

17 Law of Ukraine no 3384-IX of 20 September 2023 'On Amendments to Certain Laws of Ukraine on Determining the Procedure for Submitting Declarations of Persons Authorised to Perform State or Local Government Functions under Martial Law' [2023] Official Gazette of Ukraine 94/5535.

18 Law of Ukraine no 2322-IX of 20 June 2022 'On the Principles of State Anti-Corruption Policy for 2021-2025' [2022] Official Gazette of Ukraine 56/3272.

19 Resolution of the Cabinet of Ministers of Ukraine no 220 of 4 March 2023 'On Approval of the State Anti-Corruption Programme for 2023-2025' [2023] Official Gazette of Ukraine 31/1685.

developed and launched several key platforms, including the "Anti-Corruption Portal" for compliance officers and the "Single Whistleblower Reporting Portal" for persons reporting possible corruption practices.

In 2023, the NACP presented the "Information System for Monitoring the Implementation of the State Anti-Corruption Policy," allowing stakeholders to track progress on the Anti-Corruption Strategy for 2021-2025. Additionally, a "Learning Platform" featuring online anti-corruption courses was created for the public, civil servants and educators, along with a 'Knowledge Base' where the NACP provides guidance on the most common issues related to implementing anti-corruption legislation.

The "PolitData" portal, unique worldwide, discloses information on the financing of all political parties in Ukraine, with party reports expected to be submitted through the platform during elections.[20] In reaction to the full-scale invasion of Ukraine by Russian troops, the NACP also developed the "Sanctions portal" to inform foreign governments and the public about sanctions imposed on persons supporting the war, both financially and through informational means.

Ukraine has made significant progress in combatting corruption, undeterred even by the constraints of martial law. While many reforms have already been implemented, challenges remain in implementing the Anti-Corruption Strategy by 2025. An integral component of this effort includes integrating the recommendations from international anti-corruption organisations to enhance the effectiveness of anti-corruption measures.

Non-governmental organisations play a very important role in this fight. There are many anti-corruption NGOs in Ukraine, the most prominent of which are the Centre of Policy and Legal Reform, the Human Rights NGO, the Centre for Political Studies and Analysis "EIDOS", and the Anti-Corruption Platform Group of the Reanimation Package of Reforms. These organisations have significantly contributed to the development of Ukraine as a state governed by the rule of law, civil society, democratic institutions, and effective self-governance.

3.2. Lithuania's successful control and prevention of corruption during the state of emergency

The Republic of Lithuania has made substantial efforts to fight corruption since declaring independence from the Soviet Union in 1990.[21] The Corruption Perceptions Index is a good indicator of this success.[22] Lithuania has developed a robust framework of legal measures designed to fight corruption, driven largely by its integration into the European

20 Oleksandr Novikov, 'Integrity is a matter of survival for Ukraine' (*UkrInform*, 15 January 2024) <https://www.ukrinform.ua/rubric-polytics/3813501-oleksandr-novikov-golova-nacionalnogo-agentstva-z-pitan-zapobiganna-korupcii.html> accessed 20 September 2024.

21 Bryane Michael, Eleanor Kennon and Jeppe Kromann Hansen, 'The Future of Anti-corruption Measures in Lithuania' (2006) 1(16) Public Policy and Administration 7.

22 'Corruption Perceptions Index 2023' (*Transparency International*, 2024) <https://www.transparency.org/en/cpi/2023> accessed 20 September 2024.

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community.[23] The country joined the Council of Europe in 1993 and later ratified the Council's Criminal and Civil Law Conventions against Corruption in 2002 and 2003, respectively. Since 1999, Lithuania has been a member of the Council's Group of States against Corruption (GRECO) and ratified the United Nations Convention against Corruption in 2006. In 1997, an independent anti-corruption body, the Special Investigation Service of the Republic of Lithuania, was established. In 2002, the first long-term national anti-corruption program was adopted, further bolstering anti-corruption legislation. All these steps have become a solid foundation for Lithuania's successful anti-corruption policy,[24] as reflected in the improvement of corruption indices and declining reports of bribing activities.[25]

On 10 November 2021, for the first time since regaining independence in 1990, the Seimas declared a state of emergency in the country due to the critical situation with migrants on the border with Belarus. This declaration led to heightened security measures, including restrictions on vehicle traffic in the border area without border guard permission and limited access to the border area for local residents with supporting documents. On the territory where the state of emergency was introduced, the special services had the right to check people, their belongings and vehicles for illegal storage of weapons, ammunition, explosives and other dangerous substances. Rallies and various gatherings were also banned.

During this period, persons who illegally crossed the border with Lithuania were restricted in their right to correspondence and telephone calls, with exceptions for communication with consular and other state institutions. To curb unauthorised entry, Lithuanian authorities decided to build a 508-kilometre-long physical security fence on the border with Belarus.[26]

The second state of emergency was declared in Lithuania on 24 February 2022 when the Russian Federation began a large-scale invasion of Ukraine. At that time, a state of emergency was declared throughout the country and was subsequently extended several times, but only in border areas. During a state of emergency, the state registry may be used more freely to ensure the financing of relevant institutions and eliminate possible threats to national security.[27]

23 Raimundas Urbonas, 'Corruption in Lithuania' (2009) 9(1) Connections 67.

24 Dainius Velykis, 'A Diagnosis of Corruption in Lithuania' (2010) 10 ERCAS Working Paper 5 <https://www.againstcorruption.eu/publications/lithuania/> accessed 20 September 2024.

25 Ainius Lašas, *Backstage Democracy: Political Corruption and Governance* (Palgrave Macmillan 2023) 25, doi:10.1007/978-3-031-25531-1_3.

26 Oleksandr Topchii, 'For the First Time in its History, Lithuania has Declared a State of Emergency over Migrants from Belarus' (*UNIAN*, 9 November 2021) <https://www.unian.ua/world/litva-vpershe-v-istoriji-zaprovadila-nadzvichayniy-stan-cherez-migrantiv-z-bilorusi-novini-svitu-11604361.html> accessed 20 September 2024.

27 Resolution of the Parliament of the Republic of Lithuania no XIV-1789 of 14 March 2023 'On the Introduction of the State of Emergency' <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/5aaf73d2c25511ed924fd817f8fa798e?positionInSearchResults=0&searchModelUUID=ef3c6b32-fc47-414d-a1a0-574523b8ee7e> accessed 20 September 2024; The Lithuanian Seimas (n 3).

In response to Russia's invasion of Ukraine, Lithuania took urgent measures to enable contractors to avoid ties with aggressor countries and simultaneously avoid funding from these countries. On 1 April 2022, amendments to the Law on Public Procurement, the Law on Procurement by Customers in the Fields of Water Management, Energy, Transport, and Postal Services, and the Law on Public Procurement in the Field of Defense and Security came into force. Accordingly, on 31 March 2022, the Government of the Republic of Lithuania approved a list of hostile countries prepared by the Ministry of Economy and Innovation, allowing the exclusion of companies associated with these countries from public procurement tenders announced in Lithuania or the termination of contracts with them. These conditions apply in the event of mobilisation, war, or state of emergency, or when the Government of the Republic of Lithuania, having assessed the risk that the factors that led to the declaration of mobilisation, war, or state of emergency pose a threat to national security, decided to apply this provision.[28]

On 1 January 2022, a new version of the Law on Prevention of Corruption came into force, replacing the corruption-prevention model in place for almost 20 years. The new law sets out the basic principles, goals, and objectives of preventing corruption and strengthening national security by reducing the threats posed by corruption in the public and private sectors, the measures for the creation of a corruption-resistant environment and their legal basis, and the entities involved in the prevention of corruption, as well as their rights and obligations in the area of corruption prevention. The new version of the law establishes the rights, duties, and performance guarantees of the entities responsible for corruption resistance.[29]

Non-governmental organisations have also contributed to Lithuania's success, activating the public and creating awareness of and dissatisfaction with corruption. The most well-known organisations are the Human Monitoring Institute, Civil Society Institute, National Anti-Corruption Asociation (NACA), and the Development Cooperation Platform.

Overall, research shows that corruption in Lithuania is increasingly under control but remains a problem in some areas. Additionally, the ongoing war in Ukraine poses challenges for strategic national security sectors. The existing corruption risks call for vigilance and monitoring of the situation inside the country, assessment of the activities of existing companies and potential investors, and additional measures to strengthen both the anti-corruption environment in Lithuania and mutual cooperation with foreign countries in the field of international business operations.[30]

28 Leščinskaitė Aistė, 'Viešųjų pirkimų pokyčiai karo ir nepaprastosios padėties akivaizdoje' (*Teise Pro*, 12 April 2022) <https://www.teise.pro/index.php/2022/04/12/viesuju-pirkimu-pokyciai-karo-ir-nepaprastosios-padeties-akivaizdoje/> accessed 20 September 2024.

29 Special Investigation Service of the Republic of Lithuania, *Report on the Activities of the Special Investigation Service of the Republic of Lithuania, 2021* (STT 2022) <https://stt.lt/data/public/uploads/2022/06/stt-veiklos-ataskaita-2021_210x297-mm_en_web.pdf> accessed 20 September 2024.

30 Special Investigation Service of the Republic of Lithuania, *Annual Report, 2022* (STT 2023) <https://www.stt.lt/data/public/uploads/2023/06/stt_ataskaita_2022_en_web.pdf> accessed 20 September 2024.

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3.3. Interview results – Factors contributing to corruption

Identifying relevant measures aimed at combating and preventing corruption requires recognising and analysing the factors that contribute to its spread. Interviewing 13 anti-corruption experts in Ukraine revealed the factors that contributed the most to corruption during martial law. The mentioned factors included inadequate control and supervision (53.8%), increased need for funding (23.1%), lack of transparency and openness (53.8%), vulnerability and citizens' moral hazards (38.5%), and aggravation of social problems and mistrust in authorities (61.5%). The total votes exceeded 100% because the respondents were given the opportunity to select multiple answers.

Inadequate control and supervision. Anti-corruption reform efforts in Ukraine intensified in 2014, leading to the implementation of numerous measures to combat and prevent corrupt practices. The success of these measures can be seen in the reports of international anti-corruption organisations, including Transparency International Ukraine. According to the Corruption Perceptions Index, Ukraine received 32 points in 2021,[31] one point lower than its record high of 33 in 2020. However, the Russian Federation's military aggression against Ukraine interrupted most state activities in certain territories, including those aimed at combatting corruption. Here, we discuss temporarily occupied Ukrainian territories.

In the initial months of Russia's 2022 invasion of Ukraine, local governments and law enforcement agencies in temporarily occupied territories or areas of active hostility were nearly paralysed. In a country's struggle for existence, all resources naturally concentrate on defence. As Drago Kos, the Chair of the OECD Working Group on Bribery, notes, it is very difficult to expect a country under invasion to actively fight corruption. However, if parts of the country and the government continue to function in some way, then measures aimed at combating corruption should not be ignored.[32] Ukrainian defenders successfully drove Russian troops out of Kyiv, almost entirely from the Kharkiv region and later partially from the Kherson region. Restoration of essential structures is currently underway.

Simultaneously, anti-corruption institutions in the liberated territories are being restored. All anti-corruption institutions are beginning to perform not only their main functions but also additional ones aimed at accelerating Ukraine's victory. For example, in the first months of full-scale aggression, the National Agency for the Prevention of Corruption set up a Humanitarian Aid Centre, which delivered more than 250 tonnes of humanitarian aid. Some NACP staff even joined the Ukrainian Armed Forces. Together with the Ministry of Foreign Affairs of Ukraine and with the support of the National Security and Defence Council of Ukraine, a single sanctions website, "War and Sanctions", was developed, where sanction data is publicly accessible.

31 'Corruption Perceptions Index 2021' (*Transparency International Ukraine*, 25 January 2022) <https://ti-ukraine.org/en/research/corruption-perceptions-index-2021/> accessed 1 June 2024.

32 Kos (n 10).

Additionally, the National Agency on Corruption Prevention (NACP) compiled a list of sponsors of the war against Ukraine and launched a large-scale educational project called "Ukraine NOW. A Vision of the Future," engaging opinion leaders to reflect on lessons and potential missteps for Ukraine.[33] To further bolster the institutional capacity of the National Anti-Corruption Bureau of Ukraine, legislation was passed to provide an additional 300 employees in the central and territorial departments of the NABU.[34] The number of prosecutors in the Specialised Anti-Corruption Prosecutor's Office[35] and the High Anti-Corruption Court of Ukraine increased accordingly.[36]

These changes are intended to implement the following: first, the tasks assigned to Ukraine by the European Commission as a requirement for the start of negotiations on Ukraine's accession to the EU; and second, to increase the efficiency of the work of specially authorised anti-corruption bodies in the current circumstances.

Sociological surveys from 2022 reveal that Lithuanians perceive national institutions as more corrupt than those operating at the regional or local level. In the context of some public sector institutions, the legislature continues to face the highest risk of corruption, though this risk has decreased since 2021.[37] The defence sector also requires particular scrutiny, as monitoring existing anti-corruption measures is critical for addressing potential risks that may arise in the future.

Increased need for funding. Russia's invasion of Ukraine in 2022 has significantly heightened Ukraine's need for financial support to preserve its statehood. Under such circumstances, the state budget is unable to cover all needs. The key funding area is the defence sector. Despite three consecutive years of defence growth, Ukraine's current defence funding meets less than a tenth of the military's requests to the Cabinet of Ministers of Ukraine. Ukraine is currently at the limit in its ability to finance the Defence Forces. The nation is operating at its financial limits, dedicating all internal resources – including tax revenue, dividends of state-owned companies, and funds from internal borrowing – to defence, yet this remains insufficient. To bridge the gap, the government urgently needs to increase its defence budget by USD 12 billion.[38]

33 National Agency on Corruption Prevention, *Annual Report 2022* (NACP 2023) <https://nazk.gov.ua/wp-content/uploads/zvit-2022/NACP-annual-report.pdf> accessed 20 September 2024.

34 Law of Ukraine no 3502-IX of 8 December 2023 'On Amendments to Article 5 of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine" to increase the institutional capacity of the National Anti-Corruption Bureau of Ukraine' [2024] Official Gazette of Ukraine 6/252.

35 Law of Ukraine no 3409-IX of 8 December 2023 'On Amendments to the Criminal Procedure Code of Ukraine and Other Legislative Acts of Ukraine to Strengthen the Independence of the Specialised Anti-Corruption Prosecutor's Office' [2024] Official Gazette of Ukraine 6/255.

36 'High Council of Justice Increases the Number of Judges of the High Anti-Corruption Court' (*High Council of Justice*, 26 September 2023) <https://hcj.gov.ua/news/vrp-zbilshyla-chyselnist-suddiv-vyshchogo-antykorupciynogo-sudu> accessed 20 September 2024.

37 Special Investigation Service of the Republic of Lithuania (n 30).

38 Yaroslav Vynokurov, 'Half a Trillion for the War: When Are the Authorities Going to Raise Taxes and Is There an Alternative?' (*Ekonomichna Pravda*, 3 July 2024) <https://www.epravda.com.ua/publications/2024/07/3/716119/> accessed 20 September 2024.

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Further budgetary assistance is crucial to ensure social welfare expenditures, humanitarian aid, and support for internally displaced persons, businesses, etc. According to Ukraine's Minister of Finance, the monthly need for external financing will reach approximately USD 3 billion by 2024.[39] Thus, Ukraine must receive timely international financial support to ensure its survival and defence capabilities. Between 29 June 2023 and 24 February 2022, Ukraine received almost EUR 170 billion from international partners,[40] encompassing military, financial, and humanitarian aid provided by foreign governments and international financial organisations.[41]

Unfortunately, such significant financial resources can incentivise corruption, especially among those with the authority to manage public funds. Some concerns about the security of financial support to Ukraine have been expressed by representatives of partner countries, as well as experts and scholars.[42] The Chair of the OECD Working Group on Bribery, Drago Kos, emphasises that Ukraine is currently receiving significant amounts of military, humanitarian, and financial support from abroad. In this regard, the Government of Ukraine should focus on establishing a credible system for the effective management of foreign aid to ensure that it is distributed and delivered to the populations and armed forces that need it most. In addition, the main focus should be on the military effort.[43] Simultaneously, the heads of Ukraine's anti-corruption institutions and international experts noted the positive results of the fight against corruption over the past ten years.[44]

39 Ministry of Finance of Ukraine, 'International Cooperation is Important for Winning the War: Sergii Marchenko at Meeting of G7 Financial Bloc' (*Government Portal*, 28 February 2024) <https://www.kmu.gov.ua/en/news/mizhnarodna-spivpratsia-vazhlyva-dlia-peremohy-u-viini-serhii-marchenko-pid-chas-zustrichi-finbloku-g7> accessed 20 September 2024.

40 '170 billion in international aid to Ukraine' (*Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine*, 29 June 2023) <https://minre.gov.ua/en/2023/06/29/170-billion-in-international-aid-to-ukraine/> accessed 20 September 2024.

41 Pietro Bomprezzi, Ivan Kharitonov and Christoph Trebesch, 'Ukraine Support Tracker: Methodological Update & New Results on Aid "Allocation"' (*IfW Kiel Institute for the World Economy*, June 2024) <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/> accessed 20 September 2024.

42 Oksana Muzychenko, 'The West is Not Satisfied with Ukraine's Anti-Corruption Efforts: Does this Threaten Aid - The Washington Post' (*TSN*, 20 June 2024) <https://tsn.ua/ukrayina/na-zahodi-nezadovoleni-antikorupciynimi-zusillyami-ukrayini-chi-zagrozhuye-ce-dopomozi-the-washington-post-2604501.html> accessed 20 September 2024; Nahal Toosi, 'Leaked US Strategy on Ukraine Sees Corruption as the Real Threat' (*Politico*, 2 October 2023) <https://www.politico.com/news/2023/10/02/biden-admin-ukraine-strategy-corruption-00119237> accessed 20 September 2024; 'Ukraine Claims to be Winning its War on Corruption. The West Says: Do More' (*Washington Post*, 19 June 2024) <https://www.washingtonpost.com/world/2024/06/19/ukraine-corruption-us-accountability-war/> accessed 20 September 2024.

43 Kos (n 10).

44 CPI-2023 (n 11); Novikov (n 20); 'Progress in the Fight Against Corruption and Judicial Reform in Ukraine' (*Basel Institute on Governance*, June 2024) <https://baselgovernance.org/publications/progress-ukraines-anti-corruption-and-judicial-reform-efforts-update-ukraine-recovery> accessed 20 September 2024.

Thus, there are substantial grounds for the successful implementation of an anti-corruption strategy in Ukraine.

Lithuania received no significant financial assistance during its state of emergency. However, given martial law in Ukraine, the activities of companies and potential investors should continue to be monitored. As the Special Investigation Service of the Republic of Lithuania (STT) notes, the risks remain relevant but manageable and are associated with investments involving Belarus, Russian citizens, and companies (acting directly or indirectly through intermediaries) and their desire to establish themselves in strategic, national security-critical sectors (including energy, communications, and information technology), which would give these companies, often associated with undemocratic regimes, the opportunity to not only gain access to information about the critical infrastructure of the Republic of Lithuania[45] but also delay the implementation of important projects.

Lack of transparency and openness. The Open Data Maturity Report 2021 ranked[46] Ukraine 6th among European countries in terms of open data development. However, owing to the Russian invasion of Ukraine on 24 February 2022, the State Enterprise National Information Systems temporarily suspended the operation of Unified and State Registers, which are under the jurisdiction of the Ministry of Justice of Ukraine. This suspension halted real estate transactions, the establishment and registration of legal entities, individual entrepreneurs, and civil associations, as well as notarial acts, public procurement processes, and verification of participants in public procurement. Such restrictions were introduced because of the high probability of unauthorised interference with the registers by the aggressor state during martial law, posing a potential threat to the security of citizens, businesses, and the state.[47]

Unfortunately, the lack of transparency and openness of data on the activities of government and local self-government bodies may lead to increased corruption risks because society and the media have fewer opportunities to monitor their actions.

Moreover, on 7 March 2022, Law No. 2115-IX came into force, postponing the deadline for submitting all reporting documents to three months after the end of martial law. On the same day, the NACP officially clarified that the provisions of this law also apply to *electronic declarations.* A few months later, the Verkhovna Rada supplemented the final provisions of the Law on Prevention of Corruption with a new paragraph (2-7), which allowed e-declarations due during martial law to be submitted within 90 days of the date of termination or cancellation of martial law. In other words, there was a technical possibility of filing a declaration in the register, but there was no obligation to do so under martial law.

45 Special Investigation Service of the Republic of Lithuania (n 30).

46 Daphne van Hesteren and others, *Open Data Maturity Report 2021* (EU Publ Office 2021) 5, doi:10.2830/394148.

47 Aliona Hryshko, 'Registers and War: Striking a Balance between Transparency and Security' (*Vox Ukraine*, 12 September 2022) <https://voxukraine.org/vidkryti-dani-i-vijna-poshuk-balansu-mizh-prozoristyu-ta-bezpekoyu> accessed 20 September 2024.

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The absence of mandatory submission of e-declarations by declaring entities has raised significant concerns among Ukrainian society and the international community, as it could potentially allow dishonest officials to conceal their illegally gained income and avoid monitoring by the anti-corruption authorities and society. Moreover, the International Monetary Fund (IMF) highlighted on the 31 March 2023 memorandum that failing to reinstate e-declarations for public officials not engaged in hostilities could jeopardise Ukraine's IMF credit support. Additionally, Ukraine's EU candidate status hinges on the fulfilment of seven criteria, one of which is the prevention and combating of corruption.[48]

Finally, on 12 October 2023, the Law of Ukraine "On Amendments to Certain Laws of Ukraine on Determining the Procedure for Submitting Declarations of Persons Authorised to Perform the Functions of the State or Local Self-Government under Martial Law" dated 20 September 2023 No. 3384-IX came into force, restoring the mandatory electronic declaration during martial law.[49] The law now requires declarants who did not submit a declaration of a person authorised to perform state or local government functions in 2022-2023 to submit relevant declarations no later than 31 January 2024. Simultaneously, prisoners of war and citizens in temporarily occupied territories do not have to file declarations until martial law is lifted or the territories are liberated. The declarations are to be submitted no later than 90 days after the liberation of the territory or the return to the territory controlled by Ukraine. Declarants who, as a result of injuries, contusions, and diseases related to the performance of military service duties, are undergoing inpatient treatment (including abroad) or are on leave for treatment and/or rehabilitation must submit declarations no later than 90 days after the end of treatment or leave.[50]

Civil society organisations and the media have repeatedly stated that there is a line between security issues and the accountability of state and local government bodies.[51] After all, the war and COVID-19 have created opportunities for politicians, officials, and judges to hide data and block public control over their work. Only in certain clearly defined cases can restrictions on access to information be justified in times of war.[52] Over time, and with the success of the Armed Forces of Ukraine on the frontline, access to registers and databases can be gradually restored, first to civil servants and then to the public, starting in the summer of 2022.

48 Anatolii Pashynskyi, 'Why Ukraine Needs to Restore e-Declaration' (*Ekonomichna Pravda*, 24 July 2023) <https://www.epravda.com.ua/columns/2023/07/24/702512/> accessed 20 September 2024.

49 Law of Ukraine no 3384-IX (n 17).

50 'E-Declaration of Income During Martial Law and Anti-Corruption Mechanisms Restored' (*Liga Zakon*, 12 October 2023) <https://buh.ligazakon.net/news/222758_vdnovleno-e-deklaruvannya-dokhodv-pd-chas-vonnogo-stanu-ta-dyu-antikoruptsynikh-mekhanzmv> accessed 20 September 2024.

51 Oleksandr Salizhenko, 'War and Open Data: Where Is the Line Between Danger and Accountability?' (*LB.ua*, 27 October 2022) <https://lb.ua/blog/oleksandr_salizhenko/533930_viyna_i_vidkriti_dani_de_mezha_mizh.html> accessed 20 September 2024.

52 'The Public Demands to Open Registers and Renew Access to Public Information – A Statement' (*BRDO*, 6 March 2022) <https://brdo.com.ua/news/gromadskist-vymagaye-vidkryty-reyestry-ta-ponovyty-dostup-do-publichnoyi-informatsiyi-zayava/> accessed 20 September 2024.

The issues of transparency and data openness are relevant for all countries, even those that have achieved significant success in fighting corruption. In Lithuania, for example, in 2022, fewer businesses complained that corrupt practices had prevented their company from winning a public tender than in the last three years.[53] This has been made possible by the strong control of public procurement procedures.

Closed state registries and a lack of access to socially important data lead to corruption, a lack of accountability and responsibility, and, most importantly, a loss of trust in key state institutions.

Vulnerability and citizens' moral hazards. The situation of emergency and marital law causes significant stress and anxiety in the country's population by necessitating major changes in one's way of life and the need to adapt to new living, working, and everyday conditions. These changes were particularly acute for the IDPs fleeing temporarily occupied territories, areas of active hostility, and areas with a high degree of insecurity. The entire population of the country is also experiencing tension, uncertainty, and numerous difficulties. These circumstances have led to a state of vulnerability in the population, including corruption. Unfortunately, these cases are common when social benefits, medical services, or other vital resources are provided.

A 2022 survey of the Ukrainian population identified the areas where respondents most often encountered corruption. These areas include humanitarian aid, education, public and municipal healthcare, and administrative services.[54] The moral and psychological state of the country's population plays an essential role in vulnerability to corruption. Sociological research by the National Institute for Strategic Studies found that 71% of Ukrainians felt stressed or nervous. Among the reasons, the first was the Russian invasion in 2022, and the second was financial hardship. Key war-related stressors included concern for relatives' safety and the loss of work or income[55]. Thus, these problems during a state of emergency and martial law may encourage some individuals to resort to bribery and engage in other corrupt practices to secure essential resources for themselves and their loved ones.

Living under a state of emergency is generally less traumatic than living under martial law. A state of emergency is usually declared to strengthen control in problem territories and introduce certain restrictions and prohibitions. If the event leading to the declaration has no fatalities, the overall stress on the population remains low. While circumstances leading to the declaration are important, the psychological state of the population remains largely unchanged, which can help maintain social stability.

53 Special Investigation Service of the Republic of Lithuania (n 30).

54 National Agency on Corruption Prevention, *Corruption in Ukraine 2022: Understanding, Perception, Prevalence: Report on the Results of the Survey* (NACP 2023) <https://nazk.gov.ua/wp-content/uploads/2023/04/1f23b766-e031-4c3f-81a4-0167b4f93116.pdf> accessed 20 September 2024.

55 'Support for Mental Health in Times of War' (*National Institute for Strategic Studies*, 27 June 2023) <https://niss.gov.ua/en/node/4977> accessed 20 September 2024.

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Today, Lithuania has high anti-corruption potential. Every year, positive changes are recorded, and the public is becoming increasingly aware of the importance of its contribution to the creation of an anti-corruption environment.[56] According to Lithuanian research, the number of reports from citizens about possible facts of corruption is increasing every year. This, in turn, indicates an increase in public confidence in the police, STT, and media. However, there are some limitations in this area. Many people fear reporting corruption because they believe it will be difficult to prove and/or pointless to report because those responsible for corruption will not be punished.[57] Therefore, the decision not to report is mainly made due to a lack of trust in justice and a belief in prevailing impunity.

3.4. Preventative measures

Based on the results of the author's anonymous survey of experts, an analysis of the factors that contributed to the spread of corruption in Ukraine during martial law and in Lithuania during the state of emergency allowed us to identify measures to counteract and prevent corruption during this period. Anti-corruption experts identified the following areas for preventing and combating corruption during martial law in Ukraine: strengthening the independence of anti-corruption bodies (92.3%), increasing the transparency of government activities (53.8%), disseminating anti-corruption education (46.2%), cooperating internationally to combat corruption (38.5%), and strengthening public control (38.5%). The total percentage sum was higher than 100% because the respondents were given the opportunity to select multiple answers.

The institutional capacity and independence of anti-corruption bodies are the keys to successfully combating corrupt practices. Therefore, anti-corruption institutions must possess the necessary powers, access to data and registers, and a certain degree of sanction for offenders to perform their duties effectively.

Thus, based on the 2023 Corruption Perceptions Index results, TI Ukraine provides recommendations that could help improve anti-corruption activities in 2024. These recommendations cover three areas of work: increasing the effectiveness of the fight against grand corruption, effective use of the assets of corrupt officials and Russia's associates for the needs of the state, and launching the reform of the Accounting Chamber and State Audit Service of Ukraine.[58] Today, it is important to increase the capacity and conduct an objective competitive selection of employees of the National Anti-Corruption

56 'Map of Corruption in Lithuania 2022/2023: Public Anti-Corruption Stance Is Strengthening, though the Willingness to Report Cases of Corruption Remains a Challenge' (*Special Investigation Service of the Republic of Lithuania*, 3 July 2023) <https://www.stt.lt/en/news/7481/_2023/map-of-corruption-in-lithuania-2022-2023-public-anti-corruption-stance-is-strengthening-though-the-willingness-to-report-cases-of-corruption-remains-a-challenge:3609> accessed 20 September 2024.

57 Special Investigation Service of the Republic of Lithuania (n 30).

58 'Corruption Perceptions Index - 2023' (*Transparency International Ukraine*, 30 January 2024) <https://ti-ukraine.org/research/indeks-spryjnyattya-koruptsiyi-2023/> accessed 20 September 2024.

Bureau of Ukraine, prosecutors of the Specialised Anti-Corruption Prosecutor's Office, and judges of the High Anti-Corruption Court.

The Special Investigation Service of the Republic of Lithuania (STT) assesses investors and parties for transactions to help protect the state's interests in strategically important sectors of the economy related to national security. Thus, by 2023, 842 assessments had been conducted on individuals and legal entities seeking to invest or enter into transactions in the financial and credit sectors, transport, energy, and military industries. There is a tendency for some individuals or organisations to manipulate hard-to-reach data to conceal ties with hostile states. In 2023, the STT analysed data contained in state registers and information systems, comparing this data with other information available to them, to identify possible threats and risks of corruption and threats in areas of national security, energy, transport, healthcare, agriculture, and political activity.[59]

Although Lithuania has made significant progress in anti-corruption efforts, there is still more work to be done. In particular, experts from the Organisation for Economic Co-operation and Development (OECD) provided the following recommendations to Lithuania as part of the technical support project: Effective Implementation of the National Anti-Corruption Strategy.[60] These include developing anti-corruption activities in municipalities, providing law enforcement agencies wider access to data registers, and implementing more effective sanctions for corruption offences and corruption in the private sector.

Transparency and openness of public authorities and local self-governing bodies. During a state of emergency and martial law, the likelihood of corrupt decision-making practices and resource use increases, which also applies to public procurement. Therefore, it is necessary to focus on these issues. The disclosure of this information does not harm national interests or security.

On 2 February 2024, the Government of Ukraine approved the Public Procurement System Reform Strategy for 2024-2026 and approved the operational plan for its implementation in 2024-2025. However, according to TI Ukraine experts, the strategy currently does not address a number of important problems in the sector, such as insufficient transparency in the formation of the expected value and value of direct contracts and insufficient transparency in the execution of contracts.[61]

59 National Agency on Corruption Prevention, *Report on the Activities of the National Agency on Corruption Prevention for 2023* (NACP 2024) <https://drive.google.com/file/d/1gOEkDfh5Y3L2R48wc2s0hgDbN6qUhVXT/view> accessed 20 September 2024.

60 'OECD Experts Prepare Recommendations for Lithuania to Develop and Improve Measures to Prevent Corruption' (*Special Investigation Service of the Republic of Lithuania*, 4 April 2023) <https://stt.lt/naujienos/7464/ebpo-ekspertai-parenge-rekomendacijas-lietuvai-pletojant-ir-tobulinant-korupcijos-prevencijos-priemones:3563> accessed 20 September 2024; OECD, *Review of Lithuania's National Agenda on the Prevention of Corruption: Strengthening Public Sector Integrity Strategies* (OECD Public Governance Reviews 2023) doi:10.1787/e6efed26-en.

61 'Public Procurement 2023: Functioning of the Field and Changes to It' (*Transparency International Ukraine*, 16 May 2024) <https://ti-ukraine.org/en/research/public-procurement-2023-functioning-of-the-field-and-changes-to-it/> accessed 20 September 2024.

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Lithuania also supports the view that the introduction of sufficient controls and the prevention of corruption in public procurement procedures reduces the risks of state vulnerability, as public procurement often becomes one of the areas through which opaque financial interest groups, some of which are linked to business or third-country governments, can carry out state capture, thus weakening the state of national security.[62] Thus, the indicators showing an increase in the transparency of public procurement procedures in Lithuania indicate that the risks in this sector are well managed from the perspective of national security.

Anti-corruption education and awareness among various groups of the population contribute to the formation of anti-corruption attitudes, reduced tolerance of corruption, and decreased likelihood of corrupt practices. Therefore, countries need to pay significant attention to this area.

Anti-corruption education in Ukraine has always been integral to modern anti-corruption policies. This is reflected in key anti-corruption legal acts. Since 2014, many measures have been taken to raise public awareness of anti-corruption practices.[63] Even under martial law, the implementation of the Anti-Corruption Strategy in Ukraine for 2021-2025 continues, including relevant exercises. In 2023, the National Agency for the Prevention of Corruption developed nine training courses. The "Good Government" training program was presented to civil servants, representatives of local authorities, police officers, judges, and deputies. In addition, a community of educators was formed, united by the value of integrity, and committed to implementing this value in the educational process on a daily basis. Currently, the community comprises twelve hubs and more than 280 schools.[64]

The Republic of Lithuania also actively conducts various activities aimed at raising citizens' awareness about the need to prevent and combat corruption. One such initiative is the "Transparency Academy" project, launched under the direction of the President of the Republic of Lithuania in cooperation with STT. The project involved 21 organisations and 19 mentors and organised 11 events to share best practices in transparency with approximately 3,000 participants.[65] Also, in 2023, STT, in cooperation with the Young Doctors Association (JGA), launched the social campaign "To Give or Not to Give".[66] This campaign aimed to encourage dialogue between doctors

62 Special Investigation Service of the Republic of Lithuania (n 30).

63 Kateryna Kulyk, 'The Current Situation and Prospects of Education in the Field of Preventing and Combating Corruption in Ukraine' (2023) in Valentyna Smachylo and Oleksandr Nestorenko (eds), *Modern Approaches to Ensuring Sustainable Development* (University of Technology in Katowice Press 2023) 584.

64 National Agency on Corruption Prevention (n 59).

65 Special Investigation Service of the Republic of Lithuania (n 30).

66 Special Investigation Service of the Republic of Lithuania, *Annual Report, 2023* (STT 2024) <https://www.stt.lt/data/public/uploads/2024/04/stt_veiklos_ataskaita_2023.pdf> accessed 20 September 2024.

and patients, drawing attention to the importance of transparency in the healthcare sector and the negative emotions caused by bribes.

It is important to note that only a few projects have been implemented by anti-corruption institutions to raise public awareness of anti-corruption issues. Continued focus on this area of corruption prevention is essential. Citizens, business representatives, non-governmental organisations, the media, and the academic community should all be involved in these initiatives. Only through joint efforts can we accelerate the process of building zero tolerance for corruption and create a sustainable anti-corruption society.

International cooperation played an important role in combating and preventing corruption during martial law or states of emergency in Ukraine and Lithuania. Countries should collaborate to share best practices and intelligence and strengthen the implementation of international legal instruments such as the United Nations Convention against Corruption to prevent and investigate corrupt practices. By exchanging best practices, information, and experiences, countries can develop standardised guidelines and procedures that promote transparency and accountability. This reduces opportunities for corrupt practices and increases the chances of detecting and preventing irregularities.

Ukraine's accession to the European Union in 2022 was a significant step towards its overall development and strengthening of its anti-corruption legislation, bringing it into compliance with European standards. Ukraine committed itself to implementing the recommendations of both the European Commission and all international anti-corruption organisations. For instance, the latest report submitted by Ukraine to GRECO shows that certain improvements have been made, having implemented 15 out of 31 recommendations satisfactorily despite martial law. These data were confirmed using GRECO software. Of the remaining recommendations, nine were partially implemented, and seven were not.[67] One of the important areas of cooperation between Ukraine and the Organisation for Economic Co-operation and Development's (OECD/OECD) Anti-Corruption Network for Eastern Europe and Central Asia (ACN) is the implementation of recommendations received in the framework of regular monitoring of the Istanbul Anti-Corruption Action Plan. Over the past two years, Ukraine has been actively involved in developing an evaluation methodology for the new 5th round of monitoring.

Each year, Lithuania actively participates in the activities of international organisations, such as the OECD, GRECO, the European Union, and the UN. Thus, the Special Investigation Service of the Republic of Lithuania's director was elected President of the European Partners Against Corruption and the European Contact-point Network Against Corruption (EPAC/EACN). Lithuania also participates in the Organisation for Economic Co-operation and Development, the Council of Europe, the European Union, and the UN.

67 'Council of Europe Removes Ukraine from Black List of Countries That Prevent Combating Corruption' (*European Pravda*, 24 March 2023) <https://www.eurointegration.com.ua/eng/news/2023/03/24/7158592/> accessed 20 September 2024.

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STT is the lead partner in EU TWINNING projects in Jordan and Azerbaijan. Baltic-American Freedom Foundation Project "Preventing, Detecting and Investigating Foreign Bribery" was won by Lithuania.[68]

Special attention should be paid *to preventing corruption during Ukraine's reconstruction***.** As of 31 December 2023, Ukraine's recovery and reconstruction needs are estimated to be almost USD 486 billion. Considering almost two years of the war, as of 31 December 2023, direct damage has reached almost USD 152 billion, with housing, transport, commerce and industry, agriculture, and energy being the sectors most affected.[69] The destruction of the Kakhovka hydroelectric dam and hydroelectric power station by Russian troops in June 2023 significantly harmed the environment and agriculture and exacerbated the challenges faced by people in securing access to housing, water, food, and healthcare.[70] In addition, the Russian Federation's military aggression against Ukraine led to the destruction of its natural resources, ecosystems, and infrastructure. As of January 2023, according to the Ministry of Environmental Protection and Natural Resources of Ukraine, 2278 reports of environmental crimes in Ukraine have been recorded, and the estimated cost of the minimum damage was UAH 441 billion.[71] Thus, we see a real ecocide committed by the Russian military, for which they should be held criminally liable.

According to the 2023 TI Ukraine Research on Expectations of Future Reconstruction[72] conducted by TI Ukraine and involving both citizens and businesses, 73% of Ukrainians and 80% of business representatives were most concerned about the return of corruption schemes to the reconstruction process. Another 63% of citizens and 73% of entrepreneurs fear a lack of control over this process and, as a result, the theft of public funds.[73] International partners are also concerned about fighting corruption in the post-war period,

68 Special Investigation Service of the Republic of Lithuania (n 29).

69 Anne Himmelfarb (ed), *Ukraine Rapid Damage and Needs Assessment (RDNA3), February 2022 – December 2023* (World Bank 2024) <https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/099021324115085807/p1801741bea12c012189ca16d95d8c2556a> accessed 20 September 2024.

70 Kateryna Totska, 'How Much Money Does Ukraine Need for Recovery?' (*Investory News*, 15 February 2024) <https://investory.news/skilki-koshtiv-potribno-ukraini-dlya-vidnovlennya/> accessed 20 September 2024.

71 Sergiy O Kharytonov and others, 'Criminal Responsibility for Ecocide Resulting from the Military Aggression of Russia' (2024) 14(1) European Journal of Environmental Sciences 24, doi:10.14712/23361964.2024.3.

72 'How to Restore Ukraine: A Research of Citizens and Business Representatives' (*Transparency International Ukraine*, 14 June 2023) <https://drive.google.com/file/d/1v30npi8x6bK1ghKIoIaSFG9ZxyvNZxqQ/view> accessed 20 September 2024.

73 Kateryna Ryzhenko, 'Four Pillars of Recovery: How to Prevent Corruption from "Devouring" Reconstruction?' (Transparency International Ukraine, 26 June 2023) <https://ti-ukraine.org/en/blogs/four-pillars-of-recovery-how-to-prevent-corruption-from-devouring-reconstruction/> accessed 20 September 2024.

which will affect their cooperation and funding. In this regard, considerable attention should be paid to preventing corruption.

Experts from the NACP, together with the Institute for Applied Humanitarian Research, modelled possible corruption risks that may arise in the future. The NACP has also proposed recommendations for implementing preventive measures and ensuring transparent reconstruction.

These corruption risks include corruption practices based on falsification of data entered into the Register of Damaged and Destroyed Property as a Result of Hostilities; corruption in the activities of the Compensation Review Commissions; corrupt practices at the stage of recording the facts of damage/destruction, inspecting the damage to the facility and drawing up a preliminary conclusion on the technical condition regarding the possibility/impossibility of operating (restoring) the facility; and possibilities of corrupt practices in the activities of the Fund for Elimination of the Consequences of Armed Aggression and the Fund for Restoration of Destroyed Property and Infrastructure,[74] etc.[75]

Additionally, Transparency International Ukraine, together with the Basel Institute on Governance, prepared recommendations for strengthening anti-corruption measures to ensure the country's transparent recovery. These measures include increasing the institutional capacity of anti-corruption bodies, reforming the judiciary and Constitutional Court, asset recovery, and increasing transparency in public procurement.[76]

In 2023, the population also expressed their opinions on the future housing development in Ukraine. The Info Sapiens research agency surveyed citizens and business representatives at the request of Transparency International Ukraine, with the support of the USAID Project "Support to Anti-Corruption Champion Organisations in Ukraine" (VzaemoDia). The majority of respondents identified several key priorities for reconstruction: decentralisation of funds, advanced reconstruction strategy, transparency and openness of reconstruction, involvement of citizens and businesses, and quality of work.[77]

74 National Agency on Corruption Prevention, *Corruption Risks of Restoration of Real Estate Damaged/Destroyed As a Result of the Armed Aggression of the Russian Federation: Modelling and Proposals for Their Minimisation/Elimination* (NACP 2023) <https://nazk.gov.ua/wp-content/uploads/2023/06/vidbudova.pdf> accessed 20 September 2024.

75 'Eight Possible Corruption Risks During Reconstruction: Research and Recommendations of the NACP' (*National Agency on Corruption Prevention*, 19 June 2023) <https://nazk.gov.ua/en/news/eight-possible-corruption-risks-during-reconstruction-research-and-recommendations-of-the-nacp/> accessed 20 September 2024.

76 Basel Institute on Governance, 'Increasing Anti-Corruption Measures to Ensure Ukraine's Reconstruction' (*Transparency International Ukraine*, June 2023) <https://drive.google.com/file/d/18qkCI-4b567SGk25Yy-E28u-59lZGwIl/view> accessed 20 September 2024.

77 How to Restore Ukraine (n 72).

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4 CONCLUSIONS

The United Nations General Assembly Human Rights Committee recognises that fighting corruption is integral to national security.[78] In its 2020 Rule of Law Report,[79] the European Commission stressed that effective anti-corruption efforts are cornerstones of democracy and the rule of law. These values are particularly essential when a country is in a state of emergency or under martial law, as such circumstances can significantly impact both the lives of the population and the state as a whole. During this period, the risk of corrupt practices tends to rise due to factors such as inadequate control and supervision, an increased need for funding, lack of transparency and openness, vulnerability and citizens' moral hazards, aggravation of social problems, and mistrust in authorities.

Analysing these factors during martial law in Ukraine and the state of emergency in Lithuania produced recommendations for future corruption control and prevention measures. These measures include strengthening the independence of anti-corruption bodies, increasing the transparency of government activities, disseminating anti-corruption education, promoting international cooperation in combating corruption, and strengthening public control. It is also important to pay attention to the prevention of corruption during Ukraine's restoration by actively engaging international experts and business and civil society representatives throughout this process.

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78 OHCHR, 'Study on Common Challenges Facing States in Their Efforts to Secure Democracy and the Rule of Law From a Human Rights Perspective: Report of the United Nations High Commissioner for Human Rights' (2012) <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.29_English.pdf> accessed 20 September 2024.

79 Directorate-General for Justice and Consumers, '2020 Rule of Law Report - Communication and Country Chapters' (*European Commission*, 30 September 2020) <https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en> accessed 20 September 2024.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗДІЙСНЕННЯ КОНТРОЛЮ ТА ЗАПОБІЖНИХ ЗАХОДІВ ЩОДО КОРУПЦІЙНИХ ЗЛОЧИНІВ В УКРАЇНІ ТА ЛИТВІ ПІД ЧАС НАДЗВИЧАЙНОГО ТА ВОЄННОГО СТАНУ

Катерина Кулик

АНОТАЦІЯ

Вступ. *Воєнний стан в Україні та надзвичайний стан у Литві призвели до змін у повсякденному житті багатьох жителів цих країн. Обставини, які зумовили необхідність запровадити ці спеціальні режими, також підвищили ризик протиправної діяльності, зокрема корупції, на цих територіях.*

Методи. *У цьому дослідженні було застосовано комплексний підхід, який охоплює ретельне вивчення українського та литовського антикорупційного законодавства, звіти про впровадження антикорупційних заходів під час надзвичайного стану в Литві та воєнного стану в Україні, а також контент-аналіз новинних ЗМІ. Дослідниця опитала 13 антикорупційних експертів в Україні та на основі їхніх відповідей і матеріалів попередніх досліджень визначила чинники, які сприяють поширенню корупції в Україні під час воєнного стану та в Литві під час надзвичайного стану. Результати опитування також були використані для того, щоб окреслити заходи контролю та запобігання корупції під час зазначених правових режимів у цих країнах.*

Результати та висновки. *Дослідження корупції в цьому контексті дозволяє зрозуміти чинники, які сприяють її поширенню. Антикорупційні експерти з України виокремили такі фактори як найбільші чинники, що сприяють корупції: неналежний контроль і нагляд (53,8%), підвищена потреба у фінансуванні (23,1%), відсутність прозорості та відкритості (53,8%), вразливість і моральні ризики громадян (38,5%), загострення соціальних проблем і недовіра до влади (61,5%). Аналіз цих данних дав змогу надати рекомендації щодо посилення контролю та запобігання корупційним правопорушенням в Україні та Литві. Ці заходи спрямовані на те, щоб посилити незалежність антикорупційних органів, підвищити прозорість діяльності уряду, поширювати антикорупційну освіту, сприяти міжнародній співпраці у боротьбі з корупцією та посилити громадський контроль.*

Ключові слова: *корупція, корупційні ризики, воєнний стан, надзвичайний стан, контроль за корупцією, запобігання корупції.*

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Review Article

ISSUES OF PROVIDING GUARANTEES AND SOCIAL PROTECTION FOR EAEU LABOUR MIGRANTS

Mereke Zhurunova

ABSTRACT

Background: *Today, the Eurasian Economic Union (hereinafter the EAEU) has formed its own labour market; however, in the current international environment, issues related to ensuring the health protection of migrants and their access to employment persist. Despite ongoing efforts within the EAEU to develop and deepen Eurasian integration and improve the regulatory framework, there is a need in the age of digitalisation to develop better access for workers to social protection and medical support systems.*

The relevance of this scientific article lies in the presence of problematic issues related to the fact that many migrants are not registered and lack the documentation to protect them legally and financially; this situation contributes to the development of informal employment and low labour productivity. Although the EAEU countries have established working and socio-economic conditions, the issue of ensuring health protection, access to work, and social protection for labour migrants remains unsolved.

Methods: *This article employs various methods of scientific cognition, including historical and legal analysis, comparative legal study, induction and deduction, as well as analysis and synthesis. It also applies the acts and regulations of the ILO.*

What is the role of protecting the socio-economic and labour rights of migrant workers as the main task of receiving states?

In law enforcement practice, to what extent do the provisions of international agreements on the organised hiring of workers between receiving countries and countries of origin of migrants ensure the adaptation of migrants to the legal regime of the host country, the participation of migrants in the functioning of civil society institutions, and the monitoring of migration processes?

How does national regulation of labour migration in integration associations of states rationally organise their actions on the principles of national treatment for migrant workers?

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Labour migration strengthens integration unions, creating strong social ties and developing civil society institutions within the boundaries of integration associations. Since state sovereignty is inextricably linked to the protection of the interests of fellow citizens in regulating labour migration, all states participating in regional integration are called upon not only to protect the rights of migrant workers but also to provide all conditions for migrants to fulfil their obligations to civil society.

The study examined the free movement and provision of labour and social guarantees for labour migrants in the EAEU and compared their situation in the EU. It also surveyed labour migrants in the EAEU by questioning workers in education, medical care, and various private sectors. This article is based on the results of this study.

This article examined the challenges in providing guarantees and social protection for EAEU labour migrants. It proposed improvements to legal regulatory mechanisms and outlined recommendations for improving and expanding opportunities for free movement while better safeguarding the social and labour rights of migrants in the EAEU. The study's primary objectives were as follows:

- *Examining the provisions of the ILO Convention on migrant workers.*
- *Collecting and analysing data on labour movement across the EAEU*
- *Analysing international EU treaties regarding the legal status of migrant workers*
- *Interviewing migrant workers in the EAEU on issues related to their provision of rights and guarantees under the EAEU Treaty.*

Results and conclusions: *This study highlights the need to organise safe labour migration, provide labour migrants with full access to digital services, improve the system of vocational and technical education in line with labour market demands, as well as develop and implement a unified system for ensuring the safety of workers and their families. Successful adaptation in the host country is identified as a critical factor for both labour migrants and their families.*

The authors recommend adding a dedicated chapter to the EAEU treaty that would comprehensively address labour and social rights, along with their guarantees.

1 INTRODUCTION

The history of the EAEU creation began with the signing of the EAEU Treaty in 2014, which came into force on 1 January 2015. Many problems labour migrants previously faced within the Customs Union and the Common Economic Space were settled by the EAEU Treaty.[1]

Economic integration in the EAEU is based on creating a single labour market, which should guarantee freedom of movement of labour migrants within the Union member states.

1 Treaty on the Eurasian Economic Union of 29 May 2014 (amended 7 June 2024) (EAEU Treaty) <https://online.zakon.kz/document/?doc_id=31565247> accessed 11 May 2024.

At the same time, it is worth noting that unhindered free movement was previously ensured under the framework of the Agreement between the Government of the Republic of Belarus (hereinafter: RB), the Government of the Republic of Kazakhstan (hereinafter: RK), the Government of the Kyrgyz Republic (hereinafter: KR), the Government of the Russian Federation (hereinafter: RF) and the Government of the Republic of Tajikistan (hereinafter: RT) on mutual visa-free travel of citizens dated 30 November 2000.[2] In other words, this agreement on free movement was in force before the creation of the EAEU. Following the establishment of the EAEU, citizens of the Republic of Armenia (hereinafter: RA) also gained the right to free movement within the EAEU.

One of the goals of the EAEU Treaty is the desire to create a market for simple goods, services, capital, and labour resources within the EAEU. The sphere of labour is an important and multifaceted area of society's economic and social life, covering both the labour market and its direct use in social production.

The purpose of creating a common integration space was to promote the socio-economic development of the EAEU member states. One of the priority areas of economic development is the labour movement. Therefore, it should be valued higher and regulated within the framework of law to create reasonable working conditions.

Since labour migration is an essential component of the economic development of states and a resource for regional integration, Deputy Director General of the International Organization for Migration (IOM) Laura Thompson, in her article "Protection of Migrants' Rights and State Sovereignty", notes that protecting migrants' rights can be an effective method to strengthen state sovereignty.[3] Each state focuses its legislative efforts on improving and developing laws to protect the rights of migrants while also working to strengthen its economy and resolve issues like corruption and organised crime. These challenges are often associated with violations affecting the most vulnerable segments of the population.

The international labour migration regime is defined by acts of the United Nations (UN), the International Organization for Migration (IOM), and the International Labour Organization (ILO). The most significant international acts in the field of labour migration are:

- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990;[4]

2 Resolution of the Government of the Republic of Kazakhstan no 1772 of 29 November 2000 'On the conclusion of an Agreement between the Government of the Republic of Belarus, the Government of the Republic of Kazakhstan, the Government of the Kyrgyz Republic, the Government of the Russian Federation and the Government of the Republic of Tajikistan on mutual visa-free travel of citizens' <http://adilet.zan.kz/rus/docs/P000001772_> accessed 11 May 2024.

3 Laura Thompson, 'Protection of Migrants' Rights and State Sovereignty' (2013) 50(3) UN Chronicle 8, doi:10.18356/57e51f0e-en.

4 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (adopted 18 December 1990 UNGA Res 45/158) <https://adilet.zan.kz/eng/docs/O9000000002> accessed 11 May 2024.

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- ILO Convention No 97 "On Migrant Workers";[5]
- ILO Convention No 143 Convention on Abuses in the Field of Migration and on Ensuring Equal Opportunities and Treatment for Migrant Workers 1975;[6]
- Recommendation No 169 on employment policy.[7]

The EAEU Treaty acknowledges the need to coordinate "policies in the field of regulation of labour migration within the Union" (Article 96) and also guarantees workers "the right to engage in professional activities in accordance with the speciality and qualifications specified in the education documents ..." (Article 98). It is noteworthy that EAEU documents do not establish a national regime for citizens of member states, as this is recognised by acts of primary EU law.[8]

2 DISCUSSION

Migration is generally characterised by economic determinants, such as income levels, social conditions, and the success of compatriots in destination countries. However, labour migration is not only driven by economic or social determinants; the influence of the political environment in the destination countries is essential for the intensity of migration flows.

2.1. General State of Eurasian Integration in The Labour Sphere

Currently, there is a growing scientific debate regarding the establishment and rapid development of legal regulation within the EAEU. The EAEU provides close cooperation among member states in the development of labour migration and social protection of workers. As the EAEU approaches its tenth anniversary in 2025, it can be noted that significant progress has been made since its inception, particularly in maintaining stability under difficult conditions and improving the socio-economic conditions of migrant workers.

5 ILO Convention no 97 Concerning Migration for Employment (revised 8 June 1949) <https://ilo.primo.exlibrisgroup.com/discovery/delivery/41ILO_INST:41ILO_V2/1246487300002676> accessed 11 May 2024.

6 ILO Convention no 143 Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (adopted 24 June 1975) <https://webapps.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO> accessed 11 May 2024.

7 ILO Recommendation no 169 Concerning Employment Policy (Supplementary Provisions) (adopted 26 June 1984) <https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312507> accessed 11 May 2024.

8 Article 3 of the Treaty on European Union (TEU), and Articles 9, 10, 19, 45–48, 145–161 of the Treaty on the Functioning of the European Union (TFEU). See: Consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C 202/13, 47 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016ME%2FTXT#d1e32-13-1> accessed 11 May 2024.

Firstly, we can note the conclusion of an agreement on pension provision for EAEU workers, developed by the Eurasian Economic Commission (hereinafter: the EEC),[9] together with the EAEU states. This agreement enabled the provision and implementation of pension rights for workers under the same conditions as citizens of employment states.

The experience gained through EAEU relations is invaluable, especially in regulating labour relations, including pension payments and social protection registration.

Secondly, it's well known that the COVID-19 pandemic has accelerated the transformation processes in the labour market through the wide use of digital technologies. In this regard, since 2021, the "Unified search system "Work without borders" was introduced in the EAEU countries, which became the first joint digital project in the Eurasian space.

Has the electronic labour exchange become an effective tool to promote employment? Statistics from the website "enbek.kz" reveal that over 330,000 unemployed individuals have found suitable vacancies through this electronic platform. Of these, more than half secured permanent jobs, while 143,000 found temporary jobs during challenging periods. There are currently 643,000 requests on this platform from more than 171,000 users.[10]

According to EEC statistics, the number of unemployed people registered at employment services in the EAEU member states reached 813.8 thousand people by the end of May 2024, representing 13,8 % of the labour force. This figure is lower than in May 2023. Specifically, unemployment in the Russian Federation increased by 2.8% times, in the Republic of Kazakhstan by 4,7%, in the Republic of Armenia by 15,5%, and in Kyrgyzstan by 4.9%. Meanwhile, unemployment in the Republic of Belarus decreased by 3.3%, which Prime Minister R. Golovchenko attributes to the stable work of the real sector.[11]

Within the EAEU, today, more than 500,000 vacancies and more than 2 million resumes have been entered into the international system of job search and recruitment in the territory of EAEU countries: RA, RB, RK, KR and RF, which indicates the demand of this direction.[12]

9 'The Agreement on Pension Provision for Workers of the EAEU Countries has Entered into Force' (*Eurasian Economic Commission*, 12 January 2021) <http://www.eurasiancommission.org/ru/nae/news/Pages/12-01-2021-01.aspx> accessed 11 May 2024.

10 'In the EAEU, the Task of Ensuring the Freedom of Movement of Labour has Been Largely Solved' (*Eurasian Economic Commission*, 28 November 2023) <https://eec.eaeunion.org/news/v-eaes-zadacha-obespecheniya-svobody-peredvizheniya-rabochey-sily-reshena-v-znachitelnoy-stepeni/> accessed 11 May 2024.

11 The number of unemployed in the EAEU decreased by 13.8% <https://eec.eaeunion.org/news/chislennost-bezrabotnykh-v-eaes-sokratilas-na-13-8/> accessed 11 July 2024.

12 *Work Without Borders: International System for Job Search and Recruitment in the Territory of the EAEU Countries: Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia* <https://gsz.gov.by/front-rbg/> accessed 11 May 2024.

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According to A. Kishkembaev, it is necessary to continue development so that employees can receive all the advantages and benefits within the framework of economic integration:

> *"Today we are faced with the task of further development of a single labour market, which requires development of proposals to deepen cooperation between the Union member states in the field of regulation labour migration."*[13]

Regarding world practice on the interconnection of States, the General Agreement of the World Trade Organization on Trade in Services (GATS),[14] which includes an Annex on the Movement of Individuals, contains few obligations that would require States to change their existing policies and formally exclude immigration from its scope. However, the discussion of the relationship is dictated by the fact that the liberalisation of migration, even on a relatively small scale, can significantly increase global well-being, exceeding the growth in global well-being that would be achieved as a result of the full liberalisation of trade in goods and services.

This increase in well-being is due to the significant increase in productivity achieved by migrants moving from developing to developed countries, as evidenced by the significant wage gap between these regions. Migrants seek opportunities in developed countries to significantly increase their productivity and, consequently, their income for purchasing power.[15]

An empirical study of the labour market in the Republic of Kazakhstan showed that EAEU migrants often possess high levels of specialisation in the fields of health, education and services. This expertise naturally benefits not only the migrant workers themselves but also the economies of the host countries. The analysis also showed that the possibility of free movement within the EAEU has enabled these migrants to find good job opportunities and the possibility to settle in the host country permanently. From official sources, it can be concluded that, in general, the donor states of the EAEU are the Kyrgyz Republic, while the Republic of Kazakhstan and the Russian Federation are the primary recipient states.[16]

Examining the experience of foreign countries in this aspect reveals that often, the indigenous population benefits from migration since migrants offer quite different

13 'Fundamentals of Labour Legislation of the EAEU Member States Will Additionally Protect the Labour Rights and Interests of Workers in the Union Countries' (*Eurasian Economic Commission*, 14 September 2017) <https://pravo.by/novosti/obshchestvenno-politicheskie-i-v-oblasti-prava/2017/september/25573/> accessed 11 May 2024.

14 General Agreement on Trade in Services (GATS) <https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm> accessed 11 May 2024.

15 Joel P Trachtman, 'Is Migration a Coherent Field of International Law? The Example of Labour Migration' (2017) 111 AJIL Unbound 481, doi:10.1017/aju.2018.1.

16 'Information on the number of citizens of the member States of the Eurasian Economic Union who entered the country (Republic of Armenia, Republic of Belarus, Republic of Kazakhstan, Kyrgyz Republic, Russian Federation) for employment in 2023' (*Eurasian Economic Commission*, 2024) <https://eec.eaeunion.org/upload/medialibrary/a62/47ntgmtqyfcumatqynsuboxvnipttzbe/Svedeniya-o-chislennosti-trudyashchikhsya-za-2012_2023.pdf> accessed 11 May 2024.

production resources, such as unskilled labour. However, this observation is becoming increasingly controversial in the United States due to the declining earnings of low-skilled workers of local origin. Over time, the diversity of sources of migration to the West has also expanded the human capital of migrants, making the observation of the "absence of significant" income differences less clear, especially due to self-selection and other unobservable characteristics.

Thus, the impact of immigration on economic growth depends on the level of qualifications. More educated and skilled immigrants generally have a positive impact on economic growth. Since the benefits of migration depend on the ability to use migrants' skills, the World Bank (2023) advocates for matching migrants' skills to the needs and obligations of the host country as a strategy to optimise benefits for both sides of the migration equation.[17]

Based on the above, in the age of digitalisation development within the EAEU, migrant workers still need to be provided with flexible access to digital services. This applies not only to the employment platform "Work without Borders" but also to the registration of children in schools, preschool institutions and medical institutions. In this regard, workers in shadow employment are the most vulnerable, and it is more difficult for them to receive such assistance. Therefore, we think that labour migrants in the EAEU can receive public online services without barriers, and, in this regard, it is worth strengthening legislative norms at the national level.

With the development of digitalisation, there is not only the growth of online services but also the use of chatbots and robots, which in turn can compete with migrant workers. This shift has increased the demand for specialists with high digital skills in the international labour market. European countries and China are already incorporating artificial intelligence, which in 2030, according to forecasts, indicates the need for workers to learn new professions related to digital technologies.[18]

The development of new educational programs and the legislative regulation of digital systems are relevant for the EAEU countries. In this regard, we consider it necessary to consider the issues of harmonisation of labour laws of the EAEU countries to effectively regulate labour relations in the era of artificial intelligence.

According to scientist M. Kh. Khasenov, the primary task in forming the Eurasian labour market is to correct the current situation by harmonising labour legislation among the EAEU countries.[19]

17 Udaya R Wagle, 'Labour Migration, Remittances, and the Economy in the Gulf Cooperation Council Region' (2024) 12(1) Comparative Migration Studies 30, doi:10.1186/s40878-024-00390-3.

18 Alexandra Molchanovskaya and others, *The Labour Market Kazakhstan 2022: On the Way to Digital Reality* (Labour Resources Development Center 2022).

19 Muslim Kh Khassenov, 'Grounds and Procedure for Termination of an Employment Contract on the Employer's Initiative in the Member States of the Eurasian Economic Union in the Context of International Labour Standards' (2022) 18(3) Journal of Foreign Legislation and Comparative Law 83, doi:10.12737/jflcl.2022.038.

International legal obligations allow States, through mutual concessions during negotiations and through the exchange or pooling of powers provided for by international law, to achieve such a state of affairs to the maximum extent possible. States have adopted international legal norms that can mobilise additional constituencies and contribute to creating new political coalitions. Without such reciprocity, migration liberalisation is unlikely to be sufficiently implemented, and global well-being will be suboptimal.

Harmonisation of labour legislation is considered favourable for the creation of socio-economic conditions for migrant workers in the EAEU in the event of ratification of the ILO Convention on the Integration and Protection of the Rights of Migrant Workers.

We believe this approach makes it possible to use the term "migrant worker" in the EAEU treaty to consolidate the legal status of migrant workers and their family members and further use this term in the national legislation of the five EAEU countries when regulating issues of external labour migration.

2.2. Analysis of the Advanced Practice of The European Union

Having considered promising directions and significant achievements in labour migration since the establishment of the EAEU, as well as discussing issues of Eurasian integration, the second direction of analysis turns to international norms and practices within the EU to identify best practices that could be applied in the EAEU. While labour migration issues in the EAEU are not so large-scale and complex as those in the EU, the EU's practice in this area remains relevant and should not be overlooked.

According to historical data, it is generally accepted that the legal basis for the free movement of persons in the EU has existed since 1957.[20]

Key legal acts of international cooperation for EU citizens include the following agreements:

1. The Maastricht Treaty, concluded in 1992, introduced the idea of EU citizenship and its accessibility to every citizen of its member states, thereby guaranteeing the freedom of movement of EU citizens and guests of the country.[21]

20 Kubatbek Rakhimov and Akbermet Azizova, 'Comparative Analysis of the EAEU and the EU Common Labour Markets' (2022) 22(1) Vestnik RUDN, International Relations 94, doi:10.22363/2313-0660-2022-22-1-94-110.

21 TEU (n 8); Will Kenton, 'Maastricht Treaty: Definition, Purpose, History, and Significance', *Investopedia* (New York, 31 July 2024) <https://www.investopedia.com/terms/m/maastricht-treaty.asp> accessed 11 May 2024.

2. The Amsterdam Treaty of 1997 granted every EU citizen the right to travel, work and live in an EU country without special formalities. This facilitated unhindered access to employment, education, residence and retirement regulation in other member states.[22]
3. The Treaties on the European Union and the Functioning of the European Union provide EU citizens with various social, cultural and economic benefits. Host countries, without discriminatory actions, provide migrant workers with the same rights as their citizens to use social and tax benefits and access to housing, and their family members have the right to access educational and professional institutions.[23]

Thus, the free movement of workers has become a crucial principle of the single European labour market. To consolidate the rights of migrant workers, the EAEU adopted the Agreement on the Legal Status of Migrant Workers and Members of Their Families, dated 8 October 2010 (hereinafter: the Agreement).[24]

There is no separate agreement on migrant workers in EU law, but Council Regulation (EEC) No. 1612/68 of 15 October 1968, "On Freedom of Movement for Workers within the Community," is in force.[25] Article 5 of this Regulation provides migrant workers the right to work on an equal basis with citizens within the EU. Meanwhile, Article 6 of the Agreement provides for the possibility for Member States to impose restrictions on the employment of migrants for national security purposes and lists a number of restrictions.

Unlike the EAEU, EU regulations do not specify the period of stay on the state's territory, nor do they require registration and the obtaining of a migrant certificate.

Article 15 of the EU regulations states, "Migrants have the right to receive advisory assistance through specialised bodies, information bureaus, employers and government agencies." In contrast, Article 9 of the Agreement stipulates that information can be obtained from employers and authorised bodies, but it does not provide for additional information bureaus.

Furthermore, Article 25 of the EU regulation provides housing for migrants and their families, while Article 13 guarantees the right to medical services, with children having the right to attend preschool institutions.

22 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 02 October 1997 [1997] OJ C 340/1 <http://data.europa.eu/eli/treaty/ams/sign> accessed 11 May 2024; 'Treaty of Amsterdam', *Wikipedia* (Wikimedia Foundation, 6 April 2024) <https://en.wikipedia.org/wiki/Treaty_of_Amsterdam> accessed 11 May 2024.

23 'Law EU' (*European Union*, 2024) <https://european-union.europa.eu/institutions-law-budget/law_en> accessed 11 May 2024.

24 Resolution of the Government of the Republic of Kazakhstan no 1044 of 8 October 2010 'On signing an Agreement on the legal Status of Migrant Workers and members of Their Families' <https://adilet.zan.kz/rus/docs/P100001044_> accessed 11 May 2024.

25 Regulation (EEC) no 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers Within the Community [1968] OJ L 257/2 <http://data.europa.eu/eli/reg/1968/1612/oj> accessed 11 May 2024.

S.Yu. Golovina and N.L. Lyutov have observed that while integration into the EU has already impacted the national labour law systems of its member states, the future impact of the EAEU can only be speculated. Examining how the EU affected Eastern European states transitioning from a planned economy to a market economy, it can be concluded there are some similar changes in the system of legal regulation of labour.[26]

It is also worth noting that the EU has a significant document – the Charter of Fundamental Rights of the European Union of 7 December 2000 – the most recent in the past millennium, but a highly significant "bill of rights".[27] The Charter of the European Union consolidates all personal, political and socio-economic rights and recognises them all as fundamental. Although social rights are largely programmatic in nature, they are no longer considered secondary.

The Charter of Human Rights is associated with most UN human rights conventions, with relevant supervisory bodies, including committees on:

- Human Rights;
- Economic, Social and Cultural rights;
- Elimination of All Forms of Discrimination;
- The Rights of the Child;
- Protecting the Rights of All Migrant Workers.

In times of economic and social crisis, the Charter becomes increasingly important to ensure the fundamental rights of people in Europe.

The most effective protection of workers ' rights in the EU can be seen from the law enforcement practice in the "Viking" and "Laval" cases, where trade unions demonstrated their strength.[28]

Based on the above, we believe that the protection of workers' rights by trade unions within the framework of the EAEU will contribute to the protection of migrant workers' rights by providing them with guarantees of decent work and social protection.

2.3. Formal Legal and Empirical Analysis of The Application of The EAEU Treaty Norms

Based on the results of the previous two directions of work of the EAEU, we will move on to the third direction: studying the application of certain norms contained in the EAEU treaty, as well as studying and analyzing statistical data of persons who arrived in the

26 Nikita Lyutov and Svetlana Golovina, 'Development of Labour Law in the EU and EAEU: How Comparable?' (2018) 6(2) Russian Law Journal 93.

27 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3AC2012%2F326%2F02> accessed 11 May 2024.

28 Nikita Lyutov, 'Conflict between the Fundamental Rights of Employees and Entrepreneurs in the Practice of the European Court of Justice' (2008) 12 Labour Law 70.

country to obtain information on labour migrants and their families, and conducting social surveys on the protection of labour migrants' rights and social security.

As we have already noted, the main EAEU direction within the framework of the Treaty is to ensure four directions: the movement of goods, services, capital and labour. To implement a unified policy in the field of labour movement, the migration and labour legislation of the EAEU member states was adjusted. This has led to some innovations in the migration sphere. For example, under the EAEU treaty, EAEU citizens can engage in labour activities in two ways: by concluding a civil law or an employment contract. These provisions are reflected in Article 96 of the Treaty.[29]

Both contracts, despite their diversified nature, have similarities from the root of the word "contract," which implies obligation and performance. The conclusion of a civil contract is less costly and profitable for the employer for the following reasons: it does not require payment for vacations, for the absence of an employee due to temporary disability, or other guarantees and compensation payments. In other words, by concluding a civil law contract, the employer is exempt from providing a social package.

Thus, the EAEU treaty provides an opportunity for an employee to choose to work under an employment or civil law contract, thereby giving migrant workers more opportunities to work freely in the host country.

The next change is the removal of restrictions on admission to the general labour market. Quotas and permits of authorised bodies have been cancelled. The EAEU treaty and its accompanying documents provide benefits for employment within the EAEU member states in the form of the following norms:

1. The EAEU Citizens can engage in labour activities within the EAEU without the permission of the authorised body and stay in the country without registration for 30 days; this norm also applies to their family members. Upon expiration of this period, they must register for the period determined by the service agreement or employment contract. It should be noted that there is no specific prohibition if a citizen registers in one region but works in another region. International practice also supports such a practice. There is no prohibition on movement within the Union.[30]

Also, Paragraph 9 of Article 97 states that if a citizen's service or employment contract has expired, they must renew it within 15 days. Otherwise, they will have to leave the country. This indicates the presence of restrictions on the free movement of labour in the framework to protect the national market.

29 EAEU Treaty (n 1) art 96.

30 Regulation (EEC) no 1612/68 (n 25).

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2. In accordance with Paragraph 3 of Article 97 of the EAEU Treaty, there is a norm on recognition of diplomas and qualifications without passing nostrification, except for legal, medical, pedagogical and pharmaceutical education.[31] By restricting access to the work of specialists in this field, we believe that within the EAEU, the doors are closing to these specialists, who are in demand in the labour market.

The situation is related to the fact that, in practice, there is considerable discussion about the possibility of recognising academic degrees in the EAEU. Currently, to recognise academic degrees in the country of employment, it is necessary to undergo the procedure of nostrification (recognition), which varies in complexity and duration among the EAEU countries. Thus, a barrier exists to the movement of highly qualified scientists within the EAEU.

As Minister of Economy and Financial Policy of the EEC R. Beketayev notes: "The Agreement provides for mutual direct recognition of documents on academic degrees of workers issued in member states for professional activities."[32] However, this means that specialists with an academic degree in fields such as law, medicine, pedagogy and pharmacy face restrictions on their ability to engage in employment.

A separate issue is the recognition of the PhD degree in Kazakhstan. Currently, recognition of an academic degree within the EAEU does not extend to specialists holding a Doctor PhD degree. This problem not only prevents Kazakhstani PhD doctors from working freely within the EAEU but also reduces the appeal of studying in Kazakhstan for international students pursuing PhD programs. Therefore, we advocate for the re-evaluation of the PhD degree status in Kazakhstan to create fair competition in the labour market.

3. The EAEU Treaty considers work experience for social security, but it lacks a dedicated chapter addressing the social security of workers. We assume it is a gap in the treaty. Although there is an entire section on labour migration consisting of three articles aimed at regulating labour activity, we believe that the existing norms are insufficient for comprehensive regulation of labour activity within the EAEU.

For example, there are currently problematic issues arising in law enforcement practice regarding the social security of children and family members of migrant workers. Migrants and their families face such problems as timely access to healthcare and education institutions.

Such problems exist in practice today. In addition, there are no official statistical data on migrants and family members from the EAEU who entered the Republic of Kazakhstan. Concerning the social security rights of migrant workers' children and protection of the

31 EAEU Treaty (n 1) art 97, para 3.

32 'In the EAEU Countries, Recognition of Academic Degree Documents will be "Direct"' (*Eurasian Economic Commission*, 17 March 2022) <https://eec.eaeunion.org/news/v-stranakh-eaes-priznanie-dokumentov-ob-uchenykh-stepenyakh-budet-pryamym/> accessed 11 May 2024.

rights of children who work at an early age in shadow employment, the following problem is identified at the international level.

On the first issue, according to Paragraph 5 of Article 97 of the EAEU Treaty, the children of migrant workers and citizens of the EAEU may stay in EAEU countries based on and for the duration of their parents' employment contracts. In this case, their migration registration is subject to renewal for the duration of the employment contract. Children of EAEU citizens have the right to attend kindergartens and schools free of charge. However, it is difficult to assess the scale of this phenomenon due to the lack of unified and systematic statistics on migrant children.

Data on the number of migrant workers and children living in Kazakhstan are unclear due to shortcomings in registration systems and irregular labour migration, according to the response of the International Organization for Migration (IOM) to the request of CABAR.asia. However, there are official data on the number of migrant children attending school. In the 2020-2021 academic year, according to the National Educational Database, 20,349 migrant children and 731 refugee children are studying at schools, and 93 migrant children are studying in the vocational education system. Among them, 81 are from KR, 6 from RA, and 16 from RB.[33]

A significant issue is shadow migration involving underage employees within the EAEU. Children involved in the migration process are the most vulnerable category of migrants. Due to their age and especially in the absence of parental care, birth registration, or citizenship, they experience a greater risk of violence, labour exploitation and detention.

International law obliges states to respect and protect the rights of all children within their territory. As A.Bekmusa, head of UNICEF's child protection programs, emphasises, "Children who participate in migration processes, like all children, have the right to protection from all forms of violence, exploitation and abuse."[34] The best interests of the child must be considered in all decisions affecting migrant children, as migration is not always their choice.

A particular concern is the employment of bakchy girls in migrant families. Parents voluntarily send their underage daughters to work as bakchy.[35]

Bakchy girls are often represented in families among Kyrgyz migrants, where they are hired to perform multiple duties, including childcare, cooking for the whole family, and cleaning, often with little.

33 Laura Kopzhassarova, 'Migrant Children in Kazakhstan are at Higher Risk' (*Central Asian Bureau for Analytical Reporting*, 18 August 2021) <https://cabar.asia/en/migrant-children-in-kazakhstan-are-at-higher-risk> accessed 11 May 2024.

34 ibid.

35 International Organization for Migration, *The Fragile Power of Migration: The Needs and Rights of Women and Girls from Tajikistan and Kyrgyzstan who are Affected by Migration, 2018: Summary Report* (IOM Publ 2018) 30.

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As a rule, minors leave their home country to work as nannies for a year, during which they do not study but often continue to be registered in a school in Kyrgyzstan. Due to absences, such girls do not receive a full, high-quality education, depriving them of the opportunity to receive a professional education and find a good job, leading to further violations of their rights.

From this case, several violations of rights can be identified, including the right to work to an eight-hour working day, fair working conditions, fair working conditions and equal pay for work of equal value. Typically, migrant workers are at risk of delayed payment, underpayment and non-payment of wages. They may be forced to work long hours and weeks without days off, subjected to forced labour, and denied the right to miss work due to illness. Additionally, they are vulnerable and at risk of psychological violence, the humiliation of honour and dignity, and may experience sexual harassment and violence at work and in public places.

The right to work and freedom of employment are closely linked to the principle of abolishing forced labour. International labour standards developed by the UN and the ILO aimed at addressing the problem of slavery, forced or compulsory labour. The Home Work Convention No. 177 and Recommendation No. 184, adopted in 1996, will help to improve the situation of millions of home workers, most of whom are women. Convention No. 182 and Recommendation No.190, declaring the prohibition and elimination of the worst forms of child labour, also include a gender component, calling for special attention to the situation of working girls.[36]

The problem under consideration prompts reflection and a search for solutions. Focusing on the issue, migration policy should include a comprehensive information campaign for migrants and their family members about the system of rights protection and residency regimes in destination countries, working in particular on the protection of migrants ' rights with further expert support. A gender-sensitive approach should be applied in national programs and projects to protect the rights of migrant women and their families.

The migration effect will become evident with a significant reduction in the scale of illegal migration and a simultaneous increase in legal migration. It is necessary not only to tighten control over illegal immigrants but also to create a favourable climate for legalising illegal migrants by providing free state programs to enhance the qualifications of low-skilled legal migrants.[37]

It is clear there is also a problem with the deportation of labour migrants due to shadow employment. Migrants who are deported often return to their homeland, change their

36 'ILO Conventions' (*International Labour Organization (ILO)*, 13 July 2011) <https://www.ilo.org/resource/ilo-conventions> accessed 11 May 2024.

37 Laura Dzhunisbekova and others, 'International Labour Migration: Concept and Modern Trends of its Development Within the Framework of EAEU' (2017) 20(3) Journal of Legal, Ethical and Regulatory Issues 1.

surnames to the maiden names of their mothers, or completely remove the surname altogether, leaving only their patronymics. This allows them to return to the EAEU countries where they were deported as seemingly different citizens.[38] To identify shadow employment within the EAEU, it is proposed to introduce verification of biometric data of migrant workers.

Today, the European Union, along with the United States, is one of the regions where significant flows of migrants are constantly directed. When attracting migrant workers, EU countries are guided by their economic interests and the needs of national labour markets. The EU has introduced a "Blue Card" for issuing work and residence permits to workers with the inclusion of their biometric data. The validity period of such a permit is strictly tied to the terms of the migrant's legal work contract. The most attractive is the experience of the United States using the Green Card, which plays a very significant role in the development of the economy and science, ensuring their competitiveness in the world.[39]

In the EU, the provisions of the Stockholm Treaty are applied to protect security and exit from shadow employment, the priority of which, along with border protection and combating crime and illegal migration, is to create a more effective access channel for persons with legal status. In this regard, we are considering the possibility of applying the positive experience of the EU and the United States in granting permits, protection and unhindered promotion of migrant workers in the EAEU.

3 CONCLUSIONS

Harmonising labour legislation of the EAEU states is necessary; it should be operated not by unifying norms but by convergence based on the transformation theory. Based on the analysis of the situation of labour migrants in the EU and the EAEU, we consider it necessary to expand and improve the legal framework for protecting workers' rights. In this regard, within the EAEU, we believe it would be appropriate to change the requirement for labour migrants to increase the time spent in the country and exclude the deadline for renegotiating the contract, which in turn will help reduce the growth rate of illegal migrants. The Treaty should address the situation of third countries.

After analysing the provisions of the agreement on Labour Activities, we concluded that it is necessary to:

- extend the duration of stay within the EAEU.
- train EAEU citizens for the upcoming competitive digital environment.

38 Yakub Halimov, 'Tajikistan: Who and How Does "Business" on New Passports with Changed Surnames: Investigation of Radio Ozodi' (*Radio Ozodi*, 23 November 2021) <https://rus.ozodi.org/a/31575126.html> accessed 11 May 2024.

39 International Organization for Migration, *The Future of Migration: Building Capacities for Change: World Migration Report 2010* (IOM Publ 2010) 183.

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- create unified requirements for member states to allow applicants for legal, medical, pedagogical and pharmaceutical education to travel and exchange practices.
- systematise issues and create a chapter in the EAEU treaty titled "Protection of labour rights and social security of workers".
- create strong and trustful relations between trade unions and employees in the EAEU.

The organised efforts of state bodies can significantly improve the maintenance of statistics on the number of migrant workers by specialisation, as well as provide data on accompanying family members. Such statistics can overcome the problem of accessing medical and educational institutions. Additionally, there is a pressing need to enhance protections for migrant children who are subjected to forced labour. It is proposed that a single Commissioner for Children's Rights be established within the EAEU.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ПИТАННЯ ЗАБЕЗПЕЧЕННЯ ГАРАНТІЙ ТА СОЦІАЛЬНОГО ЗАХИСТУ ТРУДОВИХ МІГРАНТІВ ЄАЕС

Мереке Журунова

АНОТАЦІЯ

Вступ. *На сьогодні Євразійський економічний союз (далі — ЄАЕС) сформував власний ринок праці; однак в сучасних міжнародних умовах залишаються невирішеними питання, пов'язані із забезпеченням охорони здоров'я мігрантів та їх доступу до працевлаштування. Незважаючи на постійні зусилля в межах ЄАЕС щодо розвитку та поглиблення євразійської інтеграції й удосконалення нормативно-правової бази, в епоху цифровізації є потреба розвивати кращий доступ працівників до систем соціального захисту та медичного забезпечення.*

Актуальність цієї наукової статті полягає в існуванні проблемних питань, пов'язаних із тим, що багато мігрантів не зареєстровані та не мають документів, які б захищали їх юридично та фінансово; ця ситуація сприяє розвитку неформальної зайнятості та низької продуктивності праці. Хоча країни ЄАЕС встановили робочі та соціально-економічні умови, питання забезпечення охорони здоров'я, доступу до праці та соціального захисту трудових мігрантів залишаються невирішеними.

Методи. *У цій статті застосовано різні методи наукового пізнання, зокрема історико-правовий аналіз, порівняльно-правове дослідження, індукцію та дедукцію, а також аналіз і синтез. У цій роботі також застосовуються акти та нормативні документи МОП.*
Яка роль захисту соціально-економічних і трудових прав працівників-мігрантів як основного завдання приймаючих держав?

Наскільки в правозастосовній практиці положення міжнародних угод щодо організованого найму працівників між приймаючими країнами та країнами походження мігрантів забезпечують адаптацію мігрантів до правового режиму країни перебування, участь мігрантів у функціонуванні інститутів громадянського суспільства та моніторинг міграційних процесів?

Як національне регулювання трудової міграції в інтеграційних об'єднаннях держав раціонально організовує їхні дії на основі принципів національного режиму для трудових мігрантів?

Трудова міграція зміцнює інтеграційні об'єднання завдяки тому, що створює міцні соціальні зв'язки та розвиває інститути громадянського суспільства в межах інтеграційних об'єднань. Оскільки державний суверенітет нерозривно пов'язаний із захистом інтересів співгромадян у регулюванні трудової міграції, усі держави, що беруть

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участь у регіональній інтеграції, повинні не лише захищати права трудових мігрантів, а й забезпечувати всі умови для того, щоб мігранти виконували свої зобов'язання перед громадянським суспільством.

У дослідженні розглядалося вільне пересування та забезпечення трудових і соціальних гарантій працівників-мігрантів в ЄАЕС та порівнювалося їхнє становище з аналогічним в ЄС. Також було проведено опитування трудових мігрантів в ЄАЕС, зокрема серед працівників в галузі освіти, медицини та різних приватних секторів. Ця стаття ґрунтується на результатах цього дослідження.

У статті проаналізовано проблеми надання гарантій та соціального захисту трудовим мігрантам ЄАЕС. Було запропоновано вдосконалити правові регуляторні механізми та окреслено рекомендації щодо покращення та розширення можливостей для вільного пересування, що допоможе забезпечити кращий захист соціальних та трудових прав мігрантів у ЄАЕС. Основними завданнями дослідження були:

- *Вивчення положень Конвенції МОП про працівників-мігрантів.*
- *Збір та аналіз даних про трудову міграцію в межах ЄАЕС.*
- *Аналіз міжнародних договорів ЄС щодо правового статусу трудових мігрантів.*
- *Проведення опитування трудових мігрантів у ЄАЕС щодо питань забезпечення їхніх прав та гарантій за Договором про ЄАЕС.*

Результати та висновки. *Це дослідження підкреслює необхідність організації безпечної трудової міграції, надання трудовим мігрантам повного доступу до цифрових послуг, вдосконалення системи професійно-технічної освіти відповідно до потреб ринку праці, а також розробки та впровадження єдиної системи для забезпечення захисту працівників та їхніх сімей. Успішна адаптація в країні перебування визначається як критичний фактор як для трудових мігрантів, так і для їхніх сімей.*
Автори рекомендують додати до договору про ЄАЕС окремий розділ, який би комплексно розглядав трудові та соціальні права, а також їхні гарантії.

Ключові слова: *Євразійський економічний союз, ЄАЕС, Договір про ЄАЕС, працівники ЄАЕС, Європейський Союз, ЄС, Хартія основних прав людини, трудова міграція, інтеграція, гармонізація, уніфікація.*

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Review Article

CONFRONTING TRANSNATIONAL CORPORATE CRIMES: URGENT GLOBAL MEASURES

Khoat Van Nguyen

ABSTRACT

Background*: In today's interconnected world, the global economy holds significant importance due to its far-reaching impact on various aspects of the world. It provides emerging economies, especially developing countries, access to larger markets and enhances substantial business transactions requiring commercial legal entities to wield significant influence and power across borders, leading to a surge in complex transnational crimes.*

Methods: *This qualitative systematic review paper overviews, analyses, and synchronises the secondary sources relating to the prosecution of the criminal liability of commercial legal entities. The outcomes cement the legal basis for the urgent need for globally harmonised sanctions to prosecute commercial legal entities involved in transnational crimes effectively.*

Results and conclusions: *By exploring the nature and scope of these offences, the challenges in enforcement, and the benefits of a unified approach, this research aims to provide a comprehensive framework for international cooperation to uphold justice and integrity in prosecuting the criminal liability of commercial legal entities. Through case studies, analysis of existing legal structures, and recommendations for future actions, this study highlights the necessity of global collaboration to establish harmonised sanctions and legal frameworks relating to the prosecution of criminal liability among countries. In addition, it constitutes some implications for changing the current situation of prosecuting criminal liability worldwide, especially in countries that have yet to enter into signatories with other countries to address transborder prosecution of criminal liability.*

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1 INTRODUCTION

The globalisation of trade and commerce has brought unprecedented opportunities and challenges. While multinational corporations contribute significantly to economic growth, their transnational operations often lead to complex criminal activities that transcend national borders.[1] Crimes such as money laundering, human trafficking, environmental violations, and tax evasion involve sophisticated networks and intricate corporate structures, making prosecution difficult. The current situation indicates that in an increasingly interconnected world, commercial legal entities operate across borders, making them susceptible to engaging in or falling victim to complex transnational crimes. This growing threat necessitates a coordinated global response to ensure that justice is served and to deter future criminal activities.[2] In essence, the concept of criminal liability for commercial legal entities, often referred to as corporate criminal liability, has been a subject of considerable debate and evolution in legal systems worldwide. Historically, criminal liability was predominantly associated with natural persons, based on the premise that only individuals could possess the moral and intentional capacity necessary for criminal responsibility.[3] However, the complexity and scale of modern business operations have necessitated a re-evaluation of this stance. Today, many jurisdictions recognise that commercial entities, such as corporations and partnerships, can and should be criminally liable for certain offences.

The primary justifications for imposing criminal liability on commercial legal entities revolve around deterrence, retribution, and moral culpability.[4] Deterrence theory suggests

1 Nadia Bernaz, 'Corporate Criminal Liability under International Law: The *New TV SAL* and *Akhbar Beirut SAL*: Cases at the Special Tribunal for Lebanon' (2015) 13(2) Journal of International Criminal Justice 313, doi:10.1093/jicj/mqv014; Jonathan Clough, 'Improving the Effectiveness of Corporate Criminal Liability: Old Challenges in a Transnational World' in Ron Levy and others (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press 2017) 163; Michael J Kelly and Luis Moreno-Ocampo, 'Modes of Criminal Liability under International Law' in Michael J Kelly and Luis Moreno-Ocampo, *Prosecuting Corporations for Genocide* (OUP 2016) 73, doi:10.1093/acprof:oso/9780190238896.003.0004.

2 Mark Pieth and Radha Ivory, 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Ius Gentium: Comparative Perspectives on Law and Justice (IUSGENT, vol 9), Springer Dordrecht 2011) 3, doi:10.1007/978-94-007-0674-3_1; Azat M Toleubai and Antonina S Kizdarbekova, 'The Concept of Commercial Legal Entities in Kazakhstan and Foreign Legislation' (2018) 9(7) Journal of Advanced Research in Law and Economics 2437, doi:10.14505//jarle.v9.7(37).31.

3 Bokhodir Isroilov, Gaybulla Alimov and Bobokul Toshev, 'Prosecution of Legal Entities: History, Theory, Practice and Proposals' (2021) 527 Advances in Social Science, Education and Humanities Research 294, doi:10.2991/assehr.k.210322.127; Eli Lederman, 'Corporate Criminal Liability: The Second Generation' (2016) 46(1) Stetson Law Review 71; Ellen S Podgor, 'Introduction: Corporate Criminal Liability 2.0' (2016) 46(1) Stetson Law Review 1.

4 Lawrence A Cunningham, 'Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform' (2014) 66(1) Florida Law Review 1.

that the threat of criminal sanctions can dissuade companies from engaging in illegal activities. By holding corporations accountable, the law can influence organisational behaviour, encouraging the implementation of robust compliance programs and ethical standards. Retribution, on the other hand, focuses on the moral blameworthiness of corporate conduct. When a corporation engages in conduct that harms society, it is argued that the entity itself should bear responsibility, not just the individuals involved. This perspective acknowledges that corporations can create cultures and systems that promote or tolerate illegal behaviour, thus warranting punitive measures.[5] Despite these justifications, corporate criminal liability faces significant criticism and practical challenges. One major critique is the "collective knowledge" problem, which questions whether it is fair to attribute criminal intent to a corporation when it comprises many individuals, none of whom may possess the requisite mens rea[6] (guilty mind) individually. This issue complicates the prosecution process, as it requires piecing together fragmented knowledge and intentions within the organisation.[7] Moreover, there is the risk of disproportionate punishment. Fines and sanctions imposed on corporations can have far-reaching consequences, potentially harming innocent stakeholders such as employees, shareholders, and customers. This raises ethical concerns about the fairness and efficacy of corporate punishment, suggesting a need for carefully calibrated penalties that target culpable individuals within the corporation alongside the entity itself.[8]

One of the most significant hurdles in prosecuting commercial legal entities is the complexity of gathering evidence and establishing guilt.[9] Corporations often have vast resources and sophisticated legal teams that can complicate investigations. Accessing internal documents, emails, and communications requires extensive effort, and companies may engage in obfuscation or destruction of evidence. Whistleblowers and internal investigations play a crucial role in uncovering corporate misconduct.[10] However, whistleblower protection laws vary significantly across jurisdictions, and potential

5 Toleubai and Kizdarbekova (n 2).

6 The mens rea requirement is premised upon the idea that one must possess a guilty state of mind and be aware of his or her misconduct; however, a defendant need not know that their conduct is illegal to be guilty of a crime.

7 Carlos Gómez-Jara Díez, 'Corporate Criminal Liability in the Twenty-First Century: Are all Corporations Equally Capable of Wrongdoing?' (2011) 41(1) Stetson Law Review 41.

8 Peter Alldridge, 'The Changing Face of Corporate Criminal Liability in England and Wales' (2017) 39 Archives de Politique Criminelle 163, doi:10.3917/apc.039.0163; Peter J Henning, 'Corporate Criminal Liability and the Potential for Rehabilitation' (2009) 46 American Criminal Law Review 1417.

9 Lisa M Fairfax, 'On the Sufficiency of Corporate Regulation as an Alternative to Corporate Criminal Liability' (2011) 41(1) Stetson Law Review 117.

10 Mihailis E Diamantis and William S Laufer, 'Prosecution and Punishment of Corporate Criminality' (2019) 15 Annual Review of Law and Social Science 453, doi:10.1146/annurev-lawsocsci-101317-031212.

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whistleblowers may fear retaliation. Strengthening legal protections and incentivising whistleblowing can be pivotal in securing critical evidence against corporate wrongdoers.[11]

The global nature of modern business poses additional jurisdictional challenges. Corporations often operate across multiple countries, complicating the enforcement of national laws. Differences in legal standards, evidentiary requirements, and procedural rules can hinder cooperation between jurisdictions. International cooperation mechanisms, such as mutual legal assistance treaties (MLATs) and joint investigation teams, are essential in addressing these challenges.[12] Enhancing the efficiency and scope of these mechanisms can facilitate the prosecution of transnational corporate crimes, ensuring that legal entities cannot exploit jurisdictional gaps to evade accountability. Imposing criminal liability on commercial legal entities must strike a balance between punishment and the broader economic impact. Excessive fines or sanctions can lead to bankruptcies, job losses, and negative economic repercussions. Policymakers and prosecutors must consider these potential outcomes when determining appropriate penalties. Deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) have emerged as tools to balance these concerns.[13] These agreements allow corporations to avoid criminal convictions by fulfilling certain conditions, such as paying fines, implementing compliance measures, and cooperating with investigations. While these agreements can mitigate economic fallout, they also raise concerns about accountability and the potential for corporations to view fines as mere costs of doing business.

International law addressing the prosecution of the transnational criminal liability of commercial legal entities involves various treaties, conventions, and legal frameworks. These regulations aim to hold businesses accountable for criminal activities that transcend national borders.[14] Recent developments, including enhanced corporate due diligence,

11 Díez (n 7); Rafael Aguilera Gordillo, 'Weaknesses in Spanish Jurisprudence on the Criminal Liability of Legal Entities: Non-Imputability of Certain Legal Entities and Lack of Methodology When Applying the Transfer of Criminal Liability between Corporations' (2023) 3 Eucrim 293.

12 Nguyen Thi Phuong Hoa, 'A Scientific Understanding of Conditions for a Commercial Legal Entity to be Criminally Charged under the Current Criminal Code' (2022) 38(2) VNU Journal of Science: Legal Studies 60, doi:10.25073/2588-1167/vnuls.4454; Isroilov, Alimov and Toshev (n 3); Robert E Wagner, 'Corporate Criminal Prosecutions and the Exclusionary Rule' (2016) 68(4) Florida Law Review 1119.

13 Jennifer Arlen, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements' (2016) 8(1) Journal of Legal Analysis 191, doi:10.1093/jla/law007; Cunningham (n 4); David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72(4) Maryland Law Review 1295.

14 Dinh Thi Mai, 'Provisions on Execution of Criminal Judgments against Commercial Legal Entities Committing a Crime' (2020) 11 Journal of Legal Studies - Hanoi Law University 59; Joanna Kyriakakis, 'Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law' in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (CUP 2009) 108; Alejandro Sánchez González, 'The Criminal Liability of Corporations: A Step Forward in the Implementation of the United Nations Guiding Principles on Business and Human Rights' (2019) 12(1) Mexican Law Review 91, doi:10.22201/iij.24485306e.2019.2.13640.

transparency initiatives, and international accountability mechanisms, offer promising avenues for strengthening the prosecution of transnational corporate crime.[15]

Corporate crime refers to illegal acts committed by a company or its representatives, typically involving financial or regulatory misconduct, such as fraud, insider trading, embezzlement, and environmental violations. The primary motivation is usually financial gain or competitive advantage within legal business operations. Organised crime involves structured groups engaging in illegal activities on a continuous basis. These groups often participate in drug trafficking, human trafficking, extortion, money laundering, and other forms of serious crime. Their primary aim is profit through illegal means.

While corporate crime and organised crime are distinct, they can overlap. For instance, organised crime groups may infiltrate legitimate businesses to launder money or use corporate entities as fronts for illegal activities. Conversely, corporate entities may engage in activities that facilitate organised crime, such as providing logistical support, falsifying records, or engaging in corrupt practices to avoid scrutiny.

The role of the UNODC[16] is crucial in providing comprehensive frameworks for member states to criminalise and prosecute organised and corporate crimes. It also encourages and supports cross-border cooperation among law enforcement agencies, fostering information sharing, joint investigations, and mutual legal assistance in combatting these crimes.

Continued innovation, commitment to global cooperation, and robust legal frameworks are essential to ensure that commercial legal entities are held accountable for their actions across borders. As globalisation increasingly intertwines economies and societies, pursuing justice for transnational corporate crime remains a critical endeavour for the international community. Despite this, until now, there have been limited reports on transnational corporate prosecutions, convictions, and punishment, reflecting that current sanctions might be ineffective or conceptually and practically incoherent. This situation possibly stems from the loophole in the tight cooperation among countries to prosecute the criminal liability of commercial legal entities.[17]

Photeine Lambridis notes that multinational corporations' complicity in international crimes has risen because they are directly involved in the commission of crimes, making it challenging to address this ongoing situation on a global scale.[18] Recognising the complexity and danger of transnational corporate criminality, most nations must establish their own

15 Charles R P Pouncy, 'Reevaluating Corporate Criminal Responsibility: It's All About Power' (2011) 41(1) Stetson Law Review 97.

16 UNODC, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2004) <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> accessed 20 May 2024.

17 Diamantis and Laufer (n 10).

18 Photeine Lambridis, 'Corporate Accountability: Prosecuting Corporations for the Commission of International Crimes of Atrocity' (2021) 53(1) NYU International Law and Politics 144.

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legal framework to combat these crimes due to the lack of comprehensive international regulations and sanctions.

Given the situation in Vietnam, some studies have explored preventive methods and current sanctions for prosecuting corporate criminality. However, the challenges of transnational corporate prosecutions operating inside and outside Vietnam have been considered.[19]

As such, this research paper argues the necessity of globally harmonised sanctions to address the criminal liability of commercial legal entities engaged in such transnational crimes. By aligning legal standards and fostering international cooperation, the global community can enhance the effectiveness of law enforcement and ensure that corporate entities are held accountable for their actions. To highlight the corpus of the paper, the following questions are set forth to direct the study correctly as follows:

1. Why is it necessary to call for single international harmonised sanctions to prosecute the criminal liability of transborder commercial legal entities?
2. How do countries deal with the prosecution of criminal liability of transnational commercial legal entities currently?

Accordingly, this research explores the prosecution of the criminal liability of commercial legal entities, examining the legal frameworks, theoretical foundations, practical challenges, and implications for justice and corporate governance.

2 MATERIALS AND METHODS

This study employed a qualitative systematic review based on the content analysis methods to generate, systemise, analyse, and scrutinise the secondary resources by adopting the research model proposed by Long-Sutehall et al.[20] By examining the United Nations Convention against Transnational Organized Crime and the Protocols Thereto,[21] and the highly influential EU Directive 2024/1226 on the definition of criminal offences and penalties for the violation of Union restrictive measures,[22] together with current legal

19 Dinh (n 14); Do Thi Phuong, 'Criminal Prosecution Against the Crime of Legal Entities in Vietnam' (2023) 39(1) VNU Journal of Science: Legal Studies 45, doi:10.25073/2588-1167/vnuls.4365; Mai Dac Bien, 'Supervising the Investigation of Criminal Cases Committed by Commercial Legal Entities under the Regulation of Vietnam Criminal Procedure Code' (2021) 12(3) Turkish Online Journal of Qualitative Inquiry (TOJQI) 3095.

20 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.

21 UNODC (n 16).

22 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the Definition of Criminal Offences and Penalties for the Violation of Union Restrictive Measures and amending Directive (EU) 2018/1673 <http://data.europa.eu/eli/dir/2024/1226/oj> accessed 20 May 2024.

normative documents in Vietnam, this study has developed appropriate recommendations for formulating the legal framework. These recommendations aim to establish global sanctions to effectively prosecute commercial legal entities involved in transnational crimes.

3 DISCUSSIONS

3.1. Legal basis for the classification of criminal liability of transnational commercial legal entities

The classification of criminal liability for transnational commercial legal entities - necessary for maintaining ethical standards in international trade - remains fraught with challenges. It plays a crucial role in facilitating the flow of goods, services, and capital across borders. Key among these are the inconsistencies across legal systems and the difficulties in enforcing laws across borders. Moving forward, enhanced international cooperation and the harmonisation of laws are crucial. Additionally, there is a growing need to focus on preventive measures, including effective corporate compliance programs and a strong ethical corporate culture.[23] However, their global reach and multifaceted operations also introduce significant legal challenges, especially in the realm of criminal liability. Initially, it is important to understand the nature of transnational crimes.

Transnational crimes are criminal activities that cross national borders and involve multiple jurisdictions. These crimes are often complex, involving various actors, intricate planning, and sophisticated methods to evade detection and prosecution. The principal characteristics of transnational crimes include four features, particularly cross-border nature, involvement of organised crime groups or networks, significant impact on multiple countries, and challenges in jurisdiction and enforcement.[24] As cited by Brandon L. Garrett,[25] cross-border corporate crime, also known as transnational corporate crime, involves illegal activities carried out by corporations that span national borders. They pose significant challenges due to modern business's complexity and global nature. These crimes can have severe socio-economic and environmental impacts on the countries involved.

Another definition describes transnational commercial crimes as a range of illegal activities coordinated across national borders, primarily profit-driven. These crimes can significantly impact economies, societies, and governance structures worldwide.[26] Photeine Lambridis

23 Clough (n 1).

24 Robert C Thompson, Anita Ramasastry and Mark B Taylor, 'Transnational Corporate Responsibility for the 21st Century: Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes' (2009) 40(4) George Washington International Law Review 894.

25 Brandon L Garrett, 'International Corporate Prosecutions' in Darryl Brown, Jenia Turner and Bettina Weisse (eds), *Comparative Criminal Procedure* (OUP 2018) <https://ssrn.com/abstract=3138239> accessed 20 May 2024.

26 UNODC (n 16).

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highlights that while corporate complicity in international crimes is not considered a new phenomenon, multinational corporations are increasingly involved in directly committing such atrocities.[27] By providing perpetrators with the means necessary to commit these crimes, they exacerbate conflicts between state governments and paramilitary groups while actively profiting from them. However, due to the lack of international enforcement mechanisms, including substantive criminal laws, companies are easily able to escape criminal liability despite their direct involvement in criminal activities.

Dr. Jennifer Zerk firmly asserts that currently, there is a lack of decisive action from criminal prosecution and law enforcement agencies, significant legal uncertainty surrounding the scope of principal liability concepts, unevenness in distribution and use of domestic remedial mechanisms to deal with these consequences, some political concerns over extraterritorial regulations, and gaps in international mechanisms for fair distribution and cooperation in prosecuting transnational commercial entities.[28]

Mai Dac Bien claims that, at present, there is no specific legislative definition regulating the norms of cross-border criminal liability in Vietnam's current criminal law; this notion is, however, conceptualised by criminologists in criminal law science.[29] Regarding its nature, the State holds the right to prosecute criminal acts prescribed clearly from Article 74 to Article 89 in Chapter XI of the Criminal Code 2015.[30] Nguyen Hung et al. analyse the criminal liability of commercial legal entities under Vietnam's Criminal Code but fail to define and mention the transnational crimes thereof.[31] Thus, prosecuting transnational commercial entities for criminal activities presents numerous challenges, including legal interpretations of complicity, limitations of international criminal law, and reliance on national legal systems.

The criminal prosecution of commercial entities represents an essential aspect of corporate governance and regulatory compliance, aiming to hold businesses accountable for offences committed in the name of or for the organisation's benefit. The extent and nature of corporate criminal liability varies significantly between different legal systems. In some jurisdictions, like the United States, corporate responsibility is well-established and widely

27 Lambridis (n 18) 144.

28 Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies: A Report Prepared for the Office of the UN High Commissioner for Human Rights* (OHCHR 2012) 9 <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf> accessed 20 May 2024.

29 Mai (n 19).

30 Criminal Code of the Socialist Republic of Vietnam no 100/2015/QH13 of 27 November 2015 <https://luatvietnam.vn/hinh-su/bo-luat-hinh-su-2015-101324-d1.html> accessed 20 May 2024.

31 Nguyen Hung, Mai Van Thang and Tran Thu Hanh, 'The Criminal Liability of Commercial Legal Entities in the Current Criminal Code of Vietnam' (2022) 2(40) Law & Social Bonds 185, doi:10.36128/priw.vi40.398.

enforced, especially under federal law.[32] In contrast, other jurisdictions may be more limited in scope or may rely more on civil penalties and administrative sanctions rather than criminal prosecution.

Transnational corporations can face criminal liability for committing a range of activities, including–but not limited to–financial fraud, bribery and corruption, environmental crimes, and other regulatory offences. The severity and nature of these crimes often influence the decision to prosecute and the type of punishment imposed therein.

In other ways, transnational corporate crime refers to corporate crimes that extend beyond national borders. These crimes can involve multiple jurisdictions and are often complex regarding enforcement and the legislation governing them therewith.[33] The typical categories of crimes (as cited by Brandon L. Garrett)[34] might be classified into politics, human beings, economics, and environment as follows:

a) *Corruptive regimes*: Transnational corporations operating in multiple countries with central management in their home country play crucial roles in the global economy. However, their extensive reach and the complexity of their operations also make them susceptible to unethical practices and, remarkably, corruption. Their commission of corruption typically involves activities such as bribery of foreign public officials, kickbacks, and other illicit payments to facilitate business operations across different countries. These illicit actions can occur at different levels of the organisation, from top executives to local subsidiaries. The principal corruption causes might stem from the following:

   (1) diverse regulatory environments across countries with either stringent anti-corruption laws and robust enforcement mechanisms or weak regulations and inadequate enforcement;
   (2) cultural differences in which different countries might address corruption in a dissimilar way;
   (3) competitive pressures to enjoy favourable stances and;
   (4) inadequate internal controls and poor corporate governance.

As such, the corruption of transnational corporations can be prevented by implementing comprehensive anti-corruption measures and fostering a culture of integrity.

b) *Human rights issues*: Transnational corporations involving human rights violations can involve many activities, for example, labour exploitation, environmental degradation, displacement of communities, and complicity in government abuses. These violations can take place directly through the corporations' actions or indirectly through their

32 Stephen F Smith, 'Corporate Criminal Liability: End it, Don't Mend it' (2022) 47(4) Journal of Corporation Law, 1089.

33 Pouncy (n 15); Nguyen, Mai and Tran (n 31).

34 Garrett (n 25).

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supply chains and business partners to conduct business. These human rights violations' causes might originate from the following:

(1) weak regulatory or poorly enforced frameworks resulting in a lack of stringent labour laws, environmental regulations, and oversight mechanisms;
(2) aggressive cost-cutting measures leading to poor working conditions, low wages, and inadequate health and safety standards;
(3) complex and extensive supply chains, making it challenging to monitor and ensure compliance with human rights standards, and;
(4) corrupt practices to bypass legal and regulatory requirements, allowing transnational corporations to operate with impunity, ignoring labour laws, environmental protections, and other regulations designed to protect human rights.

c) *Money laundering*: It refers to the process of disguising the origins of illegally obtained money and has become a critical concern in the global financial system. Transnational corporations, while instrumental in driving global economic growth, can also be conduits for money laundering activities, which typically involve three stages: placement, layering, and integration. With their complex structures and extensive global networks, transnational corporations might encompass these stages.

Placement denotes converting illicit funds to the financial system using legitimate business operations to commingle illegal proceeds with legitimate earnings. Layering involves concealing the illicit origin of the money through a series of transactions by exploiting international presence to move funds through subsidiaries in different jurisdictions, especially those with weak regulatory frameworks or strong banking secrecy laws. Integration is the final stage, where the 'cleaned' money is integrated into the legitimate economy. Such activities might be practised by investing in real estate, luxury goods, or other high-value assets to provide a cover of legitimacy for the illicit funds.

As regulatory frameworks evolve and enforcement capabilities strengthen, transnational corporations must prioritise compliance and ethical practices to mitigate the risks associated with money laundering and uphold the integrity of the global financial system.

d) *Tax evasion*: Transnational corporations are scrutinised for their involvement in tax evasion, which undermines the tax base of countries, distorts competition and raises ethical concerns. In other words, tax evasion involves illegal practices to avoid paying taxes using various sophisticated strategies to evade taxes, taking advantage of their complex structures and the disparities in tax regimes across different countries.

Some common mechanisms include transfer pricing manipulation, profit shifting, use of tax havens, or even selling companies. Transfer pricing manipulation often manipulates transfer prices, that is, the prices at which goods and services are sold between subsidiaries of the same company to shift profits to low-tax jurisdictions. They reduce their overall tax burden by inflating prices in high-tax countries and underpricing in low-tax countries. Meanwhile, profit shifting involves moving profits from high-tax to low-tax jurisdictions. Techniques

include strategic location of intangible assets (like patents and trademarks) in tax havens or using intra-company loans to shift profits through interest payments. Another ongoing practice is the deceptive use of tax havens in which transnational corporations set up subsidiaries in countries with low or no corporate tax rates and high levels of secrecy, commonly called 'tax havens'. These subsidiaries are often used to hold intellectual property or to route financial transactions, effectively lowering the corporation's global tax rate. Lastly, the formation of selling companies, which do not have significant operations or employees, facilitates financial manoeuvres such as profit shifting. They provide a layer of opacity that makes it difficult for tax authorities to trace the money flow. Thus, transnational corporations employ various sophisticated mechanisms to minimise their tax liabilities, often at the expense of public revenue and fair competition.

e) *Environmental Crimes*: The extensive operations of transnational corporations can lead to severe environmental impacts, such as pollution, deforestation, and biodiversity loss. Consequently, prosecuting transnational corporations for environmental crimes is essential to hold them accountable and mitigate environmental damage. Transnational corporations' mechanisms of environmental crimes manifest in various forms, primarily stemming from their resource extraction, manufacturing, and industrial operations. Common mechanisms comprise pollution, deforestation and land degradation, illegal resource extraction, and non-compliance with environmental regulations.

As far as pollution issues are concerned, transnational corporations may release harmful pollutants into the air, water, and soil through direct discharge or accidental spills. These pollutants can include heavy metals, toxic chemicals, and greenhouse gases. As for the problems of deforestation and land degradation, transnational corporations' large-scale agricultural and logging activities commonly lead to deforestation, habitat destruction, and soil erosion, contributing to biodiversity loss and climate change. Regarding illegal resource extraction, some transborder corporations engage in illegal mining, logging, and fishing activities, exploiting natural resources without proper permits or exceeding legal limits. The last issue refers to the non-compliance with environmental regulations. Multinational companies may evade environmental regulations by falsifying reports, bribing officials, or exploiting regulatory loopholes in countries with weak enforcement.

Efforts to enhance accountability and enforcement are crucial in holding transnational corporations responsible for environmental crimes and promoting sustainable business practices. As regulatory frameworks evolve and enforcement mechanisms strengthen, transnational corporations must prioritise environmental stewardship to minimise their impact and contribute positively to global sustainability. In short, transnational corporations significantly impact the environment, and prosecuting them for environmental crimes is essential to ensure accountability and mitigate harm.

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In the same vein, the classification of criminal liability for transnational commercial legal entities under the 2015 Criminal Code of Vietnam involves understanding the legal framework that holds corporations accountable for criminal acts committed in the course of their business activities, especially those with cross-border implications.[35] In essence, the 2015 Criminal Code of Vietnam marks a significant shift by recognising the criminal liability of legal entities, which was not provided for in previous legislation,[36] which allows for the prosecution of companies, not just individuals, for criminal offences. It, however, does not provide any specified legal provision regulating the prosecution of the criminal liability of commercial legal entities like individuals therewith, leaving some gaps in enforcement.

As a result, corporate criminal liability encompasses various offences, including environmental crimes, corruption, and other economic-related crimes, as outlined in Articles 8 and 75.[37] This broad scope is particularly broad for transnational companies operating in Vietnam, encompassing crimes committed both within the country and those with effects outside the national borders, as prescribed from Article 10 to Article 18). Enforcement of these regulations involves cooperation between Vietnamese authorities and other countries (see Articles 74 to 89),[38] including extradition agreements, mutual legal assistance treaties, and coordination with international law enforcement agencies.

Despite these advancements, challenges remain. Do Thi Phuong argues that the regulations for prosecuting criminal liability for commercial legal entities have loopholes, which may conflict with other legal documents.[39]

In general, Vietnam's legal normative documents for prosecuting commercial entities need to be revised and specified in detail to regulate unpredicted commercial crimes. This revision is crucial to address the ongoing complexity of the criminal liability of transnational corporations.

3.2. Principles regarding the applicable prosecution of the criminal liability of commercial legal entities

Prosecuting commercial legal entities for criminal activities represents a significant aspect of corporate governance and legal accountability. It is, therefore, necessary to harmonise common principles underlying the prosecution of commercial legal entities for criminal offences to focus on legal frameworks, challenges, and implications. These principles should ensure these entities can be held liable for criminal acts and promote ethical behaviour and

35 Criminal Code of the Socialist Republic of Vietnam (n 30).
36 Do (n 19); Nguyen (n 12); Nguyen, Mai and Tran (n 31).
37 Nguyen (n 12).
38 Mai (n 19).
39 Do (n 19) 49.

compliance within corporate structures.[40] Clearly, the principle that a corporate entity can be held criminally liable originates from the notion that corporations, like individuals, can commit crimes and should be subject to sanctions accordingly.[41] This concept is rooted in the broader objectives of deterrence, punishment, and encouraging ethical corporate behaviour. By holding corporations liable, the law aims to foster a culture of compliance and responsibility at all organisational levels.

In the field of corporate law, due diligence and compliance programs are important tools to manage and minimise criminal liability risks in commercial legal entities. These programs serve not only as a defence mechanism but also as a proactive strategy to ensure businesses operate ethically and within the boundaries of the law.[42] In particular, due diligence in a legal context involves a thorough investigation into the business activities and associations of a company. Accordingly, it is a preventive measure that helps identify legal, financial, and compliance risks associated with business operations, especially in mergers, acquisitions, and partnerships.

The nature of due diligence encompasses some key aspects, such as due diligence, financial due diligence, and operational due diligence. In particular, legal due diligence overviews the legal aspects of a company, including contracts, ownership of assets, liabilities, pending litigation, compliance with local laws, and intellectual property rights.[43] Financial due diligence assesses the financial health of a company through audits, evaluations of asset valuations, and reviews of cash flow and debt. Lastly, operational due diligence analyses the operational aspects of a company, including the efficiency of processes, reliability of supply chains, and the integrity of information systems.

Compliance programs are structured plans designed to ensure adherence to legal standards and regulations. Courts and regulatory bodies often view robust compliance programs as a mitigating factor when assessing penalties for criminal activities, and it might contain the following compliance programs hereinafter.[44]

40 Fairfax (n 9); Pieth and Ivory (n 2); Alessandra De Tommaso, *Corporate Liability and International Criminal Law* (Routledge 2023) doi:10.4324/9781003390534.

41 Cunningham (n 4); Kingsley Omote Mrabure and Alfred Abhulimhen-Iyoha, 'A Comparative Analysis of Corporate Criminal Liability in Nigeria and Other Jurisdictions' (2020) 11(2) Beijing Law Review 429, doi:10.4236/blr.2020.112027; Mohammed Saif-Alden Wattad, 'Natural Persons, Legal Entities, and Corporate Criminal Liability under the Rome Statute' (2016) 20(2) UCLA Journal of International Law and Foreign Affairs 391.

42 Arlen (n 13); Vitalii Datsiuk and Iryna Nesterova, 'Sustainability Issues of Business Security in Ukraine: Risk Factors of the Corporate Criminal Liability' (2020) 116 Teisė 120, doi:10.15388/Teise.2019.116.8; Fabian Teichmann, Chiara Wittmann and Sonia Boticiu, 'Compliance as a form of Defense against Corporate Criminal Liability' (2023) 1 Journal of Economic Criminology 100004, doi:10.1016/j.jeconc.2023.100004.

43 Garrett (n 25); Isroilov, Alimov and Toshev (n 3).

44 Gustavo A Jimenez, 'Corporate Criminal Liability: Toward a Compliance-Orientated Approach' (2019) 26(1) Indiana Journal of Global Legal Indiana Journal of Global Legal Studies 353.

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Notably, Michael J. Kelly and Luis Moreno-Ocampo outline several modes of criminal liability[45] for compliance programs. These programs typically include documented guidelines that outline ethical behaviours and legal compliance, ensuring accessibility for all employees. Training and education are integral, involving the process of regular training sessions for employees to reinforce the company's commitment to legal and ethical standards. Monitoring and auditing programs play a crucial role in conducting regular audits to ensure policy adherence and detect violations early. Furthermore, it is necessary to mention the vitality of reporting mechanisms, which allow employees to report unethical behaviour or compliance violations anonymously. The last program focuses on the tasks of enforcement and discipline, which entails clear consequences for violating policies applied consistently across all levels of the organisation. In short, transnational corporations must demonstrate that they have adequate measures in place to prevent criminal behaviour by implementing compliance programs and internal controls.

In the context of transnational commercial corporations, attributing criminal liability extends beyond individual actors to encompass the corporate entity itself. This approach recognises that the decisions and actions resulting in criminal behaviour involve complex organisational processes and cannot solely be attributed to individuals. The prosecution of these entities, therefore, focuses on corporate culture, policies, and the role of top management in fostering an environment where illegal activities can occur.

To address this, specific principles such as the control test and the identification doctrine are applied.[46] In more detail, the control test examines whether the senior personnel who committed the offence had substantial control over the corporation's decision-making process. In contrast, the identification doctrine features conventional practices in common law jurisdictions and associates the corporation with its decision-makers–typically senior executives–whose actions and intentions are deemed to be those of the corporation itself. By that means, the responsibility of transnational commercial corporations in criminal activities extends beyond individual perpetrators to include the entity itself, particularly when facilitated by corporate practices or culture.

Another principle relates to the proportionality and penalties in prosecuting the criminal liability of transnational commercial corporations. This aspect involves complex legal considerations due to the nature of transnational business operations and the difficulty in enforcing laws across different jurisdictions.[47] Specifically, the principle of proportionality in legal penalties is crucial in ensuring that punishments are appropriate to the severity of the offence. In the context of transnational corporations, penalties must not only be severe enough to deter future violations but also fair and consistent across

45 Kelly and Moreno-Ocampo (n 1).
46 Díez (n 7); Nick Werle, 'Prosecuting Corporate Crime when Firms are Too Big to Jail: Investigation, Deterrence, and Judicial Review' (2019) 128(5) The Yale Law Journal 1366.
47 Garrett (n 25).

different legal systems.[48] While penalties must be proportionate to the harm caused and should serve both punitive and deterrent functions. These can include fines, remediation orders, or even corporate dissolution. In practice, penalties for criminal activities of corporations can include fines, sanctions, or more severe measures such as barring the company from doing business. In some cases, individual corporate officers might face personal penalties, including prison sentences.

The last principle refers to restorative justice in prosecuting the criminal liability of transnational commercial corporations, constituting a significant regulation in addressing the aforementioned issues. Notably, restorative justice presents an alternative approach to the traditional punitive measures in dealing with the criminal liability of transnational commercial corporations. Its primary focus is to repair the harm caused by criminal actions, involve all stakeholders, and promote a dialogue that leads to mutual understanding and resolution.[49] Restorative justice characterises some significant features. Remarkably, the involvement of stakeholders relates to victims, offenders, community members, and transnational corporations therein, including affected local communities, employees, shareholders, and regulatory bodies. Another feature is to concentrate on repairing harm. Restorative justice addresses the harm caused by the corporation's actions, which may involve compensation to affected communities, remediation of environmental damage, or public commitments to change harmful business practices. Typically, an essential principle of restorative justice is voluntary participation by the corporation and all other stakeholders, which is critical to achieving a genuine dialogue and meaningful outcomes.[50]

It can be challenging in cases involving transnational entities due to the complexity of legal and ethical standards across different jurisdictions. Restorative justice often employs mediation sessions where all parties come together to discuss the impact of the corporation's actions and agree on steps to make amends. This dialogue is facilitated by a neutral mediator who ensures all voices are heard, and the process remains constructive. Restorative justice might encounter outcome agreements; thereby, its process typically involves some form of agreement on actions that the corporation shall take to address the harm caused.[51] These agreements can be more flexible than traditional court orders, allowing for creative solutions that better fit the specific circumstances and needs of the affected parties.

Regarding preventive measures, beyond addressing specific incidents, restorative justice can encourage corporations to implement ongoing changes in their business practices to prevent future harm. It might refer to altering corporate governance structures, increasing

48 Lederman (n 3); Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12(1) Chinese Journal of International Law 43, doi:10.1093/chinesejil/jmt010.

49 Pouncy (n 15); Smith (n 32).

50 Wilt (n 48).

51 Henning (n 8).

transparency, and enhancing ethical standards within the company.[52] In addition, it also encounters challenges and criticism. It denotes that implementing restorative justice for transnational corporations faces several challenges, including ensuring meaningful participation by large corporations, balancing power asymmetries between corporations and victims, and integrating these processes into diverse legal systems with varying degrees of support for restorative practices.[53] Overall, restorative justice offers a promising complement to traditional legal approaches, particularly in its capacity to transform corporate behaviour and remedy the broader impacts of corporate misconduct on communities and the environment.

Under Vietnam's jurisdiction, the principle applicable to this type of crime is prescribed in Article 74 of the 2015 Criminal Code, which stipulates general principles subject to commercial legal entities. The provisions in Article 74 are appropriate, affirming more clearly that the individuals and the legal entity shall be liable for their commission of crime. Consequently, issues such as fault, stage of crime, crime classification, and complicity (inter alia) are regulated to the corresponding provisions of the 2015 Criminal Code to be under the criminal liability of legal entities.[54]

3.3. The demand for establishing globally harmonised sanctions regarding transnational prosecution concerning the criminal liability of commercial legal entities

The demand for globally harmonised sanctions concerning the criminal liability of commercial legal entities is a response to the increasing recognition of corporations' role in transnational crimes, including corruption, human rights violations, and other international crimes. Based on the previous legal grounds, the following section synthesises critical points from various sources to provide an overview of the current landscape and the push towards a more unified approach to prosecuting corporate criminality. To constitute a globally harmonised mechanism, legislators shall confront many difficulties in overcoming challenges in the global trend towards increased prosecution of corporations for criminal violations, with multinational corporations facing enforcement in multiple countries.[55]

The first challenge in prosecuting transnational crimes is jurisdiction. Countries have varying legal frameworks, making coordinating and enforcing laws across borders difficult. Some jurisdictional issues are determining the appropriate jurisdiction for prosecution, the conflicts between national laws and international standards, and the limited extraterritorial

52 Datsiuk and Nesterova (n 42); Pouncy (n 15).
53 Alldridge (n 8).
54 Criminal Code of the Socialist Republic of Vietnam (n 30).
55 Wagner (n 12).

reach of national laws.[56] Overall, different countries have varying laws and regulations, leading to conflicts and loopholes which transnational criminals fraudulently exploit.

The second challenge is the complexity of corporate structures. Many multinational corporations use intricate structures designed to obscure ownership and operations, complicating investigations. These structures involve deceptively selling companies and offshore entities, retaining multiple layers of ownership, or making complex financial arrangements.

Next, more international cooperation is needed to deal with this aspect. Inadequate cooperation between countries often hampers the ability to gather evidence and prosecute offenders effectively.[57] This loophole includes differences in the legal system and procedure, limited mutual legal assistance treaties, and political and diplomatic barriers. As such, the lack of globally cooperative sanctions can result in uneven justice and create safe havens for criminal entities.

Finally, legal loopholes and inadequate laws in some countries contribute to the problem. Many jurisdictions lack robust laws to address corporate criminal liability, resulting in safe havens for criminals.[58] Issues include inadequate definitions of corporate criminal liability, limited penalties for corporate crimes, and weak enforcement mechanisms. Generally, the absence of standardised legal definitions and frameworks allows entities to manoeuvre through legal gaps. As a result, globally harmonised sanctions are needed to address these challenges.

Countries like Vietnam should consider adopting and ratifying international conventions that set standards for corporate criminal accountability.[59] The legal basis should be formulated based on a number of widely recognised normative documents, typically the United Nations Convention against Transnational Organized Crime (UNTOC),[60] also known as the Palermo Convention. The Convention is a comprehensive international legal instrument designed to combat transnational organised crime. Its mission is to provide cooperation to prevent and fight transnational organised crime more effectively. The practicality of the Convention is to provide a global framework for dealing with proceedings brought by transnational organisations and to enhance international cooperation, making it easier for signatory States to combat organized crimes. By addressing different aspects of organised crime, from prevention and criminalisation to protection and cooperation, a comprehensive approach is necessary to tackle this problem. Overall, the UNTOC is a

56 Garrett (n 25).

57 Clough (n 1).

58 Werle (n 47).

59 Jimenez (n 44); Kelly and Moreno-Ocampo (n 1); Bui Sy Nam, 'Criminal Liability of Commercial Legal Entity in Vietnamese Law' (2020) 498 Advances in Social Science, Education and Humanities Research 54, doi:10.2991/assehr.k.201205.010.

60 UNODC (n 16).

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pivotal instrument in the global fight against transnational organised crime, providing international cooperation and strengthening legal frameworks worldwide.

The second legislative document is the OECD Anti-Bribery Convention,[61] formally known as the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This landmark international treaty is designed to curb corruption and promote fair business practices. Its primary purpose is to combat the bribery of foreign public officials in international business transactions. In fact, the OECD Anti-Bribery Convention has had a significant impact on global efforts to combat corruption, influencing national laws and corporate practices. It actively strengthens international cooperation in the fight against corruption, fostering mutual legal assistance and information sharing. By criminalising bribery of foreign public officials across signatory countries, the Convention helps level the playing field for businesses operating internationally. In short, the OECD Anti-Bribery Convention is a critical instrument in the global fight against corruption, setting high standards for anti-bribery laws and enforcement practices and promoting integrity and transparency in international business transactions.

The final document is the Financial Action Task Force (FATF) Recommendations, a comprehensive framework aimed at combating money laundering, terrorist financing, and other related threats to the integrity of the international financial system.[62] It sets international standards and promotes effective implementation of legal, regulatory, and operational measures to combat money laundering, terrorist financing, and other related threats. These normative documents are recognised globally as the international standard for combating money laundering and terrorist financing, which foster international cooperation and coordination among countries to combat financial crimes. In reality, the FATF continuously updates and refines its Recommendations to address emerging threats and challenges in the financial sector. Generally, the FATF Recommendations play a crucial role in maintaining the integrity of the global financial system by setting comprehensive and adaptable standards for combating money laundering, terrorist financing, and other related threats.

The pillar of the Framework for Harmonized Sanctions is the establishment of a centralised international body tasked with overseeing and regulating the implementation and enforcement of harmonised sanctions. It is practical to propose that this body could be modelled after the FATF,[63] incorporating the regulations from OECD[64], UNTOC[65],

61 OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: And related documents* (OECD 2024) <https://www.oecd.org/corruption/oecdantibriberyconvention.htm> accessed 20 May 2024.

62 FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (FATF OECD 2023) <www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html> accessed 20 May 2024.

63 ibid.

64 OECD (n 61).

65 UNODC (n 16).

UNODC[66], U.S. Department of Justice 9-28.000,[67] and International Criminal Court (ICC) [68] to constitute three functions; that is, this unique body should be legitimate with three distinctive features. First, the body is in compliance with a standard setting to develop and promote international standards for corporate criminal liability. Second, it has a feature of monitoring compliance to assess and monitor compliance with international standards. Finally, it is committed to facilitating cooperation and promoting cooperation and coordination among countries and organisations. A treaty on MLATs in prosecuting the criminal liability of commercial legal entities subject to complicated, transnational crimes shall be strengthened to facilitate the exchange of information and evidence between countries.[69]

Besides, it is necessary to clarify some key elements to ascertain MLATs. The primary principle is to establish transparent and efficient procedures for requesting and providing assistance. Next, it is crucial to ensure timely and effective responses to requests for assistance, and finally, it is mandatory to cover a wide range of transnational crimes, including provisions for corporate liability.

In addition, national governments should bolster regulatory bodies to enforce compliance with international standards by providing adequate resources and training for regulatory bodies. They shall update national laws to align with international standards and develop robust mechanisms for monitoring and enforcing compliance.[70]

Another effective method is encouraging collaboration between governments and the private sector to share intelligence and best practices in combating transnational crimes. Critical aspects of public-private partnerships are facilitating the exchange of information between businesses and law enforcement, promoting the development and implementation of corporate compliance programs, and raising awareness about the risks and consequences of transnational crimes. Moreover, international organisations play a critical role in facilitating harmonised sanctions to assist the enforcement of the body.[71] Key organisations should be actively joint-hand to make sure about the functions of the body. For the role of the United Nations, the organisation should provide a platform for developing international legal standards and promoting cooperation. In addition, the International Criminal Police

66 *United Nations Office on Drugs and Crime (UNODC)* <https://www.unodc.org/unodc/en/index.html> accessed 20 May 2024.

67 US Department of Justice, '9-28.000 - Principles of Federal Prosecution of Business Organizations' in *Justice Manual* (DOJ 2023) title 9 <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations> accessed 20 May 2024.

68 ICC, *Rome Statute of the International Criminal Court* (ICC 2021) <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf> accessed 20 May 2024.

69 Isroilov, Alimov and Toshev (n 3).

70 Garrett (n 25).

71 Tommaso (n 40).

Organization (INTERPOL) assists in coordinating law enforcement efforts across borders,[72] and the OECD develops guidelines and conventions to combat transnational crimes. The above bodies can foster judicial cooperation through regular meetings, joint training programs, and information-sharing platforms to establish networks of judges and prosecutors to facilitate communication and cooperation. They could offer joint training programs to enhance the skills and knowledge of judicial personnel and develop platforms for exchanging information and best practices among judicial bodies.

In short, to address the challenges of prosecuting transnational crimes, there is an urgent need for globally harmonised sanctions. Harmonisation involves aligning national laws and regulations to create a cohesive framework for prosecuting transnational crimes.

4 CONCLUSIONS

Confronting corporate criminal activities in developing countries like Vietnam requires a multi-faceted approach that addresses legal, regulatory, institutional, and cultural challenges. To start, there must be a reform of outdated laws to clearly define and penalise corporate crimes, including fraud, bribery, embezzlement, and environmental violations. Establishing or reinforcing independent regulatory agencies with clear mandates, adequate funding, and protection from political interference is crucial.

Harmonising local laws with international standards and best practices, such as those set by the OECD and UNODC, is also necessary. Promoting good corporate governance involves developing and enforcing codes of good corporate governance that outline ethical standards and practices, coupled with more training programs for corporate boards to ensure they understand their roles and responsibilities in preventing and addressing corporate crime.

Furthermore, companies should implement robust internal controls and compliance programs. Developing countries should participate in international cooperation to address transnational corporate crimes, leveraging treaties and agreements, and seek technical and financial assistance from international organisations and developed countries to build local capacity and strengthen regulatory frameworks. Besides, advocacy for necessary policy changes at national and international levels will further enhance the legal and regulatory environment against corporate crime.

At present, there is a loophole in addressing the criminal liability of transborder commercial legal entities, highlighting the urgent need for globally harmonised sanctions. Harmonisation involves aligning national laws and regulations to create a cohesive framework for prosecuting transnational crimes. Uniform laws across countries ensure that all commercial entities are held to the same standards, eliminating safe havens. A unified

72 'Cooperation Agreements' (*INTERPOL*, 2024) <https://www.interpol.int/en/Who-we-are/Legal-framework/Cooperation-agreements> accessed 20 May 2024.

approach increases the risk for entities involved in transnational crimes, deterring future violations. Thus, harmonised sanctions facilitate better cooperation between countries, enabling efficient evidence collection and prosecution by pooling resources and expertise, which reduces the enforcement burden on individual countries.

The absence of a global regulatory body means that different countries may address these issues in inconsistent ways, creating loopholes for corporate criminals to exploit. A global legal framework would enable the classification and prosecution of criminal activities across transnational commercial entities, bridging gaps between different legal systems and improving the ability to address crimes that transcend national boundaries. Given the rise in transnational crimes involving commercial legal entities, a harmonised approach to sanctions and prosecution is essential. Aligning legal standards, boosting international cooperation, and strengthening enforcement mechanisms will help the international community combat these crimes and hold commercial entities accountable. The urgency of this call cannot be overstated, as the integrity of the global economic system and the rule of law depend on robust and unified actions against transnational criminal activities. Implementing harmonised sanctions will deter future violations and promote a fair and just international business environment.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Оглядова стаття

ПРОТИДІЯ ТРАНСНАЦІОНАЛЬНИМ КОРПОРАТИВНИМ ЗЛОЧИНАМ: ТЕРМІНОВІ ГЛОБАЛЬНІ ЗАХОДИ

Хоат Ван Нгуєн

АНОТАЦІЯ

Вступ. *У сучасному взаємопов'язаному світі глобальна економіка має важливе значення через свій широкомасштабний вплив на різні аспекти життя. Вона надає країнам, що розвиваються, доступ до більших ринків і сприяє значним бізнес-операціям, що вимагають від комерційних юридичних осіб мати значний вплив і силу за межами національних кордонів, що призводить до зростання складних транснаціональних злочинів.*

Методи. *У цій якісній систематичній оглядовій роботі здійснюється огляд, аналіз і синхронізація вторинних джерел, що стосуються притягання до кримінальної відповідальності комерційних юридичних осіб. Результатами дослідження було підтверджено правову основу для нагальної необхідності глобально гармонізованих санкцій, що дадуть змогу ефективно переслідувати комерційні юридичні особи, причетні до транснаціональних злочинів.*

Результати та висновки. *У роботі досліджується природа та обсяг цих правопорушень, виклики у їхньому застосуванні, а також переваги єдиного підходу. Оглядова стаття має на меті надати всебічну основу для міжнародної співпраці, щоб дотримуватись справедливості та доброчесності під час притягнення до кримінальної відповідальності комерційних юридичних осіб. Завдяки тематичним дослідженням, аналізу наявних правових структур і рекомендацій для майбутніх дій, у цьому дослідженні підкреслюється необхідність глобальної співпраці для встановлення гармонізованих санкцій та правових меж, що стосуються притягнення до кримінальної відповідальності між країнами. Крім того, дослідження містить деякі пропозиції щодо зміни стосовно зазначеного питання у світі, особливо в країнах, які ще не підписали міжнародні угоди з іншими країнами для вирішення проблеми з транскордонним притягненням до кримінальної відповідальності.*

Ключові слова: *гармонізовані санкції, кримінальна відповідальність, комерційні юридичні особи, транснаціональні злочини, правові межі.*

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Case Note

RESOLVING CONFLICTS OF LAW DURING JUDICIAL PROCEEDINGS: AN EMPIRICAL STUDY OF UKRAINE

Oksana Khotynska-Nor* and Kyrylo Legkykh

ABSTRACT

Background: *Law is a key regulator of social relations. Its systemic nature is fundamental for proper, clear and comprehensive regulation of legal relations. As an integral system, law has its own logic, structure, order and purpose. This purpose is to properly regulate social relations, ensure law and order, and qualitatively and consistently satisfy the rights, obligations and interests of participants in legal relations. However, legal regulation is not without its flaws. One major issue of legal regulation is gaps in the law, where certain social relations lack proper legal regulation due to a lack of specific legislative or legal approaches. Other flaws include conflicts between laws, legislative gaps, qualified silence of the legislator, "darkness" of legal norms, and a "seeming" need for legal regulation and other legal phenomena similar in nature. This article addresses how judges resolve conflicts of law in the course of judicial proceedings, namely the construction of a mechanism to resolve conflicts within national legislation to ensure the right to a fair trial. This issue is of particular importance in the context of the war in Ukraine because, unlike in the relatively stable judicial practice of resolving disputes that arise in a society where there is no war, today, the courts now face unprecedented cases, such as those involving military medical commissions decisions, financial support of military personnel, and new wartime criminal prosecution. Additionally, judges must navigate the procedural norms for the administration of justice in wartime, which are changing rapidly.*

The study identifies specific cases of conflict in law, particularly in issues related to mobilisation. It highlights how inconsistencies in current legislation and the lack of uniform approaches to overcoming them often prevent citizens from exercising their rights. This situation directly contradicts the Sustainable Development Goals in terms of building peaceful and inclusive societies for sustainable development, ensuring access to justice for all, and building effective, accountable, and inclusive institutions at all levels.

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The authors of the article highlight the growing importance of legal principles in resolving conflicts within the law. Foundational concepts like the rule of law, legal certainty, and legality are recognised grounds for judicial decision-making. Accordingly, this allows courts to interpret conflicts in specific areas of legislation – such as tax legislation in favour of the taxpayer, child rights in favour of children, and labour law in favour of employees. Consequently, similar claims may be resolved differently depending on their subject matter. To support this analysis, the authors analysed 150 decisions of Ukrainian judges, studied the concept of conflicts, formulated a refined definition, assessed the role of judicial law-making in resolving legal conflicts, and developed a mechanism for addressing conflicts in law by judges.

Methods: *The authors employed a general dialectical analysis approach grounded in the doctrine of society and thinking, along with the historical method, to analyse the development of legal norms and institutions in different historical periods. This approach provides insights into their origins, evolution and impact on the modern legal system. Methods of analysis and synthesis of information were also utilised. To support the authors' conclusions, relevant empirical information, including court decisions from the Unified State Register of Court Decisions, were referenced. A total of 150 court decisions containing collisions from 2015 to 2024 were analysed, 22 of which were cited in this article.*

Results and Conclusions: *Conflicts in law are defined as subjectively caused phenomena involving the confrontation of several norms or their totality, resulting in the inability to apply legal norms effectively, clearly, and consistently to regulate social relations. A definition of conflicts in law from a judicial perspective is also proposed: they are contradictions within legal regulation, a negative legal phenomenon that a judge, with the authority vested in them, must resolve in a manner that upholds fundamental principles of law during the administration of justice.*

1 INTRODUCTION

In applying current legislation, Ukrainian courts face problems due to imperfections and gaps within national legislation, often requiring them to draw on the fundamental legal principles and the ideological intent behind legal norms to resolve cases. This is particularly evident in cases that relate to family, labour, and military law, as well as in cases involving public legal relations. When making substantive decisions, courts frequently encounter conflicts from variations in the strength, specialisation or date of adoption of normative legal acts. Resolving these conflicts not only forms a crucial part of the court's reasoning but serves as a means to achieve fair justice.

For Ukraine, resolving legal conflicts in the administration of justice is of particular importance. First, the country continues to transition its legislation from Soviet-era to national legislation, with many pre-independence regulations still partially or entirely outdated and in need of replacement. Secondly, Ukraine's current legislation is not devoid of various types of collisions that have arisen both as a result of the involvement of multiple

bodies in drafting normative legal acts and the sheer accumulation of such acts – some of which suffer from poor drafting quality. Thirdly, it is almost impossible to resolve conflicts at the administrative level, and most often, going to court is the only effective way to protect the rights of individuals and legal entities.

This article provides examples of specific cases of collisions and outlines the author's proposed vision to solve them. The aim is to establish uniform, scientifically grounded conclusions that will enable judges to apply a systematic, algorithmic approach to overcoming simple and complex collisions within current legislation by judges in the administration of justice.

2 CONFLICTS IN LAW

Scholars perceive conflicts in law ambiguously. In his work, *Legal Technique*, German philosopher Rudolf von Jöring pointed out that even the most precise law may be challenging for judges to apply, as it often lacks the clarity necessary for straightforward application to particular cases. He argues that technical imperfections reflect the broader imperfection of law as a whole.[1] In the context of conflicts, it should be noted that laws with such defects may lead to conflicts that make formal application by judges impossible.

Conflicts in law are generally perceived by the scientific community and practitioners as a certain negative phenomenon. The inability to clearly apply the rules of law in the system of civil law causes various conflict situations, including discrepancies in interpretation and law enforcement, which can lead to poor quality of court decisions. Accordingly, judges play a crucial role in finding the right approach to resolving conflicts to ensure the establishment of democracy and equality in applying laws. A high-quality court decision, where the law is applied reasonably, impartially, and in accordance with the case circumstances, is one of the main criteria for the quality of justice.

Some, however, see conflicts in law as a positive phenomenon, suggesting they reflect that social relations and state-legal mechanisms are developing.[2] Such a position can be justified by the fact that conflicts are virtually impossible to avoid in legislative evolution and a natural result of the legal system's progressive development along a certain established path.

Regardless of how we perceive legal conflicts – positively, neutrally or negatively – it is essential to recognise that law, as a regulator of social relations, is effective when its norms are both imperceptible and absolutely accepted by those it governs and sufficiently robust to qualitatively and quickly resolve existing shortcomings and conflicts. Collisions are neither wholly negative nor positive; they are a legal fact that law-making and law

1 Rudolf von Jöring, *Juridical Technique* (FS Schoendorff tr, Typo-Lithography AG Rosen (AE Landau) 1905).

2 YI Lenger, 'Legal Nature of Conflict and Its Features in Municipal Law' (2017) 25 Scientific Bulletin of the International Humanities University: Series Jurisprudence 14.

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enforcement agencies face. Accordingly, the ultimate goal to be achieved is more global and significant for society than the problem of conflicts in law, which, while challenging, should not undermine the primary purpose of the law. Accordingly, legal conflicts are a legal fact that require resolution.

As F. A. Hayek pointed out, law is crucial both for rulers and for maintaining order, enabling people to continue their efforts in peace.[3] Analysing this given thesis, it can be assumed that the scientist distinguishes two perspectives on law: 1) that of the ruler (or statesman), in which law serves as a foundational tool and a guarantee of existence and instrument of activity, enabling it to fulfil its tasks effectively and consistently; and 2) the perspective of the ordinary person whether a natural and legal person, a citizen, a foreigner, a stateless individual who resides under the state's laws. For individuals, the law guarantees the opportunity to work and create a material, moral, economic, labour, social, and cultural basis both for their own existence and that of the state. Citizens (population) are not required to be professional lawyers to be able to accurately and qualitatively interpret the content of legislation.

The well-known theorist and philosopher of law R. Dvorkin remarked that while lawyers and judges may have differing views on the nature of legal rights, citizens and statesmen often share similar contradictions in connection with political rights.[4] Accordingly, a conflict of law is not a factor that should adversely affect a person's life. Instead, it should primarily impact the activities of the state and lawyers, creating a certain space for dialogue and resolving conflicts. Such a space can be formed through collaboration between the professional legal community and competent public authorities, particularly in the administration of justice.

3 THE ROLE OF JUDICIAL LAW-MAKING IN RESOLVING LEGAL CONFLICTS

Taking into account the division of power into three main branches established by Art. 6 of the Constitution of Ukraine: legislative, executive and judicial, it should be emphasised that each of them has its own rights and obligations envisaged by the Constitution and legislation to exercise the powers vested in them.

Using the powers established by normative legal acts, public authorities carry out law-making and law enforcement. However, it is impossible to clearly assign clear law-making and law-enforcement functions to each branch of power. While the legislative branch is primarily responsible for law-making, it holds some law-enforcement functions. Similarly, the judiciary, in turn, contains a number of opportunities that can be interpreted as law-making.

3 Friedrich Hayek, *Law, Legislation, and Freedom: A New Exposition of the Broad Principles of Justice and Political Economy*, vol 1: Rules and Order (Sphere 1999).

4 Ronald Dworkin, *Serious View of Law* (A Frolkin tr, Osnova 2000).

In the context of resolving legal conflicts, the issue of judicial law-making is less acute when addressing gaps in law and legislation. Resolving conflicts in law involves finding a rational compromise, and each branch of government, within its competence, should strive to achieve this rational compromise. The Court, as the body with jurisdiction to resolve any legal disputes and administer justice under the Constitution of Ukraine, plays a critical role in addressing conflicts in specific legal relations. Courts are approached to resolve legal disputes, including those where conflicts in law exist due to defects in legal regulation.

It is worth emphasising that due to the distribution of functions among the authorities, the legislative branch has a greater institutional capacity to solve the problems of conflicts in law at the global level, forming and proposing a new legal order to regulate certain social relations.

In administering justice, judges rely on specific rules that can be applied to a particular case under specific circumstances. While judicial law-making is permitted, it often results in less clearly formulated norms, known as "quasi-precedents." These are specific approaches to legal regulation that, while not formal precedents, can serve as a legal basis in cases provided for by law.

In particular, according to the Law of Ukraine *On the Judiciary and the Status of Judges*, the practice of courts of cassation should be taken into account by state authorities and judges of lower instances. In addition, it should be emphasised that there is no clear, consolidated procedure for resolving conflicts. According to the Supreme Court, the Constitution of Ukraine does not establish the priority of application of a particular law, including depending on the subject of legal regulation. Furthermore, there is no specific Ukrainian law regulating the resolution of conflicts between norms of laws with equal legal force.[5]

However, in August 2023, the Law of Ukraine *On Law-Making Activity* was adopted,[6] which includes Art. 66, briefly addressing methods for overcoming conflicts (contradictions and inconsistencies) in legal rules while implementing normative legal acts. However, it must be noted that the article does not fully outline the methods to resolve conflicts, only indicating temporal and hierarchical ways for resolving simple conflicts.

The lack of direct and detailed legislative regulation gives rise to double consequences: on the one hand, it provides the space for judges to make the most appropriate decision, while on the other hand, it increases the responsibility for sound argumentation in adopting decisions and applying legal acts. In fact, when resolving a conflict of law, a judge is free to apply existing legal approaches. The quality of conflict resolution depends on the

5 Case no 240/4937/18 (Supreme Court of Ukraine (Grand Chamber), 18 March 2020) <https://reyestr.court.gov.ua/Review/88952401> accessed 30 September 2024; Case no 580/2371/20 (Supreme Court of Ukraine, 23 September 2020) <https://reyestr.court.gov.ua/Review/91722416> accessed 30 September 2024.

6 Law of Ukraine no 3354-IX of 24 August 2023 'On Law-Making Activity' [2023] Official Gazette of Ukraine 88/5121.

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professionalism, experience, and attentiveness of the judge. It is essentially individual in each case, except when applying established practices of resolving typical cases.

Historical aspect

In the historical and legal context, conflicts in Ukrainian law have their own chronology, which allows them to be systematised in a certain way. D. Belkina characterises the following periods through the prism of changes in the legislation that regulates the above issues: 1) 1991 - 2003; 2) January 2004 - April 2014; 3) from April 2014 onwards.[7]

However, this periodisation is not without its disadvantages. In particular, it is worth paying attention to the fact that it concerns only the selection of such a criterion for classification as amendments to the legislation. In our opinion, when determining the periods of development of legislation on the regulation of relations regarding conflicts in law, the main criterion should be the amendments to the legislation (which eliminate conflicts and gaps). Additionally, it is necessary to consider auxiliary mechanisms – such as principles, legal certainty, and case law – that have expanded the opportunities for resolving conflicts with the democratisation of the Ukrainian state. Given this, analysing the historical components of how judges have addressed conflicts since Ukraine's independence, we propose the following chronological order of legislative development:

1) *from 28 June 1991 (establishment of Ukraine's independence) to 24 August 1996 (adoption of the Constitution of Ukraine).* This period was characterised by particular difficulty, as Soviet legislation was implemented into the legal system of Ukraine through legal succession. Accordingly, justice was administered on the basis of outdated legislation that did not meet the needs of the time and often conflicted with laws adopted by the Verkhovna Rada of Ukraine and decrees of the Cabinet of Ministers of Ukraine (acts with equal legal force to laws). During this period, the rule of law and legal principles had not yet gained the prominence they would later acquire in Ukraine's legal system. Consequently, the only tool for resolving conflicts was the application of conflict-of-law principles. The absence of the Constitution of Independent Ukraine also played a negative role, as there was no higher legal framework to serve as a direct reference point in the administration of justice. Furthermore, conflicts in law enforcement were resolved somewhat ambiguously due to the lack of a unified information base of Ukrainian legislation and the rapid pace at which new legal norms were introduced;

2) *from 24 August 1996 to 2004.* This period was marked by the development of a new legislative framework, including the adoption of new codes of substantive and procedural law and the gradual displacement of Soviet-era legislation. The Constitution of Ukraine established a democratic vector of development for the legal system, providing a solid foundation for forming approaches to resolving legal conflicts.

7 Oleksandr G Kolb (ed), *The Concept and Content of Gaps and Collisions in the Criminal Executive Legislation of Ukraine and Ways to Overcome Them* (Helvetica 2021).

Characterising this period, it is worth mentioning the position of D. Lylak, who stated that as of March 2003, there was not enough legislative regulation in Ukraine. At that time, the share of laws in the legislative system was only 3.8%. According to the author, such a situation gave rise to legal collisions between legal acts and their norms, creating contradictions in the law enforcement activities of courts and law enforcement agencies. Such contradictions inevitably resulted in defects in legal understanding, legal awareness, legal culture and legal behaviour;[8]

3) *from 2004 to 2014.* This period was marked by the entry into force of new codes of substantive law, democratisation and judicial independence, which from 2010 to 2014 was actively destroyed. A significant development was the adoption of the Law of Ukraine, *On the Execution of Judgments and Application of the Practice of the European Court of Human Rights*, which set the vector for the development of the practical application of the rule of law in the administration of justice and, among other things, made it possible to apply the practice of the European Court of Human Rights as a guideline in resolving conflicts;

4) *from 2014 to the present.* An important democratisation process resulted in the revision of Ukraine's judicial system. The practice of precedent decisions of courts of cassation, which should be taken into account by the courts of lower instances in administering justice, and the rule of law consolidated the status of a practical tool. Accordingly, the possibility of judges resolving conflicts has increased significantly.

The historical evolution of conflict resolution in Ukrainian law demonstrates that while legal conflicts cannot be entirely avoided if judges are provided with the necessary means to resolve them, they can be localised and eradicated as much as possible in most cases. Furthermore, reducing the caseload on courts of first instance allows judges to dedicate more attention to each case, facilitating the effective resolution of legal conflicts and the restoration of justice.

Having emphasised the critical role of judges in overcoming the phenomenon under consideration in law, it is important to define **what a conflict in law is and what a conflict in law is for a judge.**

Theoretical aspect

According to J. Lenger, conflicts in law are 1) contradictions and 2) differences between various legal norms and acts. It is necessary to clarify that by acts, the scientist refers to legal acts that regulate a common object of legal regulation.[9]

8 Dmytro D Lylak, 'The Problem of Collisions in the Legislation of Ukraine (Theory and Practice)' (PhD (Law) thesis, VM Koretsky Institute of state and law NAS of Ukraine 2004).

9 Lenger (n 1).

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S. Pogrebnyak characterises conflicts in law in two ways: in the narrow sense, as an exclusively internal or formal (formal-logical) contradiction within the legal system, and in the broad sense, as a contradiction between existing legal acts and institutions, the rule of law, and the intentions or actions aimed at changing, recognising or rejecting them.[10]

Analysing the problems of conflicts in penal law, D. Belkina pointed out the importance of the subject component. In her opinion, conflicts in law are formal inconsistencies and contradictions resulting from violations of rule-making and its principles, as well as temporal, hierarchical and substantive errors of the subjects of this type of activity existing in legal practice.[11]

T. Shevchenko emphasises that collisions should be considered in two senses: narrow and broad. In the narrow sense, a conflict in law is a practical category in law enforcement, denoting discrepancies in two or more normative legal acts. In the broad sense, conflicts in law are considered legal conflicts, representing material contradictions in legal regulation and contradictions within the legal system itself.[12]

In studying the conceptual apparatus, S. Vasyliv points out the synonymy of the categories that are found in the scientific literature that address the problem of collisions, including *legal conflict*, *conflict of legislation*, *conflict of legal acts*, *conflict of laws* and *conflict of legislation*.[13] While we can only partially agree with the author, it is important to note that the terms *legal conflict*, *conflict of legislation*, *conflict of legal acts* and *conflict of laws* denote a specific problem that exists in legal regulation. At the same time, *conflict of laws* serves as a broader characteristic of Ukrainian legislation, which inevitably contains legal conflicts.

V. Zvonarev's position that the conflict in law is a contradiction between "available" and "necessary" is quite reasonable. The essence of conflicts on a global scale, according to the author, is the contradiction between positive law and natural law.[14] While such an opinion has the right to exist, it is important to note that conflicts may also arise between two positive laws that align with the purpose of natural law in regulating legal relations. Accordingly, a conflict in law does not necessarily contradict the natural law principles of legal relations.

10 Stanislav P Pogrebnyak, 'Collisions in the Legislation of Ukraine and Ways to Overcome Them' (PhD (Law) thesis,Yaroslav Mudryi National Law University 2001).

11 Dina Belkina, 'Legal Gaps and Collisions in the Criminal Executive Legislation of Ukraine: Concept and Content' (2020) 43(3) Jurnalul juridic national: teorie și practică 77.

12 TV Shevchenko, 'Legal Collision: Theoretical and Legal Aspect' (2013) 3 Law and Society 13.

13 SS Vasyliv, 'On the Development of the Institute of Jurisdiction Over the Consideration of Cases on Administrative Offenses' (2015) 813 Bulletin of Lviv Polytechnic National University: Series Juridical Sciences 15.

14 Valentyn Zvonarov, 'Collisions in Law: Theoretical and Methodological Approaches to Definition and Classification' (2021) 6 New Ukrainian Law 84, doi:10.51989/NUL.2021.6.11.

The Ministry of Justice of Ukraine points to three primary forms of manifestation of conflicts in law: 1) inconsistency between existing normative legal acts; 2) their contradictions regarding one subject of regulation; and 3) a contradiction between two or more rules of law regarding the regulation of the same issue.[15]

Thus, summing up the analysis of scholars' opinions on conflicts in law, we will formulate their key characteristic features:

1) conflicting nature - the confrontation between several norms or their totality;
2) subjective nature of their occurrence - collisions are based on the decisions of certain subjects;
3) consequences - the inability to qualitatively, clearly and consistently apply legal norms to regulate social relations.

We consider it necessary to support the opinions expressed and clarify the definition of conflicts in law with the help of the features we have formulated in this study. Thus, conflicts in law are subjectively caused phenomena consisting of the confrontation of several norms or their totality, which leads to the impossibility of qualitatively, clearly and consistently applying legal norms to regulate social relations.

Practical aspect

To illustrate conflicts in law for a judge, we will turn to some examples of judicial practice where courts addressed such conflicts. Notably, the issue of conflicts in law has been repeatedly considered by the Supreme Court. In a 2024 Resolution, the Court identified a conflict between the provisions of the Tax Code of Ukraine and the Resolution of the Cabinet of Ministers of Ukraine No. 89 in terms of the possibility of carrying out control measures by conducting certain types of inspections in the period from the date of entry into force of such a resolution to the last calendar day of the month (inclusive), in which the quarantine, established by the Cabinet of Ministers of Ukraine on the entire territory of Ukraine to prevent the spread of COVID-19, ended.

The Supreme Court has repeatedly resolved the above conflict. In particular, it addressed the impact of procedural violations resulting from the conflict of rules on the legitimacy of tax notification decisions adopted based on the results of relevant tax audits. The Supreme Court's rulings on this matter include those in cases No. 420/22374/21, No. 540/5445/21, No. 160/14248/21, dated 28 December 2022; case No. 160/24072/21, dated 12 October 2022; case No. 600/1741/21-a, dated 28 October 2022; and case No. 640/16093/21, dated 1 September 2022.[16]

15 Letter of the Ministry of Justice of Ukraine no 758-0-2-08-19 of 26 December 2008 'Regarding the Practice of Applying Legal Norms in the Event of a Collision' <https://zakon.rada.gov.ua/laws/show/v0758323-08#Text> accessed 30 September 2024.

16 Case no 460/16388/21 (Administrative Court of Cassation of the Supreme Court of Ukraine, 28 May 2024) <https://reyestr.court.gov.ua/Review/119466584> accessed 30 September 2024.

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The dissenting opinion of Judge V.I. Krat in the 2024 Resolution of the Supreme Court is noteworthy.[17] In his analysis, the judge noted that the panel of judges should have referred the case to the Grand Chamber of the Supreme Court due to the necessity of deviating from the conclusions made in the resolutions of the Grand Chamber of the Supreme Court of 13 October 2020 (case No. 447/455/17, proceedings No. 14-64цс20) and 21 August 2019 (case No. 569/4373/16-ц proceedings No. 14-298цс19). The judge argued that this deviation was required because the case presented an exceptional legal issue, and referring it to the Grand Chamber would be necessary to promote the development of law and ensure the formation of a unified law enforcement practice.[18]

The Resolution itself addressed a conflict between the norms of the Housing Code of Ukraine and the Civil Code of Ukraine regarding the use of residential premises. The case involved a dispute between former spouses, where one spouse owned a residential building and the land on which it stood as personal private property, while the other spouse, initially residing in the house as a family member, continued to occupy it even after the dissolution of the marriage and the family relations ended.

The Joint Chamber of the Cassation Criminal Court of the Supreme Court drew attention to the fact that the principle of the rule of law requires judicial action in cases where contradictory norms of the same hierarchical level coexist. In such situations, courts of different types of jurisdiction are required to apply the classical formulas (principles) of legal practice: "the later law takes precedence over the older one" (*lex posterior derogat priori*); "the special law takes precedence over the general law" (*lex specialis derogat generali*); and "a general later law does not take precedence over a special older one" (*lex posterior generalis non derogat priori speciali*).

In its Decision No. 5-p(II)/2020, dated 18 June 2020, the Constitutional Court of Ukraine noted that failure to apply these formulas (principles) when required results in the erosion of the effectiveness of the rule of law. The imperative to uphold the rule of law requires the simultaneous application of all three classical formulas.[19]

Accordingly, it is necessary to determine separately what conflicts in law represent for a judge. The characteristic factors in this case are:

1) the complexity of resolving the case;
2) possible impact on the quality of the court decision.

17 Case no 200/1057/24 (Administrative Court of Cassation of the Supreme Court of Ukraine, 30 September 2024) <https://reyestr.court.gov.ua/Review/122007861> accessed 30 September 2024.

18 Case no 761/32982/21, Dissenting opinion of judge Krat VI (Civil Court of Cassation of the Supreme Court of Ukraine, 14 August 2024) <https://reyestr.court.gov.ua/Review/121029293> accessed 30 September 2024.

19 Case no 554/2506/22 (Criminal Court of Cassation (Joint Chamber) of the Supreme Court of Ukraine, 15 April 2024) <https://reyestr.court.gov.ua/Review/118558563> accessed 30 September 2024.

Thus, conflicts in law represent a form of contradiction within legal regulation, a negative legal phenomenon that a judge must qualitatively, in compliance with the basic principles of law, resolve in the process of administering justice.

Conflicts in law are divided into temporal, substantive, and hierarchical.[20] Some scholars recognise the presence of complex collisions. Here is a breakdown of these types:

1) Temporal collisions occur when one legal relationship is governed by several normative legal acts with the same legal force, but one of the acts comes into force later than the other.
2) Substantive conflicts arise when there are several normative legal acts, institutions or norms of the law of equal legal force, where one act is considered general and the other special in relation to the regulation of these legal relations.
3) Hierarchical collisions involve collisions between acts of several bodies regulating the same legal relations but with differing legal forces. Examples include conflicts between a Resolution of the Cabinet of Ministers of Ukraine and the Law of Ukraine, a Resolution of the Cabinet of Ministers of Ukraine, and decisions made by local self-government bodies.

Complex conflicts are rather rare and occur when several types of conflicts arise regarding the regulation of certain legal relations. For instance, they may combine substantive and hierarchical collisions or temporal and substantive conflicts. Such conflicts are characterised by the absence of an obvious solution for determining the correct legal regulation.

One example of the existence of complex conflicts was given by the Supreme Court of Ukraine in 2015.[21] The case was considered in the court of administrative jurisdiction and involved legal relations in the field of social security. In this case, temporal and substantive collisions were present. The court considered both the issue of the validity of the law over time and the issue of a special law. In resolving this conflict, the court emphasised that the norms of the special law should take precedence in regulating the relations, even though the special law provisions were adopted earlier.

In this context, it should be noted that more than 60% of the cases analysed in our study relate to the consideration of disputes on social security. This is due to significant legislative changes in the field of social security and pensions, including the establishment of new rules for the calculation of payments and various pensions; the number of disputes and facts of conflicts has increased.

An example of a complex conflict is also found in the 2021 Resolution of the Grand Chamber of the Supreme Court. In this Resolution, the court conducted a systematic analysis of the legislation that regulates the conditions, grounds and procedure for

20 Shevchenko (n 12).

21 Case no 753/22929/14-a (Supreme Court of Ukraine, 23 June 2015) <https://reyestr.court.gov.ua/Review/46570809> accessed 30 September 2024.

compensation for damage caused by unlawful decisions, actions or inaction of regulatory authorities and their officials (officers), as outlined in Art. 114 of the Tax Code of Ukraine. The court identified the presence of a complex conflict, which involved an internal contradiction with the provisions of the Tax Code of Ukraine regarding the amount of damages, as well as in the contradiction of the norms of law of the Tax Code of Ukraine and those of the Commercial and Civil Codes of Ukraine. This conflict specifically concerned the possibility of compensating legal expenses incurred for attorney services during the out-of-court settlement.[22]

Thus, complex conflicts arise when two or more conflicts– temporal, substantive or hierarchical – combine within the same legal relationship, leading to a dispute that the court must resolve.

In times of war, courts continue to consider cases related to legal relations that were typical in peacetime while also considering the impact of martial law. However, full-scale aggression has led to changes in the regulations governing mobilisation, military service, and the administration of justice under martial law. These regulations often change, leading to collisions.

For example, in 2024, the Seventh Administrative Court of Appeal addressed a case involving financial support for military personnel, specifically the calculation of one-time financial assistance upon dismissal from military service. Referencing the Grand Chamber of the Supreme Court, the court noted that establishing the procedure and conditions for the payment of monthly additional monetary remuneration set by a by-law cannot narrow or deny the right to receive such remuneration as established by a law of supreme legal force. Hierarchical conflicts of normative legal acts are overcome by applying a norm enshrined in a normative legal act with the highest legal force. In this case, the legal regulation of disputed legal relations, the provisions of Law No. 2011-XII and Resolution No. 889 are applicable, not Instructions No. 595 and 550. The provisions of Law No. 2011-XII also establish the right of military personnel to receive one-time financial assistance upon discharge from military service. For the above reasons, the provisions of Instruction No. 260 were deemed inapplicable, particularly in terms of restricting the inclusion of monthly additional monetary remuneration from which the one-time financial support is calculated.[23]

Regarding procedural legislation under martial law, it is necessary to give an example where the court notes the conflict of norms of the Criminal Procedure Code. In 2024, the investigating judge of the Znamensky City District Court of the Kirovohrad region pointed out that in accordance with paragraph 2 of Pt. 1 of Art. 615 of the Criminal Procedure Code

22 Case no 910/11820/20 (Supreme Court of Ukraine (Grand Chamber), 16 November 2021) <https://reyestr.court.gov.ua/Review/101829998> accessed 30 September 2024.

23 Case no 240/8441/24 (Seventh Administrative Court of Appeal, 30 September 2024) <https://reyestr.court.gov.ua/Review/121973008> accessed 30 September 2024.

of Ukraine, in the event of the imposition of martial law and if there is no objective possibility for the investigating judge to exercise his powers (provided for in Arts. 140, 163, 164, 170, 173, 206, 219, 232, 233, 234, 235, 245-248, 250 and 294), such powers are exercised by the head of the relevant prosecutor's office, at the request of the prosecutor or investigator agreed upon by the prosecutor.

At the same time, according to Paragraph 20-7 of Section XI of the Transitional Provisions of the Criminal Procedure Code of Ukraine, introduced by the Law of Ukraine dated 15 March 2022 No. 2137-IX, during the state of emergency or martial law on the territory of Ukraine, temporary access to items and documents (specified in Paras. 2, 5, 7, 8 of Pt. 1 of Art. 162) can only be granted based on a resolution of the prosecutor, agreed upon with the head of the prosecutor's office. This provision, however, does not specifically address situations where the investigating judge is unable to exercise his/her powers. Thus, there is currently a conflict of law, ambiguous interpretation and application of these provisions of the Criminal Procedure Code of Ukraine.[24]

4 MECHANISMS FOR RESOLVING CONFLICTS IN LAW

Each conflict in law has slightly different causes, consequences, and a specific legal nature. Accordingly, approaches to solving them differ.

In most cases, legal conflicts cannot be resolved without the involvement of law-making and law enforcement entities. Exceptional circumstances can be considered when certain events and legal facts governed by conflicting legal rules cease to exist, eliminating the need for further legal regulation. In such cases, the relevant legal relations may no longer require application.

Authorities operate within the limits of powers granted to them by law, forming the most transparent and clear strategies for resolving legal conflicts. As such, these authorities have established practices for overcoming conflicts in law by applying the legal tools available, thereby forming a legal mechanism for conflict resolution.

The evolution of this mechanism is ongoing within modern national legal doctrine. For instance, Y. Lenger has formulated the components of this mechanism, defining it as a set of elements and legal tools aimed at overcoming conflicts. These components include the subjects of resolution, conflict of laws rules and principles, conflict-of-laws relations, methods and procedures for resolution, and the final act of resolution.[25]

24 Case no 389/2948/24 (Znamianka City District Court of Kirovohrad Oblast, 24 September 2024) <https://reyestr.court.gov.ua/Review/121917560> accessed 30 September 2024.

25 YuI Lenher, 'Mechanism for Resolving Legal Conflicts in Municipal Law, its Elements' (2017) 78 Actual Problems of State and Law 81.

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We believe that the mechanism for judges to resolve conflicts in law is not merely a set of elements but also a defined procedural process. In essence, the mechanism for resolving conflicts, consisting of specific elements, serves as a means that can be applied by the court during the law enforcement process.

The most common ways to resolve conflicts in law are based on the application of conflict of laws principles, which Roman lawyers originally formed. These include, but are not limited to:

1) in case of temporal collisions, acts issued later are applied;
2) in case of substantive collisions between general and special acts, special acts shall be applied as a general rule;
3) in case of contradiction of acts of different legal force, acts of higher legal force shall be applied.

The Constitutional Court of Ukraine states that:

> " … The principle of the rule of law requires judges to apply conflict-of-laws principles in situations where conflicting rules of the same hierarchical level coexist. The rule of law, accordingly, presupposes the requirement to apply the following principles: 1) "the later law takes precedence over the older one" (lex posterior derogat priori); 2) "the special law takes precedence over the general law" (lex specialis derogat generali); (3) "A general law that is later does not take precedence over a special older law" (lex posterior generalis non derogat priori speciali). If the court does not apply these formulas (principles) in circumstances that require it to apply them, then the principle of the rule of law (the rule of law) loses its effectiveness."[26]

Given the fundamental importance of principles such as the rule of law and its components (legality, legal certainty, non-discrimination, prohibition of arbitrariness, respect for human rights), the question arises: what should be the solution when the application of the principles of conflict resolution in law leads to a violation of general legal principles?

Considering the role of legal principles in ensuring an objective, complete, fair decision of cases, the judge must, in addition to checking the possibility of applying a particular conflict-of-laws principle, also ensure that the application of certain rules does not worsen the situation of a person seeking to protect their rights, freedoms, and legitimate interests. Accordingly, general law principles prevail in resolving conflicts of law.

Confirmation of the need to apply general legal principles when resolving conflicts in law can be found in the 2022 decision of the District Administrative Court of Kyiv. In this decision, the court pointed out that the conflict in law related to social security must be

26 Decision no 5-p(II)/2020 case no 3-189/2018(1819/18) (Constitutional Court of Ukraine, 18 June 2020) [2020] 55-2/1729.

resolved in compliance with the principle of the rule of law in terms of recognising a person, his rights and freedoms as the highest values that determine the content and direction of the state. The court must also acknowledge the discretion of the state to determine the procedure and amount of guarantees, considering its financial and economic capacity, while ensuring a fair balance between the interests of the individual and society without violating the essence of the relevant rights.[27]

This position is echoed in other court decisions, such as in cases No. 240/14861/21, No. 240/14213/21, and No. 240/20356/21.[28]

In its 2022 decision, the Rivne District Administrative Court noted that a conflict of law should be resolved in compliance with the rule of law, in the sense that a person, his rights and freedoms are determined by the highest social values that determine the content and direction of the state. Therefore priority cannot be given to the norm that narrows the relevant rights, as this will violate a fair balance between the interests of the individual and society and negate the essence of the relevant rights.[29]

The importance of resolving conflicts in law and the role of the court in such matters is reflected in the Resolution of the Sixth Administrative Court of Appeal in case No. 640/24589/19, dated 19 March 2020. The court addressed the issue of recognising illegal actions and the lack of competence, highlighting the court's pivotal role in overcoming conflicts in law. The court noted that competence disputes may arise due to differing interpretations of the law, leading to overlapping powers of public authorities. In such cases, the court's role is to resolve legislative conflicts and eliminate the consequences of redundant or overlapping powers.[30]

The Eighth Administrative Court of Appeal, in its Resolution in case No. 1340/3445/18, dated 11 February 2019, considered the issues of declaring the order illegal and reinstating at work and emphasised the importance of compliance with the quality of the law.[31] If the law does not meet the quality criterion, the procedures that are most favourable for him/her should be applied to the person in whose legal relations conflicts of laws have arisen. In the

27 Case no 320/10182/21 (District Administrative Court of Kyiv, 31 January 2022) <https://reyestr.court.gov.ua/Review/103015945> accessed 30 September 2024.

28 Case no 240/14861/21 (Zhytomyr District Administrative Court, 28 January 2022) <https://reyestr.court.gov.ua/Review/103009499> accessed 30 September 2024; Case no 240/14213/21 (Zhytomyr District Administrative Court, 28 January 2022) <https://reyestr.court.gov.ua/Review/103009511> accessed 30 September 2024; Case no 240/20356/21 (Zhytomyr District Administrative Court, 27 January 2022) <https://reyestr.court.gov.ua/Review/103009172> accessed 30 September 2024.

29 Case no 460/15449/21 (Rivne District Administrative Court, 26 January 2022) <https://reyestr.court.gov.ua/Review/103019063> accessed 30 September 2024.

30 Case no 640/24589/19 (Sixth Administrative Court of Appeal, 19 March 2020) <https://reyestr.court.gov.ua/Review/88334654> accessed 30 September 2024.

31 Case no 1340/3445/18 (Eighth Administrative Court of Appeal, 11 February 2019) <https://reyestr.court.gov.ua/Review/79791797> accessed 30 September 2024.

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event that national legislation has allowed for ambiguous or multiple interpretations of the rights and obligations of individuals, the court noted that the national authorities are obliged to apply the most favourable approach for individuals. That is, the resolution of conflicts in legislation is always interpreted in favour of the person.[32]

The principle of *lex superior derogat inferiori* ("a law of greater force repeals a law of inferior force") is exemplified in the Resolution of the Sixth Administrative Court of Appeal in case No. 620/3546/18, dated 5 February 2019, where it is defined as a concretisation of the principle of legality in law enforcement.[33] In this case, the court considered the conflict between the provisions of the Code of Administrative Procedure of Ukraine and the Tax Code of Ukraine regarding compliance with the procedure of administrative appeal before filing a claim. Acknowledging the conflict, the court ruled that the norms of the Tax Code of Ukraine should be applied, as it functions as a special law in relation to the general law, which in this case is the Code of Administrative Procedure of Ukraine.[34]

In its resolution on the case concerning the place of residence of minor children with one of the parents (case No. 805/2089/18-a, dated 25 September 2018), the Donetsk Administrative Court of Appeal emphasised the importance of prioritising the best rights of the child in the event of any legal conflict, incompleteness, vagueness or contradiction of the legislation governing disputed legal relations. Referring to Article 3 of the Convention on the Rights of the Child of 1995, the court noted that the child's welfare should take precedence over any conflicting legal provisions.[35]

In another significant ruling (case No. 236/2685/17, dated 15 August 2018), the Donetsk Administrative Court of Appeal addressed the obligation of the city council to approve technical documentation regarding the normative monetary valuation of state-owned agricultural land. The court underscored the state's duty to adopt legislation with a clear legal definition of disputed legal relations that ensures the protection and exercise of rights while avoiding legal gaps and conflicts. The court also stressed the importance of a systematic interpretation of the legislation in resolving disputes, emphasising the principle of legal determination and the need for legal clarity in addressing conflicts in law.[36]

In its ruling in case No. 876/5686/17, dated 11 July 2017, the Lviv Administrative Court of Appeal considered an appeal regarding the defendant's inaction in failing to address the plaintiff's application and pay one-time financial assistance to a disabled person of the

32 ibid.
33 Case no 620/3546/18 (Sixth Administrative Court of Appeal, 5 February 2019) <https://reyestr.court.gov.ua/Review/79785433> accessed 30 September 2024.
34 ibid.
35 Case no 805/2089/18-a (Donetsk Administrative Court of Appeal, 25 September 2018) <https://reyestr.court.gov.ua/Review/76697682> accessed 30 September 2024.
36 Case no 236/2685/17 (Donetsk Administrative Court of Appeal, 15 August 2018) <https://reyestr.court.gov.ua/Review/75928838> accessed 30 September 2024.

second group of a disease related to the defence of the Motherland. The court noted that the defendant's refusal was not based on the insufficiency of the documents submitted by the plaintiff for the payment but rather justified by a conflict of certain provisions of legislative acts.[37] The court recognised this situation as a quasi-conflict, stemming from the lack of a clear position or necessary documents on the defendant's part.

In its resolution in case No. 638/92/17 of 25 May 2017, the Kharkiv Administrative Court of No. 638/92/17 on 25 May 2017 referenced the European Court of Human Rights's decision in the case of *Kechko vs. Ukraine* (No. 63134/00, dated 8 November 2006). In this case, the ECHR highlighted the procedure for resolving conflicts in budgetary legislation. The European Court notably did not consider Ukraine's position on the conflict of two normative legal acts – the general law establishing budgetary assistance and the specific Law of Ukraine *On the State Budget of Ukraine* – should be resolved in favour of the latter as the special law. The ECHR held that state authorities could not justify the non-fulfilment of financial obligations by citing budgetary constraints. This stance aligns with the Court's earlier judgment in case No. 59498/00 *Burdov v. Russia*, reinforcing that financial limitations cannot excuse a failure to fulfil state obligations.[38]

In its resolution in case No. 501/531/16-a on 23 February 2017, the Odesa Administrative Court of Appeal analysed the legal standing of international treaties within Ukraine's legal system, noting that the precedence of international treaties over conflicting domestic laws grants Ukrainian courts rather broad powers when choosing a source of law to resolve a specific dispute.[39] In this case, when resolving a dispute that arose in legal relations on the enforcement of decisions, the court drew attention to the fact that according to the practice of the European Court of Human Rights, an effective remedy provided for by Art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, should ensure the restoration of the violated right; in case of impossibility of such restoration, it must guarantee that the individual can receive appropriate compensation. The court underscored this as a guiding framework for resolving conflicts related to the legal force of the act in question.

37 Case no 876/5686/17 (Lviv Administrative Court of Appeal, 11 July 2017) <https://reyestr.court.gov.ua/Review/67703902> accessed 30 September 2024.

38 Case no 638/92/17 (Kharkiv Administrative Court of Appeal, 25 May 2017) <https://reyestr.court.gov.ua/Review/66789408> accessed 30 September 2024.

39 Case no 501/531/16-a (Odesa Administrative Court of Appeal, 23 February 2017) <https://reyestr.court.gov.ua/Review/65111117> accessed 30 September 2024.

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5 CONCLUSIONS

Given the heterogeneity of conflict-of-laws legal relations and their conditional division into simple (temporal, substantive, hierarchical) and complex types, we would like to emphasise that the mechanism for their resolution itself cannot be homogeneous and unified. Accordingly, a simple mechanism must be applied to solve the so-called simple collisions, while complex collisions necessitate a complex mechanism.

A simple conflict arises when a judge encounters one conflict during case resolution. Formulating the mechanism for resolving simple conflicts in law by judges, we propose the following procedure:

1) analyse the problematic legal relations by a judge, determination of the presence of a conflict in law;
2) identify what type of conflict is present in the case;
3) review relevant precedents from courts of cassation;
4) verify the application of the conflict-of-laws principle in specific legal relations;
5) assess the selected conflict-of-laws principle and the possible results of its application through the prism of general legal principles.

A complex conflict, on the other hand, occurs when several conflicts are present in a case. A mechanism for a judge to resolve complex conflicts in law is formulated as follows:

1) analyse the problematic legal relations by a judge, determination of the presence of a conflict in law;
2) identify the specific conflicts involved and how they are imposed in a particular case;
3) consult relevant case law;
4) decide on how to apply the conflict-of-laws principles: whether the resolution of one of the conflicts has priority, whether they should be applied in turn and in what order;
5) verify the chosen conflict-of-law principles for compliance with general legal principles.

In both cases, the judge's ultimate goal is to administer justice by resolving the case and resolving legal conflicts within specific legal relations.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ВИРІШЕННЯ КОЛІЗІЙ ПРАВА ПІД ЧАС СУДОВОГО РОЗГЛЯДУ: ЕМПІРИЧНЕ ДОСЛІДЖЕННЯ В УКРАЇНІ

Оксана Хотинська-Нор* та Кирило Легких

АНОТАЦІЯ

Вступ. *Право є основним регулятором суспільних відносин. Його системний характер має фундаментальне значення для належного, чіткого та всебічного регулювання правовідносин. Як цілісна система право має власну логіку, структуру, порядок і мету. Ця мета полягає у відповідному регулюванні суспільних відносин, забезпеченні правопорядку, у якісному і послідовному задоволенні прав, обов'язків та інтересів учасників правовідносин. Проте правове регулювання не позбавлене недоліків. Однією з основних проблем правового регулювання є прогалини в праві, коли певні суспільні відносини не мають належного правового регулювання через відсутність конкретних законодавчих чи правових підходів. Серед інших недоліків – суперечності між законами, законодавчі прогалини, кваліфіковане мовчання законодавця, «темрява» правових норм, «уявна» потреба правового регулювання та інші правові явища, подібні за своєю природою.*

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У цій статті досліджується те, як судді вирішують колізії права під час судового розгляду, а саме про побудову механізму вирішення колізій у національному законодавстві для того, щоб забезпечити право на справедливий суд. Це питання набуває особливого значення в умовах війни в Україні, оскільки, на відміну від відносно стабільної судової практики вирішення спорів, що виникають у суспільстві, де немає війни, сьогодні суди стикаються з безпрецедентними справами, зокрема, пов'язаними з рішеннями військово-лікарських комісій, фінансовим забезпеченням військовослужбовців, новим кримінальним переслідуванням у воєнний час. Крім того, судді повинні орієнтуватися в процесуальних нормах здійснення правосуддя у воєнний час, які швидко змінюються.

Дослідження визначає конкретні випадки колізій законодавства, зокрема в питаннях, пов'язаних із мобілізацією. Підкреслюється, що неузгодженість чинного законодавства та відсутність єдиних підходів до їх подолання часто заважають громадянам реалізувати свої права. Така ситуація прямо суперечить Цілям сталого розвитку з погляду побудови мирних та інклюзивних суспільств для сталого розвитку, забезпечення доступу до правосуддя для всіх та побудови ефективних, підзвітних та інклюзивних інституцій на всіх рівнях.

Автори статті висвітлюють зростання значення правових принципів у вирішенні колізій у межах права. Такі основоположні поняття, як верховенство права, правова визначеність і законність, є визнаними підставами для прийняття судових рішень. Відповідно, це дозволяє судам тлумачити конфлікти в окремих галузях законодавства – наприклад, податкове законодавство на користь платника податків, права дитини на користь дітей, трудове законодавство на користь працівників. Отже, подібні позови можуть вирішуватися по-різному залежно від їх предмета. Для підтвердження цього аналізу автори проаналізували 150 рішень українських суддів, вивчили поняття колізії, сформулювали уточнене визначення, оцінили роль судової правотворчості у вирішенні правових колізій та розробили механізм їхнього вирішення суддями.

Методи. *Для аналізу розвитку правових норм та інститутів у різні історичні періоди автори застосували загальний діалектичний підхід до аналізу, що ґрунтується на вченні про суспільство і мислення, а також історичний метод. Цей підхід дає змогу з'ясувати їхнє походження, еволюцію та вплив на сучасну правову систему. Також були використані методи аналізу та синтезу інформації. Для підтвердження висновків авторів було застосовано відповідну емпіричну інформацію, зокрема судові рішення з Єдиного державного реєстру судових рішень. Загалом було проаналізовано 150 судових рішень, що містять колізії з 2015 по 2024 роки, 22 з яких процитовано в цій статті.*

Результати та висновки. *Колізії в праві визначаються як суб'єктивно зумовлені явища, пов'язані з протистоянням кількох норм або їх сукупності, що призводить до неможливості ефективного, чіткого та послідовного застосування правових норм з метою регулювання суспільних відносин. Запропоновано також визначення колізій у законодавстві з погляду судової практики: це суперечності в правовому регулюванні, негативне правове явище, яке суддя, що має наданими йому повноваженнями, повинен вирішувати у спосіб, що забезпечує дотримання основоположних принципів права під час здійснення правосуддя.*

Ключові слова: *правосуддя, суд, колізія права, судочинство, судова правотворчість, справедливий суд, механізм вирішення колізій.*

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Note

THE FIRST STEPS IN IMPLEMENTING THE UKRAINIAN STRATEGY FOR RESTORING THE RIGHTS OF OWNERS OF CERTAIN CATEGORIES OF REAL ESTATE DAMAGED OR DESTROYED AS A RESULT OF THE ARMED AGGRESSION OF THE RUSSIAN FEDERATION

Viktoriia Ivanova

ABSTRACT

Background: *In the context of war, the issue of compensation for damages caused by the military aggression of the Russian Federation against Ukraine is of utmost relevance, given the unprecedented scale of damage and the number of affected individuals. This article explores one of the existing methods for compensating damages related to the damage or destruction of certain categories of real estate as a result of hostilities, terrorist acts, and sabotage caused by the armed aggression of the Russian Federation against Ukraine through the state electronic public service "eRecovery". This article explores the main aspects of the operation of this state service, including its limitations and the conditions for receiving compensation.*

Additionally, the article reviews a civil case involving a Ukrainian citizen against Ukraine for failure to fulfil its positive obligations and against the Russian Federation for the destruction of housing that resulted in material and moral damage. It also highlights the difficulties that may arise in the process of reparations paid by the Russian Federation.

Protecting the rights and freedoms of individuals residing in Ukraine is the state's duty, and during wartime, this task takes on new significance, becoming complex and extremely important. One way to provide such protection is through compensation for damages caused by the military aggression of the Russian Federation against Ukraine. However, developing a mechanism for such compensation requires the mobilisation of significant resources and additional research across various fields, primarily to ensure justice. It is essential to explore the legal grounds for compensation, criteria for damage assessment, possible methods and means of compensation, and potential cooperation between national and international institutions.

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Methods: *This study analyses one of the ways to protect the rights of those affected by the Russian-Ukrainian war through obtaining compensation via the state electronic service "eRecovery". In particular, it examines the following issues: current limitations regarding the objects eligible for compensation, the principles of operation and development prospects of the "eRecovery" state service, and the development and challenges of national court practices in disputes arising from the war. It also explores the state's positive obligations in the field of human rights and the measures Ukraine is taking to protect and restore the rights of the affected individuals. National and international opportunities for developing a compensation mechanism for the affected and the challenges Ukraine faces before receiving reparations from the Russian Federation are analysed.*

Results and conclusions: *The results of this study highlight the state's ability to provide adequate protection to individuals affected by the Russian-Ukrainian war, particularly through the "eRecovery" electronic public service. The need for further development of the service has been identified to cover a broader scope of damages that Ukraine can compensate prior to receiving reparations from the Russian Federation, including through cooperation with international partners.*

1 INTRODUCTION

This research addresses the issue of compensation to property owners for damages whose assets were damaged or destroyed as a result of the armed aggression of the Russian Federation against Ukraine, as well as the analysis of the state mechanism for restoring violated property rights through the "eRecovery" service. Given the extensive damage inflicted by the war in Ukraine, there is a pressing need for effective approaches to handle claims from affected individuals. Some of these claims are already being reviewed by national courts, while others may be addressed by international judicial bodies. Regardless of the chosen method of protecting the rights of the affected individuals, the state must ensure recovery and compensation for the damages caused by the armed aggression of the Russian Federation while adhering to principles of justice, proportionality and adequacy.

In 2023, Ukraine launched a mechanism for the extrajudicial provision of compensation for the restoration of certain categories of real estate damaged due to hostilities, terrorist acts, and sabotage caused by the armed aggression of the Russian Federation, using the "eRecovery" electronic public service.[1]

1 Resolution of the Cabinet of Ministers of Ukraine no 381 of 21 April 2023 'On the approval of the Procedure for Providing Compensation for the Restoration of Certain Categories of Real Estate Objects Damaged Due to Hostilities, Terrorist Acts, Sabotage, and Armed Aggression by the russian federation, Using the Electronic Public Service "eRecovery"' (amended 16 July 2024) <https://zakon.rada.gov.ua/laws/show/381-2023-%D0%BF#Text> accessed 25 July 2024.

This publication is dedicated to the issues of the Ukrainian strategy for ensuring compensation for damages caused to owners of property damaged or destroyed as a result of the armed aggression of the Russian Federation against Ukraine. It addresses the state's obligation to take all necessary actions to protect the rights of individuals residing on its territory and explores the development of national practices for compensating both material and moral damages caused by the armed aggression. These issues require urgent resolution and are of significant importance for further research into the restoration of justice in Ukraine, ensuring guarantees of the rights of war victims, and ensuring adequate compensation for the damages incurred.

2 THE "eRECOVERY" ELECTRONIC PUBLIC SERVICE: THEORETICAL AND PRACTICAL ASPECTS OF COMPENSATION FOR CERTAIN CATEGORIES OF VICTIMS IN THE RUSSIAN-UKRAINIAN WAR

Compensation for certain categories of real estate damaged due to hostilities, terrorist acts and sabotage caused by the armed aggression of the Russian Federation, as established by the relevant Law of Ukraine,[2] is not absolute. Specifically, due to the priority directions of state policy and budget deficits, the mechanism includes limitations regarding:

a) **objects** – exclusively single-family houses, including detached residential houses of manor type, block houses with separate apartments having their entrance from the street, cottages and single-family houses of increased comfort, houses of manor type, dachas and garden houses; apartments (residential premises) in a multi-apartment building (in case where common areas are not damaged, or in case where such common areas were damaged but subsequently repaired);
b) **individuals –** exclusively citizens of Ukraine: who have reached the age of 18, have submitted the relevant application, are owners (co-owners) of the damaged property, whose property rights have been confirmed; who are not subject to sanctions; who do not have convictions for crimes against the foundations of national security; who are not heirs of the two preceding categories of persons, in case the property of the deceased was damaged during their lifetime;
c) **location of the object** – territory of Ukraine, excluding territories of active hostilities, territories of active hostilities where state electronic information resources operate, or temporarily occupied territories of Ukraine by the Russian

2 Law of Ukraine no 2923-IX of 23 February 2023 'On Compensation for Damage and Destruction of Certain Categories of Real Estate Objects Due to Hostilities, Terrorist Acts, Sabotage, and Armed Aggression by the russian federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of Hostilities, Terrorist Acts, Sabotage, and Armed Aggression by the russian federation against Ukraine' (amended 15 April 2024) <https://zakon.rada.gov.ua/laws/show/2923-20#Text> accessed 25 July 2024.

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Federation, for which as of the date of application submission, the date of cessation of hostilities or temporary occupation has not been determined;

d) **time** – after the entry into force of the Decree of the President of Ukraine dated 24 February 2022, №64 "On the introduction of martial law in Ukraine",[3] approved by the Law of Ukraine dated 24 February 2022, №2102-IX "On the approval of the Decree of the President of Ukraine "On the introduction of martial law in Ukraine";[4]
e) **intended purpose** – for the purchase of construction products and/or conducting repair works;
f) **funds utilisation period** – up to 18 months;
g) **compensation amount** – up to 500,000 UAH (~11,168,79 euro according to the official rate of the NBU), depending on the extent of the damage.

The functionality of the state service "eRecovery" continues to expand, particularly regarding assistance in cases where housing has been destroyed and is not subject to restoration. The form of assistance under these conditions differs somewhat and is not limited to a specific amount. Compensation is provided in the form of a certificate, which enables the purchase of a new home, with the amount determined by the relevant commission.[5] In the future, there will be an opportunity to receive monetary compensation for the reconstruction of destroyed housing, indicating Ukraine's active efforts towards at least partial restoration of violated rights of the affected before receiving reparations from the aggressor country.

The condition for compensation concerning the location of the property is complicated by the difficulties in assessing the extent of damage and destruction, as temporary occupation or active combat operations hinder the assessment commission's functions. Unfortunately, "eRecovery" cannot cover all destroyed, damaged, or stolen property throughout Ukraine or that has been taken out of its territory. However, we are seeing initial progress in this process, which will contribute to the creation of an effective mechanism for compensating for the material and moral damage caused by the war.

Additionally, the inadequacy of national compensation methods for losses incurred by victims in the Russian-Ukrainian war will lead victims to seek ways to protect their rights themselves. For instance, in July 2022, a Ukrainian citizen filed a lawsuit against the State of Ukraine, including the Cabinet of Ministers of Ukraine, the State Treasury Service of

3 Decree of the President of Ukraine no 64/2022 of 24 February 2022 'On the introduction of Martial Law in Ukraine' (amended 10 May 2024) <https://zakon.rada.gov.ua/laws/show/64/2022#Text> accessed 25 July 2024.

4 Law of Ukraine no 2102-IX of 24 February 2022 'On the approval of the Decree of the President of Ukraine "On the Introduction of Martial Law in Ukraine"' <https://zakon.rada.gov.ua/laws/show/2102-20#Text> accessed 25 July 2024.

5 Resolution of the Cabinet of Ministers of Ukraine no 600 of 30 May 2023 'On approval of the Procedure for Providing Compensation for Destroyed Real Estate Objects' (amended 15 June 2024) <https://zakon.rada.gov.ua/laws/show/600-2023-%D0%BF#Text> accessed 25 July 2024.

Ukraine, and the Russian Federation, including the government of the Russian Federation, "*for the recovery of material and moral damages caused by the military invasion of the Russian Federation*".[6] The basis of the lawsuit is the destruction of the plaintiff's house located in the city of Irpin during the temporary occupation. The plaintiff believes that both Ukraine and the Russian Federation are responsible for the material and moral damage caused to him.

In response, the Cabinet of Ministers of Ukraine and the State Treasury Service of Ukraine emphasised in their replies to this lawsuit that the Russian Federation bears full legal responsibility for both property and non-property damage caused to civilian individuals and legal entities as a result of its armed aggression. This includes damage caused by armed formations controlled by Russia, as well as damage caused by armed formations controlled by Ukraine in exercising their legitimate right to self-defence. The replies also stated: "*The state takes all possible actions and measures to protect citizens and their property from unlawful encroachments by the aggressor state. Furthermore, after gaining access to assets and property of the Russian Federation blocked abroad, individuals will have the opportunity to fully exercise their right to compensation for the damage caused to their property*."[7]

Indeed, in early March 2022, the United Nations General Assembly recognised the military actions of the Russian Federation against Ukraine as illegal and called on both parties to adhere to their obligations under international humanitarian law to protect civilian populations and civilian objects.[8] In particular, such an obligation is provided for by the Geneva Convention on the Protection of Civilian Persons in Time of War,[9] according to Article 53, of which any destruction by the occupying state of movable or immovable property belonging individually or collectively to private persons, states, or other public institutions or social or cooperative organisations is prohibited, except where such destruction is rendered absolutely necessary by military operations.

It is widely known that the Russian Federation has been attacking civilian objects that are in no way involved in military operations, leading to additional casualties among civilians. During the occupation of the Irpin territorial community, military forces destroyed or damaged nearly every building and claimed hundreds of lives.[10] Therefore, shifting responsibility for war crimes committed by the Russian Federation onto Ukraine

6 Case no 757/16790/22-ц (Pecherskyi District Court of Kyiv, 26 April 2023) <https://reyestr.court.gov.ua/Review/110981890> accessed 25 July 2024.

7 ibid.

8 'General Assembly Overwhelmingly Adopts Resolution Demanding russian federation Immediately end Illegal Use of Force in Ukraine, Withdraw All Troops: GA/12407' (*United Nations*, 2 March 2022) <https://press.un.org/en/2022/ga12407.doc.htm> accessed 25 July 2024.

9 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) <https://www.refworld.org/legal/agreements/icrc/1949/en/32227> accessed 25 July 2024.

10 Zhanna Bezpiatchuk, 'Irpin: Russia's reign of terror in a quiet neighborhood near Kyiv' (*BBC*, 8 June 2022) <https://www.bbc.com/news/world-europe-61667500> accessed 25 July 2024.

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contradicts international law, which places the obligation to compensate for such damage squarely on the aggressor.[11]

In turn, the national court, in its decision to dismiss the claims against Ukraine, emphasised that recent relevant legislative acts facilitate and standardise the documentation and assessment of property damage suffered by individuals due to the Russian Federation's armed aggression, thus rendering the plaintiff's arguments regarding the absence of a compensation mechanism unfounded.

The mechanism for compensating damage caused by military aggression cannot be swift and easy; Ukraine needs not only to gather sufficient evidence and conduct necessary expertise but also to secure the required funding. The Russian Federation has not yet paid reparations, and it is unknown how they will be paid in the future, prompting Ukraine to seek additional funding sources for the "eRecovery" service. These include funds from the state (including the Property and Infrastructure Restoration Fund, the Fund for the Elimination of Consequences of Armed Aggression) and local budgets; funds from international financial organisations, other creditors, and investors; international technical and/or financial assistance, whether repayable or non-repayable; reparations or other recoveries from the Russian Federation; and other sources not prohibited by Ukrainian law.[12] This will allow owners of damaged or destroyed property not to wait unreasonably long for funds from Russia but to receive compensation as quickly as possible. Currently, all state efforts are directed towards fighting for freedom and ensuring the maximum possible well-being for citizens and individuals residing in Ukraine during these times. Therefore, the establishment and development of the "eRecovery" service indicates, firstly, the absence of government inaction and, secondly, the state's firm commitment to obtaining fair compensation and presenting evidence of Russian war crimes in Ukraine to the world.

When granting the claims against the Russian Federation, the national court referenced Article 48 of the Additional Protocol to the Geneva Conventions of 12 August 1949, which mandates that parties in conflict must always distinguish between civilian populations and combatants, as well as civilian and military objects, and accordingly direct their actions solely against military objectives.[13] It is evident that Russia ignores these provisions. Property damage incurred under these circumstances must be fully compensated, as the absence of accountability for violations of international humanitarian law undermines its very existence.

11 Responsibility of States for Internationally Wrongful Acts (2001) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 25 July 2024.

12 Law of Ukraine no 2923-IX (n 2) art 13.

13 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (adopted 08 June 1977) <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and> accessed 25 July 2024.

Regarding moral damage, national practice is well-established.[14] According to the general principles of civil liability, the mandatory considerations in resolving disputes concerning compensation for moral (non-pecuniary) damage include the existence of such damage, the unlawfulness of the actions causing it, the causal link between the damage and the unlawful actions of the perpetrator, and the fault of the latter in causing it. The court, in particular, must clarify how the fact of causing the plaintiff moral or physical suffering or non-pecuniary loss is substantiated, under what circumstances or by what actions (or inaction) they were caused, in what monetary amount or material form the plaintiff assesses the damage inflicted upon them, and other circumstances relevant to resolving the dispute.[15] Thus, the legal basis for civil liability for compensation for damage caused by decisions, actions, or inaction includes a violation of rights, which encompasses damage, unlawful actions of the person who caused it, and the causal connection between them. At the same time, the burden of proving the existence of damage, unlawfulness of actions, and causal relationship lies with the plaintiff. The absence of any component of civil liability serves as grounds for dismissing the claim.

Therefore, pivotal in resolving such disputes is proving all elements of tort liability based on which the court establishes the fact of causing moral damage to the plaintiff precisely through those actions (inactions) as determined by the court (judge).[16]

Furthermore, in determining the compensation for moral damage, the court must adhere to principles of reasonableness, balance, and fairness. Assessing the amount of compensation is complex due to the specific nature of non-pecuniary damage, where criteria for its monetary equivalent are absent. Thus, the assessed amount can only be approximate and probable. The loss of housing undoubtedly results in moral damage, as the owner is compelled to expend resources to restore their situation. The most crucial aspect in this matter is determining a sufficient compensation amount to compensate the victim for the non-pecuniary losses.

The reviewed case is under consideration by the Supreme Court, and a final decision regarding the plaintiff's claims has not yet been made.[17] Given the extensive destruction or damage to property in the Russian-Ukrainian war, not limited to housing, similar judicial

14 Iryna Izarova, Oksana Uhrynovska and Yuliia Hartman, 'Compensation for War Damages: A Study of the Issue Using the Example of the Armed Aggression of the russian federation Against Ukraine' (2023) 126(2) Bulletin of Taras Shevchenko National University of Kyiv, Legal Studies 34, doi:10.17721/1728-2195/2023/2.126-5.

15 Resolution of the Plenum of the Supreme Court of Ukraine no 4 of 31 March 1995 'On Judicial Practice in Cases of Compensation for Moral (Non-Pecuniary) Damage' (amended 27 February 2009) <https://zakon.rada.gov.ua/laws/show/v0004700-95#Text> accessed 25 July 2024.

16 Case no 686/13212/19 (Civil Cassation Court of the Supreme Court, 19 March 2020) <https://reyestr.court.gov.ua/Review/88337542> accessed 25 July 2024.

17 Case no 757/16790/22-ц (Civil Cassation Court of the Supreme Court, 27 May 2024) <https://reyestr.court.gov.ua/Review/119419598> accessed 25 July 2024.

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disputes will continue to be brought before both national and international courts. Such cases take considerable time to resolve, and court decisions may remain unenforced for years, thereby causing additional moral harm.

Currently, there is no single mechanism for compensating material and moral damage caused by the aggression of the Russian Federation against Ukraine that would fully cover the claims of the affected parties. This necessitates comprehensive approaches to recording and compensating for damages. For example, in addition to "eRecovery", there is a *Register of Damages Caused by the Aggression of the Russian Federation against Ukraine*, which provides victims with the opportunity to claim compensation not covered by the state[18] by submitting applications in accordance with the Rules Governing the Submission, Processing and Recording of Claims.[19] Claims that can be submitted to the Registry of Damages are divided into categories A, B, and C, as follows:

A – *claims from individuals* related to forced displacement, violation of personal integrity, loss of property, income, or means of subsistence, and loss of access to public services;
B – *claims from the State of Ukraine* related to damage or destruction of property, loss of historical, cultural, and religious heritage, environmental damage and natural resources, state humanitarian expenses to support the affected population in Ukraine, and demining and clearance of unexploded ordnance;
C – *claims from legal entities (excluding those in category B)* related to damage or destruction of property, loss of historical, cultural, and religious heritage, business losses, other economic losses, and humanitarian expenses.[20]

The ability to submit claims online through the state portal "Diia" facilitates the processing of claims, thereby accelerating the recording of damages and subsequent verification.

The most common method of protecting their rights among the affected parties remains the judicial method, predominantly through national courts, by filing claims against the government of the Russian Federation in civil or commercial proceedings, depending on the affected party, and by filing civil claims within criminal proceedings. This method is

18 Andrii Shvadchak, 'International Register of Damage: Addition to eRecovery or Alternative?' (*Transparency International Ukraine*, 31 May 2024) <https://ti-ukraine.org/en/news/international-register-of-damage-addition-to-erecovery-or-alternative/> accessed 25 July 2024.

19 Register of Damage Caused by the Aggression of the russian federation Against Ukraine: Rules Governing the Submission, Processing and Recording of Claims ("Claims Rules") RD4U-Board(2024)04-final-EN (adopted 21 March 2024) <https://rd4u.coe.int/documents/358068/386726/RD4U-Board%282024%2904-final-EN+-+Claims+Rules.pdf/46892730-ba99-c1ec-fa98-44082a2e0f25?t=1711545756013> accessed 25 July 2024.

20 Register of Damage Caused by the Aggression of the russian federation Against Ukraine: Categories of Claims Eligible for Recording, RD4U-Board(2024)07-final-EN (adopted 21 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 25 July 2024.

currently the most comprehensible as a court decision is an official document confirming the rights and obligations of the parties and, in general, creates legal certainty for the victims. It is unlikely that the prejudicial effect of such a court decision will have any legal force in the future unified reparations mechanism, even considering its international nature. Furthermore, this method allows for the immediate assessment of moral damage caused by the Russian-Ukrainian war.

Regarding the European Court of Human Rights, its jurisdiction does not extend to human rights violations committed by the Russian Federation after its membership in the Council of Europe was terminated on 16 September 2022.[21] Thus, this method of protection is currently the least universal, especially if the human rights violation is ongoing and began before this date. The recognition of damage at the international level is a crucial element since, after the establishment of the Registry of Damages, the international nature of the future reparations mechanism has become evident, involving all willing countries of the world and international institutions, ensuring its maximum possible effectiveness. Therefore, regardless of the chosen method of protection, Ukraine's task will be the subsequent consolidation of all decisions, conclusions, facts, and evidence comprehensively obtained by the victims and their inclusion in the future unified mechanism. Of course, there is no easy path, and this process requires significant resource expenditure. However, the protection of the rights of the victims is an obligation, not a right.

The "eRecovery" service, although in its developmental stage, provides an opportunity for victims to receive compensation expediently without waiting for years in line for reparations. It should be emphasised separately that a court decision in favour of the victim regarding compensation for material losses should preclude further claims through the "eRecovery" service and vice versa, as Ukraine effectively gains the right to claim compensation from the Russian Federation on behalf of the victim. Double liability cannot arise for the same action; thus, this issue will require additional oversight. The culpable party must compensate for moral damage, and Ukraine cannot currently undertake such an obligation. Moreover, efforts must be directed towards verifying potential duplication, as the victim may have sought protection of their rights through various institutions. Therefore, during the subsequent unification of the confirmed damages for the future reparation mechanism, this issue must be subject to enhanced scrutiny.

Positive obligations of the state in the field of human rights require the application of necessary and adequate measures to guarantee them, which Ukraine implements with the support of the international community. Unfortunately, in times of war, it is impossible to avoid violations of human rights and freedoms; however, the harm caused as a result of their violation must be properly compensated.

21 Resolution CM/Res(2022)3 On Legal and Financial Consequences of the Cessation of Membership of the russian federation in the Council of Europe (adopted 23 March 2022) <https://rm.coe.int/resolution-cm-res-2022-3-legal-and-financial-conss-cessation-membershi/1680a5ee99> accessed 25 July 2024.

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3 CONCLUSIONS

The comprehensive mechanism for compensating damage caused by the armed aggression of the Russian Federation against Ukraine is still under development. Given that the actual receipt of reparations may take years, Ukraine has implemented the state program "eRecovery" to provide immediate compensation for specific categories of real estate damaged or destroyed in the Russian-Ukrainian war. While currently limited, the electronic public service "eRecovery" serves as an effective tool for assisting victims. It centralises the submission and processing of claims, significantly reducing bureaucratic processes and ensuring prompt initiation of compensation and information verification. Expanding its capabilities with the support of the international community will help protect or restore the rights of more individuals both during and after the wartime period.

National mechanisms for compensating damage cannot cover all losses incurred during the Russian-Ukrainian war, encouraging victims to seek avenues for protecting their rights through national and international courts. Regardless of the method of protection chosen, ensuring fairness in the amount of compensation objectively sufficient to compensate for material and moral damage should remain a priority. This creates a comprehensive approach to restoring the rights of victims and expands their options in choosing a method of protection until the full-fledged mechanism for compensating for damage caused by the Russian Federation's armed aggression against Ukraine is launched.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Примітка

ПЕРШІ КРОКИ В РЕАЛІЗАЦІЇ УКРАЇНСЬКОЇ СТРАТЕГІЇ ЩОДО ВІДНОВЛЕННЯ ПРАВ ВЛАСНИКІВ ОКРЕМИХ КАТЕГОРІЙ НЕРУХОМОГО МАЙНА, ПОШКОДЖЕНОГО АБО ЗРУЙНОВАНОГО ВНАСЛІДОК ЗБРОЙНОЇ АГРЕСІЇ РОСІЙСЬКОЇ ФЕДЕРАЦІЇ

Вікторія Іванова

АНОТАЦІЯ

Вступ. *В умовах війни питання відшкодування шкоди, завданої воєнною агресією Російської Федерації проти України, є надзвичайно актуальним з огляду на безпрецедентні масштаби шкоди та кількість постраждалих. У статті досліджено один із наявних способів відшкодування збитків, пов'язаних із пошкодженням або знищенням окремих категорій нерухомого майна внаслідок воєнних дій, терористичних актів, диверсій, спричинених збройною агресією Російської Федерації проти України, за допомогою державної електронної публічної послуги «єВідновлення». У статті було досліджено основні аспекти функціонування цієї державної програми, зокрема її обмеження та умови отримання компенсації.*

Крім того, у статті розглядається адміністративна справа за позовом громадянина України проти України за невиконання позитивних зобов'язань та проти Російської Федерації за знищення житла, що спричинило матеріальну та моральну шкоду. Також було наголошено на труднощах, які можуть виникнути в процесі виплати Російською Федерацією репарацій.

Захист прав і свобод громадян, які проживають в Україні, є обов'язком держави, а у воєнний час це завдання набуває нового значення, стає складним і надзвичайно важливим. Одним із способів забезпечення такого захисту є відшкодування шкоди, завданої воєнною агресією Російської Федерації проти України. Однак розробка механізму такої компенсації потребує мобілізації значних ресурсів і додаткових досліджень у різних сферах, насамперед для забезпечення справедливості. Важливо вивчити правові підстави для компенсації,

критерії оцінки шкоди, можливі методи та засоби компенсації, а також потенційну співпрацю між національними та міжнародними установами.

Методи. *У цьому дослідженні аналізується один із способів захисту прав постраждалих внаслідок російсько-української війни через отримання компенсації за допомогою державного електронного сервісу «єВідновлення». Зокрема, розглядаються наступні питання: поточні обмеження щодо об'єктів, які підлягають компенсації, принципи функціонування та перспективи розвитку державної програми «єВідновлення», а також розвиток та виклики національної судової практики у спорах, що виникають внаслідок війни. Також досліджуються позитивні зобов'язання держави у сфері прав людини та заходи, яких вживає Україна для захисту та відновлення прав постраждалих осіб. Проаналізовано національні та міжнародні можливості розвитку механізму компенсації постраждалим та виклики, з якими стикається Україна до отримання репарацій від Російської Федерації.*

Результати та висновки. *Результати цього дослідження підкреслюють здатність держави забезпечити належний захист особам, які постраждали внаслідок російсько-української війни, зокрема через електронний державний сервіс «єВідновлення». Визначено необхідність подальшого розвитку сервісу для охоплення ширшого кола видів шкоди, які Україна може відшкодувати до отримання репарацій від Російської Федерації, зокрема через співпрацю з міжнародними партнерами.*

Ключові слова: *компенсація за зруйноване житло, репарації, російсько-українська війна, електронний державний сервіс «єВідновлення», позитивні зобов'язання, захист громадянських прав під час війни.*

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